



BANCA D'ITALIA
EUROSISTEMA

Quaderni di Ricerca Giuridica

della Consulenza Legale

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

V. Jan-Jun 2024

edited by Raffaele D'Ambrosio and Giuseppe Pala

October 2025

number

106



BANCA D'ITALIA
EUROSISTEMA

Quaderni di Ricerca Giuridica

della Consulenza Legale

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

V. Jan-Jun 2024

edited by Raffaele D'Ambrosio and Giuseppe Pala

Number 106 – October 2025

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

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

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

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

Editorial Board:

MARINO PERASSI, STEFANIA CECI, GIUSEPPE LEONARDO CARRIERO, RAFFAELE D’AMBROSIO, MARIA PATRIZIA DE TROIA, PIERA COPPOTELLI, MONICA MARCUCCI, VINCENZA PROFETA

Editorial Assistants:

MARIA ELISABETTA RIZZICA

ISSN: 0394-3097 (print)

ISSN: 2281-4779 (online)

Printed by the Printing and Publishing Division of the Bank of Italy

TABLE OF CONTENTS

INTRODUCTION	9
COMMON ABBREVIATIONS.....	14
THE CASE-LAW OF THE CJEU	17
I – General Court, Dexia Crédit Local v SRB, Case T-405/21, Judgment of 24 January 2024; DZ Bank v SRB, Case T-390/21; Deutsche Kreditbank v SRB, Case T-391/21; Landesbank Hessen-Thüringen Girozentrale v SRB, Case T-392/21; Bayerische Landesbank v SRB, Case T-394/21; DZ Hyp v SRB, Case T-395/21; DZ Bank v SRB, Case T-404/21, Judgment of 20 March 2024	19
1. <i>Keywords and summary</i>	19
2. <i>Single Resolution Board’s decision on ex ante contributions to the Single Resolution Fund: the Board is required to describe in a clear and consistent manner the calculation method used to determine the annual target level, by Luca Alessandria and Enrica Consigliere</i>	34
3. <i>Reference to “notes de doctrine”</i>	37
II – General Court, Hypo Vorarlberg Bank v SRB, Case T-347/21; Volkskreditbank v SRB, Case T-348/21, Judgment of 24 January 2024.....	38
1. <i>Keywords and summary</i>	38
2. <i>Reference to “notes de doctrine”</i>	44
III – Court of Justice, Pilatus Bank v ECB, Case C-256/22 P, Judgment of 8 February 2024.....	45
1. <i>Keywords and summary</i>	45
IV – General Court, NRW. Bank v SRB, Case T-466/16 RENV, Judgment of 21 February 2024.....	46
1. <i>Keywords and summary</i>	46
2. <i>Reference to “notes de doctrine”</i>	51
V – General Court, Sber v ECB, Case T-647/21 (Joined Cases T-647/21, T-99/22), Judgment of 28 February 2024.....	52
1. <i>Keywords and summary</i>	52
VI – General Court, BAWAG PSK v ECB, Case T-667/21, Judgment of 28 February 2024.....	55
1. <i>Keywords and summary</i>	55
2. <i>The General Court annuls two ECB supervisory decisions requiring two Austrian banks to pay absorption interests and lays down interesting principles while at it, by Giuseppe Pala</i>	57

VII – Court of Justice, Sberbank of Russia v MeSoFa and SRB, Case C-676/23 P; Sberbank of Russia v MeSoFa and Others, Case C-690/23 P; Sberbank of Russia v MeSoFa and Others, Case C-693/23 P, Judgment of 22 March 2024	63
1. <i>Keywords and summary</i>	63
VIII – General Court, Dexia v SRB, Case T-411/22, Judgment of 10 April 2024	64
1. <i>Keywords and summary</i>	64
2. <i>The General Court annuls the SRB’s decision on ex ante contributions for 2022, by Leonardo Droghini</i>	65
3. <i>Reference to “notes de doctrine”</i>	67
IX – Court of Justice, Republic of Latvia v Kingdom of Sweden, C-822/21, Judgment of 30 April 2024	68
1. <i>Keywords and summary</i>	68
2. <i>Reference to “notes de doctrine”</i>	69
X – General Court, Max Heinr. Sutor v SRB, Case T-393/21, Judgment of 8 May 2024	70
1. <i>Keywords and summary</i>	70
2. <i>Reference to “notes de doctrine”</i>	73
XI – General Court, Portigon v SRB, Case T-360/21, Judgment of 29 May 2024	74
1. <i>Keywords and summary</i>	74
XII – General Court, Hypo Vorarlberg Bank v SRB, Case T-395/22, Judgment of 29 May 2024	82
1. <i>Keywords and summary</i>	82
XIII – General Court, Malacalza Investimenti and Malacalza v ECB, Case T-134/21, Judgment of 5 June 2024.....	86
1. <i>Keywords and summary</i>	86
2. <i>The General Court’s landmark ruling in Banca Carige case on ECB’s liability within the SSM, by Luca Alessandria</i>	93
3. <i>Reference to “notes de doctrine”</i>	97
XIV – General Court, Deutsche Bank and Others v ECB, Case T-182/22, Judgment of 5 June 2024.....	98
1. <i>Keywords and summary</i>	98
2. <i>ECB’s measure imposing IPC-related deduction from CET 1: the General Court dismissed German banks’ action for annulment, by Cristiano Martinez</i>	100
XV – General Court, BNP Paribas v ECB, Case T-186/22; BPCE and Others v ECB, Case T-187/22; Crédit agricole and Others v ECB, Case T-188/22; Confédération nationale du Crédit mutuel and Others v ECB, Case T-189/22; Banque postale v ECB, Case T-190/22; Société générale v ECB, Case T-191/22, Judgment of 5 June 2024	103

1. <i>Keywords and summary</i>	103
XVI – Court of Justice, Commission v SRB, Case C-551/22 P, Judgment of 18 June 2024	107
1. <i>Keywords and summary</i>	107
2. <i>The resolution scheme cannot be challenged separately from the Commission’s endorsement. A new confirmation of the Meroni doctrine, by Francescopaolo Chirico</i>	109
3. <i>Reference to “notes de doctrine”</i>	111
 THE CASE-LAW OF THE EU ADMINISTRATIVE REVIEW BODIES	113
 I – Appeal Panel of the Single Resolution Board, Cases 2/2023 and 3/2023, Final Decision of 25 January 2024	115
1. <i>Keywords and summary</i>	115
 II – Appeal Panel of the Single Resolution Board, Case 5/2023, Final Decision of 7 March 2024	119
1. <i>Keywords and summary</i>	119
 III – Appeal Panel of the Single Resolution Board, Case 1/2023, Final Decision of 15 May 2024	124
1. <i>Keywords and summary</i>	124
 IV – Appeal Panel of the Single Resolution Board, Case 2/2024, Final Decision of 11 June 2024	129
1. <i>Keywords and summary</i>	129
 THE JUDGMENTS OF THE NATIONAL APICAL COURTS	135
 ITALY	137
 I – Consiglio di Stato, [.] v [.], Judgment of 5 April 2024, No 3131	137
1. <i>Keywords and summary</i>	137
2. <i>The exclusive competence of the Bank of Italy to decide on the access to the annual report provided for in Article 84, para 4, of Testo Unico Bancario, by Donatella La Licata and Michelino Villani</i>	138
3. <i>Reference to “notes de doctrine”</i>	142
 II – Corte di Cassazione, [.] v Banca d’Italia, Judgment of 29 March 2024, No 8581	143
1. <i>Keywords and summary</i>	143

III – Corte di Cassazione, [.] v Banca d’Italia, Judgment of 16 April 2024, No 10277	145
1. <i>Keywords and summary</i>	145
IV – Corte di Cassazione, [.] v Banca d’Italia, Judgment of 16 April 2024, No 10288	147
1. <i>Keywords and summary</i>	147
V – Corte di Cassazione, [.] v Banca d’Italia, Judgment of 17 April 2024, No 10348	149
1. <i>Keywords and summary</i>	149
VI – Corte di Cassazione, [.] v Banca d’Italia, Judgment of 17 April 2024, No 10357	151
1. <i>Keywords and summary</i>	151
VII – Corte di Cassazione, [.] v Banca d’Italia, Judgment of 24 April 2024, No 11127	152
1. <i>Keywords and summary</i>	152
VIII – Corte di Cassazione, [.] and others v Banca d’Italia, Judgment of 7 May 2024, No 12323	153
1. <i>Keywords and summary</i>	153
IX – Corte di Cassazione, [.] v Banca d’Italia, Judgment of 7 May 2024, No 12295	155
1. <i>Keywords and summary</i>	155
X – Corte di Cassazione, [.] v Banca d’Italia, Judgment of 28 May 2024, No 14863; [.] and others v Banca d’Italia, Judgment of 31 May 2024, No 15293	157
1. <i>Keywords and summary</i>	157
APPENDIX. TEXT OF THE JUDGMENTS OF THE NATIONAL APICAL COURTS.....	159
INDEX.....	215
I – The case-law of the CJEU	215
1. <i>Synthesis</i>	215
2. <i>Series of keywords</i>	216
3. <i>Series of legal provisions</i>	220
II – The case-law of the EU administrative review bodies.....	225
1. <i>Synthesis</i>	225
2. <i>Series of keywords</i>	225

3. <i>Series of legal provisions</i>	226
III – The judgments of the national apical Courts	228
Italy	228
1. <i>Synthesis</i>	228
2. <i>Series of keywords</i>	229
3. <i>Series of legal provisions</i>	230

INTRODUCTION

1. The first semester of 2024 has been characterized by an abundance of important judgments of the General Court concerning contributions to the Single Resolution Fund, impinging on their general legal framework, their specific calculation year-by-year, and the rights of the contributing institutions.

As regards the first matter, the General Court confirmed that the SRMR and the BRRD were lawfully adopted on the basis of Article 114 TFEU (*DZ Bank v SRB*, case T-390/21, *et al.*; *Portigon v SRB*, case T-360/21) and that the Commission did not breach the external limits to its broad discretion in the drafting of the Delegated Regulation (EU) 2015/63, namely where it specifies the rules for adjusting *ex ante* contributions according to the risk profile of each contributing institution, where it regulates the transitional period after its adoption in its Article 20, and where it leaves to the SRB exclusively technical assessments without any unlawful delegation of power (*DZ Bank v SRB*, case T-390/21, *et al.*; *Max Heinr. Sutor v SRB*, case T-393/21; *Portigon v SRB*, case T-360/21). The Court also recognised to the SRB the possibility to issue a decision fixing *ex ante* contributions with retroactive effects to remedy its failure to state reasons in a previous decision annulled by the General Court itself (*NRW. Bank v SRB*, case T-466/16). However, the same Court remarkably found that Council Implementing Regulation (EU) 2015/81 was adopted by the Council on the basis of Article 70(7) of SRMR which is itself in breach of Article 291(2) TFEU; also, that Council Implementing Regulation derogates from, rather than simply specifying, the conditions of application of the SRMR provisions relating to the calculation of contributions to the SRF. Therefore, according to the Court, that Implementing Regulation is inapplicable (*Hypo Vorarlberg Bank v SRB*, case T-395/22).

As pertains to the adjustment of the *ex ante* contributions to the SRF (and, at least implicitly, to national resolution financing arrangements) to the risk profile of each institution, the Court of first instance dwelled on various technical aspects in the light of the prescriptions of the Commission Delegated Regulation (EU) 2015/63, adopted to implement the BRRD, which provide for specific methods, such as the binning one established in its Annex I (*DZ Bank v SRB*, case T-390/21, *et al.*), and for multiple criteria to be taken into consideration, such as the membership of the contributing institution to an institutional protection scheme (*ibidem*), and the nature of certain liabilities of the institution concerned (*NRW. Bank v SRB*, case T-466/16; *Max Heinr. Sutor v SRB*, case T-393/21). At the same time, the General Court reiterated that, in general, the case-by-case assessment necessary to the adjustment of the *ex ante* contributions does not violate the principle of equal treatment of the institutions concerned, insofar as it is based on the objective grounds established by the applicable provisions of law (*DZ Bank v SRB*, case T-390/21, *et al.*; *NRW. Bank v SRB*, case T-466/16; *Max Heinr. Sutor v SRB*, case T-393/21). Nonetheless, looking at the contribution period of 2022, it was found that the SRB breached the cap to the overall contributions due by all institutions provided for by Article 70(2) of SRMR, i.e. 12.5% of the target level for the SRF (*Dexia v SRB*, case T-411/22; *Hypo Vorarlberg Bank v SRB*, case T-395/22).

Finally, the General Court further clarified the way in which the SRB's obligation to state the reasons for the quantification of the contributions to the SRF interacts with, on the one hand, the general principle of confidentiality as pertains, in particular, to confidential data concerning other institutions; and, on the other hand, the right to effective judicial protection of the institutions concerned (*DZ Bank v SRB*, case T-390/21, *et al.*; *Hypo Vorarlberg Bank v SRB*, case T-347/21, and *Volkskreditbank v SRB*, case T-348/21; *NRW. Bank v SRB*, case T-466/16; *Max Heinr. Sutor v SRB*, case T-393/21; *Portigon v SRB*, case T-360/21), underlining in particular that the SRB's decisions are unlawful if their statement of reasons concerning the methodology supposedly used to calculate *ex ante* contributions is contradicted by the same SRB before the Court during the hearing for the action brought against those same decisions (*Portigon v SRB*, case T-360/21).

Looking at contributions to the SRF from the different standpoint of the ECB's powers in its prudential supervisory role, the General Court was again called upon to assess the ECB's decisions imposing the deduction from CET1 capital of the amount of irrevocable payment commitments entered into by the addressees credit institutions to fulfil their obligations towards the SRF (*Deutsche Bank and Others v ECB*, case T-182/22; *BNP Paribas v ECB*, case T-186/22 *et al.*).

Differently, the General Court annulled the ECB's decisions levying absorption interests on Austrian banks as an administrative measure provided for by Austrian law under Article 65 of CRD. Indeed, the ECB expressly (and incorrectly) denied having any discretion in the imposition of absorption interests following the prescriptions of Austrian law and, therefore, did not carry out any proportionality assessment (*Sber v ECB*, case T-647/21; *BAWAG PSK v ECB*, case T-677/21).

On a different topic, the Court of first instance, in *Malacalza Investimenti and Malacalza v ECB* (case T-134/22), elaborated on the ECB's non-contractual liability stemming from the exercise of its prudential supervisory powers, analysing to this end the provisions of the SSMR and of the Italian Consolidated law on banking applied by the same ECB in the specific case and their suitability to confer rights on individuals.

2. In the semester covered by this issue of Pandectae, the Court of Justice has had to deal with the conditions of admissibility of actions brought against Union acts adopted by the ECB or the SRB.

In *Pilatus Bank v ECB* (case C-256/22 P), the Court excluded that the Board of Directors of a credit institution has the necessary standing to challenge an ECB's decision withdrawing that institution's authorisation, if the competent authority has already appointed a competent person to assume all powers (also) of that Board of Directors, which therefore is no longer entitled to represent the bank.

Similarly, but on different grounds, the Court of Justice reiterated that shareholders of a credit institution lack interest in the result of an action for annulment of a Union act brought by that credit institution (*Sberbank of Russia v MeSoFa and SRB*, case C-676/23 P, *et al.*).

Finally, the Court denied the challengeability in itself of the resolution scheme adopted by the SRB, as only the Commission's endorsement of that scheme produces binding legal effects (*Commission v SRB*, case C-551/22 P, where the Court also discussed at length the different roles and responsibilities of the SRB, the Commission and the Council, in the adoption of a resolution action).

The Court of Justice also had the opportunity to clarify the correct application of Article 14(3) of DGSD, relating to the proportional transferral of contributions paid to a DGS to the DGS of another Member State, where the credit institution concerned has transferred part of its assets in the mentioned Member State (*Republic of Latvia v Kingdom of Sweden*, case C-822/21).

3. Interesting and complex rulings were also rendered by the Appeal Panel of the SRB. Besides dealing with the legal nature and efficacy of the joint decision on MREL adopted by the members of the resolution college under Article 45h of BRRD and the consequent nature of the following implementing SRB's decision (in cases 2/2023 and 3/2023) and with the perimeter of its own competence (in case 5/2023 and in case 1/2024), the Appeal Panel thoroughly analysed the methodology for the determination, the downward adjustment, and the increasing of MREL (in cases 2/2023 and 3/2023, in case 5/2023, and in case 1/2023) and scrutinized separately the multiple exceptions to the right to access provided for by Article 4 of Regulation (EC) 1049/2001 and, incidentally, by Article 4 of ECB Decision 2004/258.

4. On the national level, as no significant national rulings of the apical Courts concerning Banking Union matters were found in the evidence of foreign contributors with regard to the six-month reporting period, this issue presents the main findings (all confirming precedents) of judgments of the Consiglio di Stato and the Corte di Cassazione.

While the Consiglio di Stato dealt with the legal implications of the compulsory administrative liquidation of a bank, both as regards the administrative nature of the acts of the liquidators appointed to that end by Banca d'Italia and as pertains to the confidential nature of the final report on the procedure submitted to the same Authority by those liquidators, the Corte di Cassazione had to reiterate a miscellanea of principles concerning administrative pecuniary sanctions imposed by Banca d'Italia pursuant to the Italian consolidated laws on banking and financing (e.g. their non-criminal nature in the light of the ECtHR's Engel criteria, the presumption of negligence under Article 3 of the Italian Law No 689/1981, the time limit for the conclusion of the sanctioning proceeding), further clarifying the strict liability of members of the Board of Directors of banks (even non-executive ones) and of statutory auditors of the same institutions.

COMMON ABBREVIATIONS

BRRD	Directive 2014/59/EU (Bank Recovery and Resolution Directive)
CET 1	Common Equity Tier 1
Charter	The Charter of Fundamental Rights of the European Union
CRD	Directive 2013/36/EU (Capital Requirements Directive)
CRR	Regulation (EU) No 575/2013 (Capital Requirements Regulation)
DGS(s)	Deposit Guarantee Scheme(s)
DGSD	Directive 2014/49/EU (Deposit Guarantee Schemes Directive)
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
ECJ	Court of Justice of the European Union
EGC	General Court of the European Union
EU	European Union
EU G-SIIs	Global systemically important institutions
IFD	Directive (EU) 2019/2034 (Investment Firms Directive)
IFR	Regulation (EU) 2019/2033 (Investment Firms Regulation)
IPC(s)	Irrevocable payment commitment(s)
LRE	Leverage Ratio Exposure Measure
MiFID I	Directive 2004/39/EC (Markets in Financial Instruments Directive I)
MiFID II	Directive 2014/65/EU (Markets in Financial Instruments Directive II)
MiFIR	Regulation (EU) No 600/2014 (Markets in Financial Instrument Regulation)
MREL	Minimum requirement for own funds and eligible liabilities
NCA(s)	National competent authority(/ies)
NCB(s)	National central bank(s)

NRA(s)	National resolution authority(/ies)
Para(s)	Para(s)
SRB	Single Resolution Board
SREP	Supervisory Review and Evaluation Process
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SRMR	Regulation (EU) No 806/2014 (SRM Regulation)
SSM	Single Supervisory Mechanism
SSMR	Regulation (EU) No 1024/2013 (SSM Regulation)
SSMFR	Regulation (EU) No 468/2014 of the ECB (SSM Framework Regulation)
Subpara(s)	Subpara(s)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TLAC	Total-loss absorbing capacity
TLOF	Total liabilities and own funds
TUB	Legislative Decree No 385/1993 (Italian consolidated law on banking)
TUF	Legislative Decree No 58/1998 (Italian consolidated law on finance)

THE CASE-LAW OF THE CJEU

**DEXIA CRÉDIT LOCAL v SRB
DZ BANK v SRB, DEUTSCHE KREDITBANK v SRB,
LANDESBANK HESSEN-THÜRINGEN GIROZENTRALE v SRB,
BAYERISCHE LANDESBANK v SRB,
DZ HYP v SRB, DZ BANK v SRB**

1. Keywords and summary

Dexia Crédit Local v SRB

General Court – Case T-405/21 – Judgment of 24 January 2024 –
ECLI:EU:T:2024:33

[under appeal: case C-254/24 P]

DZ Bank v SRB

General Court – Case T-390/21 – Judgment of 20 March 2024 –
ECLI:EU:T:2024:181

[no appeal case detected on curia.europa.eu]

Deutsche Kreditbank v SRB

General Court – Case T-391/21 – Judgment of 20 March 2024 –
ECLI:EU:T:2024:182

[no appeal case detected on curia.europa.eu]

Landesbank Hessen-Thüringen Girozentrale v SRB

General Court – Case T-392/21 – Judgment of 20 March 2024 –
ECLI:EU:T:2024:183

[no appeal case detected on curia.europa.eu]

Bayerische Landesbank v SRB

General Court – Case T-394/21 – Judgment of 20 March 2024 –
ECLI:EU:T:2024:184

[no appeal case detected on curia.europa.eu]

DZ Hyp v SRB

General Court – Case T-395/21 – Judgment of 20 March 2024 –
ECLI:EU:T:2024:185

[no appeal case detected on curia.europa.eu]

DZ Bank v SRB

General Court – Case T-404/21 – Judgment of 20 March 2024 –
ECLI:EU:T:2024:186

[no appeal case detected on curia.europa.eu]

Annulment of the SRB’s decision fixing the *ex ante* contribution to the SRF due to the lack of correspondence between the methodology actually applied by the SRB and that described in the contested decision

SRMR AND BRRD LAWFULLY BASED ON ARTICLE 114 TFEU
--

The choice of the legal basis for a law act of the EU must rest on objective factors amenable to judicial review, which include the aim and content of that act. The legislative acts adopted on the basis of Article 114(1) TFEU must, first, comprise measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States and, second, have as their object the establishment and functioning of the internal market. Article 114 TFEU may be used as a legal basis only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market. In this perspective, taking into account its purposes, SRMR and BRRD satisfy the conditions set out in Article 114(1) TFEU. In particular, Articles 5, 69 and 70 of SRMR can be regarded as provisions relating to the approximation of Member States’ provisions on the resolution of banks.

SRMR AND BRRD LAWFULLY BASED ON ARTICLE 114 TFEU – SRMR and BRRD provisions on <i>ex ante</i> contributions are not fiscal provisions under Article 114(2) TFEU – Insurance-based logic of <i>ex ante</i> contributions to resolution financing arrangements
--

Article 114(2) TFEU provides that para 1 of that provision is not to apply, inter alia, to ‘fiscal provisions’. While the TFEU does not contain any definition of the words ‘fiscal provisions’, it follows from the case-law of the Court of Justice that a levy paid by economic operators in a particular sector is not fiscal in nature in a situation where, in particular, it is directly allocated solely to the financing of expenditure in that sector and where that expenditure is necessary for the functioning of that sector in order, in particular, to stabilise it.

That reasoning also applies in the case of *ex ante* contributions, which follow an insurance-based logic and which are paid by economic operators in a particular sector in order to finance exclusively expenditure of that sector. In particular, the purpose of the SRM is to avoid the damages that have resulted from failures of institutions during crises, since the failure of institutions in just one Member State may affect the stability of the financial markets as a whole, as is apparent from

recitals 8 and 12 of SRMR. The same is true of BRRD, as is stated in recitals 3 and 5 thereof. In that context, the EU legislature took the view that it was for the financial sector as a whole to finance the stabilisation of the financial system, as is apparent, *inter alia*, from recital 100 of SRMR and recital 103 of BRRD. From that perspective, the specific nature of the *ex ante* contributions consists, as is confirmed by recitals 105 to 107 of BRRD and recital 41 of SRMR, in ensuring, according to an insurance-based logic, that the financial sector provides adequate financial resources for the SRM to be able to fulfil its functions.

In that regard, as follows from Article 1 of SRMR and Article 1 of BRRD, the resolution measures are applied solely for the benefit of the institutions which are required to pay the *ex ante* contributions. It is true that neither SRMR nor BRRD establishes any automatic link between the payment of the *ex ante* contribution and the resolution of the institution concerned, so that *ex ante* contributions cannot be regarded as insurance premiums which could be paid monthly and reimbursed, but the institutions benefit in two respects from the SRF and the national financing arrangements, which are financed specifically by their *ex ante* contributions. First, where institutions are failing or are likely to fail, their financial situation can be remedied in the context of a resolution procedure which may be initiated in their favour if the other conditions laid down in Article 18 of SRMR or Article 32 of BRRD are also met. Second, all institutions benefit from their *ex ante* contributions through the stability of the financial system, which is ensured by the SRF and the national financing arrangements.

That insurance-based purpose is also reflected in the calculation of the *ex ante* contributions, given that they are not the result of applying a certain rate to a basis of assessment but rather, in accordance with Articles 102 and 103 of BRRD as well as with Articles 69 and 70 of SRMR, are the result of the setting of a final target level, and thereafter of an annual target level, which is then divided between the institutions. That division of the annual target level is based, *inter alia*, as is also apparent from recital 107 of BRRD and recital 109 of SRMR, on the risk represented by each institution to the stability of the financial system, which provides incentives to the institutions to operate under a less risky model.

Accordingly, the provisions of SRMR and of BRRD which require the institutions to pay *ex ante* contributions and specify the methods for their calculation do not constitute ‘fiscal provisions’ within the meaning of Article 114(2) TFEU.

<i>EX ANTE</i> CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – <i>Ex ante</i> contributions to resolution financing arrangements – Commission Delegated Regulation (EU) 2015/63 – Right to effective judicial protection – Duty to state reasons – Protection of business secrets
--

The effectiveness of the judicial review guaranteed by Article 47 of the Charter presupposes that the person concerned can know the grounds on which the decision taken against him is based, by reading the decision itself or being

informed of it at his request, without prejudice to the power of the competent court to require the authority concerned to communicate those grounds, in order to enable the person concerned to defend his rights in the best possible conditions and to decide in full knowledge of the facts whether to bring the matter before the competent court, and to enable the court to review the lawfulness of the decision in question.

However, it cannot be inferred from the case-law of the Court of Justice that the statement of reasons for any decision of an EU institution, body, office or agency imposing the payment of a sum of money on a private operator must necessarily include all the evidence enabling the addressee to verify the accuracy of the calculation of the amount of that sum of money.

Second, EU institutions, bodies, offices and agencies are, in principle, required, in accordance with the principle of the protection of business secrets, which is a general principle of EU law, to which concrete expression is given *inter alia* in Article 339 TFEU, not to disclose to the competitors of a private operator confidential information which that operator has provided.

It follows from the foregoing that, in the context of the decision fixing the *ex ante* contributions, the SRB's duty to state reasons must be weighed, on the basis of the logic of the system of financing the SRF and of the method of calculation laid down by the EU legislature, against the SRB's obligation to respect the confidentiality of business secrets of the institutions concerned. In particular, the obligation to state reasons on which legal acts are based – enshrined in Article 296 TFEU – must be regarded as fulfilled where the parties concerned, while not being sent data which are business secrets, have the method of calculation used by the SRB and sufficient information to understand, in essence, how their individual situation was taken into account, for the purposes of calculating their *ex ante* contributions to the SRF, relative to the situation of all the other financial institutions concerned.

Consequently, BRRD, SRMR and Commission Delegated Regulation (EU) 2015/63 do not prevent the SRB from complying with its obligation to state reasons and enables it to provide the institutions concerned with sufficient information to understand the reasons justifying the decisions fixing the *ex ante* contributions to the SRF and to assess whether an action would need to be brought against those decisions. Specifically, Commission Delegated Regulation (EU) 2015/63 allows the SRB to disclose, without infringing its obligation to respect business secrets, the limit values of each bin and the related risk indicators, in order to enable the institution concerned to satisfy itself, *inter alia*, that the profile attributed to it during the discretisation of the indicators, as defined in Annex I to that delegated regulation, in fact corresponds to its economic situation, that that discretisation was calculated consistently with the methodology set out in the delegated regulation on the basis of plausible data and that all the risk factors that must be taken into account pursuant to SRMR and to Commission Delegated Regulation (EU) 2015/63 were indeed taken into account. Therefore,

Commission Delegated Regulation (EU) 2015/63 is not in breach of the principle of effective judicial protection.

This is the case with *ex ante* contributions to the SRF, which involve the use by the SRB of confidential data provided for by credit institutions, because they are calculated on the basis of a proportion between the amount of the net liabilities of each credit institution and the amount of the accumulated net liabilities of all authorised banks in all member states.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Principle of legal certainty – Adjustment of *ex ante* contributions to the risk profile of the institution

The principle of legal certainty requires, on the one hand, that provisions of law be clear and precise and, on the other hand, that their application be foreseeable for those subject to them, in particular where they may have adverse consequences. That principle requires that the persons concerned should be able to ascertain the exact extent of duties imposed by the law and that they should be able to ascertain unambiguously what their rights and obligations are and to take action accordingly.

In particular, a provision of an act of the EU infringes the principle of legal certainty, by reason of its lack of clarity, only if it is so ambiguous that it would prevent individuals from being able to resolve with sufficient certainty any doubts as to the scope or meaning of that provision.

From that perspective, the fact that an act of the EU confers a discretion on the authorities tasked of its implementation does not in itself infringe the requirement of foreseeability, if the extent of and the rules for the exercise of such a discretion are defined with sufficient clarity.

Therefore, with regard to the conferral on an EU authority of the power to impose pecuniary charges, such as the *ex ante* contributions to the SRF, it is necessary to assess whether a prudent economic operator could foresee with sufficient precision the method of calculation and the order of magnitude of such charges, it being understood that the impossibility of knowing in advance the precise level of such charges cannot constitute a breach of the principle of legal certainty.

In the light of the above, the method of calculating *ex ante* contributions to resolution financing mechanisms, to the extent that it is influenced by Pillar IV risk, is defined by Articles 6 and 7 of Commission Delegated Regulation (EU) 2015/63 with enough precision for the parties concerned to resolve any potential doubts. In particular, those Articles, while conferring discretion to the NRAs and the SRB in order to assess the Pillar IV risk, do so without infringing the principle of legal certainty.

In this regard, it should be noted that the SRMR provide for the target result to be achieved, i.e. the financial resources available in the SRF reaching the target level at the end of the initial eight-year period starting from 1st January 2016, as well as a sufficiently specified method of calculation of contributions by obliged entities to achieve this result, which reduces the impact of the discretion exercised by the SRB when determining those contributions. Specifically, the risk indicators relating to each entity, for which the SRB exercises a certain degree of discretion, only influence the risk profile of the institution concerned to an extent that is below 20%. Furthermore, the impact of these indicators on the final amount of the *ex ante* contribution is further diminished by the fact that the SRB has no discretion regarding the determination of the amount of the annual base contribution, and that the adjustment of this contribution to the risk profile of an institution is clearly framed within a predefined range of 0.8 to 1.5. Under these conditions, the scope and modalities of exercising the discretion that Article 6, paras 5 to 7, and Article 7, para 4, of Commission Delegated Regulation (EU) 2015/63 confer to the SRB cannot be considered insufficiently framed or defined.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – European Commission’s competence and powers – Power conferred on the Commission to adopt delegated acts – Commission Delegated Regulation (EU) 2015/63 – Adjustment of *ex ante* contributions to the risk profile of the institution – Principle of legal certainty

In determining the method of calculating *ex ante* contributions to the SRF and the national resolution financing mechanisms, 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 Commission Delegated Regulation (EU) 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 BRRD. The Commission had to develop rules for adjusting *ex ante* contributions based on the risk profile of the institutions, pursuing two related objectives, namely, on the one hand, to ensure the consideration of the different risks generated by the activities of the institutions, whether banking or more broadly financial, and, on the other hand, to encourage these same institutions to adopt less risky modes of operation, ensuring, according to an insurance logic, that the financial sector provides the SRB with sufficient financial resources for its functions. To this end, complex assessments and evaluations are required because of the need to examine the different elements in the light of which the various types of risk are perceived in the banking sector.

Under these conditions, regarding the method for adapting the annual basic contributions pursuant to Article 103(7) of BRRD, the review by the Union courts must be limited to examining whether the exercise of the discretion granted to the Commission is not tainted by a manifest error or an abuse of power, or whether it has not clearly exceeded the limits of that discretion.

The mere fact that the Commission could have adopted a different method for calculating *ex ante* contributions does not constitute the proof of a violation of the principle of legal certainty.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – European Commission’s competence and powers – Power conferred on the Commission to adopt delegated acts – Commission Delegated Regulation (EU) 2015/63 – Adjustment of *ex ante* contributions to the risk profile of the institution – Institutional Protection Schemes

It follows from Article 103(7)(h) of BRRD that the European Commission is empowered to adopt delegated acts to clarify the concept of adjusting the basic annual contribution of an institution in proportion to its risk profile, by taking into account whether such an institution belongs to an Institutional Protection Scheme (IPS).

In this regard, Article 103(7)(h) of BRRD does not specify how the Commission must take account of that membership to an IPS; in addition, it is not provided that the Commission is to assign the same weighting to all credit institutions that are members of the same IPS. On the contrary, the Commission enjoys wide discretion as regards the method for adjusting the basic annual contributions under Article 103(7) of BRRD, including the definition of the criterion relating to the institutions’ membership to an IPS.

Consequently, the review by the Court of Justice must be limited to verify whether the exercise of the discretion has been vitiated by a manifest error of assessment or a misuse of powers, or whether the European Commission has manifestly exceeded the limits of that discretion.

In this regard, the Commission did not commit a manifest error of assessment or misuse of powers or manifestly exceeded the limits of its discretion in providing for potentially different weightings to credit institutions forming part of the same IPS according to Article 7(4) of Commission Delegated Regulation (EU) 2015/63, given that the members of an IPS do not have an unconditional right to receive from that IPS support capable of covering all their commitments and given also that the insolvency of a bank with a large and complex balance sheet could completely exhaust the funds of an IPS.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Adjustment of *ex ante* contributions to the risk profile of the institution – Institutional Protection Schemes

Article 113(7) of CRR defines the conditions for the authorisation of institutional protection schemes (IPSs) for prudential purposes, and not for the calculation of the *ex ante* contributions to the SRF.

Even if, under Article 2(1)(8) of BRRD, the SRB may only take account of IPSs which have been authorised in accordance with Article 113(7) of CRR, the latter provision does not prohibit differentiation between credit institutions that are members of the same IPS for the purposes of calculating the *ex ante* contributions.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – European Commission’s competence and powers – Power conferred on the Commission to adopt delegated acts – Adjustment of *ex ante* contributions to the risk profile of the institution – Institutional Protection Schemes

The risk indicator ‘Trading activities and off-balance sheet exposures, derivatives, complexity and resolvability’ constitutes an objective criterion which, in the context of Article 7(4), second subpara, of BRRD, made it possible to assess the likelihood that an institution would request support from an IPS that the latter could not be able to grant, with the result that that institution would be likely to be subject to resolution. Thus, that provision allows the *ex ante* contribution to be adapted to the actual risk profile of the institution concerned in the light of the risk indicator above mentioned.

In those circumstances, Article 7(4), second subpara, of BRRD is not vitiated by a manifest error of assessment when it provides that the risk indicator ‘Trading activities and off-balance sheet exposures, derivatives, complexity and resolvability’ is taken into account in the process of determining the IPS’ risk indicator.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – European Commission’s competence and powers – Power conferred on the Commission to adopt delegated acts – Adjustment of *ex ante* contributions to the risk profile of the institution – Institutional Protection Schemes – Principle of equal treatment – Commission Delegated Regulation (EU) 2015/63

Article 20 of the Charter enshrines the principle of equal treatment, which requires that comparable situations not be treated differently and that different

situations not be treated equally, unless such treatment is objectively justified. According to established case-law, the comparability of different situations is assessed in light of all the factors that characterise them, which in turn must be evaluated considering the subject matter and purpose of the act establishing the distinction in question. In addition, the principles and objectives of the field to which that act relates must be taken into consideration.

In view of this, it should be noted that not all credit institutions which participate to an IPS are in a comparable situation solely by virtue of that membership, because they do not have an unconditional right to receive support from the IPS covering all their commitments, as the IPS has a certain margin of discretion in deciding whether to support a member. In addition, the insolvency of an institution with a large and complex balance sheet could completely exhaust the funds of an IPS, unlike the insolvency of institutions with smaller and simpler balance sheets.

Therefore, the risk indicator ‘Trading activities and off-balance sheet exposures, derivatives, complexity and resolvability’, provided for by Article 7(4)(a) of Commission Delegated Regulation (EU) 2015/63, is an objective criterion for assessing which credit institutions belonging to an IPS are likely to request support from the IPS that it would be unable to provide. This indicator therefore constitutes an objective criterion for assessing which banks are in a comparable situation with regard to such a risk.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Principle of equal treatment – Adjustment of *ex ante* contributions to the risk profile of the institution – Commission Delegated Regulation (EU) 2015/63 – Binning method

The application by the SRB of the “binning method”, as established by Annex I of Commission Delegated Regulation (EU) 2015/63, may lead to situations in which institutions with values for a given risk indicator that are close to those of institutions assigned to the previous bin, are nevertheless assigned to the next bin, containing institutions with higher values for the same risk indicator. This consequence stems from the rule laid down in Annex I, Step 2, (3), to Commission Delegated Regulation (EU) 2015/63, according to which the SRB assigns, in principle, the same number of institutions to each bin.

The effects of the binning method do not amount to a breach of the principle of equal treatment, which is not infringed if the different treatment of equal situations or the equal treatment of different situation is aimed at pursuing a legitimate objective, such as the establishment of general rules that are easily applicable and monitorable by the competent authorities, and is proportionate to that objective. That is the case with the “binning method”, which is a recognised statistical method that uses objective criteria to determine *ex ante* contributions, in particular the mathematical formula set out in Annex I, Step 2, (2), to Commission

Delegated Regulation (EU) 2015/63. This method enables the SRB to efficiently manage and compare the large amount of data reported by institutions whose *ex ante* contributions must be adjusted to their risk profile and, therefore, achieves the legitimate objective of establishing a simple and easily verifiable method for calculating the *ex ante* contributions.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Principle of equal treatment – European Commission’s competence and powers – Power conferred on the Commission to adopt delegated acts – Commission Delegated Regulation (EU) 2015/63 – Adjustment of *ex ante* contributions to the risk profile of the institution – Institutional Protection Schemes

Commission Delegated Regulation (EU) 2015/63 is not in contrast with the principle of equal treatment merely because it provides for differential treatment of intragroup liabilities and liabilities created by a member of an institutional protection scheme through an agreement concluded with other institutions that are members of the same institutional protection scheme (hereinafter ‘intra-IPS liabilities’) in two situations, namely, first, when calculating the annual base contribution which, under certain conditions, allows for the exclusion of those liabilities and, second, when calculating the risk indicator for Pillar III, which does not provide for any similar exclusion.

In this regard, it is clear from the case-law that the comparability of two situations must be assessed in the light of all the factors that characterize them. Those factors must, in particular, be determined and assessed in the light of the object and purpose of the act which establishes the distinction at issue. Furthermore, the principles and objectives of the area covered by that act must be taken into account.

As regards the principles and objectives of the area covered by Commission Delegated Regulation (EU) 2015/63, it should be recalled that the specific nature of *ex ante* contributions consists, as is apparent from recitals 105 to 107 of BRRD and recital 41 of SRMR, to ensure, in an insurance-based approach, that the financial sector provides the SRM with sufficient financial resources to fulfil its functions, while encouraging the adoption of less risky business models by the institutions concerned.

In this context, Article 5 of Commission Delegated Regulation (EU) 2015/63 provides for the exclusion, under certain conditions, of intragroup liabilities and intra-ISP liabilities for the purpose of calculating, as a first step, the annual base contributions. However, the risk indicator of Pillar III, as provided for in Article 6(4) of that delegated regulation, is one of the four risk pillars provided for in that provision in order to adjust, in a second step, the annual base contributions to the risk profile of the institutions concerned. There is no evidence to show that the exclusion of these two categories of liabilities in the calculation of the annual

base contribution, which is intended to reflect the size of institutions, and their inclusion in the calculation of the risk indicator under Pillar III, which is intended to measure the risk profile of institutions, constitute comparable situations.

That conclusion is not called into question by the applicant's argument that intragroup liabilities and internal loss-sharing liabilities should be deductible under Article 113(6) and (7) of CRR, as those provisions lay down the conditions for calculating risk-weighted exposure amounts for prudential purposes, not those for calculating *ex ante* contributions. Moreover, nothing in the wording of that provision requires that those liabilities be deductible for the purposes of calculating *ex ante* contributions.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Principle of equal treatment – European Commission's competence and powers – Power conferred on the Commission to adopt delegated acts – Commission Delegated Regulation (EU) 2015/63 – National orderly resolution plan

Institutions which are subject to a national orderly resolution plan are not, because of that circumstance, in a different situation from that of other institutions subject to the obligation to pay *ex ante* contributions, and therefore no breach of the principle of equal treatment stems from the fact that institutions subject to orderly resolution plans are required to pay *ex ante* contributions.

In fact, first, as is apparent from recital 102 of SRMR, *ex ante* contributions are collected from institutions prior to any resolution action and independently from it.

Second, in accordance with Articles 67(4) and 70 of SRMR and Article 103 of BRRD, the obligation to pay *ex ante* contributions applies to all institutions holding a banking license, and the resolution action on institutions does not necessarily imply the withdrawal of their banking license. Consequently, such institutions continue to pose a certain risk to the stability of the financial system.

Third, the method for calculating *ex ante* contributions, as established by Commission Delegated Regulation (EU) 2015/63, is capable of reflecting the specificities of the risk profile of institutions subject to an orderly resolution plan.

Fourth, institutions subject to an orderly resolution plan are not excluded from any benefit provided by the SRF: the mere existence of that fund contributes to the stability of the financial sector, which benefits all institutions concerned, including those subject to a national orderly resolution plan.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Ex ante contributions to resolution financing arrangements – Principle of equal treatment – European Commission’s competence and powers – Power conferred on the Commission to adopt delegated acts – Commission Delegated Regulation (EU) 2015/63 – National orderly resolution plan – Public financial support

Subjecting institutions subject to a national orderly resolution plan to the general regime for the collection of *ex ante* contributions pursues the objective of the annual collection of *ex ante* contributions from institutions, as provided for in BRRD, SRMR and Commission Delegated Regulation (EU) 2015/63, which is to ensure, in accordance with an insurance logic, that the financial sector provides the SRM with sufficient financial resources to enable it to fulfil its tasks and to encourage institutions to adopt less risky business models.

That finding is not invalidated by the fact that Commission Delegated Regulation (EU) 2015/63 takes into account, in a penalizing manner, the fact that an institution had already received exceptional public financial support. Article 103(7) of BRRD requires the Commission, in order to determine the modalities for adapting *ex ante* contributions to the risk profile of institutions, to take into account, inter alia, the risk exposure of institutions, the diversity of their resources and their stability, and the extent to which they have received exceptional public support. In this regard, Commission Delegated Regulation (EU) 2015/63, in particular Article 6(8)(a), provides that the restructuring of an institution or group with public funding is considered a factor that increases the risk posed by the institution in question, which consequently also increases the extent to which the annual basic contribution of the institution in question is appropriate to its risk profile. The granting of public funding attests to the difficulties of the institution in question in obtaining financing on the financial market, which necessarily has an impact on the risk profile of that institution. It follows that taking into account the fact that an institution has already received exceptional public financial support, as provided for in Commission Delegated Regulation (EU) 2015/63, is not manifestly inappropriate for achieving the objective referred to above, since that consideration is intended to reflect the risk profile of the institution concerned.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Ex ante contributions to resolution financing arrangements – European Commission’s competence and powers – Power conferred on the Commission to adopt delegated acts – Adjustment of ex ante contributions to the risk profile of the institution – Commission Delegated Regulation (EU) 2015/63 – Transitional provisions of Commission Delegated Regulation (EU) 2015/63

Under Article 20(1) of Commission Delegated Regulation (EU) 2015/63, entitled “Transitional provisions,” a risk indicator shall not apply as long as the information required for a specific risk indicator referred to in Annex II to that

delegated regulation is not part of the prudential information requirements referred to in Article 14 of that delegated regulation, namely the prudential information requirements laid down in Commission Implementing Regulation 680/2014 or, where applicable, at Member State level. Such a provision is not in breach of the legal basis for the adoption of the Commission Delegated Regulation (EU) 2015/63, namely Article 103(7) of BRRD, which requires the Commission to take into account all the factors listed in points (a) to (h) for the purpose of specifying the concept of “adjustment of contributions according to the risk profile of institutions.” Indeed, Article 103(7) of BRRD does not specify how the SRB or the NRA must take into account the factors listed therein and, therefore, it was within the Commission’s margin of discretion to consider, where appropriate, the need to provide for transitional periods for the application of the elements listed in Article 103(7)(a) to (h) of BRRD, in particular because of the unavailability of the data necessary for the calculation of risk indicators based on those elements.

Furthermore, it should be noted that the justification for the transitional period provided for in Article 20 of Commission Delegated Regulation (EU) 2015/63 is closely linked to the gradual nature of the process of establishing the prudential requirements and the corresponding information requirements.

Therefore, Article 20(1) of Commission Delegated Regulation (EU) 2015/63 is not vitiated by a manifest error of assessment or a misuse of powers nor manifestly exceeds the limits of the broad discretion conferred on the Commission by Article 103(7) of BRRD.

<i>EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Ex ante contributions to resolution financing arrangements – Statement of reasons of the decision imposing ex ante contributions – Duty to state reasons – Protection of business secrets</i>

In order to examine whether that statement of reasons is sufficient in the case of a decision determining *ex ante* contributions to the SRF, it must be recalled, first, that it cannot be inferred from the case-law of the Court of Justice that the statement of reasons for any decision of an EU institution, body, office or agency imposing the payment of a sum of money on a private operator must necessarily include all the evidence enabling the addressee to verify the accuracy of the calculation of the amount of that sum of money.

Second, EU institutions, bodies, offices and agencies are, in principle, required, in accordance with the principle of the protection of business secrets, which is a general principle of EU law, to which concrete expression is given *inter alia* in Article 339 TFEU, not to disclose to the competitors of a private operator confidential information which that operator has provided.

Given that the institutions, bodies, offices and agencies of the European Union are required, pursuant to the general principle of the protection of business

secrecy, not to reveal to competitors of an economic operator confidential information provided for by that operator, if the statement of reasons of a decision of the SRB on *ex ante* contributions were to necessarily enable the credit institution concerned to fully verify the accuracy of the calculation of its contribution, the EU legislator would be prevented from establishing a method for calculating such contributions that includes confidential data and, as a result, its wide discretion in this field would be unduly reduced.

It follows from the foregoing that, in the context of the decision fixing the *ex ante* contributions, the SRB's duty to state reasons must be weighed, on the basis of the logic of the system of financing the SRF and of the method of calculation laid down by the EU legislature, against the SRB's obligation to respect the confidentiality of business secrets of the institutions concerned. In particular, the obligation to state reasons on which legal acts are based – enshrined in Article 296 TFEU – must be regarded as fulfilled where the parties concerned, while not being sent data which are business secrets, have the method of calculation used by the SRB and sufficient information to understand, in essence, how their individual situation was taken into account, for the purposes of calculating their *ex ante* contributions to the SRF, relative to the situation of all the other financial institutions concerned.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Duty to state reasons – Protection of business secrets – Confidential information in an anonymised or aggregated form

Pursuant to the principle of protection of the business secrecy, the SRB cannot provide a credit institution with data related to other institutions. On the contrary, the SRB can publish or transmit to the institution concerned, in aggregated and anonymised form, information relating to other institutions used to calculate the contributions: this is on condition that it does not lead, in practice, to a breach of the principle of protection of the business secrecy, since, in certain cases, it could be easy to trace back from these aggregated and anonymised information to specific banks.

In particular, the SRB may make available to the credit institution concerned the limit values for each bin and the related risk indicators, on the basis of which the *ex ante* contributions of that institution have been adapted to its risk profile.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Statement of reasons of the decision imposing *ex ante* contributions – Duty to state reasons – Protection of business secrets – Final composite risk indicator

Since the SRB's duty to state reasons as regards its decision on *ex ante* contributions to the SRF does not imply that the credit institution concerned can

gain access to the confidential information relating to other institutions used to calculate such contributions, the SRB is not required to disclose to that institution the final composite risk indicators of all institutions, as these values can provide information on the economic situation of those institutions and, in particular, on their level of risk on the markets, it being clear that credit institutions with a higher risk profile obtain a higher final composite risk indicator. In these circumstances, the SRB may legitimately consider that the disclosure of the final composite risk indicators of all credit institutions would infringe its duty to protect the business secrecy.

ANNUAL TARGET LEVEL FOR THE SRF – Statement of reasons of the decision imposing <i>ex ante</i> contributions – Duty to state reasons – Contradictions between statement of reasons of the decision and reasons given before the Court – Right to effective judicial protection
--

The statement of reasons for a decision of an institution, body, office or agency of the European Union must not contain contradictions, so that the addressees are able to know the real reasons for that decision, with a view to defend their rights before the competent court, and so that this court can exercise its power of review. Similarly, where the author of the contested decision provides certain 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 that decision.

It follows that, when the SRB is required to provide the credit institutions, by means of the decision establishing the *ex ante* contributions to the SRF, with explanations concerning the method of determining the annual target level, those explanations must be consistent with the correspondent explanations provided by the SRB during any judicial proceedings relating to the method of calculation actually applied.

Therefore, the SRB's decision on *ex ante* contributions to the SRF must be annulled as vitiated by a breach of the obligation to state reasons, where the SRB first claimed therein to have used a mathematical formula for calculating the annual target level of the SRF, and, subsequently, in the judicial proceedings before the EU court brought against that same decision, explained that it had in fact used a partially different method of calculation.

<i>EX ANTE</i> CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – <i>Ex ante</i> contributions to resolution financing arrangements – Public authorities shareholders or creditors of a bank subject to a resolution procedure

Whereas BRRD aims to achieve the objective that most of the funding for the resolution procedures of the credit institutions should come from the

shareholders and creditors of the institutions subject to such procedures and not public budgets, to the extent that a public authority is a shareholder or creditor of a bank subject to a resolution procedure, it is not incompatible with this objective that the said public authority should participate in the financing of the SRF, thus helping to ensure the soundness of the European Union banking system.

2. Single Resolution Board’s decision on *ex ante* contributions to the Single Resolution Fund: the Board is required to describe in a clear and consistent manner the calculation method used to determine the annual target level

by Luca Alessandria and Enrica Consigliere

1. By its ruling of January 24, 2024, the General Court of the European Union annulled the decision of the *Single Resolution Board* (SRB) of April 14, 2021 (hereinafter, “the decision”) on the calculation of the *ex ante* contributions to the *Single Resolution Fund* (SRF) for 2021, in so far as it concerned Dexia Crédit Local (Case T-405/21).¹

The General Court found of its own motion² that there was a failure to state reasons which prevented it from examining the plea raised by the appellant.³

Indeed, the annual target level is one of the parameters to determine the *ex ante* contributions.⁴ The General Court noted that the calculation method of the annual target level of the contributions to the SRF described in the contested decision appeared to be at odds with the method that – according to what the Single Resolution Board itself reported at the hearing – had actually been used by the latter.

¹ Pursuant to Article 7(2) of Regulation (EU) No 806/2014, the SRB’s decision determined the *ex ante* contributions to be paid by the credit institutions referred to in Articles 2 and 67(4) of that Regulation (including the applicant) for year 2021. Please note that the effects of the decision shall not be affected until a new decision setting Dexia’s *ex ante* contribution has been adopted, within a maximum period of six months, in accordance with the principles set out in that decision.

² The lack or inadequacy of a statement of reasons constitutes a ground of public policy which the European Courts may, and indeed must, raise of its own motion (ECJ, 2 December 2009, Case C-89/08 P, *Commission v Ireland and Others*, para 34).

³ The bank plead the alleged violation of Article 69(2) of Regulation (EU) No 806/2014.

⁴ The calculation of contributions to the SRF is based on the determination of the so-called “target level”, set at the amount of at least 1% of the amount of covered deposits of all credit institutions authorized in all the participating Member States at the end of an initial period of eight years from January 1, 2016 (Article 69 of the Regulation (EU) No 806/2014 of the European Parliament and of the Council). In order to reach the target level, each year the SRB determines the *annual* target level (Council Implementing Regulation (EU) 2015/81 of 19 December 2014 with particular reference to Article 3 (1) (2) and Article 4). *Ex ante* contributions are then calculated on the basis of the annual target level, in accordance with Article 70 of the SRM Regulation.

As a consequence, the statement of reasons was found to be contradictory.⁵ This inconsistency prevented the statement of reasons from fulfilling its functions: *i.e.* to enable the persons concerned to know the real reasons underlying the decision and assess whether to challenge it before the competent court and, accordingly, to enable the latter to exercise judicial review of legality.

2. On closer examination, the ruling comes as a natural complement to the principle stated by the Court of Justice in the previous *Commission v. Landesbank Baden-Württemberg*.⁶

In that case, the Court of Justice stated that, when fixing *ex ante* contributions due to the SRF by each credit institution, the SRB must disclose the method of calculation.⁷

Indeed, calculation of *ex ante* contributions to the SRF is based, *inter alia*, on the use of confidential data relating to the financial situation of the institutions. Therefore, the obligation to state reasons must be carefully balanced against the SRB's obligation to respect the business secrets of those institutions. According to the Court, the obligation to state reasons is fulfilled where the persons concerned, while not being sent professionally confidential data, are enabled to know the method of calculation used by the SRB; and are provided with sufficient information to understand, in essence, how their individual situation was taken into account, for the purposes of calculating their *ex ante* contribution to the SRF, relative to the situation of all the other financial institutions concerned⁸ and verify whether their contribution to the SRF was fixed arbitrarily.⁹

Well, the judgment under review is in the same vein.

As the General Court itself noted, the setting of the annual target level of the contributions to be raised is essential for determining *ex ante* contributions. The latter are derived from the distribution of the amount of the target level among all the entities concerned; therefore, *an increase or decrease in that target level entails a corresponding increase or decrease in the ex ante contribution of each of those entities*.¹⁰ In other words, description of the calculation method used to determine the annual target level plays a crucial role in the justification of the SRB decisions on contributions.

⁵ As the ECJ has repeatedly stated, the statement of reasons must not show any internal contradiction (see GC, 24 January 2024, *Dexia Crédit Local v. SRB*, para 229, which refers to ECJ, 10 July 2008, Case 413/06 P, *Bertelsmann and Sony Corporation of America v. Impala*, para 169 and the case-law cited therein).

⁶ ECJ, 15 July 2021, Joined Cases C 584/20 P and C 621/20 P, *Commission v. Landesbank Baden-Württemberg v. SRB*.

⁷ On this, please see “*Obbligo di motivazione del provvedimento di determinazione dei contributi ex ante al Fondo di risoluzione unico e segreto commerciale: il punto di equilibrio secondo la Corte di Giustizia*” in the No 7-8 of this Newsletter (July-August 2021).

⁸ Para 122.

⁹ Para 123.

¹⁰ GC, 24 January 2024, *Dexia Crédit Local v. SRB*, para 233.

3. The General Court also addressed the question of the legal basis of the SRM Regulation raised by Dexia who had complained that Articles 5, 69 and 70 of Regulation (EU) No 806/2014 of the European Parliament and of the Council (SRM Regulation) were unlawful because they were adopted on the basis of Article 114 (1) TFEU. The provision at hand empowers the Union to adopt legislative acts providing for measures for the approximation of the laws, regulations and administrative provisions of the Member States and having as their object the establishment and functioning of the internal market.

According to the bank's claim, the SRM Regulation would not meet these conditions. On the one hand, it would have replaced the national resolution authorities with an independent European agency (the SRB). On the other hand, it would have introduced "fiscal provisions", which cannot be adopted under Article 114(1) TFEU (Article 114(2) TFEU).

The General Court rejected the plea, stating that Article 114(1) is an appropriate legal basis for the SRM Regulation. Indeed, it establishes uniform rules and a uniform procedure for the resolution of institutions. In more detail, the rules on the payment of contributions under Articles 69 and 70 of the Regulation prevent different national rules and practices from hindering the exercise of fundamental freedoms or distorting competition in the internal market.

As regards the role of the SRB, the General Court noted that the European legislator has designed the winding-up regime in such a way as to ensure that it is applied uniformly, since it is "*specifically designed to ensure the speed and effectiveness of winding-up decisions and also to ensure that due account is taken of national financial stability, the financial stability of the Union and the internal market*".¹¹ Moreover, it is within the discretion of the Union legislator (granted by Article 114 TFEU) to confer on a body or agency certain powers aimed at implementing the harmonization to be achieved, provided that the functions conferred on a body entrusted with helping to bring about a process of harmonization must be closely related to the matters which are the subject of the acts of approximation.¹² According to the General Court, given that there is certainly a close link between the tasks entrusted to the SRB and the subject matter of SRM Regulation, the conditions of Article 114 (1) TFEU are met by the SRM Regulation.

Finally, the General Court expressed the view that the *ex ante* contributions provisions cannot be qualified as "fiscal provisions". As the Court of Justice has long made clear, a levy imposed on economic operators in a given sector is not of a fiscal nature if it is directly intended solely to finance the expenditure of that sector and that expenditure is necessary for the operation of that sector, in particular for its stabilization.¹³ According to the GC's judgment these are the very

¹¹ GC, *Dexia Crédit Local v. SRB*, para 47.

¹² Thus ECJ, 2 May 2006, *United Kingdom v. Parliament and Council*, C-217/04, para 45.

¹³ ECJ, 11 July 1989, C-265/87, *Schröder HS Kraftfutter*, paras 9-10.

characteristics of the *ex ante* contributions paid by the entities of the financial sector in order to provide the SRM with sufficient resources to carry out its tasks. For these reasons, the *ex ante* contributions shall be considered to have only an insurance function.¹⁴

3. Reference to “notes de doctrine”

MARTINHO LUCAS PIRES, *The saga that keeps on going: the General Court annuls decisions of ex-ante contributions to the SRF in DZ Bank v CRU (T-390/21), Deutsche Kreditbank v CRU (T-391/21), Landesbank Hessen-Thüringen Girozentrale v CRU (T-392/21), Bayerische Landesbank v CRU (T-394/21), DZ Hyp v CRU (T-395/21) and DZ Bank v CRU (T-404/21)*, EU Law Live, 17 April 2024.

¹⁴ See ECJ, *Landesbank Baden-Württemberg*, abovementioned, para 113.

HYPO VORARLBERG BANK v SRB, VOLKSKREDITBANK v SRB

1. Keywords and summary

Hypo Vorarlberg Bank v SRB

General Court – Case T-347/21 – Judgment of 24 January 2024 – ECLI:EU:T:2024:31

[no appeal case detected on curia.europa.eu]

Volkskreditbank v SRB

General Court – Case T-348/21 – Judgment of 24 January 2024 – ECLI:EU:T:2024:32

[no appeal case detected on curia.europa.eu]

Unlawfulness of the SRB decision calculating the annual target for the SRF because its statement of reasons was contradicted by the same Institution before the General Court

<i>EX ANTE</i> CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – <i>Ex ante</i> contributions to resolution financing arrangements – Duty to state reasons – Protection of business secrets – Principle of legal certainty
--

The fact that the method for calculating *ex ante* contributions to resolution financing arrangements, provided for in Commission Delegated Regulation (EU) 2015/63, is based on the use of a large amount of data from a large number of institutions, does not entail any breach of the principle of legal certainty.

Indeed, the number of institutions affected by that calculation is determined by Article 2 of SRMR. Moreover, the Court of Justice has already accepted that the calculation of those contributions may be based on a comparison of the financial situation of such institutions in order to ensure that the financing of the SRF is dynamically adapted to developments in the financial sector and with a view to respecting the broad discretion which the EU legislature must have for that purpose. Such a comparison is, by its nature, complex. However, the mere complexity does not mean that the method for the calculation is contrary to the principle of legal certainty.

<i>EX ANTE</i> CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – <i>Ex ante</i> contributions to resolution financing arrangements – Principle of legal certainty

The principle of legal certainty requires, first, that rules of law be clear and precise and, second, that their application be foreseeable for those subject

to them, particularly when they may have adverse consequences. However, those requirements cannot be understood as precluding a Union institution, in a rule which it adopts, from using an abstract legal concept or as requiring such an abstract rule to mention the various specific cases in which it is capable of applying, in so far as all those cases cannot be determined in advance by that institution. Similarly, the fact that a Union act confers discretion on the authorities responsible for its implementation does not in itself infringe the requirement of foreseeability, provided that the scope and conditions for the exercise of that power are defined with sufficient clarity, in relation to the legitimate aim pursued, to provide adequate protection against arbitrariness.

Specifically, where a provision confers on the institutions or bodies of the Union the power to impose financial obligations, it must be determined, in the light of all the relevant factors, whether it defines with sufficient clarity the scope and conditions for the exercise of that power, so as to enable individuals to foresee the conditions under which such a charge will be imposed. Therefore, it must be assessed whether an informed operator, with the assistance of legal and economic advice if necessary, can foresee with sufficient precision the method of calculation and the order of magnitude of such charges, although the fact that that operator cannot, in advance, know precisely the level of those charges cannot constitute a breach of the principle of legal certainty.

In the light of the above, it results from Articles 6 and 7 of Commission Delegated Regulation (EU) 2015/63 that the SRB has the responsibility to adjust the annual *ex ante* contributions of institutions taking into account four risk pillars, each pillar consisting of risk indicators which, in turn, may consist of sub-risk indicators. Specifically, that delegated regulation grants the SRB a margin of discretion as to how it must “take into account” the risk indicators pertaining to the risk pillar IV, referred to in Article 6(1)(d) of that delegated regulation. Nonetheless, no breach of the principle of legal certainty occurs.

First, the applicable legislation provides for the result to be achieved, according to which the financial resources available in the SRF must reach the final target level at the end of the initial period of eight years from 1st January 2016, and a method for achieving that result, which reduces the width of the discretion exercised by the SRB when determining the *ex ante* contributions.

Second, the annual base contribution is adjusted in line with the risk profile of the institution concerned, provided that, in accordance with Article 9(3) of Commission Delegated Regulation (EU) 2015/63, the adjustment multiplier is between 0.8 and 1.5.

Therefore, the Commission Delegated Regulation (EU) 2015/63 sufficiently define the scope and manner in which the discretion conferred on the EBA is to be exercised. This is all the more so since the institutions concerned are experienced operators which can, if necessary, with the assistance of legal and economic advice, predict with sufficient precision the method of calculation and the order of magnitude of their *ex ante* contributions to the SRF.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Right to effective judicial protection

The effectiveness of the judicial review guaranteed by Article 47 of the Charter requires that the persons concerned must be able to know the reasons on which the decision taken in their regard is based in order to enable them to defend their rights and to decide in full knowledge of the facts whether it is useful to refer the matter to the competent court, and also to enable the latter to exercise its power of review of the legality of the decision in question. However, in certain exceptional cases, a Union authority may refuse to disclose to the person concerned the precise and complete reasons on which a decision taken against them is based, on grounds relating to the protection of confidential data. In such a case, it is necessary to implement techniques and rules that reconcile, on the one hand, the protection of confidential data and, on the other hand, the need to guarantee to the individual concerned sufficient guarantees of his procedural rights, such as the right to be heard and the principle of adversarial proceedings.

In view of the specific nature of *ex ante* contributions to resolution financing arrangements, such reconciliation was carried out by the legislature where it established the system for calculating *ex ante* contributions by Commission Delegated Regulation (EU) 2015/63 and Council Implementing Regulation (EU) 2015/81.

As is apparent from recitals 105 to 107 of BRRD and recital 41 of SRMR, those contributions are intended to ensure, in an insurance-based approach, that the financial sector provides the SRM with sufficient financial resources to enable it to fulfil its functions, while encouraging the adoption by the institutions concerned of less risky business models. Thus, the calculation of *ex ante* contributions is not based on the application of a rate to a base, but, pursuant to Articles 102 and 103 of BRRD and Articles 69 and 70 of SRMR, on the definition of a final target level to be reached by the sum of those contributions levied before 31 December 2023 (hereinafter the ‘final target level’), and then of an annual target level to be allocated among the institutions authorized in the territory of all participating Member States. Therefore, the very principle of the method for calculating *ex ante* contributions, as set out in BRRD and SRMR, requires the SRB to use data covered by business secrecy, which must, in principle, not be disclosed to competitors.

This feature of the system for calculating *ex ante* contributions does not, however, prevent the exercise of effective judicial review by the EU courts.

First, nothing in Articles 4 to 7 and 9 or in Annex I to Commission Delegated Regulation (EU) 2015/63 precludes the SRB, in accordance with the first subparagraph of Article 88(1) of SRMR, from disclosing, when adopting its decision fixing the *ex ante* contributions, confidential information obtained in the course of its activities in a summarized or aggregated form, in such a way that the data concerned cannot be identified.

Secondly, where the reasons for a decision must be limited in order to ensure the protection of confidential data, it is for the author of that decision, in the event of an action before the EU courts challenging that data, to justify itself before those courts in the context of the proceedings. Where necessary, in order to exercise effective judicial review in accordance with the requirements of Article 47 of the Charter, the EU courts may request the SRB to provide data capable of justifying the calculations whose accuracy is contested before them, ensuring, where necessary, the confidentiality of such data.

Furthermore, when examining all the legal and factual elements provided by the SRB, it is for the EU courts to verify the validity of the reasons put forward by the SRB for refusing to disclose the data used for the calculation of the *ex ante* contribution. If it turns out that the reasons given by the SRB do indeed prevent the disclosure of information or evidence submitted to the EU courts, it is necessary to strike a fair balance between the requirements of the right to effective judicial protection, in particular the observance of the principle of the right to be heard, and those arising from the protection of business secrecy.

Finally, the mere fact that the method for calculating those contributions is considered complex does not preclude effective judicial review by the EU courts.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Statement of reasons of the decision imposing *ex ante* contributions – Duty to state reasons – Protection of business secrets – Right to effective judicial protection – Principle of legal certainty

In order to examine whether the statement of reasons is sufficient in the case of a decision determining *ex ante* contributions, it must be recalled, first, that it cannot be inferred from the case-law of the Court of Justice that the statement of reasons for any decision of an EU institution, body, office or agency imposing the payment of a sum of money on a private operator must necessarily include all the evidence enabling the addressee to verify the accuracy of the calculation of the amount of that sum of money.

Second, EU institutions, bodies, offices and agencies are, in principle, required, in accordance with the principle of the protection of business secrets, which is a general principle of EU law, to which concrete expression is given *inter alia* in Article 339 TFEU, not to disclose to the competitors of a private operator confidential information which that operator has provided.

In that regard, it must be recalled that the very principle of the method of calculating the *ex ante* contributions, as is apparent from BRRD and from SRMR, involves the use, by the SRB, of data constituting business secrets which cannot be reproduced in the statement of reasons for the decision determining the *ex ante* contributions.

It follows from the foregoing that, in the context of the decision fixing the *ex ante* contributions, the SRB's duty to state reasons must be weighed, on the basis of the logic of the system of financing the SRF and of the method of calculation laid down by the EU legislature, against the SRB's obligation to respect the confidentiality of business secrets of the institutions concerned. In particular, the obligation to state reasons on which legal acts are based – enshrined in Article 296 TFEU – must be regarded as fulfilled where the parties concerned, while not being sent data which are business secrets, have the method of calculation used by the SRB and sufficient information to understand, in essence, how their individual situation was taken into account, for the purposes of calculating their *ex ante* contributions to the SRF, relative to the situation of all the other financial institutions concerned.

On the contrary, the mere fact that an institution is unable, because the data of the other institutions are not disclosed to it, to calculate precisely in advance the *ex ante* contributions it must pay does not constitute a breach of the principle of legal certainty.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Annual target level for the SRF – Statement of reasons of the decision imposing *ex ante* contributions – Duty to state reasons

In accordance with Article 69(1) of SRMR, by the end of the initial period, the available financial means in the SRF must reach the final target level, which corresponds to at least 1% of the amount of covered deposits of all of the institutions authorised in all of the participating Member States. Under Article 69(2) of SRMR, during the initial period, the *ex ante* contributions must be spread out in time as evenly as possible until the final target level mentioned above is reached, but with due account of the phase of the business cycle and the impact that pro-cyclical contributions may have on the financial position of the institutions. Article 70(2) of SRMR states that, each year, the contributions due by all of the institutions authorised in the territories of all of the participating Member States are not to exceed 12.5% of the final target level. Article 4(2) of Commission Delegated Regulation (EU) 2015/63 provides that the SRB is to determine the amount of the *ex ante* contributions to the SRF on the basis of the annual target level, taking into account the final target level, and on the basis of the average amount of covered deposits in the previous year, calculated quarterly, of all of the institutions authorised in the territories of all of the participating Member States. Similarly, under Article 4 of Council Implementing Regulation (EU) 2015/81, the SRB is to calculate the *ex ante* contribution for each institution on the basis of the annual target level, which must be established having regard to the final target level and in accordance with the methodology set out in Commission Delegated Regulation (EU) 2015/63.

Having regard to the recalled provisions, in order to examine whether the SRB complied with its obligation to state reasons as regards the determination

of the annual target level, it must be recalled, first of all, that the statement of reasons, without necessarily going into all the relevant facts and points of law, must however set out at least the facts and the legal considerations having decisive importance in the context of the decision. Moreover, as the SRB's decision setting the *ex ante* contributions must inform the institutions concerned of the method of calculation of those contributions, the same applies to the method of determining the annual target level, as that amount is of critical importance in the scheme of such a decision.

ANNUAL TARGET LEVEL FOR THE SRF – *Ex ante* contributions to the Single Resolution Fund – *Ex ante* contributions to resolution financing arrangements – Duty to state reasons – Contradictions between statement of reasons of the decision and reasons given before the Court – Right to effective judicial protection

As regards the SRB's duty to state reasons in relation to the determination of the annual target level, it must be borne in mind that such a statement of reasons must be adapted to the nature of the act at issue and to the context in which it was adopted. Furthermore, it must, *inter alia*, not contain contradictions, so that the addressees are able to know the real reasons for that decision, with a view to defend their rights before the court with jurisdiction, and so that the court can exercise its power of review. Similarly, where the SRB provides certain explanations concerning the reasons for that decision in the course of the procedure before the Courts of the European Union, those explanations must be consistent with the considerations set out in that decision, otherwise the statement of reasons in that decision does not fulfil its objective of ensuring the right to effective judicial protection of the addressees.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Adjustment of *ex ante* contributions to the risk profile of the institution – Commission Delegated Regulation (EU) 2015/63 – Transitional provisions of Commission Delegated Regulation (EU) 2015/63

Article 20(1) of Commission Delegated Regulation (EU) 2015/63 provides that, 'where the information required by a specific indicator as referred to in Annex II [to that delegated regulation] is not included in the applicable supervisory reporting requirement referred to in Article 14 [of the Delegated Regulation] for the reference year, that risk indicator shall not apply until that supervisory reporting requirement becomes applicable'. Therefore, the SRB lawfully does not apply the NSFR and MREL indicators or the 'complexity' and 'resolvability' sub-indicators where, at the time that the decision imposing *ex ante* contributions to the SRF, the information required in connection with those risk indicators and sub-indicators was not available in a harmonised form for all of the institutions.

Furthermore, it follows from the actual wording of said Article 20(1) of Commission Delegated Regulation (EU) 2015/63 that that provision does not allow the SRB to take account of the impact of not applying a risk indicator on the amount of the *ex ante* contribution of each institution.

<i>EX ANTE</i> CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – <i>Ex ante</i> contributions to resolution financing arrangements – Right to be heard
--

The right to be heard, enshrined in Article 41(2)(a) of the Charter, which guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely, is respected by the SRB where, before adopting a decision imposing *ex ante* contributions to the SRF, conducts a consultation procedure as part of which it communicates a draft of the decision to the institutions concerned and invites them, by means of an online form, to submit their comments on the content of that draft, and at the same time communicates to those institutions the SRB communicated the following documents: – an interactive calculation tool which allows them to calculate their *ex ante* contributions for the specific contribution period on the basis of the results of the SRB’s interim calculations; its preliminary calculation of the *ex ante* contributions to the SRF for the specific contribution period; a document including the statistics of the calculations relating to all of the institutions in a summary and collective form; guidance on how to calculate *ex ante* contributions for the specific contribution period using the calculation tool.

Moreover, in the absence of circumstantiated allegations by the applicant, a two-week period for institutions to submit their comments on the content of the draft SRB decision cannot be deemed in breach of their right to be heard.

2. Reference to “notes de doctrine”

MARCO BODELLINI, GIULIO GIACOMO CIMINI, *SRB’s calculations for SRF’s contributions got annulled due to methodological reasons*, EU Law Live, 20 February 2024.

PILATUS BANK v ECB

1. Keywords and summary

Pilatus Bank v ECB

Court of Justice – Case C-256/22 P – Judgment of 8 February 2024 –
ECLI:EU:C:2024:125

**Board of Directors of a credit institution's standing to challenge ECB's
decision withdrawing that institution's authorisation**

WITHDRAWAL OF A CREDIT INSTITUTION'S AUTHORISATION – Representation of the credit institution
--

In the case of a credit institution constituted in the form of a legal person governed by the law of a Member State, where there are no EU rules applicable to the matter, it is under that law that it is necessary to determine which bodies of that legal person are entitled to take decisions such as that to provide a lawyer with authority to act on behalf of that institution before the ECJ.

Where, under national law, the competent authority has lawfully appointed a competent person to assume all the powers, functions and duties of a credit institution in respect of all assets, whether exercisable by that credit institution in general meeting or by its Board of Directors or by any other person, including the legal and judicial representation of that credit institution, the Board of Directors of that credit institution is no longer entitled to represent it and no longer has the power to provide a lawyer with authority to act on behalf of the credit institution.

NRW. BANK v SRB

1. Keywords and summary

NRW Bank v SRB

General Court – Case T-466/16 RENV – Judgment of 21 February 2024 – ECLI:EU:T:2024:111

[no appeal case detected on curia.europa.eu]

SRB's decision on the calculation of the *ex ante* contributions, application of the exclusions under Article 5 of Commission Delegated Regulation (EU) 2015/63, and duty to state reasons

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Adjustment of *ex ante* contributions to the risk profile of the institution – No discretion to exclude certain liabilities when adjusting *ex ante* contributions in proportion to risk – Commission Delegated Regulation (EU) 2015/63 – Article 5(1) of Commission Delegated Regulation (EU) 2015/63

Article 5(1) of Commission Delegated Regulation (EU) 2015/63 does not confer any discretionary power on the SRB (or the NRA) to exclude certain liabilities when adjusting *ex ante* contributions in proportion to risk, but rather lists precisely the conditions governing whether a liability can be so excluded. Any other outcome cannot be justified by an analysis that takes account of the principle of equal treatment, non-discrimination and proportionality, since Commission Delegated Regulation (EU) 2015/63 distinguishes situations that have significant and specific features, directly linked to the risks inherent in the liabilities at issue.

Given that Article 5(1) of Commission Delegated Regulation (EU) 2015/63 establishes a derogation from the general rule laid down in Article 103(2) of BRRD, by allowing certain liabilities to be excluded from the calculation of *ex ante* contributions, it is a provision which must be interpreted strictly.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Article 5(1) of Commission Delegated Regulation (EU) 2015/63 – Promotional loans – Exclusion of certain promotional loans from the calculation of *ex ante* contributions – Commission Delegated Regulation (EU) 2015/63

Article 5(1)(f) of Commission Delegated Regulation (EU) 2015/63 lays down three cumulative conditions for the exclusion of the liabilities mentioned

therein from the calculation of *ex ante* contributions, namely, first, that the liabilities are held by an entity that manages promotional loans; second, that they constitute ‘liabilities of the intermediary institution to the original or other intermediary credit institution’ or ‘liabilities of the original credit institution to its lenders’; and third, that the exclusion is limited ‘to the extent that the amount of these liabilities is reflected in the promotional loans granted by the institution’.

Therefore, the liabilities at issue can be excluded from the calculation of the *ex ante* contribution of the institution concerned only up to the amount of the promotional loans operated by that institution, as defined in Article 3(28) of Commission Delegated Regulation (EU) 2015/63. Thus, the aforementioned provision does not permit the exclusion from the calculation of the *ex ante* contribution of all the liabilities of a promotional bank connected in one way or another to the fulfilment of the facilitating function exercised by that institution, but only those liabilities the amount of which corresponds exactly to the amount of the promotional loans administered by that institution.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Article 5(1) of Commission Delegated Regulation (EU) 2015/63 – Promotional loans – Exclusion of certain promotional loans from the calculation of *ex ante* contributions – Debt securities acquired by a promotional bank not excluded from calculation of *ex ante* contributions – Commission Delegated Regulation (EU) 2015/63

In order to constitute promotional loans, the activities of a promotional bank, as well as those of intermediary institutions, must fulfil the condition that they must be carried out ‘on a non-competitive and not-for-profit basis’, in line with Article 3(27) of Commission Delegated Regulation (EU) 2015/63.

Ancillary promotional activities of a promotional bank consisting of the acquisition of debt securities on the capital market do not fulfil this conditions: on the one hand, such transactions are carried out on the open capital market on which other operators are active, who carry out the same types of transactions and can purchase the same debt securities as the promotional banks, and this under the same market conditions as the latter, i.e. under a competitive regime; on the other hand, these activities potentially generate income, since they consist in producing interest margins in order to finance the banking business as such of the promotional banks; consequently, these activities cannot be considered as carried out on a not-for-profit basis.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Ex ante contributions to resolution financing arrangements – Adjustment of ex ante contributions to the risk profile of the institution – European Commission’s competence and powers – Power conferred on the Commission to adopt delegated acts – Commission Delegated Regulation (EU) 2015/63

The Commission enjoyed broad discretion for the purposes of adopting, pursuant to Article 103(7) of BRRD, the rules specifying the notion of ‘adjusting *ex ante* contributions in proportion to the risk profile of the institutions’ included in Commission Delegated Regulation (EU) 2015/63. The Commission had to draw up those rules in pursuit of two linked objectives, namely, first, to ensure account is taken of the different risks to which the activities of banking – or, more broadly, financial – institutions give rise and, second, to encourage those same institutions to operate under a less risky model. The drawing up of such rules entailed complex assessments and evaluations on the part of the Commission, since it had to examine the different factors in the light of which various types of risk were perceived in the banking and financial sectors.

In those circumstances, the review by the Union Courts must be limited to examining whether the exercise of the discretion afforded to the Commission has been vitiated by a manifest error or a misuse of power, or whether the Commission has manifestly exceeded the limits of that discretion and it is for the applicant to demonstrate that.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Ex ante contributions to resolution financing arrangements – Promotional banks – Provisional banks’ liabilities for calculating ex ante contributions – Commission Delegated Regulation (EU) 2015/63

Article 103(7) of BRRD did not require the Commission to exclude in toto promotional banks’ liabilities for the purposes of calculating *ex ante* contributions to resolution financing arrangements. That conclusion is not called into question by the allegation that such promotional banks would be less likely to be resolved.

Moreover, in accordance with Article 70(2) of SRMR, *ex ante* contributions are adjusted in proportion to the risk profile of the institution concerned. In that regard, Article 103(7) of BRRD provides for eight factors which the Commission must take into account when drawing up the rules for such an adjustment. Although ‘the probability that the institution enters into resolution’ and ‘the risk exposure of the institution’ number amongst those factors, they are just two of the eight factors; in addition, nothing in Article 103(7) of BRRD suggests that the Commission is required to give paramount importance to one or more of those factors.

This is a fortiori the case since, as it follows from recital 13 of Commission Delegated Regulation (EU) 2015/63, the exclusion of liabilities related to promotional loans is based on the fact that the promotional loans pursue a public

policy objective, are granted on a non-competitive and not-for-profit basis and are partially guaranteed, directly or indirectly, by the central or regional government or local authority of a Member State. Therefore, this exclusion is based on the specific characteristics of a certain category of activities, rather than on the overall risk profile of the promotional banks carrying out these activities, it being understood that these institutions do not necessarily have the same risk profile merely because they carry out, *inter alia*, promotional activities. Furthermore, the recalled exclusion does not infringe the principle of equal treatment with respect to ancillary promotional activities of a promotional bank, which are not excluded for the purposes of calculating *ex ante* contributions, because these latter activities consist of the acquisition of debt securities on the capital market, are carried out on the open capital market and cannot be considered on a not-for-profit basis.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Ex ante contributions to resolution financing arrangements – Principle of legal certainty – Retroactive effects of an SRB’s decision

The principle of legal certainty precludes an EU measure from taking effect from a date prior to its adoption, except where, exceptionally, the objective to be achieved so requires and where the legitimate expectations of those concerned are duly respected.

Subject to those conditions, the power of the institutions, bodies, offices and agencies of the Union to adopt an act with retroactive effect derives from the general principles of Union law, without the need of an express legal basis in legislation.

Therefore, it is lawful for the SRB to adopt a retroactive decision on *ex ante* contributions to the SRF to remedy its failure to state reasons in previous decisions, which was established following a judgment of the EGC, without altering the calculation of the *ex ante* contributions for those previous contribution periods and the amount thereof, in order to ensure the concomitance between the applicability of the decision and the time at which the institution’s obligation to pay an *ex ante* contribution arose and thus to avoid a result contrary to the applicable legislation.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Ex ante contributions to resolution financing arrangements – Statement of reasons of the decision imposing ex ante contributions – Duty to state reasons – Protection of business secrets – Right to effective judicial protection – Individual data of other institutions

First, the statement of reasons for any decision of an EU institution, body, office or agency imposing the payment of a sum of money on a private operator must not necessarily include all the evidence enabling the addressee to verify the accuracy of the calculation of the amount of that sum of money.

Second, EU institutions, bodies, offices and agencies are, in principle, required, in accordance with the principle of the protection of business secrets, which is a general principle of EU law, to which concrete expression is given *inter alia* in Article 339 TFEU, not to disclose to the competitors of a private operator confidential information which that operator has provided.

It follows from the foregoing that, in the context of the decision fixing the *ex ante* contributions, the SRB's duty to state reasons must be weighed, on the basis of the logic of the system of financing the SRF and of the method of calculation laid down by the EU legislature, against the SRB's obligation to respect the confidentiality of business secrets of the institutions concerned. In particular, individual data of the other institutions used by the SRB to calculate *ex ante* contributions are to be considered as business secrets, and cannot be included in the statement of reasons, even if anonymized, as anonymization could not exclude that, on the basis of the data, the institution concerned may be identified.

Therefore, the obligation to state reasons must be regarded as fulfilled where the persons concerned by that decision, while not being sent data which are business secrets, have the method of calculation used by the SRB and sufficient information to understand, in essence, how their individual situation was taken into account, for the purposes of calculating their *ex ante* contribution, relative to the situation of all the other financial institutions concerned. By way of such a statement of reasons, the persons concerned are in a position to verify whether their *ex ante* contribution was fixed arbitrarily, in disregard of the reality of their economic situation or through the use of data relating to the rest of the financial sector which are not plausible, and assess whether it is worthwhile to bring an action against that decision.

ANNUAL TARGET LEVEL FOR THE SRF – <i>Ex ante</i> contributions to the Single Resolution Fund – <i>Ex ante</i> contributions to resolution financing arrangements – Statement of reasons of the decision imposing <i>ex ante</i> contributions – Duty to state reasons

In accordance with Article 69(1) of SRMR, by the end of the initial period, the available financial means in the SRF must reach the final target level, which corresponds to at least 1% of the amount of covered deposits of all of the institutions authorised in all of the participating Member States. Under Article 69(2) of SRMR, during the initial period, the *ex ante* contributions must be spread out in time as evenly as possible until the final target level mentioned above is reached, but with due account of the phase of the business cycle and the impact that pro-cyclical contributions may have on the financial position of the institutions. Article 70(2) of SRMR states that, each year, the contributions due by all of the institutions authorised in the territories of all of the participating Member States are not to exceed 12.5% of the final target level. Article 4(2) of Commission Delegated Regulation (EU) 2015/63 provides that the SRB is to determine the amount of the *ex ante* contributions to the SRF on the basis of the annual target

level, taking into account the final target level, and on the basis of the average amount of covered deposits in the previous year, calculated quarterly, of all of the institutions authorised in the territories of all of the participating Member States. Similarly, under Article 4 of Council Implementing Regulation (EU) 2015/81, the SRB is to calculate the *ex ante* contribution for each institution on the basis of the annual target level, which must be established having regard to the final target level and in accordance with the methodology set out in Commission Delegated Regulation (EU) 2015/63.

Having regard to the recalled provisions, in order to examine whether the SRB complied with its obligation to state reasons as regards the determination of the annual target level, it must be recalled, first of all, that the statement of reasons, without necessarily going into all the relevant facts and points of law, must however set out at least the facts and the legal considerations having decisive importance in the context of the decision. Moreover, as the SRB's decision setting the *ex ante* contributions must inform the institutions concerned of the method of calculation of those contributions, the same applies to the method of determining the annual target level, as that amount is of critical importance in the scheme of such a decision.

It follows from the foregoing that the institutions liable to the *ex ante* contributions must be able to understand, on reading the contested decision, at least the main stages of the method of calculating the annual target level for the contribution period concerned.

2. Reference to “notes de doctrine”

BARBORA BUDINSKÁ, *On the inclusion of liabilities from ancillary promotional activities into the calculation of ex-ante contributions (NRW.Bank v SRB, T-466/16 RENV)*, EU Law Live, 12 March 2024.

SBER v ECB

1. Keywords and summary

Sber v ECB

General Court – Case T-647/21 (Joined Cases T-647/21, T-99/22) – Judgment of 28 February 2024 – ECLI:EU:T:2024:127¹

[no appeal case detected on curia.europa.eu]

Unlawfulness of ECB’s decision automatically levying absorption interests pursuant to Austrian law for breach of Article 395 of CRR

ADMINISTRATIVE PECUNIARY SANCTIONS – Sanctions criminal in nature

The administrative pecuniary sanctions imposed under Article 18(1) of SSMR are clearly modelled on, and are equivalent in nature and severity to, the fines that the European Commission may impose under Article 23(2) of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition. The sanctions under Article 18(1) of SSMR have also the same deterrent purpose, as pursuant to Article 18(3) of SSMR “sanctions applied shall be effective, proportionate and dissuasive”.

Considering that it is settled case-law that the *bis in idem* principle must be respected in proceedings aimed at the imposition of fines in competition law matters, it follows that the same principle must be applied by analogy to the sanctions under Article 18(1) of SSMR, which, being criminal in nature as those in the competition field, fall within the scope of Article 50 of the Charter, which enshrines the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

ABSORPTION INTEREST MEASURE – Administrative measure under Article 65 of CRD
--

The absorption interests measure, provided for in Austrian law on banking, is a non-punitive prudential measure among the “other administrative measures” that, under Article 65 of CRD, Member States may adopt to guarantee the enforcement of the compliance with CRD and CRR by the supervised entities. As such, the absorption interests measure does not fall within the scope of Article

¹ See also the comment on the following judgment.

50 of the Charter, which enshrines the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

ECB'S COMPETENCE AND POWERS – "Union law" as including national law transposing EU directives – Interpretation of national law provisions by EU Institutions – Primacy of EU law

In principle, the scope of national laws, regulations or administrative provisions must be assessed by EU Courts in the light of the interpretation given to them by national courts. Therefore, where a EU Court is called upon to review the substance of the ECB's application of national law transposing a directive, the interpretation of national courts is sufficient to establish the scope of that national law where it results in a finding that it is compatible with the directive which it transposes. In such a situation, criticisms seeking to call into question the substance of the interpretation by those courts are liable to be rejected at the outset.

However, the principle of the primacy of EU law means that, where the interpretation of the national courts does not make it possible to ensure the compatibility of national law with a directive, the EU Court must interpret national law so far as possible in the light of the wording and the purpose of the directive transposed in order to achieve the result sought by that directive. As the obligation to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem*, the EU Court, where it is not possible to interpret national law in compliance with the requirements of EU law, is under a duty to give full effect to the provisions of EU law, if necessary by refusing of its own motion to apply any national legislation, even if adopted subsequently, which is contrary to a provision of EU law with direct effect.

ECB'S COMPETENCE AND POWERS – Principle of proportionality – Non-automatic application of absorption interests

As evident from both the literal, contextual and theological interpretation of Article 70 of CRD, read in conjunction with Article 4(1), Article 65(1) and recital 37 of that directive, it is for the NCA and, in consequence, the ECB where it applies national law transposing that directive, to determine the type of administrative measure by taking into account all the circumstances, which necessarily implies that they have a margin of discretion and precludes them from being in a situation of a non-discretionary competence.

Therefore, an interpretation of the Austrian law on banking which, as concerns the absorption interests measure, would place the ECB in a situation of non-discretionary competence thus preventing it from taking into account all

the relevant circumstances, would have the effect that that national law provision would be incompatible with Article 70 of CRD. In fact, the relevant Austrian law on banking can and should be interpreted as allowing the NCA, and therefore the ECB, to take into account all the relevant circumstances where they impose an administrative measure under Article 65 of that directive, including an absorption interest measure.

BAWAG PSK v ECB

1. Keywords and summary

BAWAG PSK v ECB

General Court – Case T-667/21 – Judgment of 28 February 2024 –
ECLI:EU:T:2024:131

[no appeal case detected on curia.europa.eu]

Unlawfulness of ECB’s decision automatically levying absorption interests pursuant to Austrian law for breach of Article 395 of CRR

ECB’S COMPETENCE AND POWERS – “Union law” as including national law transposing EU directives

The expression ‘Union law’ as referred to in Article 9(1), second subpara, second sentence, SSMR is the law which constitutes the legal framework governing the prudential supervision of credit institutions. That legal framework comprises, in particular, in addition to SSMR, CRR and CRD, which, pursuant to recitals 5 and 2 thereof respectively, must be read together. Therefore, the powers the ECB enjoys pursuant to said provision are all those provided for in Title VII of CRD as implemented by national law. This is in line with the case-law of the ECJ according to which ‘under Union law’ has to be interpreted as including all the powers resulting from the legal framework established by a directive, whether they result from an obligation or power for the Member State to legislate, as opposed to the recognition by that directive of the power which the Member States enjoy under national law to provide for stricter provisions outside the framework of the regime established by that directive.

ECB’S COMPETENCE AND POWERS – “Union law” as including national law transposing EU directives – Absorption interests measure – Administrative measure under Article 65 of CRD

The levying of absorption interests under Para 97 of the Austrian law on banking is akin to an administrative measure falling within the scope of Article 65(1) of CRD, the fact that it is not referred to in the list in Article 67(2) of that directive being irrelevant, since it is apparent from the wording of that provision that that list is not exhaustive and that Article 65(1) provides that Member States are to take all measures necessary to ensure that that directive and CRR are implemented.

ECB'S COMPETENCE AND POWERS – "Union law" as including national law transposing EU directives – Interpretation of national law provisions by EU Institutions – Primacy of EU law

In principle, the scope of national laws, regulations or administrative provisions must be assessed by EU Courts in the light of the interpretation given to them by national courts. Therefore, where the EU Court is called upon to review the substance of the ECB's application of national law transposing a directive, the interpretation of national courts is sufficient to establish the scope of that national law where it results in a finding that it is compatible with the directive which it transposes. In such a situation, criticisms seeking to call into question the substance of the interpretation by those courts are liable to be rejected at the outset.

However, the principle of the primacy of EU law means that, where the interpretation of the national courts does not make it possible to ensure the compatibility of national law with a directive, the EU Court must interpret national law so far as possible in the light of the wording and the purpose of the directive transposed in order to achieve the result sought by that directive. As the obligation to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem*, the EU Court, where it is not possible to interpret national law in compliance with the requirements of EU law, is under a duty to give full effect to the provisions of EU law, if necessary by refusing of its own motion to apply any national legislation, even if adopted subsequently, which is contrary to a provision of EU law with direct effect.

ECB'S COMPETENCE AND POWERS – Principle of proportionality – Non-automatic application of absorption interests

As evident from both the literal, contextual and theological interpretation of Article 70 of CRD, read in conjunction with Article 4(1), Article 65(1) and recital 37 of that directive, it is for the NCA and, in consequence, the ECB where it applies national law transposing that directive, to determine the type of administrative measure by taking into account all the circumstances, which necessarily implies that they have a margin of discretion and precludes them from being in a situation of a non-discretionary competence.

Therefore, an interpretation of the Austrian banking law which, as concerns the absorption interest measure, would place the ECB in a situation of non-discretionary competence thus preventing it from taking into account all the relevant circumstances, would have the effect that that national law provision would be incompatible with Article 70 of CRD. In fact, the relevant Austrian banking law can and should be interpreted as allowing the NCA, and therefore the ECB, to take into account all the relevant circumstances where they impose an administrative measure under Article 65 of that directive, including an absorption interest measure.

Where the appellant challenges an ECB supervisory measure alleging that the ECB did not exercise its obligation to assess the proportionality of that measure by taking into account all the relevant circumstances, the ECB's allegation before the EU Court where that action is heard that that measure was in any case not disproportionate is irrelevant in relation to the examination of the lawfulness of the contested decision. It is not for the EU Court to take the place of the defendant by carrying out in its stead an examination which it never undertook and speculating as to the conclusions which it would have reached had it done so.

2. The General Court annuls two ECB supervisory decisions requiring two Austrian banks to pay absorption interests and lays down interesting principles while at it

by Giuseppe Pala

1. In 2021, the ECB adopted two similar decisions imposing on *Sberbank Europe AG* (now *Sber Vermögensverwaltungs AG* – ‘Sberbank’) and *Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG* (‘BAWAG PSK’), both Austrian significant institutions, the payment of absorption interests amounting to 2 million euros and 19 million euros respectively, in consequence of the breach of the limit on large exposures established in Article 395 of CRR.

The measure at hand was (and is) provided for by Article 97 of the Austrian Banking Law (*Bankwesengesetz* – “BWG”)¹ and was qualified by the Court of Justice in 2018 as a supervisory administrative measure without punitive aim among those that Member States shall establish pursuant to Article 65(1) of CRD in respect of breaches of national provisions transposing the same directive and of CRR.² As such, the measure was applied by the ECB, acting as competent authority pursuant to Article 4(1)(d) and (3) and Article 9(1) of SSM Regulation.

Both banks challenged the respective ECB decision before the General Court.

In addition, Sberbank requested also a review of the decision by the Administrative Board of Review of the ECB (‘ABoR’), pursuant to Article 24 of SSM Regulation. In October 2021, the ABoR gave its opinion, stating – as recalled in the judgment of the General Court – that the ECB decision (i) lacked sufficient reasoning regarding the application of the principle of proportionality and the

¹ The mentioned law provision was amended in 2021 in order to exclude the application of the measure when the exceedance of the limit on large exposures is permitted by Article 395(5) of CRR.

² See Court of Justice, judgment of 7 August 2018, case C-52/17, *VTB Bank (Austria)*, EU:C:2018:648, paras 40 to 42.

application of Article 70 of CRD; (ii) failed to comply with the principle that action must be taken within a reasonable time; and (iii) lacked sufficient reasoning as to the ECB's choice to levy absorption interest in respect of the limits of large exposures having been exceeded both at individual and consolidated level.

The ECB decided, nonetheless, to issue a new decision vis-à-vis Sberbank, confirming in its entirety its previous one with only small adjustments to the reasoning articulated therein. The credit institution challenged before the General Court the new decision too.

2. On 28 February 2024, the General Court published two analogous judgments upholding Sberbank and BAWAG PSK's requests, thus annulling the ECB decisions imposing absorption interests.

The annulments were based, in substance, on one articulate ground concerning the exercise of supervisory powers by the ECB and the interplay between Union law and national law.

In particular, the ECB had stipulated in its decisions that the absorption interest measure is framed by Austrian law (and by relevant national case-law) as a non-discretionary measure, meaning that the competent authority, whenever it ascertains that a credit institution breached the limit on large exposures, has the legal obligation to apply it in the specific terms established by Article 97 of BWG, thus having no discretion to decide *if* or *how*. On this basis, the ECB had expressly stated in those decisions that it lacked any margin of discretion and, as a consequence, could not and would not evaluate the proportionality of the measures adopted vis-à-vis Sberbank and BAWAG PSK nor, more generally, take into account any circumstance listed in Article 99e of BWG, which transposed in Austrian law Article 70 of CRD.

Both credit institutions disputed this ECB position and the General Court held the complaints as founded, as the ABoR already did after the request submitted by Sberbank.

First, the Court recalled the well-established principles governing the interplay between national law and Union law: the scope of national law must be assessed in the light of the interpretation of it given by national courts, but where such an interpretation does not make it possible to ensure the compatibility of said national law with the directive it transposed, the primacy of EU law requires the General Court to interpret that national law so far as possible (without going *contra legem*) in the light of the wording and the purpose of that directive. Finally, where it is unable to interpret national law in compliance with the requirements of EU law, the General Court is under a duty to give full effect to the latter.

Second, the Court observed that “Article 70 of [CRD], read in conjunction with Article 4(1), Article 65(1) and recital 37 of that directive, must be understood as meaning that it is for the [competent authority] and, in consequence, the ECB, to determine the type of administrative measure by taking into account all the

circumstances, which necessarily implies that they have margin of discretion and precludes them from being in a situation of a non-discretionary competence”.

Indeed, on the one hand, albeit its title only refers to “penalties”, Article 70 of CRD requires competent authorities to take into account all the relevant circumstances – a non-exclusive list of which is provided therein – for the purposes of the determination of also “*other administrative measures*” vis-à-vis supervised entities. In this same line is recital 37 of the same directive. On the other hand, Article 65(1) and Article 70 are in the same section of CRD, concerning “*supervisory powers, powers to impose penalties and right of appeal*”. Therefore, the concept of “*administrative measures*” in those two provisions must be regarded as having the same meaning. Consequently, since the absorption interest constitutes an administrative measure within the meaning of Article 65(1) of CRD, its application is governed by Article 70 of that directive.

Third, and consequently, the interpretation of relevant Austrian law given by Austrian courts and embraced by the ECB according to which absorption interest is to be applied by the ECB without any margin of discretion is incompatible with EU law.

Fourth, the relevant Austrian law provisions may be interpreted in line with Article 70 of CRD, thus implying a margin of discretion on the part of the ECB (and the NCA) allowing it, where appropriate, not to levy absorption interest if it believes that the circumstances entail making a decision to that effect. This is because (i) Article 97 of BWG (establishing the absorption interest measure) does not expressly rule out that the competent authority may take into consideration the peculiar circumstances of a given case, possibly leading to the exclusion or mitigation of the measure vis-à-vis the specific credit institution concerned; and (ii) Article 99e of BWG (which, as mentioned above, transposed Article 70 of CRD) provides that when determining the type of penalty *or measure* to be adopted in response to infringements of CRR, the competent authority must take into account the circumstances set out in Article 70 of CRD, and therefore “*the reference to ‘measures’ in that article can perfectly well be understood as including the levying of absorption interest referred to in point 2 of Para 97(1) of the BWG*”.

In the light of all the above, the General Court found that “*in so far as the ECB adopted the decision [...], holding that absorption interest was levied automatically, it relied on a premise which is legally incorrect, which vitiated its examination of the proportionality of the application of [the relevant Austrian law], since it resulted in it failing to examine the circumstances of the case*”.

The findings of the Court are not really surprising, not only in the light of the literal and teleological interpretation of Articles 65(1) and 70 of CRD, but also considering that the SSM Regulation confers upon the ECB the power (and obligation) to assess if and how to use its supervisory powers, exercising the necessary administrative and technical discretion.

After all, if the ECB’s stance regarding the absorption interest were to be followed, this would imply that any national legislator would be able to

legally oblige the ECB to act in a certain, predetermined way whenever specific conditions concerning a supervised entity occurred, provided that the measure to be adopted by the ECB could be traced back to those foreseen by Article 65(1) of CRD, even if in the specific circumstances the same ECB considered such a measure as unnecessary and disproportionate.

Evidently, this scenario is not compatible not only with the abovementioned Union law provisions, but more generally with the autonomy and independence of the ECB that, as an institution of the European Union, is required to always abide by the principle of proportionality pursuant to Article 5(1) of TEU.

3. Besides the conclusions described above, in the two judgments the General Court stipulated the following other important principles.

3.1 The application vis-à-vis an Austrian significant institution of the absorption interest measure provided for by Austrian law falls within the direct competence of the ECB, pursuant to Article 4(1)(d), Article 4(3), Article 6(4) and Article 9(1) of SSM Regulation.

First, the ECB is competent to ensure that significant entities comply with Article 395(1) of CRR, imposing the limit on large exposures. Indeed, under Article 4(1)(d) of SSM Regulation, the task of “*ensur[ing] compliance with the acts referred to in the first subpara of Article 4(3), which impose prudential requirements on credit institutions in the areas of [...] large exposure limits [...]*” is conferred on the ECB. When the credit institution concerned is a significant entity within the meaning of Article 6(4) of the same Regulation, the implementation of that task falls directly to the ECB.

Second, in order to carry out (also) this task, the ECB shall apply all relevant Union law, and where this Union law is composed of directives, the national legislation transposing those directives (Article 4(3) of SSM Regulation) and has the powers set out in Article 9(1) of SSM Regulation, namely (i) the powers set out in SSM Regulation; (ii) the powers of “*competent [...] authorities [...] under the relevant Union law*”; (iii) the power to instruct national authorities to “*make use of their powers, under and in accordance with the conditions set out in national law, where this Regulation does not confer such powers on the ECB*”. Considering that the absorption interest, whilst being provided for by national law, falls within the administrative measures foreseen by Article 65(1) CRD, the power to apply it is to be traced back to those of competent authorities under the relevant Union law, that the ECB is entitled to exercise directly.

3.2 When the General Court annuls the “final” ECB decision that, following the opinion given by the ABoR pursuant to Article 24 of SSM Regulation, replaced its previous “original” one, it must be assessed if the applicant maintains an interest also for the annulment of said “original” ECB decision, provided that they have challenged it before the Court in a timely manner. Indeed, as a general approach, “*an applicant should be regarded as having an interest in obtaining*

the annulment of an act which has been withdrawn, where the act withdrawing it is the subject of an action for annulment”.

Nevertheless, when the ECB requested to the Court a declaration that there is no need to adjudicate on such “original” decision, submitting that it has been withdrawn, such a stance can be akin to an acknowledgement, which is implicit but also certain, that such an act no longer forms part of the EU legal order, which means that the same institution will no longer be able to rely on it even if the act withdrawing it is set aside.

Moreover, when, as in the case of Sberbank, there is a very high degree of similarity both in the content of the “original” and “final” decisions and in the pleas raised by the applicant in its two applications, such particular conditions mean that the “original” decision is vitiated by the same illegality as that found by the Court as regards the “final” decision, which strengthens the argument that it would be impossible for the ECB to rely on the “original” decision, following the annulment of the “final” one.

Consequently, when the said conditions are met, there is no need to adjudicate on the action brought against the “original” decision after the annulment of the “final” one.

3.3 The absorption interest measure, according to national case-law (and the Court of Justice ruling of 2018, mentioned above), is a non-punitive prudential measure, aimed at depriving the credit institution concerned of an advantage improperly received by means of an irregularity. Therefore, such a measure does not fall within the perimeter of the *ne bis in idem* principle.³

On the contrary, “*administrative pecuniary penalties imposed under Article 18(1) of [SSM Regulation] fall within the scope of Article 50 of the Charter*”, which enshrines the *bis in idem* prohibition. In this regard, the Court underlined that such administrative pecuniary penalties “*are clearly modelled on the fines which the European Commission may impose pursuant to Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1) and are of an equivalent nature and severity. [...] It results from settled case-*

³ On this subject, please see in this Newsletter: “Non viola il principio del *ne bis in idem* l’applicazione a carico del medesimo soggetto delle sanzioni di cui all’art. 190 T.U.F. ad opera sia della Banca d’Italia che della Consob” (P. BATTISTINI, No 9, September 2021); “Rapporto tra ostacolo all’esercizio delle funzioni di vigilanza e false comunicazioni sociali; *ne bis in idem* tra sanzioni amministrative pecuniarie e ostacolo” (M. DI PIETROPAOLO, *ibidem*); “*Ne bis in idem*: l’Avvocato Generale della CGUE suggerisce un criterio unico di applicazione” (G. PALA, *ibidem*); “Sanzioni ‘parapenali’ in materia di pratiche commerciali scorrette e violazione del *ne bis in idem*: la parola alla Corte di Giustizia” (M. COSSA, No 15, March 2022); “La Corte di Giustizia afferma l’applicabilità anche nel campo del diritto della concorrenza dei principi della giurisprudenza Menci in materia di *ne bis in idem*” (G. PALA, No 16, April 2022); “The Italian Constitutional Court recognises that the Italian legal framework regarding breaches of copyrights violates the *ne bis in idem* principle” (G. PALA, No 19, July-August 2022); “The Court of Justice reiterates its well-established criteria for the application of the *ne bis in idem* principle” (G. PALA, No 35, January 2024).

law that the principle ne bis in idem must be observed in proceedings for the imposition of fines under competition law [...]. That classification must therefore be applied by analogy to those penalties”.

Although this specific point of the judgment was not decisive for the annulment of the ECB’s decision, it is nonetheless worth underlining, since – at least to the best of our knowledge – it is the first time that the Court of Justice has expressly stipulated that penalties under Article 18(1) of SSM Regulation are subject to the *bis in idem* prohibition and, therefore, are criminal in nature for the purposes of such a prohibition.

**SBERBANK OF RUSSIA v MeSoFa AND SRB,
SBERBANK OF RUSSIA v MeSoFa AND OTHERS,
SBERBANK OF RUSSIA v MeSoFa AND OTHERS**

1. Keywords and summary

Sberbank of Russia v MeSoFa and SRB

Court of Justice – Case C-676/23 P – Judgment of 22 March 2024 –
ECLI:EU:C:2024:273

Sberbank of Russia v MeSoFa and Others

Court of Justice – Case C-690/23 P – Judgment of 22 March 2024 –
ECLI:EU:T:2023:628

Sberbank of Russia v MeSoFa and Others

Court of Justice – Case C-693/23 P – Judgment of 22 March 2024 –
ECLI:EU:T:2023:633

**Shareholder of a credit institution lacks interest in the result of an action for
annulment brought by that credit institution before the General Court**

SHAREHOLDERS OF A CREDIT INSTITUTION – No interest of the shareholder
of a credit institution in the result of a case brought by that credit institution

An adverse effect, even if significant, on the economic and financial interests of the shareholders of a credit institution which is one of the main parties to proceedings pending before the EGC cannot be regarded as a direct, adverse effect on the interests of those shareholders, in so far as it does not alter their legal circumstances. Therefore, on the basis only of such an adverse effect, those shareholders cannot validly claim to have an interest in the result of the case and, as a consequence, cannot intervene in the case under Article 40 of the Statute of the Court of Justice.

DEXIA v SRB

1. Keywords and summary

Dexia v SRB

General Court—Case T-411/22—Judgment of 10 April 2024—ECLI:EU:T:2024:216

[under appeal: case C-454/24 P]

Unlawfulness of the SRB’s decision determining the *ex ante* contributions for 2022 for breach of the 12.5% cap provided for by Article 70(2) of SRMR

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Cap of 12.5% of the final target level for the SRF under Article 70(2) SRMR – SRF contribution period of 2022

Article 69(1) of SRMR provides that, by the end of the initial period, the available financial means of the SRF must reach the final target level, which corresponds to at least 1% of the amount of covered deposits of all of the institutions authorised in the territories of all of the participating Member States.

Under Article 69(2) of SRMR, during the initial period, the *ex ante* contributions must be spread out in time as evenly as possible until the final target level is reached, but with due account being taken of the phase of the business cycle and the impact that pro-cyclical contributions may have on the financial position of institutions.

The first subpara of Article 70(2) of SRMR provides that, ‘each year, the Board shall [...] calculate the individual contributions to ensure that the contributions due by all of the institutions authorised in the territories of all of the participating Member States shall not exceed 12.5% of the target level’. The fourth subpara of Article 70(2) of that regulation adds that, ‘in any case, the aggregate amount of individual contributions by all of the institutions authorised in the territories of all of the participating Member States [...] shall not exceed annually the 12.5% of the target level’.

The mentioned cap applies also during the initial period, as clearly stated by Article 69(2) of SRMR, which provides that, ‘during the initial period’, *ex ante* contributions are to be calculated ‘in accordance with Article 70’ of that regulation, such a reference indicating, unambiguously, that all the requirements laid down in the latter provision, including the requirement laid down in the first and fourth subparas of para 2 thereof, are to apply during the initial period.

It follows from the foregoing that the amount of the final target level, to which the 12.5% cap applies, must be determined in the light of the amount of

covered deposits as it will be at the end of the initial period, it being understood that that amount cannot be known with certainty until the end of that period. It is for the SRB, in respect of each contribution period, to make as precise an estimate as possible of the final target level in the light of the data available at the time of that estimate.

Consequently, when the SRB calculates the *ex ante* contributions during a given contribution period, it must ensure that the amount of the *ex ante* contributions due by all of the institutions authorised in the territories of all of the participating Member States does not exceed 12.5% of the forecast final target level.

When the SRB calculated the *ex ante* contributions relating to the 2022 contribution period, it exceeded the cap of 12.5% of the forecast final target level, thus infringing the first and fourth subparas of Article 70(2) of SRMR.

2. The General Court annuls the SRB's decision on *ex ante* contributions for 2022

by Leonardo Droghini

1. In recent times, the Union Courts have been dealing with numerous actions for annulment of the Single Resolution Board (SRB) decisions determining the *ex ante* contributions to the Single Resolution Fund (SRF). While many proceedings are currently pending, the EU Judges have recently issued a number of rulings addressing various legal issues.¹ The judgment delivered in *Dexia*, Case T-411/22, now adds to the list, this time with regard to *ex ante* contributions for 2022.

2. A French credit institution – *Dexia* – challenged the SRB's decision of 11 April 2022 on the calculation of the 2022 *ex ante* contributions to the SRF, in so far as that decision concerns it, arguing, among other things, that when determining individual *ex ante* contributions the SRB disregarded the upper limit set out in Article 70(2) of Regulation No 806/2014 (SRMR) which requires that the total *ex ante* contributions of all institutions authorized within the territories of participating Member States cannot exceed 12.5% of final target level.²

On 10 April 2024, the General Court delivered its judgment upholding *Dexia's* application and, thus, declaring the SRB's decision unlawful.

¹ See the previous contribution published on No 36 (February 2024) of this Newsletter. For an updated general overview of the case-law on this topic, see M. LUCAS PIRES, *The saga that keeps on going: the General Court annuls decisions of ex ante contributions to the SRF*, EU Law Live, 17/04/2024.

² Under Article 69(1) SRMR, by the end of the initial period, the available financial means of the SRF must reach the final target level, which corresponds to at least 1% of the amount of covered deposits of all of the institutions authorised in the territories of all of the participating Member States.

3. In the first place, the Court recalls that the requirement to respect a 12.5% cap also applies during the so-called ‘initial period’ for reaching the target level of the SRF (*i.e.* the period of eight years from 1 January 2016). This can be inferred not only from the clear wording of Articles 69(2) and 70(2) SRMR,³ but also from the legislative story of the SRMR. As observed by the Court, the explanatory memorandum of the Commission’s proposal and the stages of the legislative procedure show that the EU legislature established a link between the number of years in the initial period and the percentage of the cap. This link clearly confirms that the 12.5% cap is to apply during the initial period.

4. In rejecting the SRB’s argument that the cap is to be interpreted in a flexible manner in light of the dynamic nature of the final target level, which cannot be known with certainty until the end of the initial period,⁴ the Court observes that pursuant to Articles 69 and 70 SRMR it is for the SRB, in respect of each contribution period, to make as precise an estimate as possible of the final target level in the light of the data available at the time of that estimate. It follows that it is the forecast final target level that is decisive for the application of the 12.5% cap.

More importantly, a flexible interpretation of the cap must be rejected considering that the meaning of Article 70(2) SRMR is unambiguously clear from the very wording of that provision. In this respect, the Court underlines that an interpretation of a provision of EU law in the light of its context and purpose cannot have the result of depriving the clear and precise wording of that provision of all effectiveness, otherwise it would be *contra legem* and, as a result, incompatible with the requirements of the principle of legal certainty. Thus, where the meaning of a provision of EU law is absolutely plain from its very wording, the EU judicature cannot depart from that interpretation.

According to the Court, this is the case of Article 70 SRMR, since it is worded in mandatory terms (*‘shall not exceed’*) and reiterates twice without any exception that the cap is to be exactly 12.5%. In those circumstances, it cannot be argued that the first and fourth subparas of Article 70(2) SRMR should be interpreted as meaning that the 12.5% cap could be disregarded or is merely indicative.

5. Following this line of reasoning, the EU Judges clarify that Article 69(2) SRMR – which provides that *ex ante* contributions must be spread out in time as evenly as possible until the final target level is reached – does not allow the 12.5% cap to be interpreted as meaning that it is not binding or is merely

³ The EU judges underline that Article 69(2) of Regulation No 806/2014, which provides that, ‘during the initial period’, *ex ante* contributions are to be calculated ‘in accordance with Article 70’ of that regulation, such a reference indicating, unambiguously, that all the requirements laid down in the latter provision, including the requirement laid down in the first and fourth subparas of para 2 thereof, are to apply during the initial period. Next, the first subpara of Article 70(2) of Regulation No 806/2014 states that the SRB must comply with the requirement to apply a 12.5% cap ‘each year’, without in any way limiting its application in time to the period following the initial period.

⁴ The target level is not precisely set, but must be determined in the light of the amount of the covered deposits at the end of the initial period, meaning that the more the banking sector grows between the beginning and the end of the initial period, the greater the financial resources that must be collected.

indicative. Aside from the fact that such an interpretation would run counter to the clear and precise wording of the first and fourth subparas of Article 70(2) of that regulation, the Court points out that, by expressly providing in Article 69(2) of that regulation that the *ex ante* contributions must be ‘calculated in accordance with Article 70’, the EU legislature itself envisaged the simultaneous application of both the 12.5% cap and the requirement to spread out in time those *ex ante* contributions as evenly as possible.

In this regard, the Court observes that, contrary to what is claimed by the SRB, it is not impossible to reconcile the two mentioned provisions. Taking into account that the estimate of the final target level is based on a prospective analysis of the evolution of the amount of covered deposits, it is for the SRB to estimate with sufficient care and on the basis of conservative projections the evolution of the amount of covered deposits throughout the initial period in order to have sufficient funds in such a way that that target level is reached, while observing the 12.5% cap. Moreover, Delegated Regulation 2017/747, whose purpose is to set out the criteria for the spreading out in time of the contributions, confirms that the 12.5% cap and the requirements arising from Article 69 SRMR would apply simultaneously.

6. All that considered, eventually the Court takes note that actually the SRB infringed the cap. On the basis of the forecast final target level stated in the contested decision, when the SRB calculated the *ex ante* contributions relating to the 2022 it was required to make sure, in order to respect the 12.5% cap, that the amount of the *ex ante* contributions due from all of the institutions authorised in the territories of all of the participating Member States did not exceed € 9 998 431 322.50. However, the SRB set the annual target level at € 13 675 366 302.18, with the result that it was able to set the applicant’s *ex ante* contribution at too high an amount. This error of law justifies the annulment of the contested decision in so far as it concerns the applicant.

7. While annulling the contested decision, the General Court, upon request of the SRB, considers it necessary to maintain its effects temporarily, for a maximum of six months, in order to avoid serious consequences for financial stability in the banking union. As explained by the Court, if the SRB were required to repay, with immediate effect, the amount of the applicant’s *ex ante* contribution and the amounts of the *ex ante* contributions of other institutions, such as those which have brought a similar action, such a repayment would risk depriving the SRF of the financial means that may prove necessary to ensure the stability of the euro area and the financial stability of the European Union.

3. Reference to “notes de doctrine”

BARBORA BUDINSKÁ, *On the calculation of the annual target level of the 2022 ex-ante contributions to the SRF (Dexia v SRB, T-411/22)*, EU Law Live, 10 May 2024.

REPUBLIC OF LATVIA v KINGDOM OF SWEDEN

1. Keywords and summary

Republic of Latvia v Kingdom of Sweden

Court of Justice – C-822/21 – Judgment of 30 April 2024 – ECLI:EU:T:2024:373

Where a credit institution transfers some of its assets from a Member State to another, its contributions to the original DGS owed proportionally to those assets in the preceding 12 months are to be transferred to the receiving DGS in the jurisdiction in which those assets were transferred

CONTRIBUTIONS TO DEPOSIT GUARANTEE SCHEMES
--

In an action brought by a Member State against another Member State for the alleged failure of the latter to fulfil its obligations under Union law, the ECJ cannot be asked to order the alleged non-compliant Member State to adopt a particular course of conduct. Accordingly, the application of a Member State seeking an order from the ECJ requiring another Member State to transfer the contributions paid by a credit institution to the DGS of the latter to the DGS of the applicant as a consequence of the alleged breach of Article 14 of DGSD is inadmissible.

CONTRIBUTIONS TO DEPOSIT GUARANTEE SCHEMES – Transfer of contributions from a DGS to another DGS of another Member State for transferral of assets of the contributing institution – Article 14(3) of DGSD
--

According to the literal interpretation of the second subpara of Article 14(3) of DGSD, where some of the assets of a credit institution are transferred to another Member State, thereby becoming subject to another DGS, the contributions of that credit institution paid to the original DGS during the 12-month period preceding the transfer, with the exception of certain extraordinary contributions, are to be transferred to the other DGS in proportion to the amount of covered deposits transferred.

It follows from the expression ‘the contributions [...] paid’ that that provision is based on the premiss that the contributions were in principle paid during that 12-month period and must therefore be transferred to the receiving DGS in the event of a transfer of activities to another Member State. That interpretation is borne out by the expression ‘in proportion to’, which establishes a very clear link between the transfer of contributions and the transfer of the deposit guarantee. Therefore, the wording of that provision does not rule out the possibility that contributions relating to the 12-month period preceding the transfer but collected

by the DGS of the first Member State outside that period, must be transferred to the receiving DGS.

In this respect, it must be considered that, according to the second subpara of Article 10(1) of DGSD, DGSs are to raise the available financial means from the contributions to be paid by their members at least annually. It follows that the contributions paid by the members to the DGS can be regarded as a consideration for the deposit guarantee for a certain period. It is therefore consistent with the broad logic of the DGS that, in the event of the transfer of certain activities from a credit institution to another Member State and, consequently, the transfer of liability for the covered deposits to the DGS of that other Member State, the consideration for the deposit guarantee should also be transferred to the receiving DGS.

Thus, the effectiveness of Article 14(3) of DGSD requires that, in order to comply with the obligation arising from that provision, the DGS of the first Member State must transfer to the receiving DGS the contributions paid to it by a credit institution which relate to the 12 months preceding the transfer of that credit institution's activities to the receiving DGS, taking into consideration the periods to which such contributions relate, and not the exact date on which those contributions have been paid to it.

Moreover, Article 14(3) of DGSD aims to compensate the receiving DGS for the financial risk associated with the transfer of the credit institution's guaranteed deposits. This objective supports the interpretation that account should be taken of the periods to which the contributions paid by the credit institution that transferred its assets to another Member State relate, and not the exact date of the payments. That interpretation is, in fact, the only one capable of ensuring that a home DGS, which no longer bears the risk associated with guaranteed deposits transferred to another Member State, does not retain contributions paid for the 12 months preceding the transfer, on the sole ground that they were paid to that DGS after that period. That also contributes to the financial stability of the receiving DGS, to the protection of the depositors of the credit institutions affiliated to that DGS and is consistent with the principle of solidarity between institutions operating in the same financial centre.

2. Reference to “notes de doctrine”

MĀRTIŅŠ RUDZĪTIS, *The Court condemns ‘cherry-picking’ of risks and benefits of the internal market for banking services (Case C-822/21, Latvia v. Sweden (deposit guarantee schemes))*, EU Law Live, 15 May 2024.

MAX HEINR. SUTOR V SRB

1. Keywords and summary

Max Heinr. Sutor v SRB

General Court – Case T-393/21 – Judgment of 8 May 2024 – ECLI:EU:T:2024:302

[no appeal case detected on curia.europa.eu]

SRB’s calculation of the *ex ante* contributions and application of the exclusions under Article 5 of Commission Delegated Regulation (EU) 2015/63

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Adjustment of *ex ante* contributions to the risk profile of the institution – No discretion to exclude certain liabilities when adjusting *ex ante* contributions in proportion to risk – Commission Delegated Regulation (EU) 2015/63 – Article 5(1) of Commission Delegated Regulation (EU) 2015/63

Article 5(1) of Commission Delegated Regulation (EU) 2015/63 does not confer any discretionary power on the SRB (or the NRA) to exclude certain liabilities when adjusting *ex ante* contributions in proportion to risk, but rather lists precisely the conditions governing whether a liability can be so excluded. Any other outcome cannot be justified by an analysis that takes account of the principle of equal treatment, non-discrimination and proportionality, since Commission Delegated Regulation (EU) 2015/63 distinguishes situations that have significant and specific features, directly linked to the risks inherent in the liabilities at issue.

Given that Article 5(1) of Commission Delegated Regulation (EU) 2015/63 establishes a derogation from the general rule laid down in Article 103(2) of BRRD, by allowing certain liabilities to be excluded from the calculation of *ex ante* contributions, it is a provision which must be interpreted strictly.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Adjustment of *ex ante* contributions to the risk profile of the institution – Commission Delegated Regulation (EU) 2015/63 – Article 5(1) of Commission Delegated Regulation (EU) 2015/63

Article 5(1)(e) of Commission Delegated Regulation (EU) 2015/63 lays down three cumulative conditions for the exclusion of the liabilities concerned from the calculation of *ex ante* contributions, namely, first, that those liabilities

must be held by an investment firm, second, that they must arise by virtue of holding client assets or client money and, third, that those clients must be protected under the applicable insolvency law. These conditions do not depend on the size of the institutions concerned.

As regards the first condition, the concept of ‘investment firms’ is defined in Article 3(2) of Commission Delegated Regulation (EU) 2015/63 as ‘investment firms as defined in point (3) of Article 2(1) of [BRRD]’. Point (3) of Article 2(1) of BRRD defined the concept of ‘investment firm’ as referring to ‘an investment firm as defined in point (2) of Article 4(1) of [CRR]’ which, in turn, defined the concept of ‘investment firm’ as referring to ‘a person as defined in point (1) of Article 4(1) of [MiFID I], which is subject to the requirements imposed by that Directive, excluding [...] (a) credit institutions ...’. Therefore, as long as that definition applied, the exclusion under Article 5(1)(e) of Commission Delegated Regulation (EU) 2015/63 did not apply to entities which were both a credit institution and an investment firm.

The definition of ‘investment firm’, currently provided for in point (3) of Article 2(1) of [BRRD], as amended by Article 63(1) of IFD, refers to point (22) of Article 4(1) of IFR, which refers, in relation to the concept of ‘investment firm’, to point (1) of Article 4(1) of MiFID II, which defines that concept as applying to any legal person providing investment services to third parties, without excluding credit institutions from that definition.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Commission Delegated Regulation (EU) 2015/63 – *Ex ante* contributions to resolution financing arrangements – Adjustment of *ex ante* contributions to the risk profile of the institution – European Commission’s competence and powers – Power conferred on the Commission to adopt delegated acts – Commission Delegated Regulation (EU) 2015/63

The Commission enjoyed broad discretion for the purposes of adopting, pursuant to Article 103(7) of BRRD, the rules specifying the notion of ‘adjusting *ex ante* contributions in proportion to the risk profile of the institutions’ included in Commission Delegated Regulation (EU) 2015/63. The Commission had to draw up those rules in pursuit of two linked objectives, namely, first, to ensure account is taken of the different risks to which the activities of banking – or, more broadly, financial – institutions give rise and, second, to encourage those same institutions to operate under a less risky model. the drawing up of such rules entailed complex assessments and evaluations on the part of the Commission, since it had to examine the different factors in the light of which various types of risk were perceived in the banking and financial sectors.

In those circumstances, the review by the EU Courts must be limited to examining whether the exercise of the discretion afforded to the Commission has been vitiated by a manifest error or a misuse of power, or whether the Commission

has manifestly exceeded the limits of that discretion and it is for the applicant to demonstrate that.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Ex ante contributions to resolution financing arrangements – Adjustment of ex ante contributions to the risk profile of the institution – No exclusion of fiduciary liabilities for calculating ex ante contributions to resolution financing arrangements – Fiduciary liabilities – Commission Delegated Regulation (EU) 2015/63

Fiduciary liabilities do not fulfil the conditions laid down in Article 5(1) (e) of Commission Delegated Regulation (EU) 2015/63 for the exclusion of the liabilities concerned from the calculation of *ex ante* contributions.

At the same time, Article 103(7) of BRRD did not require the Commission, when drawing up Commission Delegated Regulation (EU) 2015/63, to consider fiduciary liabilities as among the liabilities that shall be excluded for the purposes of calculating *ex ante* contributions to resolution financing arrangements.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Ex ante contributions to resolution financing arrangements – Principle of equal treatment

If a breach of the principle of equal treatment is invoked, it falls to the applicant to identify precisely the comparable situations which it considers having been treated differently or the different situations which it considers having been treated identically.

As stated in recital 4 of IFD, credit institutions (even if they provide also investment services), on the one hand, and investment firms, on the other hand, do not present a comparable risk as regards the adverse effects that their failure could have on financial stability, since, unlike credit institutions, investment firms do not have large portfolios of retail and corporate loans and do not take deposits. Holding large portfolios of retail and corporate loans and deposits entails a risk to financial stability when individuals or undertakings fail, on a large scale, to repay those loans to the credit institutions concerned or when a significant number of deposits are withdrawn. In those circumstances, the likelihood of a credit institution being placed under resolution, pursuant to Article 18(1)(c) and (5) of SRMR, is higher than in the case of an investment firm.

Neither the prohibition on discrimination is concerned with any disparities in treatment which may result, between the Member States, from divergences existing between the legislation of the various Member States so long as that legislation affects equally all persons subject to it.

ANNUAL TARGET LEVEL FOR THE SRF – *Ex ante* contributions to the Single Resolution Fund – *Ex ante* contributions to resolution financing arrangements – Duty to state reasons – Contradictions between statement of reasons of the decision and reasons given before the Court – Right to effective judicial protection

As regards the SRB's duty to state reasons in relation to the determination of the annual target level, it must be borne in mind that such a statement of reasons must be adapted to the nature of the act at issue and to the context in which it was adopted. Furthermore, it must, *inter alia*, not contain contradictions, so that the addressees are able to know the real reasons for that decision, with a view to defend their rights before the court with jurisdiction, and so that the court can exercise its power of review. Similarly, where the SRB provides certain explanations concerning the reasons for that decision in the course of the procedure before the Courts of the European Union, those explanations must be consistent with the considerations set out in that decision, otherwise the statement of reasons in that decision does not fulfil its objective of ensuring the right to effective judicial protection of the addressees.

2. Reference to “notes de doctrine”

PIER MARIO LUPINU, *Motivation, Transparency and Fairness on Trial: Max Heinr. Sutor oHG v. SRB (Case T-393/21)*, EU Law Live, 30 May 2024.

PORTIGON v SRB

1. Keywords and summary

Portigon v SRB

General Court – Case T-360/21 – Judgment of 29 May 2024 – ECLI:EU:T:2024:332

[no appeal case detected on curia.europa.eu]

The General Court annuls the SRB’s decision on the *ex ante* contributions to the SRF because the methodology actually applied by the SRB to determine the annual target level, as explained at the hearing, does not correspond to that described in the contested decision

SRMR AND BRRD LAWFULLY BASED ON ARTICLE 114 TFEU

The choice of the legal basis for an EU measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure. The legislative acts adopted on the basis of Article 114(1) TFEU must, first, comprise measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States and, second, have as their object the establishment and functioning of the internal market. Article 114 TFEU may be used as a legal basis only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market.

In this perspective, SRMR and BRRD satisfy the conditions set out in Article 114(1) TFEU, taking into account their purposes as apparent from their recitals and their provisions.

SRMR AND BRRD LAWFULLY BASED ON ARTICLE 114 TFEU – SRMR and BRRD provisions on *ex ante* contributions are not fiscal provisions under Article 114(2) TFEU – Insurance-based logic of *ex ante* contributions to resolutions financing arrangements

Article 114(2) TFEU provides that para 1 of that provision is not to apply, inter alia, to ‘fiscal provisions’. While the TFEU does not contain any definition of the words ‘fiscal provisions’, it follows from the case-law of the Court of Justice that a levy paid by economic operators in a particular sector is not fiscal in nature in a situation where, in particular, it is directly allocated solely to the financing of expenditure in that sector and where that expenditure is necessary for the functioning of that sector in order, in particular, to stabilise it.

That reasoning also applies in the case of *ex ante* contributions, which follow an insurance-based logic and which are paid by economic operators in a particular sector in order to finance exclusively expenditure of that sector. In particular, the purpose of the SRM is to avoid the damages that have resulted from failures of institutions during crises, since the failure of institutions in just one Member State may affect the stability of the financial markets as a whole, as is apparent from recitals 8 and 12 of SRMR. The same is true of BRRD, as is stated in recitals 3 and 5 thereof. In that context, the EU legislature took the view that it was for the financial sector as a whole to finance the stabilisation of the financial system, as is apparent, *inter alia*, from recital 100 of SRMR and recital 103 of BRRD. From that perspective, the specific nature of the *ex ante* contributions consists, as is confirmed by recitals 105 to 107 of BRRD and recital 41 of SRMR, in ensuring, according to an insurance-based logic, that the financial sector provides adequate financial resources for the SRM to be able to fulfil its functions.

In that regard, as follows from Article 1 of SRMR and Article 1 of BRRD, the resolution measures are applied solely for the benefit of the institutions which are required to pay the *ex ante* contributions. It is true that neither SRMR nor BRRD establishes any automatic link between the payment of the *ex ante* contribution and the resolution of the institution concerned, so that *ex ante* contributions cannot be regarded as insurance premiums which could be paid monthly and reimbursed, but the institutions benefit in two respects from the SRF and the national financing arrangements, which are financed specifically by their *ex ante* contributions. First, where institutions are failing or are likely to fail, their financial situation can be remedied in the context of a resolution procedure which may be initiated in their favour if the other conditions laid down in Article 18 of SRMR or Article 32 of BRRD are also met. Second, all institutions benefit from their *ex ante* contributions through the stability of the financial system, which is ensured by the SRF and the national financing arrangements.

That insurance-based purpose is also reflected in the calculation of the *ex ante* contributions, given that they are not the result of applying a certain rate to a basis of assessment but rather, in accordance with Articles 102 and 103 of BRRD as well as with Articles 69 and 70 of SRMR, are the result of the setting of a final target level, and thereafter of an annual target level, which is then divided between the institutions. That division of the annual target level is based, *inter alia*, as is also apparent from recital 107 of BRRD and recital 109 of SRMR, on the risk represented by each institution to the stability of the financial system, which provides incentives to the institutions to operate under a less risky model.

Accordingly, the provisions of SRMR and of BRRD which require the institutions to pay *ex ante* contributions and specify the methods for their calculation do not constitute ‘fiscal provisions’ within the meaning of Article 114(2) TFEU.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Ex ante contributions to resolution financing arrangements – Institutions subject to the obligation to pay ex ante contributions – No exemption from the obligation to pay ex ante contributions for institutions with minimal risks

The *ex ante* contributions to resolution financing arrangements calculated on the national base are imposed on the basis of Article 103(2) of BRRD and are to be paid by ‘institutions’ within the meaning of Article 2(1)(23) of BRRD. Thus, those institutions include, inter alia, credit institutions within the meaning of Article 4(1)(1) of CRR, which do not number amongst the entities covered by Article 2(5) of CRD. According to Article 4(1)(1) of CRR, a ‘credit institution’ means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account, regardless of the scale of that business. Similarly, although Article 2(5) of CRD does exclude certain entities from the scope of that directive, it does not exclude from that scope institutions with a minimal level of business on the internal market, such as institutions in the process of being dismantled. It follows from the foregoing that Article 103(2) of BRRD makes all the institutions which it covers subject to the payment of the *ex ante* contributions, regardless of the extent of their business on the internal market.

In addition, Article 103(7) of BRRD, which is not the legal basis for Commission Delegated Regulation (EU) 2015/63, does not require the Commission to exempt certain institutions from the obligation to pay *ex ante* contributions on account of the minimal level of their business on the internal market because they are being dismantled.

In those circumstances, the argument that said Regulation 2015/63 infringes BRRD because it failed to exempt such institutions from its scope can only be rejected.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Ex ante contributions to resolution financing arrangements – Commission Delegated Regulation (EU) 2015/63 takes account of the risk profile of institutions – No exemption from the obligation to pay ex ante contributions for institutions with minimal risks – European Commission’s competence and powers – Power conferred on the Commission to adopt delegated acts – Commission Delegated Regulation (EU) 2015/63

In the context of a delegated power within the meaning of Article 290 TFEU, the Commission enjoys, in the exercise of the powers conferred on it, broad discretion where it is called on, inter alia, to undertake complex assessments and evaluations.

The Commission did indeed enjoy broad discretion for the purpose of adopting, pursuant to Article 103(7) of BRRD, the rules specifying the notion of ‘adjusting

ex ante contributions in proportion to the risk profile of institutions’, which were therefore established in Commission Delegated Regulation (EU) 2015/63. In that regard, bearing in mind that those *ex ante* contributions answer to an insurance-based logic, the Commission had to draw up rules for adjusting them in proportion to the risk profile of the institutions in pursuit of two linked objectives, namely, first, to ensure account is taken of the different risks to which the activities of – banking or, more broadly, financial – institutions give rise and, second, to encourage those same institutions to operate under a less risky model. The drawing up of those rules entailed complex assessments and evaluations on the part of the Commission, since it had to examine the different factors in the light of which various types of risk were perceived in the banking and financial sectors.

In those circumstances, the review by the Courts of the European Union must be limited to verify whether the exercise of the discretion afforded to the Commission has been vitiated by a manifest error of assessment or a misuse of powers, or whether the Commission has manifestly exceeded the limits of that discretion. Within the perimeter of such a review, Article 6 of Commission Delegated Regulation (EU) 2015/63 is not vitiated by the fact that it does not provide for an exemption from the obligation to pay *ex ante* contributions for institutions whose risk exposure, probability of resolution or importance to the stability of the financial markets is minimal, considering, on the hand, that such an exclusion is not provided for by BRRD nor by SRMR; and, on the other hand, that all institutions, including those whose probability of resolution is allegedly lower having regard to the liabilities they hold, benefit from their *ex ante* contributions through the stability of the financial system that is ensured by the SRF.

At the same time, Commission Delegated Regulation (EU) 2015/63 correctly takes into account all the eight factors that, under Article 103(7) BRRD, the Commission was required to consider in order to specify the detailed arrangements for the adjustment of the *ex ante* contributions in proportion to the risk profile of the institutions, including the ‘risk exposure of the institution’, the ‘probability that the institution enters into resolution’ and the ‘importance of the institution to the stability of the financial system or economy of one or more Member States or of the Union’. These three factors are just three of the eight and nothing in said Article 103(7) of BRRD states that the Commission was required to attach greater significance to one or more of those elements.

SRB’S COMPETENCE AND POWERS – SRB’s discretion – No delegation of power to the SRB for the calculation of <i>ex ante</i> contributions to the SRF – Commission Delegated Regulation (EU) 2015/63
--

Article 6(1)(d) of Commission Delegated Regulation (EU) 2015/63, which entrusts to the NRA and the SRB the power to determine additional risk indicators (‘risk pillar IV’) for the calculation of *ex ante* contributions to the SRF, does not constitute an unlawful delegation of power from the Commission to the SRB within the meaning of Article 290(1) TFEU.

It is true that the SRB enjoys a margin of discretion in the determination and application of those additional risk indicators, notwithstanding Article 6(5) to (8) of that same Commission Delegated Regulation (EU) 2015/63, which lay down details concerning the determination of various risk sub-indicators, or Article 7(4) of that Delegated Regulation, which provides for a system for the weighting of the risk sub-indicators. However, granting such discretion is not the same as a delegation of power from the Commission to the SRB within the meaning of Article 290(1) TFEU.

Indeed, a distinction must be drawn between the power provided for in Article 290(1) TFEU, namely the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act, and the power to apply – legislative or non-legislative – acts of general application to persons or situations falling within the scope of such acts. First, Commission Delegated Regulation (EU) 2015/63 does not contain any provision by which the Commission conferred on the SRB a delegated power for the purpose of adopting acts of general application which supplement or amend certain elements of BRRD, SRMR or that Delegated Regulation. By contrast, several provisions of the Delegated Regulation, such as Articles 4 and 6 to 9 thereof, confirm the power granted to the SRB by BRRD and by SRMR to apply those acts of general application by calculating the *ex ante* contributions of the institutions which fall within their scope.

Second, despite the name given to risk pillar IV, contained in Article 6(1) (d) of Commission Delegated Regulation (EU) 2015/63, namely ‘Additional risk indicators to be determined by the resolution authority’, the main principles regarding the application of that risk pillar were specified by the Commission itself in Article 6(5) to (8) of that Delegated Regulation. Similarly, the Commission determined the rules governing the relative weight applied to the risk indicators within that risk pillar in Article 7(4) of the Delegated Regulation. It follows that Commission Delegated Regulation (EU) 2015/63 did not confer on the SRB the power to adopt acts of general application within the meaning of Article 290(1) TFEU.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Statement of reasons of the decision imposing *ex ante* contributions – Duty to state reasons – Protection of business secrets – Right to effective judicial protection

In order to examine whether that statement of reasons is sufficient in the case of a decision determining *ex ante* contributions, it must be recalled, first, that it cannot be inferred from the case-law of the Court of Justice that the statement of reasons for any decision of an EU institution, body, office or agency imposing the payment of a sum of money on a private operator must necessarily include all the evidence enabling the addressee to verify the accuracy of the calculation of the amount of that sum of money.

Second, EU institutions, bodies, offices and agencies are, in principle, required, in accordance with the principle of the protection of business secrets, which is a general principle of EU law, to which concrete expression is given inter alia in Article 339 TFEU, not to disclose to the competitors of a private operator confidential information which that operator has provided.

It follows from the foregoing that, in the context of the decision fixing the *ex ante* contributions, the SRB's duty to state reasons must be weighed, on the basis of the logic of the system of financing the SRF and of the method of calculation laid down by the EU legislature, against the SRB's obligation to respect the confidentiality of business secrets of the institutions concerned. In particular, the obligation to state reasons on which legal acts are based – enshrined in Article 296 TFEU – must be regarded as fulfilled where the parties concerned, while not being sent data which are business secrets, have the method of calculation used by the SRB and sufficient information to understand, in essence, how their individual situation was taken into account, for the purposes of calculating their *ex ante* contributions to the SRF, relative to the situation of all the other financial institutions concerned.

It follows that BRRD, SRMR and Commission Delegated Regulation (EU) 2015/63 do not prevent the SRB from complying with its obligation to state reasons and enables it to provide the institutions concerned with sufficient information to understand the reasons justifying the decisions fixing the *ex ante* contributions to the SRF and to assess whether an action would need to be brought against those decisions. Specifically, Commission Delegated Regulation (EU) 2015/63 allows the SRB to disclose, without infringing its obligation to respect business secrets, the limit values of each bin and the related risk indicators, in order to enable the institution concerned to satisfy itself, inter alia, that the profile attributed to it during the discretisation of the indicators, as defined in Annex I to that delegated regulation, in fact corresponds to its economic situation, that that discretisation was calculated consistently with the methodology set out in the delegated regulation on the basis of plausible data and that all the risk factors that must be taken into account pursuant to SRMR and to Commission Delegated Regulation (EU) 2015/63 were indeed taken into account.

ANNUAL TARGET LEVEL FOR THE SRF – <i>Ex ante</i> contributions to the Single Resolution Fund – <i>Ex ante</i> contributions to resolution financing arrangements – Statement of reasons of the decision imposing <i>ex ante</i> contributions – Duty to state reasons – Contradictions between statement of reasons of the decision and reasons given before the Court – Right to effective judicial protection

As regards the SRB's duty to state reasons in relation to the determination of the annual target level, it must be borne in mind that such a statement of reasons must be adapted to the nature of the act at issue and to the context in which it was adopted. Furthermore, it must, inter alia, not contain contradictions, so that the addressees are able to know the real reasons for that decision, with a view to defend their rights before

the court with jurisdiction, and so that the court can exercise its power of review. Similarly, where the SRB provides certain explanations concerning the reasons for that decision in the course of the procedure before the Courts of the European Union, those explanations must be consistent with the considerations set out in that decision, otherwise the statement of reasons in that decision does not fulfil its objective of ensuring the right to effective judicial protection of the addressees.

<i>EX ANTE</i> CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – <i>Ex ante</i> contributions to resolution financing arrangements – Institutions subject to the obligation to pay <i>ex ante</i> contributions – Institutions in the process of being dismantled – Principle of equal treatment

The obligation to pay *ex ante* contributions to resolution financing arrangements applies to all institutions holding a banking licence, including those institutions which are being dismantled. Indeed, with a view to ensuring the financing of the resolution, BRRD, SRMR and Commission Delegated Regulation (EU) 2015/63 introduced the *ex ante* contributions, the specific nature of which consists, as is apparent from recitals 105 to 107 of that directive and from recital 41 of that regulation, in ensuring, according to an insurance-based logic, that the financial sector provides adequate financial resources for the SRM to be able to fulfil its functions and in encouraging the institutions to adopt less risky methods of operation. In this respect, institutions which are in the process of being dismantled are not, by virtue of that dismantling, in a different situation from that of the other institutions subject to the *ex ante* contributions.

Furthermore, the method of calculating the *ex ante* contributions, as detailed by Commission Delegated Regulation (EU) 2015/63, is capable of reflecting the specific elements of the risk profile of institutions which are being dismantled, for example, setting a lower amount where its risk profile decreases on account of such dismantling and in relation to its smaller dimension.

It follows from the above that no infringement of Article 20 of the Charter – i.e. the general principle of EU law of equal treatment – can be detected.

<i>EX ANTE</i> CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – <i>Ex ante</i> contributions to resolution financing arrangements – Freedom to conduct a business – Principle of proportionality
--

The freedom to conduct a business under Article 16 of the Charter does not constitute an absolute prerogative. According to Article 52(1) of the Charter, it may be limited provided that such a limitation is provided for by law, respects the essence of that freedom and, in compliance with the principle of proportionality, is necessary and actually meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.

The obligation to pay *ex ante* contributions, even if considered a limitation to the freedom to conduct a business, is provided for by law, pursues an objective of general interest and is not disproportionate. In the latter respect, it is not demonstrated that there are less restrictive means than the payment of *ex ante* contributions to achieve the objectives pursued by the law in an equally effective manner, such as, in particular, the objective of ensuring that the financial sector provides adequate financial resources for the SRM to fulfil its tasks, while encouraging the adoption of less risky operational methods by the institutions concerned.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – *Ex ante* contributions to resolution financing arrangements – Adjustment of *ex ante* contributions to the risk profile of the institution – Public financial support – Commission Delegated Regulation (EU) 2015/63

Article 6(5)(c) of Commission Delegated Regulation (EU) 2015/63 provides that risk pillar IV consists, amongst other risk indicators, of the risk indicator ‘extent of previous extraordinary public financial support’. Pursuant to Article 2(1)(28) of BRRD, read together with the first para of Article 3 of Commission Delegated Regulation (EU) 2015/63, ‘extraordinary public financial support’ means State aid within the meaning of Article 107(1) TFEU, or any other public financial support at supra-national level, which, if it were granted at national level, would constitute State aid, provided in order to preserve or restore the viability, liquidity or solvency of an institution.

The fact that that aid was granted before the entry into force of BRRD has no bearing on the fact that that aid falls within the scope of Article 6(5)(c) of Commission Delegated Regulation (EU) 2015/63, read together with Article 2(1)(28) of that directive. Indeed, those provision and Article 103(7)(e) of BRRD provide that account must be taken, when calculating the *ex ante* contributions, of the extent to which the institution has previously benefitted from extraordinary public financial support, without specifying that that support must have been granted after the Directive entered into force.

HYPO VORARLBERG BANK v SRB

1. Keywords and summary

Hypo Vorarlberg Bank v SRB

General Court—Case T-395/22—Judgment of 29 May 2024—ECLI:EU:T:2024:333

[under appeal: cases C-529/24 P and C-536/24 P]

Unlawfulness of Articles 70(7) of SRMR and 8(1)(g) of Council Implementing Regulation (EU) 2015/81 for breach of Article 291(2) TFEU and unlawfulness of the SRB’s decision determining the *ex ante* contributions for 2022 for breach of the 12.5% cap provided for by Article 70(2) of SRMR

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Council’s power to implement a legally binding act of the Union – Unlawfulness of Article 70(7) SRMR – Council Implementing Regulation (EU) 2015/81 – Duty to state reasons

Under Article 291(2) TFEU, where uniform conditions for implementing legally binding EU acts are needed, those acts are to confer implementing powers on the Commission, or, ‘in duly justified specific cases’ and in the cases provided for in Articles 24 and 26 TEU, on the Council. Article 291(2) TFEU requires a detailed statement of the reasons why that Institution is entrusted with the adoption of measures implementing a legally binding act of the Union; that statement must be made by the body which adopted the basic act to be implemented.

Article 70(7) of SRMR confers on the Council an implementing power within the meaning of Article 291(2) TFEU by authorising it to adopt, within the framework of the delegated acts adopted by the Commission under Article 103(7) of BRRD, implementing acts to determine the conditions for the implementation of Article 70(1), (2) and (3) of that regulation, in particular in relation to the application of the method of calculating the individual contributions and the practical modalities for allocating to the institutions the risk factors provided for in those delegated acts.

As regards the two situations envisioned in Article 291(2) TFEU in which an implementing power maybe conferred on the Council, the implementing power concerned does not fall within the scope of the cases provided for in Articles 24 and 26 TEU.

At the same time, the SRMR (and, in particular, recital 114 thereof) does not provide any justification concerning the reasons why the EU legislature conferred the implementing power concerned on the Council.

In addition, neither the SRMR nor any other legislative act of the European Union contains any argument capable of justifying the conferral of that power on the Council, on account of political reasons or the specific role that that Institution would be called on to perform in the field of calculating the *ex ante* contributions. In that regard, it must be clarified that the grounds contained in recitals 14 and 15 of Council Implementing Regulation (EU) 2015/81, which concern the progressive mutualisation of the SRF, as provided for in the Intergovernmental Agreement on the transfer and mutualisation of contributions to the SRF, signed in Brussels on 21 May 2014, cannot be relied upon to justify the conferral of the implementing power concerned on the Council. Since the obligation to justify such a conferral is a matter for the body which adopted the basic act to be implemented (in the present case, the Parliament and the Council), it is not for the Council to provide an *ex post* justification for the conferral on it of an implementing power in the context of an implementing act which it subsequently adopts.

It follows that Article 70(7) of SRMR is inapplicable pursuant to Article 277 TFEU. Accordingly, Council Implementing Regulation (EU) 2015/81, which was adopted by the Council on the basis of that provision, is likewise inapplicable.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Council Implementing Regulation (EU) 2015/81 – Article 8(1) of Council Implementing Regulation (EU) 2015/81

When the relevant Institution adopts implementing measures on the basis of Article 291(2) TFEU, it is to confine itself to adopting measures which are necessary or appropriate for the uniform implementation of the provisions of the legislative act on the basis of which they are adopted and which merely specify the content of that act, in compliance with the essential general aims pursued by that act, without amending or supplementing it, in its essential or non-essential elements.

In the light of the above, Article 8(1) of Council Implementing Regulation (EU) 2015/81 does not simply specify the content of Article 70(1) and (2) of SRMR but actually aims unlawfully at derogating from them. In particular, Article 8(1) of Council Implementing Regulation (EU) 2015/81 does not simply specify the method of calculating the *ex ante* contributions provided for in Article 70(1) and the second para of Article 70(2) of SRMR; rather, the ‘adjusted methodology’ under Article 8(1) of Council Implementing Regulation (EU) 2015/81 amends the method of calculating the *ex ante* contributions as provided for in those provisions of SRMR with respect to its first component that serves to calculate the basic annual contribution, by altering the data base to be taken into account in the context of that method and, accordingly, the very basis of the method.

The extent of that alteration is exacerbated by the fact that Article 8(1) of Council Implementing Regulation (EU) 2015/81 derogates from the method

provided for in Article 70(1) and the second para of Article 70(2) of SRMR in relation to seven of the eight years of the initial period, and therefore that method is deprived of its full effects for almost the entirety of that period.

In the light of the foregoing, by adopting Article 8(1) of Council Implementing Regulation (EU) 2015/81, the Council exceeded the implementing powers conferred on it by Article 70(7) of SRMR, read in conjunction with Article 291(2) TFEU.

EX ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND – Cap of 12.5% of the final target level for the SRF under Article 70(2) SRMR – SRF contribution period of 2022

Article 69(1) of SRMR provides that, by the end of the initial period, the available financial means of the SRF must reach the final target level, which corresponds to at least 1% of the amount of covered deposits of all of the institutions authorised in the territories of all of the participating Member States.

Under Article 69(2) of SRMR, during the initial period, the *ex ante* contributions must be spread out in time as evenly as possible until the final target level is reached, but with due account being taken of the phase of the business cycle and the impact that pro-cyclical contributions may have on the financial position of institutions.

The first subpara of Article 70(2) of SRMR provides that, ‘each year, the Board shall [...] calculate the individual contributions to ensure that the contributions due by all of the institutions authorised in the territories of all of the participating Member States shall not exceed 12.5% of the target level’. The fourth subpara of Article 70(2) of that regulation adds that, ‘in any case, the aggregate amount of individual contributions by all of the institutions authorised in the territories of all of the participating Member States [...] shall not exceed annually the 12.5% of the target level’.

The mentioned cap applies also during the initial period, as clearly stated by Article 69(2) of SRMR, which provides that, ‘during the initial period’, *ex ante* contributions are to be calculated ‘in accordance with Article 70’ of that regulation, such a reference indicating, unambiguously, that all the requirements laid down in the latter provision, including the requirement laid down in the first and fourth subparas of para 2 thereof, are to apply during the initial period.

It follows from the foregoing that the amount of the final target level, to which the 12.5% cap applies, must be determined in the light of the amount of covered deposits as it will be at the end of the initial period, it being understood that that amount cannot be known with certainty until the end of that period. It is for the SRB, in respect of each contribution period, to make as precise an estimate as possible of the final target level in the light of the data available at the time of that estimate.

Consequently, when the SRB calculates the *ex ante* contributions during a given contribution period, it must ensure that the amount of the *ex ante* contributions due by all of the institutions authorised in the territories of all of the participating Member States does not exceed 12.5% of the forecast final target level.

When the SRB calculated the *ex ante* contributions relating to the 2022 contribution period, it exceeded the cap of 12.5% of the forecast final target level, thus infringing the first and fourth subparas of Article 70(2) of SRMR.

MALACALZA INVESTIMENTI AND MALACALZA v ECB

1. Keywords and summary

Malacalza Investimenti and Malacalza v ECB

General Court – Case T-134/21 – Judgment of 5 June 2024 – ECLI:EU:T:2024:362

[under appeal: case C-557/24 P]

ECB's non-contractual liability within the SSM

ECB'S SUPERVISORY TASKS – ECB's non-contractual liability – No limitation of the ECB's non-contractual liability from rules on NCA's liability

The ECB's non-contractual liability is based, in accordance with Article 340, para 3, TFEU, on the general rules applicable to EU institutions. Therefore, such a liability is dependent (only) on the following three cumulative conditions: i) the unlawfulness of the conduct attributable to the ECB in the performance of its duties; ii) the occurrence of damage; iii) the existence of a causal link between the alleged conduct and the damage complained of. These rules apply also to the ECB's supervisory activity under the SSM, even when it is required to perform tasks conferred upon national competent authorities and/or to apply national legislation.

The application of the above recalled Union law framework is not precluded by the case-law of the Court of Justice allowing Member States to exclude the non-contractual liability of their supervisory authorities when they act in the public interest (judgment of 12 October 2004, *Paul and Others*, C-222/02, EU:C:2004:606). In that precedent, the Court of Justice established a relationship between, on the one hand, the purpose of the rule allegedly breached and, on the other hand, the possibility – or on the contrary the impossibility – for individuals to seek to establish the non-contractual liability of the supervisory authorities. In that judgment, the Court held that, provided that the functions of the national supervisory authority were fulfilled in the public interest, EU law did not preclude national law, in that case German law, from excluding the liability of the supervisory authority. Similarly, the non-contractual liability of the EU institutions has been relied upon in situations involving a rule creating rights for the applicants and has been excluded in situations not involving the creation of such rights, in particular situations where the rules relied on pursued an objective of public interest or were institutional in nature, in particular by conferring or allocating powers between the institutions.

At the same time, it is irrelevant for the application of the ECB's non-contractual liability regime established by EU law the fact that the majority of the Member States limit the liability of supervisory authorities to cases of

intentional fault or serious misconduct. In particular, it is to be rejected the argument according to which, in order to preserve the ECB's actions by allowing it to act in the public interest without being paralysed by the fear of being called into question even in the event of slight fault or mere unlawfulness, that approach should be followed at EU level as a general principle common to the laws of the Member States referred to Article 340, para 3, TFEU. On the contrary, the principle of equivalence requires that all the rules applicable to actions apply without distinction to actions alleging infringement of EU law and to similar actions alleging infringement of national law. Therefore, since EU law precludes the non-contractual liability of a Member State for breach of EU law from being made subject to conditions which, like those relating to the existence of intentional fault or serious misconduct, go beyond the sufficiently serious infringement of that EU law, the same applies to non-contractual liability of EU institutions.

ECB'S SUPERVISORY TASKS – ECB's non-contractual liability – Rules conferring rights on individuals – ECB's discretion

According to the case-law, the unlawfulness of an EU institution's conduct, for the purposes of establishing its non-contractual liability, requires that (i) the contested conduct must involve a rule of law intended to confer rights on individuals and (ii) the breach alleged against the institution must be sufficiently serious.

As regards the first requirement, a rule of law is intended to confer rights on individuals where it creates an advantage for individuals which could be defined as a vested right, is designed for the protection of their interests or entails the grant of rights to individuals, the content of those rights being sufficiently identifiable. The protection offered by the rule invoked must be effective vis-à-vis the person who invokes it: a rule cannot be taken into account if it does not confer any right on the person who invoked it, even if it confers a right on other natural or legal persons.

As regards the second requirement, the test held to be decisive for determining whether a breach is sufficiently serious is whether the institution concerned gravely and manifestly disregarded the limits on its discretion. Thus, a determining factor is the extent of the discretion available to the institution. For that purpose, it is for the Courts of the European Union to take account of the complexity of the situation to be regulated, the difficulties in the application or interpretation of the legislation, the clarity and precision of the rule infringed, and whether the error made was inexcusable or intentional. In those circumstances, mere errors of assessment cannot of themselves be sufficient to define an infringement as manifest and grave.

Where the conduct complained of was adopted by the ECB in the exercise of the prudential supervision tasks conferred on it in order to enable it to ensure the safety and soundness of credit institutions, it must be recalled that in order for

the ECB to be able to perform those tasks, Article 4 of SSMR confers on the ECB the power to carry out transactions such as authorising and withdrawing banking licences, monitoring the application of existing regulatory prudential requirements and internal risk assessment systems, the possibility of imposing additional own funds requirements and the possibility of imposing appropriate governance rules. When carrying out those operations, the ECB, as stated in recital 17 of SSMR, is to assess the risk profile of the banks concerned and determine, for each, the events likely to affect it, taking into account the diversity of institutions, their size and their business models. Such analyses involve making assessments which, on account of their complex nature, justify granting the ECB, according to the case-law, a broad discretion.

Therefore, in order to establish the ECB's non-contractual liability, it must be proved to the requisite legal standard that the ECB seriously and manifestly disregarded, beyond the broad discretion conferred on it in the exercise of its prudential supervision tasks, a rule of EU law conferring rights on individuals.

ECB'S SUPERVISORY TASKS – ECB's non-contractual liability – ECB's failure to act

Omissions by the institutions may give rise to their non-contractual liability only where they infringe a legal obligation to act under a provision of EU law.

ECB'S SUPERVISORY TASKS – ECB's non-contractual liability – Rules conferring rights on individuals – Articles 53(1)(da), 53a(1)(d), 56, 67(1)(e), and Article 69*octiesdecies*(1)(a) of TUB do not confer rights on individuals – Temporary administration – Amendments to credit institutions' statutes – No ECB obligation to correct misleading statements of stakeholders of a credit institution

Articles 53(1)(da), 53a(1)(d), 56, 67(1)(e), and 71(6) of TUB, applicable by the ECB under Article 9 of SSMR according to which the ECB is to act as the competent authority in place of the national authority where the credit institutions to be supervised fall within its remit under Article 4 of that regulation, do not confer individual rights on individuals and, as such, cannot constitute the basis for the allegation of an unlawful conduct of the ECB in the context of a claim of non-contractual liability of the same institution.

More precisely, Article 53(1)(da) of TUB entrusts the supervisory authority with the task of publishing information on credit institutions, in particular information on capital adequacy, risk limitation, shareholdings that may be held, governance and administrative or accounting organisation. Article 67(1)(e) of TUB provides that, for the exercise of consolidated supervision, the supervisory authority is to issue to the parent company, by means of general measures, information concerning the

banking group as a whole or its components, on capital adequacy, risk limitation in its various configurations, shareholdings, corporate governance, administrative and accounting organisation, internal controls and remuneration and incentive schemes. It follows from their wording that those provisions impose on the ECB a general obligation to publish categories of information in the public interest, namely to ensure the proper functioning and the stability of markets. However, they do not in themselves impose on the ECB, directly or indirectly, any obligation to react in a specific way when statements are made, by certain stakeholders, concerning the soundness of certain institutions, that are construed as misleading by other stakeholders. Consequently, no right of any kind can be inferred from those provisions, for investors, to have the ECB intervene in each Member State whenever comments are made there about the institutions subject to its supervision which might be judged by investors to be wholly or partly unfounded.

Article 53a(1)(d) of the TUB provides that, where the situation so requires, the supervisory authority may adopt specific measures in respect of one or more banks or the banking system as a whole. These measures may include the restriction of the activities or territorial structure of the bank; the prohibition, for the latter, on carrying out certain transactions, even of a corporate nature, and distributing profits or other items of capital, and, in the case of financial instruments which may be included in the capital for supervisory purposes, a prohibition on paying out interest; the setting of limits on the total amount of the variable part of the remuneration in the bank where that is necessary to maintain a sound capital base and, for banks receiving State support in the form of extraordinary interventions, the setting of limits on the total remuneration of company directors. In the light of its wording, it is apparent that, as such, Article 53a(1)(d) of TUB is irrelevant when determining whether an obligation has been imposed on the ECB in order to compel it to correct statements attributed to certain stakeholders and deemed incorrect by others concerning the financial stability of the bank. No such obligation is imposed in that regard on the ECB, directly or indirectly.

Under Article 56 of TUB, in carrying out the tasks entrusted to it, the supervisory authority is to ascertain whether the amendments made to the statutes of credit institutions are compatible with the constraints arising from sound and prudent management before those amendments can be entered in the companies register. Consequently, the objective to be taken into account in the context of the assessment carried out by the supervisory authority on the basis of said Article 56 is the stability of the credit institution and, more broadly, of the financial system as a whole. In those circumstances, it must be held that Article 56 of TUB does not in itself confer rights on individuals.

In so far as Article 69*octiesdecies*(1)(a) of TUB merely gives the supervisory authority the power to adopt an early intervention measure where, at the end of its assessment, the conditions which it lays down are satisfied, it does not in itself confer on individuals rights the observance of which they may request that the Courts of the European Union ensure. This conclusion cannot be called into question by the argument that the rights and interests which shareholders have are

affected since they are deprived of any possible involvement in the management of the bank following the adoption, by the ECB, of the early intervention measure. In that regard, it must be held that any effect produced by an intervention on the part of the ECB on the interests of the shareholders of a credit institution cannot be taken into account in order to establish the non-contractual liability of that institution if the rule on which that intervention is based is not intended specifically to create or protect a right conferred on them in a sufficiently defined manner.

ECB'S SUPERVISORY TASKS – ECB's non-contractual liability – Rules conferring rights on individuals – Article 71(6) of TUB confers rights on individuals – ECB's discretion – Temporary administration

It follows from Article 71(6) of TUB that in order to be able to perform their duties, temporary administrators appointed by the supervisory authority to manage a credit institution under temporary administration must have a number of characteristics, one of which being that they must be free from conflicts of interest. Such a requirement implies, on the part of the ECB, that when appointing temporary administrators it must verify that there are no conflicts of interest among the persons concerned. The requirement to be free from conflict of interest falls, in general, within the scope of the principle of impartiality, which, according to the case-law, is intended to protect, first, the public interest and, second, the interest of individuals who might be adversely affected as a result of the presence of that conflict of interest. Thus, according to the case-law, the principle of impartiality creates, in relation to individuals who may be affected, a subjective right which, if it is breached in a sufficiently serious manner, is capable of incurring non-contractual liability of the EU for any damage caused by an institution in the performance of the tasks entrusted to it. In those circumstances, it must be held that Article 71(6) of TUB is intended to confer rights on individuals for the purposes of a claim of non-contractual liability of the ECB.

This notwithstanding, the ECB is entitled to take the view, in the exercise of the broad discretion characterizing its power under Article 71(6) of TUB, without exceeding the limits thereof, that it is appropriate to entrust the management of the temporary administration to persons familiar with the credit institution covered by the measure at issue, since such familiarity would enable them to react more quickly in a crisis context in the face of the successive difficulties that arose.

ECB'S SUPERVISORY TASKS – ECB's non-contractual liability – Rules conferring rights on individuals – Articles 4 and 16(1) and (2) of SSMR do not confer rights on individuals

Article 4 of SSMR confers powers on the ECB in prudential matters and provides, more specifically, that the ECB is to be 'exclusively competent' to

exercise a number of those powers, thus allocating between that institution and the national authorities the tasks that may be envisaged in that type of area. Accordingly, that provision, in so far as it assigns powers to the institutions and allocates those powers amongst those institutions, seeks to implement the general objective of organising a regulatory system relating to an area of activity in the public interest without granting, in itself, rights to individuals.

Article 16(1) and (2) of SSMR empowers the ECB, for the purposes of carrying out the tasks conferred on it, to require credit institutions to take various measures at an early stage where those institutions do not comply with the prudential requirements or are at risk of failing to comply with them, or where other weaknesses prevent those institutions from ensuring sound management or satisfactory risk coverage. These measures may consist, *inter alia*, in requiring the strengthening of own funds, restricting or limiting the business of the credit institution, requesting the divestment of activities posing excessive risks to the soundness of the institution or removing members of the management body of institutions who do not comply with the obligations imposed on them. Again, such a provision, in so far as it confines itself to granting authorisation, does not, in itself, contain rules intended to confer rights on individuals, but structures the operation of the system of banking supervision in the public interest and is not, on that basis, capable of giving rise to non-contractual liability on the part of the European Union.

Therefore, it must be held that since they are not intended to confer rights on individuals, Article 4 and Article 16(1) and (2) of SSMR cannot form the basis of a claim of unlawful conduct alleged against the ECB in the context of the prudential supervision which it carried out on a bank such as to give rise to liability on the part of the EU in respect of that conduct.

ECB'S SUPERVISORY TASKS – ECB's non-contractual liability – Rules conferring rights on individuals – Principle of equal treatment – ECB's discretion
--

The principle of equal treatment, enshrined in Articles 20 and 21 of the Charter, requires that comparable situations must not be treated differently or different situations must not be treated in the same way unless such treatment is objectively justified. On that basis, the principle of equal treatment is capable, according to the case-law, of conferring rights on individuals. However, it is for the applicant to precisely identify the comparable situations which it considers to have been treated differently or the different situations which it considers to have been treated identically.

In any case, it should be noted that, in the exercise of its supervisory tasks, the ECB is to carry out technical assessments taking into account a wide range of variables, including levels of capital and liquidity, business models, governance, risks, systemic impact and macroeconomic scenarios. Thus, the prudential

supervision of credit institutions is not confined to a quantitative and mechanical comparison of isolated and extrapolated figures but requires an overall prudential assessment of the credit institution's situation which goes hand in hand with a broad discretion.

ECB'S SUPERVISORY TASKS – ECB's non-contractual liability – Rules conferring rights on individuals – Principle of proportionality – ECB's discretion
--

As a general principle of law, the principle of proportionality is enshrined in Article 5(4) TEU and is capable, according to the case-law, of conferring rights on individuals. Thus, the EU may incur non-contractual liability where individuals establish that the ECB caused them harm by adopting conduct contrary to the principle of proportionality, if they demonstrate that that principle was seriously and manifestly breached by that institution.

According to the case-law, the principle of proportionality requires that acts of the EU institutions be such as to enable the legitimate objectives pursued by the legislation at issue to be attained without exceeding the limits of what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

Nonetheless, when hearing a request for review of compliance with the principle of proportionality, the court having jurisdiction must respect the discretion conferred on the EU institutions. The ECB enjoys a broad discretion in the exercise of its prudential supervision tasks.

ECB'S SUPERVISORY TASKS – ECB's non-contractual liability – Rules conferring rights on individuals – Principle of the protection of legitimate expectations – No ECB obligation to correct misleading statements of stakeholders of a credit institution
--

The principle of the protection of legitimate expectations is a general principle of EU law intended to confer rights on individuals. The possibility of relying on the principle of the protection of legitimate expectations is subject to three cumulative conditions: (i) precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the EU authorities; (ii) those assurances must be such as to give rise to a legitimate expectation in the mind of the person to whom they are addressed; (iii) assurances given must comply with the applicable rules.

Where a prudent and circumspect economic operator could have foreseen the adoption of a measure likely to affect his, her or its interests, he, she or it cannot plead a violation of the principle of the protection of legitimate expectation if the measure is adopted. Moreover, economic operators cannot justifiably claim

a legitimate expectation that an existing situation which may be altered by the authorities in the exercise of their discretionary power will be maintained.

The ECB's failure to intervene to correct allegedly misleading statements by shareholders of a credit institution on the financial situation of that credit institution cannot be regarded as the provision by the ECB to other shareholders of the same credit institution of assurances as to the conduct which it intended to adopt vis-à-vis the bank and, second and in any event, as regards its form. Therefore, such a failure clearly does not satisfy the requirement that assurances must be precise, unconditional and consistent in order to give rise to legitimate expectations.

ECB'S SUPERVISORY TASKS – ECB's non-contractual liability – Rules conferring rights on individuals – Right to property – No ECB obligation to correct misleading statements of stakeholders of a credit institution

Pursuant to Article 17(1) of the Charter, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. The right to property constitutes a rule of law conferring rights on individuals.

In order for a claim for damages based on the ECB's non-contractual liability to be admissible when a breach of the right to property is alleged, the applicant must establish that the ECB's measures concerned caused the loss of property and that that result has not been caused, directly or indirectly, in whole or in part, by other facts or other circumstances.

2. The General Court's landmark ruling in Banca Carige case on ECB's liability within the SSM

by Luca Alessandria

1. By its ruling of the 5th of June 2024,¹ the General Court dismissed the actions brought against the European Central Bank (ECB) under Article 340 TFEU by a shareholder and a former director of Banca Carige, who sought compensation for damages allegedly suffered as a result of the ECB's unlawful conduct in the exercise of its supervisory functions.

In their legal action, the applicants asserted that, in conducting the rescue operation of Banca Carige, the ECB had incurred non-contractual liability for

¹ GC, 5 June 2024, T-134/21, *Malacalza Investimenti and Malacalza v. ECB*.

committing several sufficiently serious breaches of EU and Italian law provisions relevant to the SSM framework as rules for banking supervision.² Violations alleged by the applicant included *inter alia* the failure to rectify misleading statements made about the soundness of the bank by its directors, the appointment of temporary administrators who had a conflict of interest, the approval of an increase in capital contrary to the pre-emption rights provided for in the bank's statutes and (more broadly) the adoption of intervention measures running contrary to the principle of equal treatment, proportionality and protection of legitimate expectations.

2. The Court, on the contrary, held that the preconditions for the ECB's liability under Article 340(3) TFEU were not met.³ The starting point of the Court's legal reasoning is the definition of the liability regime of the ECB's supervisory activity under the SSM. It seems relevant to analyse the reasoning followed by the General Court, because it differs from the one adopted with regard to the liability of national banking supervisory authorities in previous rulings.⁴

In fact, even though under Articles 4 and 9 of Regulation No 1024/2013 the ECB may be required to carry out the tasks conferred on the national authorities in the context of the prudential supervision of credit institutions, the General Court distinguished the case from the precedent *Peter Paul and Others* (C-222/02), in which the Court of Justice held that MS are allowed to exclude the non-contractual liability of national prudential supervisory authorities where they act within the framework of rules adopted in the public interest.⁵ Indeed, the EU judge held that such *ratio decidendi* cannot be applied directly to ECB's liability regime since it concerns only national authorities.

In contrast, the GC clarified that the attribution of non-contractual liability to the ECB should be based on the general rules applicable to EU institutions, as established by the case-law of the Court of Justice.⁶ These rules presuppose the simultaneous existence of three conditions: the unlawfulness of the conduct attributable to the institution or its servants in the performance of their duties, the fact of damage and the existence of a causal link between the alleged conduct and the damage complained of.

² Indeed, it should be borne in mind that Article 4, para 3 SSMR states: "For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives".

³ Article 340, para 3 TFEU: "the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties".

⁴ See, ECJ, 12 October 2004, C-222/02, *Peter Paul*; ECJ, 4 October 2018, C-571/16, *Nikolay Kantarev v. Balgarska Narodna Bank*; ECJ, 25 March 2021, C-501/18, *BT v. Balgarska Narodna Bank*.

⁵ See previous footnote.

⁶ See ECJ, 20 September 2016, C-8/15 P to C-10/15 P, *Ledra Advertising and Others v. Commission and ECB*, para 64; GC, 7 October 2015, T-79/13, *Accorinti and Others v. ECB*, para 65 and the case-law cited.

The Court thus rejected the ECB's request to refer to the laws of the Member States to define the rules on non-contractual liability applicable to the European Union in the field of prudential supervision. The ECB had argued that the majority of the Member States limit the liability of supervisory authorities to cases of intentional fault or serious misconduct and that such approach should be followed at EU level (being a general principle common to the laws of the Member States pursuant to Article 340, para 3 TFEU) in order to preserve the Authority's actions by allowing it to act in the public interest without being paralysed by the fear of being called into question even in the event of slight fault or mere unlawfulness. On the contrary, the General Court invoked a reversed principle of equivalence to affirm that, since the liability of Member States for breach of EU law cannot depend upon a condition based on any concept of 'fault going beyond that of a sufficiently serious breach of [EU] law',⁷ neither can the EU institutions' liability be made subject to such conditions.

As a consequence, according to the GC's judgment, the general rules (and requirements) on non-contractual liability of EU institutions under Article 340 TFEU shall apply to the ECB's supervisory activity under the SSM, even when it is required to carry out task conferred to NCAs and/or apply substantive national legislation.

3. In the case at hand, though, the claimants failed to demonstrate an unlawful conduct by the ECB, that is, according to the case-law, a conduct infringing a rule of law intended to confer rights on individuals and constituting a "sufficiently serious breach".

In particular, the General Court excluded that the rules allegedly infringed by the ECB were of such a nature as to confer rights on the credit institution's investors. On the contrary, provisions of the Consolidate Law on Banking (TUB) such as Article 53, para 1, lett. d *bis*, on information to be published by the ECB on credit institutions, Article 53 *bis*, para 1, lett. d) on the adoption of specific measures, Article 56, on the review of statutes' amendments, Articles 69 *octiesdecies* and 69 *noviesdecies*, on early intervention measures, as well as Articles 4 and 16 of Reg. (EU) No 1024/2013, merely confer powers on the supervisory authority in pursuit of a public interest, without being intended to confer rights on individuals. It follows that such provisions which, in the view of the EU judge, only "structure the operation of the system of banking supervision in the public interest", cannot give rise to non-contractual liability on the part of the EBC.

Moreover, even where the plaintiff had invoked rules capable of conferring rights on private individuals (such as the principle of equal treatment, the principle of impartiality and the principle of legitimate expectations), the Court held that a sufficiently serious breach of those rules by the ECB had not been demonstrated. In this regard, the General Court recalled that, in assessing the sufficiently serious

⁷ ECJ, 5 March 1996, C-46/93 and C-48/93, *Brasserie du pêcheur and Factortame*.

nature of the breach, the extent of the discretion available to the institution is of primary importance. Indeed, it stems from the case-law of the ECJ that the test held to be decisive for determining whether a breach is sufficiently serious is whether the institution concerned gravely and manifestly disregarded the limits on its discretion. According to the GC's judgement, this was not the case.

Instead, the General Court observed that the conduct complained of was adopted by the ECB in the exercise of the prudential supervision tasks conferred on it in order to enable it to ensure the safety and soundness of credit institutions. When carrying out those tasks, the ECB is to assess the risk profile of the banks, an analysis that, on account of its complex nature, justify granting the ECB, according to the case-law, a broad discretion.⁸ Such broad discretion granted to the ECB within the SSM is a consequence of the fact that the supervision implies technical assessments taking into account a wide range of variables, including levels of capital and liquidity, business models, governance, risks, systemic impact and macroeconomic scenarios. Thus, as elucidated by the EU judge, the prudential supervision of credit institutions is not confined to a quantitative and mechanical comparison of isolated and extrapolated figures, but requires an overall prudential assessment of the credit institution's situation which goes hand in hand with a broad discretion.

In this context, the claims made by the applicants that, by adopting the early intervention measures toward Banca Carige, the ECB gravely and manifestly disregarded the principle of equal treatment and of proportionality, beyond the broad discretion conferred upon it, were found unsubstantiated by the GC. The EU Court held that the applicants failed to establish the existence of a genuine difference in treatment between Banca Carige and other Italian credit institutions and to demonstrate that the ECB seriously and manifestly breached the principle of proportionality.

4. The judgment under discussion is of particular importance, as it is the first to address the liability of the ECB as a supervisory authority within the SSM. It appears pertinent to note that, on the merits, all allegations of unlawful conduct on the part of the credit supervisory authority with regard to Banca Carige have been dismissed. Moreover, the ruling sets a very significant precedent, as it provides important clarifications on the ECB's liability regime under Article 340(3) TFEU. In fact, the Court has for the first time brought the ECB's supervisory activity, which implies the exercise of powers attributed to national authorities and even the application of national law, within the scope of the rules on the non-contractual liability of EU institutions. In doing so, the Court also elucidated the prerequisites for the ECB's non-contractual liability, excluding that the provisions intended to attribute powers to the supervision authorities can be relied on by individuals in an action for damages. However, the GC's assertion

⁸ See, to that effect, ECJ, 8 May 2019, C-450/17 P, *Landeskreditbank Baden-Württemberg v. ECB*, para 86; ECJ, 4 May 2023, C-389/21 P, *ECB v. Crédit Lyonnais*, para 55; GC, 13 December 2017, T-712/15, *Crédit mutuel Arkéa v. ECB*, para 181.

that the (numerous) national regulations limiting supervisory authority liability to cases of intentional fault or gross negligence do not constitute a general principle common to the Member States lacks sufficient substantiation.

Therefore, it can be expected that the issues addressed by the General Court in this case will continue to be the subject of future developments.

3. Reference to “notes de doctrine”

BARBORA BUDINSKA, *No compensation for Banca Carige shareholders (Malacalza Investimenti and Malacalza v ECB, T-134/21)*, EU Law Live, 9 July 2024.

DANIELE AMOROSO, MASSIMO FRANCESCO ORZAN, *Responsabilità extracontrattuale dell’Unione e vigilanza prudenziale della BCE*, *Giurisprudenza Italiana*, No 8-9, 1 August 2024.

DEUTSCHE BANK AND OTHERS v ECB

1. Keywords and summary

Deutsche Bank and Others v ECB

General Court – Case T-182/22 – Judgment of 5 June 2024 – ECLI:EU:T:2024:352

[no appeal case detected on curia.europa.eu]

ECB's second pillar measure to deduct from CET1 capital the amount of Irrevocable Payment Commitments to the Single Resolution Fund

ECB'S COMPETENCE AND POWERS – CET 1 capital – Risk of overstatement of CET 1 capital – Second pillar measure
--

With regard to the ECB's power to require the full deduction of certain items from own funds, which amounts to a general requirement not provided for by the legislature in Article 36 of CRR, the settled case-law has acknowledged that the ECB, in the context of its supervisory tasks under Article 4(1)(f) of SSMR, can impose to credit institutions corrective measures on the basis of the vulnerabilities and weaknesses identified.

Although CRR lays down general prudential requirements for own funds, including CET 1 capital, which apply to all credit institutions that are subject to supervision, and although Article 36 of that Regulation provides that several items must be deducted from CET 1 capital, that Regulation, and more specifically Article 36 thereof, does not preclude the ECB from being able to identify a risk linked to CET 1 capital during its supervisory review and therefore does not prohibit the adoption of an additional prudential measure, such as a deduction measure under its 'second pillar' powers.

Accordingly, if a significant credit institution is exposed to some risk, as the risk of overstatement of its CET 1 capital, and if it follows from the individual examination carried out by the ECB that the arrangements, strategies, processes and mechanisms implemented by it and the own funds and liquidity held by it do not ensure the sound management and coverage of that risk, the ECB may take one of the measures provided for in Article 16(2) of SSMR.

ECB'S COMPETENCE AND POWERS – CET 1 capital – Risk of overstatement of CET 1 capital – Second pillar measure – ECB's individual examination of credit institutions
--

Article 16(1)(c) of SSMR requires the ECB to carry out an individual examination in order to determine whether the arrangements, strategies, processes and

mechanisms implemented by the credit institution and the own funds and liquidity held by it ensure the sound management and coverage of its risks. The ECB must assess a real situation and not a hypothetical situation and cannot rely on hypothetical situations when taking measures. Furthermore, a measure imposed in order to address the risk identified does not preclude a credit institution from being able to opt for other measures to remedy that risk so that, in the next SREP cycle, the ECB can take them into account. In any event, the ECB may take into account only the actual arrangements and processes implemented by the credit institutions concerned.

At the same time, if some institutions apply more or less the same accounting treatment of irrevocable payment commitments to the SRF, there is a strong likelihood that the same risk of overstating CET 1 capital will be identified on the basis of similar considerations. It is not ruled out that identical risks could be covered by identical measures of the ECB.

OWN FUNDS REQUIREMENT – CET 1 capital – Risk of overstatement of CET 1 capital – Second pillar measure – Irrevocable payment commitments – *Ex ante* contributions to the Single Resolution Fund

The risk of an overstatement of CET 1 capital as a consequence of the non-deduction of IPCs to the SRF has already been recognised in the case-law. Although the risk of overstatement of CET 1 capital is linked to the risk of the IPCs being called, these two risks are different. The first means that there is a risk that reported CET 1 capital will not be there to cover risks or losses as they arise, a risk that exists even in the event of a low probability of the IPCs being called. The provision of collateral results in a net loss of economic resources that reduces the absorption capacity of the CET 1 capital as soon as the IPCs are given and the collateral is provided, collateral which the credit institutions concerned cannot retrieve in a going-concern scenario without an equivalent outflow of economic resources. As is apparent from the case-law, the IPCs being given and the collateral being provided are inextricably linked and cannot be considered separately. The collateral provided is returned to the institutions concerned only in the event of a counterbalancing contribution, a withdrawal of their banking licence or a transfer of all covered deposits and IPCs to a transferee credit institution. Accordingly, even if the IPCs are not called, the credit institutions concerned will never be in a position to retrieve the economic value of the collateral in a going-concern scenario.

OWN FUNDS REQUIREMENT – CET 1 capital – Risk of overstatement of CET 1 capital – Second pillar measure – Irrevocable payment commitments – *Ex ante* contributions to the Single Resolution Fund – Principle of proportionality – ECB's discretion

According to Article 5(4) TEU, under the principle of proportionality, which is one of the general principles of EU law, the content and form of Union

action is not to exceed what is necessary to attain the objectives of the Treaties. The EU institutions are required to apply the principle of proportionality as laid down in Protocol No 2 on the application of the principles of subsidiarity and proportionality, annexed to the TFEU.

According to the settled case-law, in accordance with the principle of proportionality, the acts adopted by EU institutions must be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not exceed the limits of what is necessary in order to achieve those objectives; where there is a choice between several appropriate measures, recourse must be had to the least onerous; and the disadvantages caused must not be disproportionate to the aims pursued.

Furthermore, according to the Court of Justice, the assessment of the proportionality of a measure must be reconciled with compliance with the discretion that may have been conferred on the EU institutions at the time it was adopted.

In the case of the risk of overstatement of CET 1 capital of a credit institution in relation to IPCs being accounted among such CET 1 capital, the ECB's analysis of proportionality of a measure under Article 16(2)(d) of SSMR imposing the deduction of those IPCs from the own funds of that credit institution is not incorrect, where it excludes that the use of other 'second pillar' measures under Article 16(2)(a) of SSMR, aimed at increasing capital requirements, and under Article 16(2)(i) thereof, aimed at restricting the distribution of dividends, would not achieve the objective that only risk-bearing CET 1 capital is reported.

2. ECB's measure imposing IPC-related deduction from CET 1: the General Court dismissed German banks' action for annulment

by Cristiano Martinez

Some German significant credit institutions discharged their obligation to provide *ex ante* contributions to the SRF and to a German DGS by way of undertaking IPCs and providing a cash deposit for the same amount as collateral at the free disposal of the SRB and the DGS.

In that respect, the ECB, after individual examination, identified a risk of CET 1 overstatement related to the accounting treatment used by such institutions for the IPCs and the cash deposit.¹ Therefore, the ECB adopted a Pillar 2 measure under Articles 4(1)(f) and 16 SSMR *vis-à-vis* such institutions, imposing *inter alia* to deduct from CET 1 capital the amount of the IPCs. After the following SREP cycle, such measure was confirmed in December 2022.

¹ In the case at hand the applicants treated IPCs as off-balance sheet items and the related collateral as an asset.

The affected institutions brought an action for the annulment of such decisions. They argued that the ECB lacked the power to impose the deduction measure, had failed to carry out an individual examination of their specific situation, had not used a coherent and adequate assessment methodology and had decided on the basis of inaccurate facts and manifest errors of assessment; they also claimed that the decision was not proportionate.

On 5 June the General Court dismissed the action.

The judgement first describes the nature of IPCs: they are conditional payment obligations that may be called by the SRB and/or the DGS when the relevant conditions are met. Institutions secure IPCs by a cash deposit for an equivalent amount; such deposit is freely disposable by the SRB and the DGS. Therefore deposited amounts are no more available to the institutions.²

This entails that such deposits are not freely available in a business-as-usual going-concern scenario.

Availability is a requirement for CET 1 eligibility. Therefore, from a prudential standpoint the ECB had found a risk of CET 1 overstatement for the amount of IPCs/cash deposits: even though the applicants remained the economic owners of the deposited amounts, they lacked effective control over them. As a consequence, the ECB had imposed on the applicants to deduct the amount of IPCs from CET 1.

The applicants claimed that IPC risk only materialises if IPCs are called. However, the General Court clarified that IPC-related risk is to be kept logically separate from CET 1 risk: the former refers to losses that the institution may incur and must record in its profit and loss accounts if the IPC is called. On the contrary, CET 1-related risk concerns the availability of capital to cover risks or losses as they arise (*i.e.* absorption capacity), regardless of the high/low probability of IPCs being called.

It is also irrelevant that the SRB records the cash deposit as its liability vis-à-vis the depositing institution: indeed, even if the SRB is obliged to return the collateral to the institution (hence an SRB liability), such an obligation only arises in the cases explained in footnote no. 2 and against an equivalent outflow of economic resources made by the institution.

On this basis, the General Court rejected all the pleas brought forward by the applicants and acknowledged that:

- the deduction measure fell within the scope of ECB's Pillar 2 powers (Article 16(2)(d) SSMR) and it does not overlap or interfere with Pillar 1 deductions set out by the legislator under Article 36 CRR;

² Such amounts are returned to the institution only if the institution makes a counterbalancing contribution, its banking licence is withdrawn or all covered deposits and IPCs are transferred to another institution. The institution thus may not retrieve the economic resources constituted by the cash collateral in a going-concern scenario without incurring an equivalent outflow of economic resources.

- the ECB had conducted an individual examination, had used an appropriate methodology and had not committed the errors and inaccuracies alleged by the applicants.

The judgement also confirmed that the deduction measure is proportionate, as the same was appropriate and necessary to address the risk of CET 1 overstatement and there were no other less onerous measures for that purpose: in particular, the request for increased capital requirements and the imposition of restrictions on the distribution of dividends (Article 16(2)(a) and (j) of the SSMR, respectively) would not have achieved that objective. Furthermore, the request for the reinforcement of the arrangements, processes, mechanisms and strategies under Article 16(2)(b) of the SSMR would have left the risk of overstatement unchanged until such time as those arrangements, processes, mechanisms and strategies had been reinforced.

* * *

This noteworthy judgement primarily deals with the prudential impact of SRF and DGS *ex ante* contributions, specifically when they are made in the form of IPCs.

In such a case the required collateralisation of IPCs by means of cash deposit lets the credit institutions still be the economic owners of the deposited amounts, but it ensures that only the SRB and the DGS (and not such institutions) have effective control over them.

The loss of effective control satisfies the objective of resolution and DGS funding and it determines the prudential effect of no more meeting the CET 1 requirement of absorption capacity that is needed for IPCs (and inherent collateral) to be included in CET 1.

Such lack of control is consistent with the crucial stability and integrity of mandatory contributions that must be at the free disposal of the SRB and DGSs for the benefit of the banking system as a whole: the obligation to return such contributions to institutions is limited to the few cases that are mentioned in footnote no. 2.

**BNP PARIBAS v ECB, BPCE AND OTHERS v ECB,
CRÉDIT AGRICOLE AND OTHERS v ECB,
CONFÉDÉRATION NATIONALE DU CRÉDIT MUTUEL AND OTHERS v ECB,
BANQUE POSTALE v ECB, SOCIÉTÉ GÉNÉRALE v ECB**

1. Keywords and summary

BNP Paribas v ECB

General Court – Case T-186/22 – Judgment of 5 June 2024 – ECLI:EU:T:2024:353

[no appeal case detected on curia.europa.eu]

BPCE and Others v ECB

General Court – Case T-187/22 – Judgment of 5 June 2024 – ECLI:EU:T:2024:354

[no appeal case detected on curia.europa.eu]

Crédit agricole and Others v ECB

General Court – Case T-188/22 – Judgment of 5 June 2024 – ECLI:EU:T:2024:355

[under appeal: case C-548/24 P]

Confédération nationale du Crédit mutuel and Others v ECB

General Court – Case T-189/22 – Judgment of 5 June 2024 – ECLI:EU:T:2024:356

[under appeal: case C-552/24 P]

Banque postale v ECB

General Court – Case T-190/22 – Judgment of 5 June 2024 – ECLI:EU:T:2024:357

[no appeal case detected on curia.europa.eu]

Société générale v ECB

General Court – Case T-191/22 – Judgment of 5 June 2024 – ECLI:EU:T:2024:358

[under appeal: case C-550/24 P]

ECB's second pillar measure to deduct from CET1 capital the amount of Irrevocable Payment Commitments to the Single Resolution Fund

ECB'S COMPETENCE AND POWERS – CET 1 capital – Risk of overstatement of CET 1 capital – Second pillar measure – ECB's individual examination of credit institutions

Article 16(1)(c) of SSMR requires the ECB to carry out an individual examination in order to determine whether the arrangements, strategies, processes and

mechanisms implemented by the credit institution and the own funds and liquidity held by it ensure the sound management and coverage of its risks. The ECB must assess a real situation and not a hypothetical situation and cannot rely on hypothetical situations when taking measures. Furthermore, a measure imposed in order to address the risk identified does not preclude a credit institution from being able to opt for other measures to remedy that risk so that, in the next SREP cycle, the ECB can take them into account. In any event, the ECB may take into account only the actual arrangements and processes implemented by the credit institutions concerned.

At the same time, if some institutions apply more or less the same accounting treatment of irrevocable payment commitments to the SRF, there is a strong likelihood that the same risk of overstating CET 1 capital will be identified on the basis of similar considerations. It is not ruled out that identical risks could be covered by identical measures of the ECB.

OWN FUNDS REQUIREMENT – CET 1 capital – Risk of overstatement of CET 1 capital – Second pillar measure – Irrevocable payment commitments – *Ex ante* contributions to the Single Resolution Fund

The risk of an overstatement of CET 1 capital as a consequence of the non-deduction of IPCs to the SRF has already been recognised in the case-law.

The accounting treatment of IPCs and the associated collateral are specific to each institution and the applicable accounting rules leave a certain margin, or even a certain choice, enjoyed by the applicant. In that regard, several choices are possible, either in order to avoid the aforementioned risk or to address it by other means, which, moreover, can be determined only on the basis of an individual examination.

Thus, it is possible to include the payment commitment in the balance sheet, as a liability, or the collateral agreement in the profit and loss account. The institution applying such treatment would record a loss, so that an equivalent amount would be deducted from its CET 1 capital when the commitment is given. It is also possible not to record IPCs as liabilities in the balance sheet, that is to say, to treat them as off-balance-sheet items and, at the same time, to recognise the cash put up as collateral as an asset on the balance sheet as a claim for repayment against the SRF. Such accounting treatment does not result in a decrease in CET 1 capital, although the collateral is not available to the institution concerned.

Similarly, from the point of view of prudential treatment, it is possible to make a voluntary reduction under Article 3 of CRR or else to consider that the asset recorded on the balance sheet, representing the claim for repayment of the sums put up as collateral, generates exposure to a risk to which a specific weighting must be assigned, which will give rise to own funds requirements and, accordingly, could partially cover the risk of overstatement of CET 1 capital.

All of those possibilities are reflected, *inter alia*, in the decisions taken by the ECB as part of the 2022 SREP, which show that the examination of the individual

situation of the various institutions entered into IPCs led to different conclusions. The amount of the sums put up as collateral and which consequently became unavailable was subject to partial deduction, total deduction or even no deduction at all, depending on the institutions concerned.

OWN FUNDS REQUIREMENT – CET 1 capital – Risk of overstatement of CET 1 capital – Second pillar measure – Irrevocable payment commitments – <i>Ex ante</i> contributions to the Single Resolution Fund

Although the risk of overstatement of CET 1 capital is linked to the risk of the IPCs being called, these two risks are different.

The risk of overstatement of the CET 1 capital stems from the unavailability of the sums put up as collateral for the commitment given by the institution. The risk of the IPCs being called represents the risk that the institution concerned will incur losses once the IPCs are called and the off-balance-sheet IPCs become an actual expense that results in losses to be recorded in its profit and loss account.

OWN FUNDS REQUIREMENT – CET 1 capital – Risk of overstatement of CET 1 capital – Second pillar measure – Irrevocable payment commitments – <i>Ex ante</i> contributions to the Single Resolution Fund – Precautionary buffers

The capital held by an institution beyond the minimum regulatory requirements and the ‘second pillar’ capital guidance cannot be regarded as capital intended to cover the risk of overstated CET 1, as the institution remains free to use those ‘precautionary buffers’ for any risk and not specifically for the risk stemming from the IPCs. Similarly, it remains free to distribute ‘precautionary buffers’, through authorised distributions of profit, at any time, unless the ECB requests a deduction or prohibits profit distributions. In addition, the risk of overstatement of CET 1 capital must not be confused with its potential consequences. The risk of overstating CET 1 capital consists in a potential overvaluation of CET 1 capital having regard to the actual capacity to absorb the institution’s losses, which could enable it to enter into exposures not covered by own funds. Although ‘precautionary buffers’ composed of CET 1 capital may cover losses resulting from those exposures, they do not cover the risk of overstatement of CET 1 capital itself.

OWN FUNDS REQUIREMENT – CET 1 capital – Risk of overstatement of CET 1 capital – Second pillar measure – Irrevocable payment commitments – <i>Ex ante</i> contributions to the Single Resolution Fund

The ECB decision imposing a second pillar measure to manage the risk of overstatement of CET 1 capital of a credit institution stemming from the accounting and prudential treatment by that institution of the IPCs it entered into

as a means to fulfil its *ex ante* contributions to the SRF do not deprive IPCs of their purpose as established by the Union legislature.

Article 70(3) of SRMR, Article 103(3) of BRRD and Article 10(3) of DGSD, which provide for the possibility of contributing to the SRF and national resolution financing schemes through IPCs, do not address and are not intended to govern the accounting and prudential treatment of IPCs. Moreover, those provisions do not allow to conclude that the legislature wished the use of IPCs to enable institutions to take risks not covered by own funds.

PRINCIPLE OF PROPORTIONALITY – Second pillar measure
--

According to Article 5(4) TEU, under the principle of proportionality, the content and form of Union action must not exceed what is necessary to attain the objectives of the Treaties. The EU institutions are required to apply the principle of proportionality as laid down in Protocol No 2 on the application of the principles of subsidiarity and proportionality, annexed to the TFEU.

According to the settled case-law, in accordance with the principle of proportionality, which is one of the general principles of EU law, the acts adopted by EU institutions must be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not exceed the limits of what is necessary in order to achieve those objectives; where there is a choice between several appropriate measures, recourse must be had to the least onerous; and the disadvantages caused must not be disproportionate to the aims pursued.

Furthermore, according to the Court of Justice of the European Union, the assessment of the proportionality of a measure must be reconciled with compliance with the discretion that may have been conferred on the EU institutions at the time it was adopted.

It complies with the aforementioned principles the ECB where, after finding a risk of overstatement of CET 1 capital of a credit institution stemming from the accounting and prudential treatment by that institution of the IPCs it entered into, in order to address that risk constituting a problematic situation referred to in Article 16(1)(c) of SSMR, it exercises the powers conferred on it by Article 16(2)(d) of SSMR to require the institution concerned to apply a specific provisioning policy or treatment of assets in terms of own funds requirements, expressly considering that the deduction requirement (1) is appropriate to address the risk of overstatement of the CET 1 capital because it specifically addresses the loss of economic resources that already occurred; (2) is necessary, as no other, less onerous, alternative measures could similarly achieve the objective that only risk-bearing CET 1 capital is reported. In this latter regard, in particular, that measure is necessary if the ECB considers that the use of other ‘second pillar’ measures under Article 16(2)(a) of SSMR, aimed at increasing capital requirements, and under Article 16(2)(i) thereof, aimed at restricting the distribution of dividends, would not achieve that objective.

COMMISSION v SRB

1. Keywords and summary

Commission v SRB

Court of Justice – Case C-551/22 P – Judgment of 18 June 2024 –
ECLI:EU:C:2024:520

The resolution scheme adopted by the SRB under Article 18(7) of SRMR is not a challengeable act within the meaning of Article 263 TFEU

DECISION PLACING A CREDIT INSTITUTION IN RESOLUTION – Resolution procedure – Resolution scheme – Commission and Council’s participation in the decision-making under Article 18(7) of SRMR – Compatibility with the “*Meroni* doctrine”

The provisions of Article 18 of SRMR are such as to avoid a “transfer of responsibility” within the meaning of the case-law resulting from the judgment in *Meroni v High Authority* and recalled in the judgment of 22 January 2014, *United Kingdom v Parliament and Council*. According to that case-law, the exercise of discretionary powers cannot be delegated to autonomous entities which have not been provided for in the Treaties. More specifically, the applicability of the principles concerning the delegation of powers to agencies solely depends on whether the delegation relates to executive powers which are precisely delineated or, on the contrary, to a discretionary power implying a wide margin of discretion which may make possible the execution of actual economic policy.

To this effect, an adequate involvement of the Council and the Commission appears to be suggested by the finding, set out in recitals 24 and 26 of SRMR, that the exercise of the resolution powers provided in the said regulation falls within the resolution policy of the European Union, which only EU institutions may establish, and that there remains a margin of discretion in the adoption of each resolution scheme. In addition, while the SRB enjoys a wide margin of discretion concerning whether and by what means the entity concerned is to be the subject of a resolution procedure, that discretion, by virtue of Article 18(1) and (4) to (6) of SRMR, is circumscribed by objective criteria and conditions delimiting the SRB’s scope of action and relating both to the resolution tools and conditions. The provisions of Article 18(7) of the SRMR also provide for the participation of the Commission and of the Council in the procedure leading to the adoption of a resolution scheme, which, in order to enter into force, must be endorsed by the Commission and, where relevant, the Council.

Thus, it is in accordance with the *Meroni* doctrine that the provisions covering the SRB’s assessment powers also confer on the Commission or on the

Council the responsibility for the final assessment of the discretionary aspects of the scheme which fall within the scope of EU policy for the resolution of credit institutions and which involve a balancing of various objectives and interests, relating to the safeguarding of the financial stability of the EU and the integrity of the internal market, the taking into account of the budgetary sovereignty of the Member States and the protection of the interests of shareholders and creditors.

Hence, in the context of the resolution procedure resulting from Article 18 of SRMR, endorsement by the Commission, in the absence of objections on the part of the Commission or the Council, is an essential element for the entry into force of the resolution scheme.

DECISION PLACING A CREDIT INSTITUTION IN RESOLUTION – Resolution procedure – Resolution scheme – Challengeable act under Article 263 TFEU – Commission and Council’s participation in the decision-making under Article 18(7) of SRMR

According to settled case-law, an EU act is challengeable within the meaning of Article 263 TFEU whenever intended to produce binding legal effects and capable of affecting the interests of their addressees. The resolution scheme adopted by the SRB under Article 18 does not produce such effects, since the entry into force of that scheme and – as a consequence – the production of its binding legal effects depend on the Commission’s endorsement and the absence of an opposition by the Council. It follows that an action of annulment brought only against the resolution scheme in itself is not admissible.

Indeed, while Articles 7 and 18 of SRMR provide that the SRB is responsible for drawing up and adopting a resolution scheme, they do not confer on it the power to adopt an act producing independent legal effects, which is instead subject to the Commission’s or, where relevant, the Council’s endorsement.

Thus, where the Commission endorses the SRB’s scheme, it fully assumes the responsibilities conferred on it by the Treaties. Since it is only by the Commission’s endorsement decision that the resolution action adopted by the SRB in the resolution scheme is definitively fixed and produces binding legal effects, it is the Commission, and not the SRB, which must answer for that resolution action before the EU judicature.

Nor can the finding set out above lead to an infringement of the right to effective judicial protection. A Commission’s endorsement decision displays, for its part, the features of an act against which an action for annulment may be brought under the fourth para of Article 263 TFEU. In an action for annulment brought against such a decision, it is open to the natural or legal persons concerned to plead the illegality of the resolution scheme approved by that institution, thereby giving it binding legal effect, which is capable of guaranteeing them sufficient judicial protection.

DECISION PLACING A CREDIT INSTITUTION IN RESOLUTION – Resolution procedure – Resolution scheme
--

The provision of Article 18(7) of the SRMR makes it apparent that the Commission and the Council are allowed to substitute their own assessment for that of the SRB as regards the discretionary aspects of the resolution scheme by objecting thereto, in which case the SRB is required to modify that scheme accordingly, so that that scheme may enter into force.

Such discretionary aspects of a resolution scheme, which relate both to the establishment of the resolution conditions and to the determination of the resolution tools, are inextricably linked to the more technical aspects of resolution. It follows that a distinction between such aspects cannot be drawn for the purposes of determining the act against which an action may be brought.

2. The resolution scheme cannot be challenged separately from the Commission’s endorsement. A new confirmation of the Meroni doctrine

by Francescopaolo Chirico

By its decision of 18 June 2024, in case C-551/22 P, the ECJ set aside one of the GC’s rulings on the five pilot cases on Banco Popular Español,¹ establishing that the resolution scheme adopted by the SRB under Article 18(7) of the SRM Regulation can be challenged only jointly with the Commission’s endorsement. As the applicant at first instance wrongly challenged only the SRB’s decision, the action for annulment has to be dismissed as inadmissible (and the case has not to be decided on its substance).

The GC had adopted the opposite interpretation in case T-481/17,² holding that several provisions of the SRM Regulation seem to imply the existence of decision making powers directly conferred on the SRB. According to the GC, the admissibility of the action for annulment brought against only the SRB’s scheme would have been consistent with those provisions and the principle of legal certainty. The Commission, supported by the Parliament, appealed the ruling, submitting that the GC had wrongly deemed the action admissible on the assumption that the resolution scheme is a challengeable act producing binding legal effects on the entity concerned. In turn, the SRB, together with the applicant before the GC, disputed the Commission’s line of argument.

¹ On the GC’s ruling on the BPE’s five pilot cases, see the monograph issue of this Newsletter No. 18, June 2022.

² See “*Admissibility of the action for annulment brought only against the SRB decision and compatibility of the resolution procedure with the ‘Meroni doctrine’*”, on the above mentioned issue of this Newsletter No. 18, June 2022.

The ECJ held the appeal admissible on the grounds that the objection of inadmissibility had been already proposed by the Commission before the GC, which had examined it on its own motion – despite the Commission’s status of intervener at first instance – due to the involvement of public policy consideration. According to the ECJ, the implicit rejection of the Commission’s objection resulting from the GC’s ruling has to be amenable to review through the appeal.

As for the substance of the case, the ECJ starts by considering that, according to its settled case-law, an action for annulment may be brought against all EU acts producing binding legal effects and capable of affecting the interests of their addressees. In assessing the act’s nature and effect, its content, the context in which it was adopted, and the powers of the institution concerned should be duly taken into account.

Contrary to what the GC held, the entry into force of the resolution scheme and the production of its binding legal effects depend on the Commission’s endorsement. The procedure provided for by Article 18 of the SRM Regulation is based on the finding that the resolution powers fall within the policy reserved to EU institutions, considering the significant margin of discretion related to the adoption of the resolution scheme, the impact of such a decision on the financial stability of the MS concerned and on the overall EU. To this end, the legislator considered it necessary to provide for the adequate involvement of the Council and the Commission, in line with the principles on delegation of powers to agencies established in the judgment in *Meroni v High Authority* (9/56) and recalled in the judgment of 22 January 2014, *United Kingdom v Parliament and Council* (C-270/12).

More specifically, while Article 18 of the SRM Regulation confers on the SRB a wide margin of discretion as to whether and by what means the entity concerned has to be placed under resolution, that discretion may be deemed sufficiently circumscribed by objective criteria and conditions delimiting the SRB’s scope of action and its modalities. In addition, the regulation provides for the participation in the administrative procedure of the Commission, through the endorsement phase, and of the Council, entrusted with a power of objection with regard to compliance with the criterion of public interest and the amount of SRF’s resources required. Under Article 18(7), the entry into force of the resolution scheme is subject to the Commission’s endorsement, in the absence of objections on the part of the Council.

According to the ECJ, such provisions confer on the Commission and the Council the responsibility for the final assessment of the discretionary aspects of the resolution scheme, as they fall within the scope of EU policy for the resolution of credit institutions and involve a balancing of various objectives and interests, relating to the safeguarding of the financial stability and the integrity of the internal market, taking into account the budgetary sovereignty of the Member States and the protection of the interests of shareholders and creditors.

While Articles 7 and 18 of the SRM Regulation provide that the SRB is responsible for drawing up and adopting a resolution scheme, such provisions do

not confer on it the power to adopt an act producing independent legal effects. In this perspective, the endorsement by the Commission constitutes “*an essential element for the entry into force of the resolution scheme*” (point 83). According to the ECJ, even though the Commission may endorse the scheme without raising any objections with regard to its discretionary aspects or proposing to the Council to do so, the endorsement mechanism allows the Commission and the Council “*to substitute their own assessment for that of the SRB as regards those discretionary aspects by objecting thereto, in which case the SRB is required ... to modify that scheme, within eight hours, in accordance with the reasons expressed by the Commission or the Council*” (point 85). In this regard, the Court also notes that an objection by the Council on the ground that the public interest criterion is not fulfilled would have the effect of preventing the resolution, resulting in the entity’s winding up according to the applicable national law.

Contrary to what the GC argued, the discretionary aspects of a resolution scheme (relating both the ascertainment of the conditions provided for by Article 18(1) and the resolution tool to be applied) are inextricably linked to the more technical aspects of the resolution. It follows that such a distinction cannot be drawn for the purposes of determining the act against which an action for annulment may be brought.

According to the ECJ, Article 86(1) and (2) of the SRM Regulation have to be applied, as clearly established by the same provisions, “*in accordance with Article 263 [TFEU]*”, which implies the condition relating to the challengeable nature of the contested act, as elaborated by the case-law. Indeed, in any complex administrative procedure, such as the resolution one, acts adopted during the preparatory stages, where they do not produce independent legal effects, cannot form the subject matter of an action for annulment.³ Obviously, in the context of the action for annulment brought against the endorsement decision, the applicant may also plead the illegality of the resolution scheme adopted by the SRB, in line with the right to effective judicial protection.

3. Reference to “notes de doctrine”

MARCO BODELLINI, GIULIO GIACOMO CIMINI, *And Meroni spoke again – the SRB does not resolve Banks, the Commission does it*, EU Law Live, 12 July 2024.

³ The ECJ notes that the principle it had affirmed in the judgment of 6 May 2021, *ABLV Bank and Others v ECB* (C-551/19 P and C-552/19 P, see “*Sindacato giurisdizionale unitario nel contesto del procedimento di risoluzione: la dichiarazione di FOLTF non è autonomamente impugnabile*”, on this Newsletter, No. 5, May 2021) – where the Court had held, in essence, that a resolution scheme may, as the outcome of a complex resolution procedure, be subject to judicial review before the EU judicature – has to be read in the light of the settled case-law on complex procedures according to which only the measure definitively laying down, at the end of the procedure, the position of the competent EU body is capable of forming the subject matter of an action for annulment, being not challengeable the intermediate measures whose aim is to prepare that final one and which produce no independent legal effects.

**THE CASE-LAW
OF THE EU ADMINISTRATIVE REVIEW BODIES**

1. Keywords and summary

[.], *Appellant v the Single Resolution Board*

Cases 2/2023 and 3/2023 – Final Decision of 25 January 2024

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

MREL DETERMINATION – Joint decision on MREL under Article 45h of BRRD

The essence of any joint decision adopted by a resolution college is that of a bundle of individual decisions, adopted together and in parallel by each of the resolution authorities being part of the college, unless one or more of them disagree, in which case the decisions will be adopted in parallel, but separately. Formally, the joint decision may result in a single document prepared by the resolution authority of the parent resolution entity, to which the individual consent of the other national resolution authorities is also attached. Yet, in substance, that document indicates that all resolution authorities being part of the college did not disagree with the joint decision, and thus adopted in parallel the content of such decision. The effect of this process is to render the decision/s binding in the respective territory and remit of each resolution authority. In the case of the SRB, this means that the joint decision is a binding decision.

Accordingly, it results from the clear and unambiguous wording of the text of Article 45h BRRD and from its contextual and teleological interpretation that the joint decision foreseen therein for the determination of MREL marks the end of the process at the college level. Furthermore, from a literal consideration of the relevant provisions in the BRRD, the joint decision does not merely “constitute a basis”, nor “forms the consensus”, for a subsequent decision by resolution authorities. On the contrary, the decision itself “shall ensure compliance” with the relevant provisions on MREL. Article 45h(7) BRRD states, in turn, that “the joint decision referred to in para 1 [...] shall be binding on the resolution authorities concerned”.

The text of both Articles 88 and 45h BRRD, duly read in their overall normative context, imply that the joint decision is not a preliminary decision, but a final decision which is binding on the resolution authorities sitting in the college and having reached their consensus and is capable of affecting the interests of the concerned credit institution by bringing about a distinct change in its legal position.

In the light of this, an SRB decision on MREL following the joint decision mentioned above is simply a confirmatory decision, to which it adds specific instructions addressed to the relevant NRAs under the SRMR to the effect of having the binding MREL determination made by the joint decision duly communicated and implemented via the competent NRAs at the national level.

Therefore, from a procedural and substantive standpoint, it is the joint decision which needs to be appealed, whereas the following SRB decision cannot be appealed as it is only of confirmatory nature.

MREL DETERMINATION – Duty to state reasons
--

Pursuant to established case-law, the obligation to state reasons under Article 296 TFEU is of fundamental significance, because this requirement enables the competent judicial authority – in this context, the Appeal Panel – to ascertain whether both the factual and legal circumstances necessary for the exercise of discretionary power are present.

The statement of reasons required under Article 296 TFEU must be commensurate with the nature of the measure adopted and must set out, in a clear and unequivocal manner, the reasoning followed by the institution in question. This ensures that the parties concerned can comprehend the rationale underlying the measure and, simultaneously, enables the competent court to conduct an effective judicial review.

Specifically, regarding individual decisions the rationale for the obligation to state reasons is twofold: it facilitates judicial review and provides the addressee with sufficient information to determine whether the decision may be tainted by error, such that its validity may be contested. The adequacy of the statement of reasons must be appraised considering the circumstances of each case, the content of the contested measure, the nature of the reasons given, and the interests of the affected parties in receiving clarification. It is not necessary for the statement of reasons to enumerate every pertinent factual and legal consideration, as compliance is to be assessed both in terms of the text and the broader context, as well as the totality of applicable legal provisions.

Therefore, the statement of reasons must enable the concerned party to ascertain whether the decision is affected by an error that could serve as grounds for challenging its validity. Nevertheless, the sufficiency of the reasoning must be evaluated contextually and in light of the specific circumstances at hand. While the obligation to provide a statement of reasons is paramount, its fulfilment is to be assessed with reference to the wording of the contested measure, its context, and the entire body of legal rules applicable to the subject matter.

Moreover, the compliance with the duty to state reasons is to be assessed also in the light of previous discussions between the SRB and the entity concerned (e.g. during workshops, calls, and information exchanges), provided that the process of dialogue and cooperation (regardless of whether the parties agree or

disagree) must find expression and continuity in the final SRB decision or its annexes. The content of the summary of those discussions need not be as detailed as that of specific interactions, but if the aim is to incorporate the substance of such interactions as part of the assessment and statement of reasons, there must be a formal acknowledgement of such interactions, and their content.

MREL DETERMINATION – Increasing of MREL-LRE to nominal amount of 8% TLOF

Pursuant to Article 12d(3) of SRMR in conjunction with Article 27(7) of SRMR, MREL-LRE may be increased to the effect that it becomes equal to the nominal amount equivalent to 8% TLOF so that, if need be, Article 27(5) to 27(7) SRMR may apply.

In this regard, as pertains to the calculation of the TLOF, whereas the liabilities arising from promotional loans are excluded from the calculation of the contributions to the SRF as part of the risk adjustment to the risk profile of the relevant institution, the expression “total liabilities” employed in Article 12d(4) SRMR refers to the definition of liabilities set out in Article 4 of Directive 86/635/EEC, or in accordance with International Financial Reporting Standards, and as such it also includes the liabilities arising from promotional loans. Such difference can be explained by the “risk-adjusted” nature of the SRF contributions, in contrast to the TLOF measure, which appears to be non-risk adjusted, and thus does not contemplate any adjustments to the risk profile in the context of the MREL-LRE determination of the 8% TLOF.

MREL DETERMINATION – Downward adjustment of MREL in case of no “no creditor worse off” risk
--

In Article 12c(4) of SRMR, the absence of a material “no creditor worse off” risk is a necessary condition for the downward adjustment of MREL, but does not automatically lead to a downward adjustment, and even less to the possibility to claim such an adjustment as a matter of right if there is “no creditor worse off risk” present. Indeed, as shown by the use of the word “may” in Article 12c(4) of SRMR, the SRB still retains discretion on whether or not to apply said downward adjustment, when all the conditions set out in that provision are met.

APPEAL PROCEEDINGS BEFORE THE APPEAL PANEL – Presumption of validity of Union acts – Increasing of MREL-LRE to nominal amount of 8% TLOF

It is settled case-law of the Court of Justice of the European Union that a regulation adopted by a Union institution is presumed to be lawful and accordingly

remains fully effective if it has not been found to be unlawful by a competent judicial authority. This principle also imposes upon all persons subject to Union law the obligation to acknowledge that regulations are fully effective as long as they have not been declared to be invalid by a competent court. The power to declare the invalidity of an act of a Union institution belongs exclusively to the Court of Justice of the European Union, and that power cannot be exercised by national courts, by national administrative or supervisory authorities, by Union bodies, nor by authorities dealing with administrative appeal procedures. An exception to the above principle is made only where the act subject to an illegality exception is tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the legal order of the Union and must be treated as having no legal effect, even provisional, so that must be regarded as legally non-existent. This exception may, however, apply in quite extreme situations.

Considering the above, the Appeal Panel cannot assess nor declare the hypothetical invalidity of Article 12(d)3, subpara 4, SRMR, read in conjunction with Articles 27(7)(a) and 12c(4) of SRMR, there being nothing which taints those provisions of an irregularity whose gravity is so obvious that it cannot be tolerated by the legal order of the Union and must be treated as having no legal effect.

CASE 5/2023, FINAL DECISION OF 7 MARCH 2024

1. Keywords and summary

[.] v the Single Resolution Board

Case 5/2023 – Final Decision of 7 March 2024

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

PROCEEDING BEFORE THE APPEAL PANEL – MREL Policy

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

MREL DETERMINATION – TLAC – MREL additional requirement – Duty to state reasons

Under a textual, contextual, and finalistic interpretation of the Articles 12e and 12d SRMR, including the international standard on which such provisions were based, namely the TLAC standard approved by the Financial Stability Board, the SRB has the possibility of setting a level of MREL higher than the common minimum of the TLAC, but, if such a power is used, the SRB must justify the need of a MREL add-on in the given circumstances of each specific case. In particular, Article 12e SRMR and the use of the word “only” therein suggest that the SRB must indeed offer a robust justification when it applies a MREL add-on, and must show (i) that the TLAC is not sufficient to meet the criteria set out in Article 12d(1), (ii) the total TLAC + MREL amount that would be sufficient to meet these criteria on the basis of the specific characteristics of the entity, and (3) the MREL add-on is the difference between the two.

PROCEEDINGS BEFORE THE APPEAL PANEL – Right to be heard

The right to be heard in the administrative procedure for the adoption of the MREL decision does not include multiple rounds of comments from the entity concerned in response to the reasons stated by the SRB in the Right to be heard (“RTBH”) Assessment Memorandum. Multiple rounds of written comments could potentially trigger a circle of exchanges which would leave the procedure open until the entity had no comments to make. The joint reading of Article 12e of SRMR and Article 41 of the Charter does not suggest that the entity should be granted a right to be heard twice, or more, about the MREL add-on.

MREL DECISION – Market Confidence Charge – Combined buffer requirement – Duty to state reasons

The Market Confidence Charge for internal MREL allows the SRB to impose an additional amount of MREL, once it determines that the resolution entity may need an amount higher than the basic recapitalisation amount resulting from Article 12d(3), first subpara (a)(ii) SRMR in order to sustain market confidence for a period not exceeding a year.

Determining the amount of Market Confidence Charge that may be necessary in the future to sustain market confidence for a period not exceeding a year, is a complex and uncertain exercise. This is why the law enhances legal certainty, by providing a reference, or base amount, equal to the combined buffer requirement (“CBR”) applicable after resolution tools, less the amount under Article 128(6)(a) CRD, and the possibility of upwards and downwards adjustments, set by the SRB after consulting with the competent supervisory authority, including the ECB.

The SRB shall assess the relevant elements and provide reasons, and the MCC allows the Board, once it determines that the resolution entity may need, in order to sustain market confidence for a period not exceeding a year, an amount higher than the basic recapitalisation amount resulting, to impose the amount needed to sustain such market confidence.

MREL DECISION – Market Confidence Charge

The Appeal Panel has already held, in relation to Article 12d(3), subpara 6, of SRMR, which refers to the Market Confidence Charge in analogous language as Article 12d(6) of SRMR, that the reference to a period of “one year” could be construed in the sense that the co-legislators may have considered that, one year after the execution of the resolution, the loss of confidence of market participants vis-à-vis the resolved entity should be ultimately overcome, and, conversely, that strengthened requirements may be needed for a period “not exceeding one year” for the purpose of restoring market confidence. Also, if the SRB sets a Market Confidence Charge

amount equal to the CBR post-resolution, in line with the one existing pre-resolution, then it is justified for the SRB to conclude that such Market Confidence Charge shall apply not only in the period not exceeding one year following resolution, yet also thereafter. This is tantamount to saying that to restore market confidence the entity should have a CBR after resolution equivalent to the one before resolution, and that, since the CBR is not a requirement that necessarily expires or changes after one year, it may continue to be necessary after such period of one year.

MREL DECISION – Waiver to internal MREL – Parent entity’s guarantee for a waiver to internal MREL
--

In light of the objectives and purpose underlying Article 12h(c) of SRMR, the textual divergence between Article 12h of SRMR and Article 45(12) of BRRD – now Articles 45f(3) and 45f(4) of BRRD – cannot, in and of itself, be interpreted as precluding the SRB from requiring, under Article 12h(c) of SRMR, that the parent entity provide a guarantee of the subsidiary’s commitments in order for the SRB to grant a waiver from internal MREL, based on the assumption “*ubi lex voluit, dixit; ubi non dixit, noluit*”.

Rather, Article 12h of SRMR is to be construed as conferring the SRB a margin of discretion within the specific context of the SRMR, permitting it to assess whether such a guarantee is necessary to positively determine that there are no “material practical or legal impediments” to grant that waiver in accordance with the negative condition set forth in Article 12h(c) of the same regulation. Accordingly, the SRB is not legally obliged to require such a guarantee as a precondition for the waiver, as would be the case under the BRRD where the positive condition in Article 45(12) of that directive must be satisfied. Instead, the SRMR grants the SRB discretion to make its positive assessment of the absence of impediments contingent, inter alia, upon the provision of a parent guarantee.

Consequently, whereas under the BRRD the fulfilment of the additional positive condition of a guarantee is mandatory for the competent resolution authority and must precede the exercise of its discretion to grant or refuse the waiver from internal MREL, under the SRMR, the law does not impose such a guarantee. Nevertheless, the SRB may still, during its evaluation as to the existence of impediments to the upstreaming of losses or the down-streaming of funds in a resolution scenario, require a parent entity’s guarantee as an element supporting its determination.

MREL DECISION – Waiver to internal MREL – Contractual guarantees for a waiver to internal MREL – MREL Policy

Pursuant to Article 12h(1)(c) of SRMR, the SRB is vested with the discretion to waive the application of Article 12g of SRMR in relation to a subsidiary,

provided certain conditions are satisfied. One condition, as specified in Article 12h(1)(c) of SRMR, is that “there is no current or foreseen material practical or legal impediment to the prompt transfer of funds or repayment of liabilities.” The wording of this provision confers a margin of technical discretion upon the SRB in its assessment of whether impediments – be they “current or foreseen,” “material,” or “legal or practical” – may affect the promptness of fund transfers or liability repayments. The margin of appreciation extends to the assessment of the contents of such guarantee, where a guarantee is considered necessary. In that context the SRB needs to be reasonably satisfied that such a guarantee is functionally equivalent to the prepositioned internal MREL in a gone concern scenario.

Accordingly, the SRB is not required to prove that a guarantee “will” be revoked, or unenforceable, but only that there is a “current or foreseen,” “material,” “legal or practical” impediment to the “prompt” transfer of funds. In the positive, the condition under Article 12h(1)(c) of SRMR is not fulfilled. In such circumstances, in order for the condition to be fulfilled, the entity is required to overcome the specific objections raised by the SRB, proving that they are as such ungrounded.

Annex II to the MREL Policy identifies criteria guiding the assessment of whether a robust and enforceable intra-group loss transfer mechanism is in place, specifying that to demonstrate the free transferability of funds in a resolution scenario, entities applying for a waiver are normally expected to submit, among the other documents listed in the Annex, also a guarantee. However, Annex II also notes that “where the specificities of an individual case so justify, the SRB may adopt a different approach to its assessment of compliance with Article 12h(1)(c) or 12h(2)(c) SRMR”. Therefore, the assumption that the SRB, by its systematic request for a guarantee and its inclusion of this element in the MREL Policy, has turned an exercise of discretion into a de facto requirement, is unfounded, as Annex II to the MREL Policy clearly specifies that case-by-case deviations from the policy guidance are warranted.

MREL DECISION – MREL Policy – Principle of protection of legitimate expectations
--

The principle of legitimate expectation presupposes that precise, unconditional and consistent assurances, originating from authorised, reliable sources, have been given to the person concerned by the competent authorities of the European Union. When such precise, unconditional and consistent assurances are received from an institution, body or agency of the European Union, the addressee can entertain well-founded expectations.

Similarly to the case of the European Commission adopting the Banking Communication, the SRB, once it adopted its MREL Policy, imposed a limit on the exercise of its own discretion and cannot, as a general rule, depart from the

guidelines in that MREL Policy, at the risk of being in breach of the principle of protection of legitimate expectations. The adoption of the MREL Policy did not relieve the SRB of the obligation to examine specific circumstances. Moreover, for expectations to be protectable, the assurances stemming from the MREL Policy should be consistent with the applicable rules, as expectations may be created beyond what the law says, but not against it.

MREL DETERMINATION – Market Confidence Charge – MREL Policy – Strong reliance on wholesale funding – Commission Implementing Regulation (EU) 2021/451 – Commission Implementing Regulation (EU) 2018/1624
--

The concept of “wholesale funding” under Commission Implementing Regulation (EU) 2018/1624 refers to “lending and borrowing activities in wholesale markets to and from financial counterparties (credit institutions and other financial corporations)” because it implements Articles 11 and 13 of BRRD. For the purposes of the Market Confidence Charge for MREL, in line with its MREL Policy, the SRB relies instead on the definition of “wholesale funding” under Commission Implementing Regulation (EU) 2021/451, which implements CRR. The Appeal Panel already held that the purpose of the “wholesale funding” definition under Commission Implementing Regulation (EU) 2018/1624 is to identify the critical functions provided by the entity or group, whereas the purpose of the definition under Commission Implementing Regulation (EU) 2021/451 is to assess an entity’s liquidity risk, and it focuses on the funding received by the entity. Thus, the latter offers a reasonable yardstick to measure an entity’s reliance on types of funding that may present an added source of risk and may justify a Market Confidence Charge.

MREL DETERMINATION – Market Confidence Charge – Statistical methodologies – Principle of equal treatment

The use of statistical methodologies, such as the quartile ranking of wholesale funding ratios, is admissible to assess the need of a Market Confidence Charge for an entity, provided these methodologies are applied in an objective, non-arbitrary, and transparently communicated manner. Such methodologies serve both to guarantee the principle of equal treatment and to prevent any form of discrimination among institutions within the SRB’s remit. This approach ensures both the identification of an individual institution’s reliance on wholesale funding and the implementation of objective and non-discriminatory treatment among all entities subject to the SRB’s authority. The Appeal Panel is not empowered to set aside the Board’s assessment where it is factually substantiated by evidence, proportionate, reasonable, and free from discriminatory effect. To contest a decision based on these criteria, the entity must demonstrate that the application of such a criterion yields unreasonable outcomes, or that alternative, more appropriate criteria exist for the intended purpose.

CASE 1/2023, FINAL DECISION OF 15 MAY 2024

1. Keywords and summary

[.] and [.] v the Single Resolution Board

Case 1/2023 – Final Decision of 15 May 2024

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

MREL DETERMINATION – Resolution plan – Material change of the status of a credit institution – Amendments to MREL determination

Article 8(12) SRMR requires the SRB to make the resolution plan and on the MREL determination not only annually, but also after any “material change” of the status of the institution concerned and that institutions, the ECB and NCAs are to promptly notify the SRB of any such material change that may necessitate a revision of that determination.

Amendments to the annual MREL determination should also be made quickly following a material change, provided the adoption process of the resolution plan is still ongoing and can accommodate such updates. The procedure must allow for timely incorporation of significant changes communicated in advance by institutions, if these changes are both material and submitted before the final decision.

MREL DETERMINATION – TLAC – MREL additional requirement – Duty to state reasons

Under a textual, contextual, and finalistic interpretation of the Articles 12e and 12d SRMR, including the international standard on which such provisions were based, namely the TLAC standard approved by the Financial Stability Board, the SRB has the possibility of setting a level of MREL higher than the common minimum of the TLAC, but, if such a power is used, the SRB must justify the need of a MREL add-on in the given circumstances of each specific case. In particular, under Article 12e(3) SRMR, the SRB may assess that, for EU G-SIIs, the amount of the common minimum of TLAC is not sufficient to fulfil the conditions set out in Article 12d SRMR taking into consideration the factors specific to those institutions (e.g. (i) size (ii) business model, (iii) funding, (iv) risk profile, or (v) the potential impact of the entity’s failure in financial stability), leading to the determination of an add-on necessary to ensure that the conditions set out in Article 12d SRMR are fulfilled.

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

MREL DETERMINATION – TLAC – MREL additional requirement – Duty to state reasons

Article 12e of SRMR balances TLAC and MREL by stating that the SRB “shall impose” an add-on “only” if TLAC is insufficient to comply with the conditions of MREL, i.e., loss absorbency and recapitalisation amounts including adjustments. The Appeal Panel has previously concluded that (i) although the SRB must acknowledge TLAC and MREL as two separate standards, (ii) Article 12e of SRMR does not require a separate methodology to assess MREL for G-SIIs (or material subsidiaries of non-EU G-SIIs), but (iii) the provision requires a robust assessment and justification of why TLAC is insufficient to comply with loss absorbency and recapitalisation requirements under Article 12d SRMR, and what levels would be needed to do so in the light of the entity’s individual features.

MREL DETERMINATION – Case-by-case approach when determining MREL

The SRB’s MREL Policy limits the SRB’s discretion but still requires consideration of each case’s specifics. The Appeal Panel has previously found that (i) this requires a bank-by-bank assessment; (ii) a bank may present a reduced balance sheet, especially if its failure is attributable to credit losses; (iii) the predominance of credit risk serves as an “indicator”, and increases the “likelihood” of applying the balance sheet depletion effect. Nevertheless, this explanation does not clarify the application of these factors to individual cases, underscoring the need for a tailored approach.

MREL PROCEEDING BEFORE THE APPEAL PANEL – Prohibition on ruling *ultra petita*

The Appeal Panel is limited to examining *ex officio* matters of public policy, such as determining whether the statement of reasons is absent or insufficient, along with other fundamental procedural safeguards. Except for these specific exceptions, the proceedings are *inter partes*; therefore, it is the responsibility of the appellant to present legal arguments against the decision and to provide supporting evidence. The SRB must demonstrate the relevant components of

the decision, while the appellant must identify the elements under challenge, formulate grounds for contesting them, and submit either direct or circumstantial evidence to support their objections.

MREL DETERMINATION – Market Confidence Charge – MREL Policy – Combined buffer requirement – Duty to state reasons

The Market Confident Charge for internal MREL allows the SRB to impose an additional amount of MREL, once it determines that the resolution entity may need an amount higher than the basic recapitalisation amount resulting from Article 12d(3) first subpara (a)(ii) SRMR in order to sustain market confidence for a period not exceeding a year.

Determining the amount of Market Confidence Charge that may be necessary in the future to sustain market confidence for a period not exceeding a year, is a complex and uncertain exercise. This is why the law enhances legal certainty, by providing a reference, or base amount, equal to the combined buffer requirement (“CBR”) applicable after resolution tools, less the amount under Article 128(6)(a) CRD, and the possibility of upwards and downwards adjustments, set by the SRB after consulting with the competent supervisory authority, including the ECB.

The SRB shall assess the relevant elements and provide reasons, and the fact that the SRB chooses to maintain the base amount does not mean that it has failed to assess the appropriate levels for the Market Confidence Charge.

As previously held by the Appeal Panel, the criterion of assessment of the necessity of a Market Confidence Charge based on the entity’s complexity and strong reliance on wholesale funding, which applies the SRB’s MREL Policy, para 30, is aligned with the legal framework, and thus not in breach of Article 12d(6) of SRMR. Indeed, a higher level of wholesale funding can result in a more unstable funding base, which makes an entity more dependent on retaining market confidence, which *prima facie* justifies the presence of a Market Confidence Charge, and, even if different circumstances could influence the situation in practice, the fact that the SRB had to reason from the crisis scenario backwards, justified the use of an element like funding that proved relevant in past crises. Furthermore, the link between complexity and systemic importance is acknowledged, as an entity’s complexity could complicate its resolution and thus make it more dependent on market confidence.

MREL DECISION – Market Confidence Charge – Period of “one year” for the Market Confidence Charge
--

The Appeal Panel has already held, in relation to Article 12d(3), subpara 6, SRMR, which refers to the Market Confidence Charge in analogous language as Article 12d(6) SRMR, that the reference to a period of “one year” could be

construed in the sense that the co-legislators may have considered that, one year after the execution of the resolution, the loss of confidence of market participants vis-à-vis the resolved entity should be ultimately overcome, and, conversely, that strengthened requirements may be needed for a period “not exceeding one year” for the purpose of restoring market confidence. Also, if the SRB sets a Market Confidence Charge amount equal to the CBR post-resolution, in line with the one existing pre-resolution, then it is justified for the SRB to conclude that such Market Confidence Charge shall apply not only in the period not exceeding one year following resolution, yet also thereafter. This is tantamount to saying that to restore market confidence the entity should have a CBR after resolution equivalent to the one before resolution, and that, since the CBR is not a requirement that necessarily expires or changes after one year, it may continue to be necessary after such period of one year.

MREL DETERMINATION – Market Confidence Charge – MREL Policy – Intragroup support

The assessment of the Market Confidence Charge for internal MREL depends on the existence of conditions such as “complexity” and “strong reliance on wholesale funding”. If those conditions apply, intragroup support can justify a downwards adjustment of the Market Confidence Charge for internal MREL. However, intragroup support as a substitute of MREL is only contemplated in very specific cases, e.g., collateralised guarantees between entities in the same Member State (Article 12g(3) of SRMR), or guarantees between entities in the same Member State, where they constitute evidence that there are no “current or foreseeable material legal or practical impediment for the prompt transfer of funds” (Article 12h of SRMR). Conversely, where a guarantee does not comply with these conditions (e.g. where the parent is outside the EU), an entity cannot claim a legitimate expectation that the SRB will deviate from its methodology for assessing the need of a Market Confidence Charge for internal MREL, and consider the intragroup support as a substitute of the Market Confidence Charge for internal MREL, or any other element of MREL. Thus, in these conditions, by failing to mention the intragroup support in the assessment of the “necessity” of a Market Confidence Charge the SRB does not violate Article 12d(6), subpara 8, of SRMR.

MREL DETERMINATION – Market Confidence Charge – MREL Policy – Strong reliance on wholesale funding – Commission Implementing Regulation (EU) 2021/451 – Commission Implementing Regulation (EU) 2018/1624
--

The concept of “wholesale funding” under Commission Implementing Regulation (EU) 2018/1624 refers to “lending and borrowing activities in wholesale markets to and from financial counterparties (credit institutions and other financial corporations)” because it implements Articles 11 and 13 of BRRD.

For the purposes of the Market Confidence Charge for MREL, in line with its MREL Policy, the SRB relies instead on the definition of “wholesale funding” under Commission Implementing Regulation (EU) 2021/451, which implements CRR. The Appeal Panel already held that the purpose of the “wholesale funding” definition under Commission Implementing Regulation (EU) 2018/1624 is to identify the critical functions provided by the entity or group, whereas the purpose of the definition under Commission Implementing Regulation (EU) 2021/451 is to assess an entity’s liquidity risk, and it focuses on the funding received by the entity. Thus, the latter offers a reasonable yardstick to measure an entity’s reliance on types of funding that may present an added source of risk and may justify a Market Confidence Charge. The Appeal Panel already held that it is reasonable for the SRB to use the criterion for determining whether an entity shows a “strong” reliance on wholesale funding envisaged in the MREL Policy, based on the statistical distribution of the different entities, where the threshold for “strong” reliance is placed in the third.

Furthermore, the concept of “wholesale funding” used by the SRB refers to the source of funding, not to the long-term or short-term nature of the funding. Thus, even if wholesale funding may present a risk that is especially acute in scenarios of wholesale short-term funding, and especially if there are maturity mismatches, it does not seem that the relevance of wholesale funding is exhausted by those scenarios. It is possible to envisage stressed scenarios involving other combinations, e.g., an entity reliant on wholesale funding, and a business model that results in a relatively low quantity of loans, and a high volume of securities, which are revalued due to changes in underlying market conditions, which may, in turn, justify an additional charge to bolster market confidence.

CASE 2/2024, FINAL DECISION OF 11 JUNE 2024

1. Keywords and summary

[.], *Appellant v the Single Resolution Board*

Case 2/2024 – Final Decision of 11 June 2024

SRB's decision denying access to confidential documents pertaining to the resolution of a credit institution, as amended in compliance with the decision of the Appeal Panel under Article 85(8) of SRMR

PROCEEDING BEFORE THE APPEAL PANEL – Scope of an appeal against a SRB's decision adopted after the Appeal Panel's remittal

Where the Appeal Panel dismisses an appeal in part, while it finds in favour of the appellant in part, remitting the case to the SRB, in principle the appeal against the new SRB's decision should not result in a retrial of the parts of the original decision for which the Appeal Panel's decision did not require an amendment. A different approach would, in substance, grant the appellant a second chance to retry those parts of the original decision for which its grounds of appeal had been already dismissed by the Appeal Panel or which the appellant had failed to challenge in the first appeal. This would be in violation of the deadline of six weeks set out by Article 85 SRMR for the filing of the appeal.

On the contrary, in cases where the Appeal Panel dismisses an appeal in part, while it finds in favour of the appellant in part, remitting the case to the SRB, it is not yet settled by the case-law of the European Courts if the appellant enjoys or lacks the possibility to challenge the parts of the new SRB's decision where the first appeal was dismissed because the case as a whole was remitted. Considering that even though the Appeal Panel is not a judicial body *proprio sensu*, it is well determined to ensure the full respect of the appellant's right to an effective judicial protection before European courts, especially since the Appeal Panel's role is now acknowledged in the system of judicial protection under the new Article 58a of the Statute of the Court of Justice, where the SRB has adopted a new decision that substantially modifies the previous one, especially in its reasoning but also in the extent of the redactions in the relevant documents, and the appellant alleges non-compliance of the new SRB's decision with the Appeal Panel's decision, but also challenges the reasoning of the new decision, raising fundamental matters of principle, the Appeal Panel may consider admissible extensive grounds of appeal.

PROCEEDING BEFORE THE APPEAL PANEL – Binding effects of the Appeal Panel’s remittal decision

Under Article 85(8) of SRMR, the SRB is bound by the decision of the Appeal Panel and shall adopt an amended decision regarding the case concerned.

By analogy with the European courts’ case-law on Article 266 TFEU, the extent of the SRB’s obligation to comply with the Appeal Panel’s decision includes not only the operative part of that decision, but also the grounds underlying it. The compliance in substance with the grounds underlying the operative part cannot be established in the abstract, but is inextricably linked to the assessment of case at hand.

PROCEEDING BEFORE THE APPEAL PANEL – Reasonable time for SRB’s decision after the Appeal Panel’s remittal

The adoption of a new decision by the SRB after the Appeal Panel’s decision to remit the case 9 and a half months after that Appeal Panel’s decision might not be within a reasonable time pursuant to Article 21(4) of the Rules of procedure adopted by the Appeal Panel. However, a remittal by the Appeal Panel to the SRB of the SRB’s new decision on this ground would not remedy the delay and thus would serve no practical purpose in the context of Article 85 SRMR. On the contrary, it would be counterproductive as it would delay the possibility for the appellant to further the issue to the attention of the Court of Justice under Article 86 SRMR.

RIGHT TO ACCESS – Non-existence of the document requested – Burden of proof in right to access procedures

Once a European institution, body or agency asserts that a document does not exist, it is not obliged to create a document which does not exist and can rely on a presumption that, indeed, the document does not exist, a presumption of veracity that can be rebutted by pertinent and consistent evidence to the contrary.

RIGHT TO ACCESS – Regulation (EC) 1049/2001 – “Policy” exception to the right to access under Regulation (EC) 1049/2001 – Deposit outflows, liquidity coverage and counterbalancing capacity of a credit institution preceding its resolution

Under Article 4(1)(a) fourth indent of Regulation (EC) 1049/2001, disclosure of a document shall be refused when it would undermine the protection of financial, economic or monetary policy of the Union or a Member State. That provision, as regards the protection of the financial policy of the Union, does

not allow the SRB to refuse access to the deposit outflows, liquidity coverage and counterbalancing capacity of a credit institution in the days preceding its resolution.

Contrary to the SRB's allegations, it is implausible that the disclosure of such meaningful details of the methodology applied in the specific case would give rise to unfounded speculations about the way in which the SRB might act in the future. If anything, it would be the refusal to disclose that could give rise to unfounded speculation as to the circumstances that led to the crisis management measure adopted over.

Nor would the said disclosure unreasonably influence the behaviour of other market participants or compromise the effectiveness and reliability of SRB's internal methodology, as the Appeal Panel finds that wider public access to the information available in the SRB's decision makes the SRB more accountable, enhances public trust and helps the market participants gain a better understanding of the measures taken by the SRB.

RIGHT TO ACCESS – Regulation (EC) 1049/2001 – “Commercial interest” exception to the right to access under Regulation (EC) 1049/2001 – Protection of confidentiality – ECB Decision 2004/258 – Protection of confidentiality under ECB Decision 2004/258 – Deposit outflows, liquidity coverage and counterbalancing capacity of a credit institution preceding its resolution

The protection of commercial interest of the parties concerned under Article 4(2) of Regulation (EC) 1049/2001 and the protection of the confidentiality of information falling within the scope of Article 4(1)(c) of ECB Decision 2004/258 in conjunction with the first indent of Article 4(2) may ground a refusal to disclose deposit outflows, liquidity coverage and counterbalancing capacity of a credit institution in the days preceding its resolution, as such information originates from the ECB, which stated that that information falls within the scope of Article 4(1)(c) of ECB Decision 2004/258 and disclosure thereof would affect that credit institution, thereby impacting the smooth functioning of the prudential supervision as a whole.

This position is in line with the judgment of 6 October 2021, *Aeris Invest Sàrl v ECB*, Case T-827/17, where the General Court found that the refusal by the ECB to disclose the information on the liquidity situation and capital ratios of Banco Popular Español (which was resolved) was justified, since the information requested was in any case confidential, not being in the public domain, and the ECB was entitled to take the view that such disclosure would adversely affect the commercial interest of third parties and the proper functioning of the prudential supervision system.

The Appeal Panel considers that the interests referred to in the *Aeris* case would also be undermined if disclosure of such information were to be obtained not from a document of the ECB but from a document of the SRB which incorporates the supervisory data originated by the ECB.

RIGHT TO ACCESS – Regulation (EC) 1049/2001 – “Commercial interest” exception to the right to access under Regulation (EC) 1049/2001 – Information on the negotiation and offer of the acquirer of a resolved credit institution – Overriding public interest – Burden of proof in right to access procedures

A refusal to disclose certain parts of documents relating to the negotiation with the authorities and the offer by the acquirer of a resolved credit institution (including the purchase price, or conditions and assumptions) can be justified under the “commercial interest” exception laid down in Article 4(2) first indent of Regulation (EC) 1049/2001 to protect the interest of that acquirer of the resolved entity.

This position is in line, *mutatis mutandis*, with the judgment of 6 October 2021, *Aeris Invest Sàrl v ECB*, Case T-827/17, where the General Court stated that the disclosure of certain information is liable to undermine the mutual trust between the ECB and the institutions under supervision, which might no longer be sure that the information they are likely to provide to the ECB in the future in the context of prudential supervision will remain confidential.

Furthermore, concerning the issue of the existence of a public interest in disclosure overriding the interest to confidentiality, in accordance with the settled case of the Court of Justice it is for the SRB to assess and justify the existence of exceptions to disclosure, while it is for the appellant to prove the existence of an overriding public interest in disclosure.

RIGHT TO ACCESS – “Privacy and integrity” exception to the right to access under Regulation (EC) 1049/2001 – Concept of personal data

The exception to disclosure laid down in Article 4(1)(b) of Regulation (EC) 1049/2001 aims to protect the “privacy and the integrity of the individual, in accordance with Community legislation regarding the protection of personal data”. According to European courts’ case-law, in so far as a document of which the disclosure is sought contains information that would make it possible to connect to one particular expert or another a particular comment, that information concerns identified natural persons and, accordingly, constitutes a set of personal data that is to be excluded from disclosure.

The fact that the said information is provided as part of a professional activity does not mean that it cannot be characterised as a set of personal data. In particular, the acceptance to participate in the crisis management of a failed bank by a specific expert does not count as a waiver of his or her right to privacy.

Moreover, the disclosure of such personal data would amount to a “transfer” under Regulation (EU) 2018/1725, which can only happen under the conditions envisaged in that specific legislation, which do not apply in the present case.

RIGHT TO ACCESS – Protection of confidentiality – Professional secrecy under Article 88 of SRMR – Concept of confidential information – *Baumeister* case

In judgment of 18 June 2018, *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, Case C-15/16, the Court of Justice clarified the notion of the confidential information that is covered by the obligation to maintain the professional secrecy laid down in Article 54(1) of Directive 2004/39/EC (functionally corresponding to Article 88 of SRMR). According to the Appeal Panel, the Court of Justice encompassed in the said notion only information held by competent authorities (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interest of the natural or legal persons who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of supervised entities.

RIGHT TO ACCESS – Duty to state reasons – Reasons to refuse disclosure – Amendments to the statement of reasons by the SRB after the remittal by the Appeal Panel

The SRB complies with its duty to justify the refusal of public access to parts of its decisions by providing detailed reasons that concretize the interests being protected, enabling the reader to understand whether the redacted information falls within the scope of the exception to the right to access relied on by the SRB.

Nothing prohibits the SRB from relying on different reasons in a decision that follows the remittal by the Appeal Panel where the latter found that the statement of reasons in the original decision was insufficient and not compliant with the law.

RIGHT TO ACCESS – Access to the file under Article 90(4) of SRMR

Pursuant to Article 85(3) of the SRMR, the Appeal Panel has no competence to hear appeals against a decision of the SRB denying access to the file to persons who are the subject of its decisions under Article 90(4) of the SRMR.

If an Appellant could get access, in the course of the proceedings before the Appeal Panel to the confidential version of the documents to which it has requested but was denied public access by the SRB, the Appeal Panel's decision concerning the SRB's decision denying access would be made irrelevant and devoid of purpose.

THE JUDGMENTS OF THE NATIONAL APICAL COURTS

ITALY

[.] v [.]

INTERVENTION AD OPPONENDUM BY BANCA D'ITALIA

1. Keywords and summary

[.] v [.]; *intervention ad opponendum by Banca d'Italia*

Consiglio di Stato, sect. VI, Judgment of 5 April 2024, No 3131¹

Confidentiality of the annual report on the compulsory administrative liquidation of a bank

COMPULSORY ADMINISTRATIVE LIQUIDATION OF BANKS – Liquidators
– Administrative nature of the activity of the liquidator appointed by Banca d'Italia

Although the liquidator of a credit institution appointed by Banca d'Italia pursuant to Article 81 of the TUB, in carrying out his duties during the compulsory administrative liquidation procedure of that credit institution, may engage in acts and transactions of private law nature, their activity is to be classified as of administrative nature, as it is aimed at protecting public interests while managing the orderly market exit of that credit institution.

RIGHT TO ACCESS – Compulsory administrative liquidation of banks
– Protection of confidentiality – Confidentiality of the annual report on the compulsory administrative liquidation procedure of banks

Under Article 7 of TUB, all information and data held by Banca d'Italia on account of its supervision are protected by confidentiality, which therefore covers also the annual report on the compulsory administrative liquidation procedure that, under Article 84 of TUB, the liquidator appointed by Banca d'Italia pursuant to Article 81 of the same law must submit to the same authority. Such a report is indeed not public and kept exclusively by Banca d'Italia as the supervisory authority.

In the first instance, it is up to Banca d'Italia to balance the public interest to the confidentiality of that document with the interest to access that same document put forward by a private party.

¹ Italian version available [here](#).

2. The exclusive competence of the Bank of Italy to decide on the access to the annual report provided for in Article 84, para 4, of Testo Unico Bancario

by Donatella La Licata and Michelino Villani

1. By the judgment No. 3131 of 2024, the Italian Supreme Administrative Court (*Consiglio di Stato*) ruled on the Bank of Italy's intervention in an appeal proceeding concerning a request for access to the documents relating to the liquidation procedure of Aigis Banca.

A creditor of Aigis Banca, a less significant credit institution put under compulsory administrative liquidation in 2021, submitted a request to the liquidator for access to a wide range of documents regarding the liquidation procedure. In essence the creditor, whose claim against the bank was fully admitted, explained in the application that, in this capacity, he had the right to obtain information on the progress of the procedure for any subsequent decision (including legal initiatives).

The liquidator denied the request, essentially objecting that the application was too generic and that, in any case, the activity of the liquidator was outside the scope of the access to documents regime laid down in the Law No. 241 of 1990.

The creditor brought an action against Aigis Banca before the *TAR Lombardia* in order to obtain the annulment of the denial and therefore the court's order to disclose the documents.

The *TAR*² established that the application was partially founded and thus ordered the liquidator to give full access to some of the requested documents, among which the annual report that the liquidator had submitted to the Bank of Italy as per Article 84, para 4, of *Testo Unico Bancario (TUB)*, the list of creditors and of holders of financial instruments under Article 87, para 7, *TUB* and the inventory. As to the other documents, the *TAR* considered, in line with the liquidator's position, the request to be in part inadmissible, where it concerned documents falling outside the scope of the access to documents regime,³ and in part unfounded, where it concerned documents not existing.

Aigis Banca appealed against this judgment to the *Consiglio di Stato*.

The Bank of Italy, which was not a party to the dispute, decided to file an intervention in the appeal proceeding in order to support some of the pleas in law put forward by Aigis Banca, basically on the ground that the first instance ruling prejudiced its prerogatives of supervisory authority to the extent that it

² Judgment No. 2655 of 2023.

³ In sum, the court held that it did not have jurisdiction over the accessibility of the documents concerning the activity aimed at liquidating the bank's assets, as it could not be considered a public administration activity (see also footnote No. 6).

deemed that the liquidator was entitled to decide on the access to the annual report provided for in Article 84, para 4, *TUB* and, what's more, it required the liquidator to fully disclose said document. According to the Bank of Italy, only the supervisory authority is competent for assessing a request for access to such a document, as it falls within the provision of Article 7 *TUB*.

2. As a preliminary point, the *Consiglio di Stato* scrutinized the admissibility of the intervention on the basis of Article 97 of *Codice del processo amministrativo* (Legislative Decree No. 104 of 2010, which contains the rules of procedure before the administrative courts). In this respect, the *Consiglio di Stato* found that Bank of Italy had *locus standi* to ask for the review of the first instance ruling, as it authorized the disclosure of a document subject to secrecy, thus harming the interest of the supervisory authority; besides, it considered the strict conditions for the admissibility of the intervention – as elaborated by the jurisprudence of administrative courts – to be fulfilled, since it was limited to endorsing some of the appellant's complaints and did not introduce new pleas.⁴

As to the merits, the court, upholding the Bank of Italy's arguments, recognized that the annual report falls within the secrecy established in Article 7 *TUB*, which applies to all the information and data held by the Bank of Italy "on account of its supervisory activity". In the court's reasoning, said provision can be referred also to the functions that the Bank of Italy carries out in the course of the compulsory liquidation procedure, since they likewise qualify as supervision.⁵ Although the report is drafted by the liquidator – the court observed – it is exclusively kept by the supervisory authority for the performance of its tasks in this field. Such a connection requires that the document be protected by the shield of Article 7, which is designed to preserve the effective functioning of the supervision.

Being the application of said provision an exclusive domain of the Bank of Italy, the decision on whether, and to what extent, to disclose the annual report is reserved to it. In particular, it is for Bank of Italy to conduct the balancing test between the interest underlying the access request and the protection of confidentiality, a necessary step when it comes to the "defensive access" (*accesso difensivo*) protected under Article 24, para 7, of the Law No. 241 of 1990.⁶

⁴ According to Article 97 of *Codice del processo amministrativo*, anyone having an interest may intervene in the appeal proceeding. As held by the *Consiglio di Stato* in several occasions (e.g. *Cons. St., Ad. Plen.*, No. 10 of 2020; *Cons. St.*, No. 5596 of 2017), the intervention laid down in this provision must be merely ancillary and therefore exclusively aimed at supporting the grounds of one of the parties.

⁵ The court mentioned, among others, the Bank of Italy's powers to: i) appoint and dismiss the liquidator and the members of the supervisory committee (Article 81 of *Testo Unico*); ii) issue binding instructions to the liquidator (Article 84); iii) authorize the liability actions against the previous bodies of the bank (Article 84); iv) authorize the distribution of the liquidation proceeds (Article 92).

⁶ Pursuant to this provision, access to documents "whose knowledge is necessary for the care or defense of one's legal interests" must be ensured.

In the case at hand, the request for access to the liquidator deprived the Bank of Italy of the possibility to govern the access to the annual report through the aforementioned test.

In light of the above considerations, the *Consiglio di Stato* concluded that the first instance court erroneously considered that the liquidator is entitled to decide on the access to a document that, once transmitted to the supervisory authority, comes into the perimeter of Article 7; therefore, it annulled the judgment of *TAR* inasmuch as it ordered the liquidator to disclose the document at issue.

The judgment further pointed out that the annulment does not prejudice the submission to the Bank of Italy of a new request for access to the annual report, as the *Consiglio di Stato*, on this occasion, could not rule on the merits of the creditor's application in that part, due to the lack of a prior determination from the Bank of Italy on the matter.

On the contrary, the judgment dismissed the other grounds of appeal.

First, the *Consiglio di Stato* rejected the appellant's lack of jurisdiction objection, on the reason that the activity of the liquidator in the compulsory administrative liquidation, although sometimes taking the form of contractual transactions, is tantamount to a public administration activity, insofar as it is instrumental to the protection of public interests;⁷ hence the access to documents regime laid down in Law No. 241 of 1990 does apply and this, in turn, triggers the jurisdiction of administrative courts, which includes, as known, the resolution of disputes on this matter.⁸

Having thus established its jurisdiction, the court did not take the view that the remaining documents⁹ (the inventory, the list envisaged in Article 87, para 7, *TUB*, the periodic information to creditors under Article 84, para 4, *TUB*) were likewise subject to secrecy and thereby to the necessary scrutiny from the supervisory authority. On this basis, the judgment held that the appellant's denial was unfounded in this part, because the creditor evidently¹⁰ had a defensive

⁷ The judgment, in this respect, followed fairly consolidated jurisprudence on the qualification of the acts of the company liquidator appointed by a public administration as administrative acts, although it does not concern, to a large extent, the compulsory administrative liquidation of banks (see, among others, *Cons. St.*, No. 4798 of 2014; *TAR Lazio*, No. 4330 of 2016). There are nonetheless some diverging precedents (see, in particular, as to the liquidation of credit institutions, *TAR Lazio*, No. 1127 of 2018). It should also be remarked that the decision of the *TAR Lombardia* in the case at hand excluded that the entire activity of the liquidator could be reviewed by administrative courts: specifically, it opined that the activity aimed at liquidating the bank's assets was beyond its jurisdiction, since the fulfilment of this task simply consists in the conclusion and execution of contracts. As a result, the *TAR* declared the creditor's application inadmissible in the part regarding the documents expressing this task (see, in the same vein, *Cons. St.*, No. 1594 of 2018).

⁸ See Article 133, para 1, let. a) of *Codice del processo amministrativo*.

⁹ Given that the creditor did not cross-appeal the ruling of the *TAR Lombardia* in the part where it did not grant access to some of the documents, the access to these documents could no longer be questioned, as the ruling in this part had become final.

¹⁰ Considering the defensive interest to be evident, the court did not give importance to the fact that the request lacked indications of the intended legal initiatives.

interest in having knowledge “at least of those documents that contain precise data on the composition of assets and liabilities”, which could have helped the applicant, e.g., to evaluate the credit or decide whether to initiate a legal action. In other words, the court considered that the creditor could benefit from the special protection afforded to the *accesso difensivo* as per Article 24, para 7, of the Law No. 241 of 1990. Hence the *Consiglio di Stato*, similarly to the first instance court, ordered the liquidator to give access to those documents with the sole limit of redacting the names of all the persons indicated therein: in the *Consiglio di Stato*’s view, the creditor failed to demonstrate of having a specific necessity of knowing the names of the creditors and other persons mentioned in the documents.

3. The judgment at issue merits some remarks.

The *Consiglio di Stato* established that the powers of direction and control over the compulsory liquidation procedure conferred on the Bank of Italy fit the notion of ‘supervision’ inherent to Article 7.

This finding has made it possible to overcome, to a certain extent, the uncertainty deriving from some, though not recent, precedents that adopted a narrow interpretation of said provision, whereby the secrecy should concern exclusively the Bank of Italy’s tasks laid down in the Title III – headed “Supervision” – of *TUB*.¹¹ Even though the most recent rulings, regardless of this restrictive and formalistic approach, have applied the secrecy regime to documents pertaining to the Bank of Italy’s tasks in the field of crisis management (which are envisaged in the Title IV *TUB*),¹² there was no settled jurisprudence on the question of whether Article 7 could extend to the Bank of Italy’s functions carried out during the liquidation, *id est* in the phase following the decision to put a bank under liquidation.¹³

In establishing the exclusive competence of the Bank of Italy to decide on the access to the annual report, the judgment, in line with a well-established stance, confirmed that, especially when it comes to the *accesso difensivo*, secrecy does not amount to an absolute exemption from access. In such a case the public authority is required to find a balance between the right of defense and the need to keep the documents, or part of them, confidential; this entails that the authority checks, on the one hand, whether the documents sought could be instrumental

¹¹ In particular, *Cons. Giust. Reg. Sic.*, No. 143 of 1999 and *TAR Lazio*, No. 416 of 2000.

¹² See, e.g., *TAR Lazio*, No. 4906 of 2020.

¹³ Interestingly, this approach makes the scope of Article 7 larger than that of 53, para 1, of Directive (EU) 2013/36 (Credit Requirement Directive: CRD), which sets out the general obligation of secrecy incumbent on the banking supervisory authority. In the decision of 13 September 2022 (C-45/21) the Court of Justice of the European Union clarified that the obligation under Article 53 CRD covers only the functions governed by the Directive in question and does not extend to the powers relating to the reorganisation and winding up of credit institution that the national legislators may have conferred on the prudential supervision authority (see paras 107-124).

for defensive purposes¹⁴ and, on the other, whether, and to what extent, there is a current and specific interest in maintaining secrecy.¹⁵

The approach adopted by the *Consiglio di Stato* – it could be argued – results in a derogation from Article 25, para 2, of Law No. 241 of 1990, whereby the access request can be submitted alternatively to the public administration that drew up the document or to the one that holds it. Anyone who wants to have access to the annual report has no other choice but to submit the application to the Bank of Italy, despite the fact that this document was formed by a person – the liquidator – who, in the *Consiglio di Stato*’s view, is equally bound by the legislation on the access to documents and, as a consequence, in principle entitled to process and evaluate requests of this kind.

It is also noteworthy that the ruling in question is, as far as known, the first – since the entry into force of the Italian *Codice del processo amministrativo* – to adjudicate on an intervention in the appeal proceeding presented by the Bank of Italy in its capacity as supervisory authority. The *Consiglio di Stato* acknowledged that the Bank of Italy can in principle resort to the intervention provided for in Article 97 of the mentioned Code, provided that the tight requirements of admissibility are met.

3. Reference to “notes de doctrine”

DOMENICO MUSSO, GIUSEPPE BOCCALONE, *Accesso agli atti nella liquidazione coatta amministrativa*, DB non solo diritto bancario, 29 January 2025.

¹⁴ See, on this regard, *Cons. St., Ad. Plen.*, No. 24 of 2020.

¹⁵ See, in particular, *Cons. St.*, No. 3003 of 2016, concerning a case of access to documents held by the market authority (*Consob*), which are subject to the secrecy regime under Article 5 of the Legislative Decree No. 58 of 1998.

[.] v BANCA D'ITALIA

1. Keywords and summary

[.] v *Banca d'Italia*

Corte di Cassazione, sect. II, Judgment of 29 March 2024, No 8581

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

ADMINISTRATIVE PECUNIARY SANCTIONS – Right to defence

The sanctioning procedure carried out by Banca d'Italia does not violate the right of defence of the person concerned. In fact, even though Article 24(1) of Law No 262/2005 states that sanctioning proceedings are carried out in compliance with the principles of access to the file, of adversarial process, and of distinction between investigative and decisional functions, the direct applicability of Articles 24 and 111 of the Italian Constitution is to be excluded, as the right of defence and the main principles informing judicial proceedings enshrined therein are applicable only to judicial proceedings, where the person concerned may challenge the sanctioning decision.

ADMINISTRATIVE PECUNIARY SANCTIONS – Sanctions not criminal in nature

The administrative pecuniary sanctions imposed by Banca d'Italia pursuant to Article 144 of TUB on persons who perform functions of management or control of credit institutions are not comparable, in terms of severity and impact on fundamental rights and freedoms, to those provided for by Article 187-ter of TUF as regards market manipulation, which were deemed criminal in nature by the ECtHR. Thus, the sanctions imposed by Banca d'Italia are not criminal in nature and do not pose a problem of compatibility with the guarantees provided for by Article 6 of the ECHR. In order to exclude the criminal nature of these sanctions, the absence of accessory sanctions and of mandatory confiscation are also relevant.

DUTIES OF MEMBERS OF CREDIT INSTITUTIONS' BODIES – Duty to act in an informed manner – Duty of due care – Liability of members of credit institutions' bodies – Non-executive members of the Board of Directors

In the banking sector, non-executive members of the management body must always act in an informed manner and, by virtue of the professional requirements

they must possess, must prevent, to the extent possible, violations of law by the executive members of the same body.

This duty, provided for by Articles 2381(3) and (6) and 2392 of the Italian Civil Code, is not fulfilled by merely relying on the reports of the executive directors; each non-executive member of the management body must have an adequate knowledge of the banking business and, participating in the management strategy decisions taken by the entire body, must contribute to ensure effective risk governance in all bank's activities and must also be active in monitoring the choices made by the executive directors, also in order to exercise the powers of direction or taking over of the activities delegated to certain members of the management body. The duties of the aforesaid members are of particular significance, since they correlate not only to the contractual liability of those members towards the shareholders of the bank, but also to the liability towards the supervisory Authority.

DUTIES OF MEMBERS OF CREDIT INSTITUTIONS' BODIES – Liability of members of credit institutions' bodies – Burden of proof in sanctioning proceedings – Presumption of negligence – Non-executive members of the Board of Directors

The liability of members of the management body of a credit institution is framed by the legislator focusing on their mere conduct, which, for the purpose of a sanctioning proceeding, must be characterised in itself as being in violation of law. It follows that the investigation on the offence is limited, per se, to ascertaining that a non-compliant conduct has occurred and is imputable to the person concerned, by virtue of the presumption of negligence pursuant to Article 3 of Law No 689/1981.

Once Banca d'Italia has proved that there were warning signals that the non-executive members of the Board of Directors of a credit institution should have followed by demanding additional information to the executive directors or by taking other effective action, it is for those non-executive members of the Board of Directors to prove that they in fact took the necessary actions to tackle the situation or, in any event, to avert damages.

[.] v BANCA D'ITALIA

1. Keywords and summary

[.] v Banca d'Italia

Corte di Cassazione, sect. II, Judgment of 16 April 2024, No 10277

Administrative pecuniary sanctions imposed by Banca d'Italia under the TUF

ADMINISTRATIVE PECUNIARY SANCTIONS – Time limit for the conclusion of a sanctioning procedure – Specific nature of law on administrative sanctioning procedure

In accordance with the case-law, the time limit of 240 days for the conclusion of the sanctioning proceeding, stipulated by a regulation of Banca d'Italia, is merely of an orderly nature.

Rules on administrative sanctioning procedure contained in Law No 689/1981 derogate those on general administrative proceedings provided for by Law No 241/1990 according to the principle *lex specialis derogat legi generali*. Law No 689/1981 'constitute[s] an organic and complete system, in which external insertions are not necessary'.

Therefore, sanctioning proceedings under TUB and TUF are subject only to a five-year limitation period.

ADMINISTRATIVE PECUNIARY SANCTIONS – Irrelevance of procedural defects for sanctioning decisions

Regarding administrative sanctions under the TUF, pursuant to Article 21-*octies*, second para, of Law No 241/1990, any defects in the administrative procedure preceding the adoption of the sanctioning decision are not relevant, both because of the constrained nature of the administrative power to impose sanctioning measures, and because the content of the sanctioning decision is not discretionary.

ADMINISTRATIVE PECUNIARY SANCTIONS – Presumption of negligence

Article 3 of Law No 689/1981 provides for the presumption of negligence, according to which once the administrative authority proves that a person's conduct was unlawful, it is up to that person to prove that they acted without negligence.

Therefore, where Banca d'Italia imposes an administrative sanction on the members of the Board of Directors or of the Board of Auditors or of the management of a credit institution, it is for those members to demonstrate that they carried out their tasks in the credit institution with due diligence (being irrelevant, for the exclusion of negligence, the situation of the credit institution preexisting to the start of their mandate).

ADMINISTRATIVE PECUNIARY SANCTIONS – Quantification of sanctions – Discretion of the court in assessing proportionality of sanctions

In the proceedings brought against the administrative pecuniary sanctions imposed under the TUB or the TUF, the court of appeal has the discretionary power to autonomously fix the quantification of the administrative pecuniary sanction, within the limits provided for by law, in order to commensurate it with the seriousness of the unlawful conduct, inferring the latter from the objective and subjective elements established during the proceedings, without being required to specify the criteria followed. The ruling of the court of appeal, on this matter, is not open to challenge before the court of last instance on legality grounds where those limits have been respected and the reasoning shows how, in the determination, account was taken of the parameters provided by the law.

[.] v BANCA D'ITALIA

1. Keywords and summary

[.] v *Banca d'Italia*

Corte di Cassazione, sect. II, Judgment of 16 April 2024, No 10288

Liability of non-executive directors in the light of their obligation to “act in an informed manner”

DUTIES OF MEMBERS OF CREDIT INSTITUTIONS' BOARD OF DIRECTORS – Duty to act in an informed manner – Duty of due care – Liability of members of credit institutions' Board of Directors – Non-executive members of the Board of Directors

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

Furthermore, the duty of non-executive directors of credit institutions to act in an informed manner should not be relegated, in its concrete operativity, to passively accepting the reports coming from the managing directors. They must possess and express constant and adequate knowledge of the banking business and, being involved in the management strategic decisions taken by the entire board, they have an obligation to contribute to ensuring effective risk management in all areas of the bank and to take action so as to be able to effectively monitor the choices made by the executive bodies, not only with a view to evaluate the reports of the managing directors, but also for the purposes of exercising the powers of the Board of Directors, of directive or avocation concerning operations falling within the scope of the delegation to the executive directors.

The above described duties are particularly relevant, because, in the banking sector, they do not only represent a responsibility towards the shareholders, but also a responsibility towards the supervisory authority for objectives of public interest.

ADMINISTRATIVE PECUNIARY SANCTIONS – Burden of proof in sanctioning proceedings – Presumption of negligence – Duty to act in an informed manner – Duty of due care – Liability of members of credit institutions' Board of Directors – Non-executive members of the Board of Directors

As regards administrative sanctions under the TUB imposed on non-executive members of a credit institution's Board of Directors for breach of their duty to act in an informed manner, Banca d'Italia, also by virtue of the presumption of negligence established by Article 3 of Law No 689/1981, has the burden of proving the existence of warning signs that should have led the non-executive directors, who remained inactive, to request additional information or to take other action, while it is up to those non-executive directors to prove that they took all the necessary actions in the light of the situation aimed at averting damage.

ADMINISTRATIVE PECUNIARY SANCTIONS – Quantification of sanctions – Discretion of the court in assessing proportionality of sanctions

In the proceedings brought against the administrative pecuniary sanctions imposed under the TUB or the TUF, the court of appeal has the discretionary power to autonomously fix the quantification of the administrative pecuniary sanction, within the limits provided for by law, in order to commensurate it with the seriousness of the unlawful conduct, inferring the latter from the objective and subjective elements established during the proceedings, without being required to specify the criteria followed. The ruling of the court of appeal, on this matter, is not open to challenge before the court of last instance on legality grounds where those limits have been respected and the reasoning shows how, in the determination, account was taken of the parameters provided by the law.

[.] v BANCA D'ITALIA

1. Keywords and summary

[.] v *Banca d'Italia*

Corte di Cassazione, sect. II, Judgment of 17 April 2024, No 10348¹

Administrative pecuniary sanctions imposed by Banca d'Italia under the TUB and duty of the Court to state reasons for the rejection of defensive arguments of the person concerned

ADMINISTRATIVE PECUNIARY SANCTIONS – Right to a fair trial

The cumulation of investigative and decision-making functions in the same administrative authority, as regards sanctioning proceedings, does not lead to a violation of Article 6 ECHR, since the guarantee of due process is ensured by subjecting the sanctioning decision to full judicial review.

In particular, the sanctioning proceedings carried out by Banca d'Italia do not violate the right to defence of the person concerned, also considering that Articles 24 and 111 of the Italian Constitution do not apply.

ADMINISTRATIVE PECUNIARY SANCTIONS – Sanctions not criminal in nature – Principle of *lex mitior*

With regard to administrative pecuniary sanctions provided for by the TUB, in its version preceding the amendments introduced by Legislative Decree No 72/2015 to transpose the CRD IV, the principle of criminal law of retroactivity of the *lex mitior* does not apply because they are not criminal in nature in the meaning of the case-law of the ECtHR.

ADMINISTRATIVE PECUNIARY SANCTIONS – Time limit for the conclusion of a sanctioning procedure – Specific nature of law on administrative sanctioning procedure

In accordance with the case-law, the time limit of 240 days for the conclusion of the sanctioning proceeding, stipulated by a regulation of Banca d'Italia, is merely of an orderly nature.

¹ Italian version available [here](#).

Rules on administrative sanctioning procedure contained in Law No 689/1981 derogate those on general administrative proceedings provided for by Law No 241/1990 according to the principle *lex specialis derogat legi generali*. Law No 689/1981 ‘constitute[s] an organic and complete system, in which external insertions are not necessary’.

Therefore, sanctioning proceedings under the TUB and the TUF are subject only to a five-year limitation period provided for by Law No. 689/1981, which runs from the time the offences are ascertained.

ADMINISTRATIVE PECUNIARY SANCTIONS – Irrelevance of procedural defects for sanctioning decisions
--

Regarding administrative sanctions under the TUF, pursuant to Article 21-*octies*, second para, of Law No 241/1990, any defects in the administrative procedure preceding the adoption of the sanctioning decision are not relevant, both because of the constrained nature of the administrative power to impose sanctioning measures, and because the content of the sanctioning decision is not discretionary.

ADMINISTRATIVE PECUNIARY SANCTIONS – Duty to state reasons
--

The court before which the administrative pecuniary sanction is challenged must assess with powers of full jurisdiction the defensive allegations put forward by the person concerned during the administrative sanctioning proceedings and then in the judicial proceedings. This duty is not fulfilled where the court merely states in the final judgment, with a purely stylistic formula, that the appellant’s defensive allegations arguments are not capable of undermining the merits of the accusation, without any concrete reference to the arguments that the appellant has put forward.

[.] v BANCA D'ITALIA

1. Keywords and summary

[.] v *Banca d'Italia*

Corte di Cassazione, sect. II, Judgment of 17 April 2024, No 10357

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

ADMINISTRATIVE PECUNIARY SANCTIONS – NCA's competence and powers
– Remuneration policies and practice

Article 22(2)(a)(1) of Italian Law No 217/2011, which replaced Article 53(1)(d) of TUB, where it grants Banca d'Italia the power to issue general provisions on corporate governance, administrative and accounting organization, internal controls and remuneration and incentive systems of credit institutions, was aimed at implementing Directive 2010/76/EC to emphasize the importance of remuneration systems for banks' management and to prevent unjustified, excessive and imprudent risk-taking by directors, with the aim of ensuring sound and prudent risk management and the long-term stability of credit institutions.

That provision of Italian Law No 217/2011 was only of an interpretative nature, as the Banca d'Italia's regulatory power pre-existed the 2011 reform, finding its legal basis in the provisions set out in the former version of Article 53(1)(b) and (d) of TUB, concerning, respectively, the matters of risk containment and administrative and accounting organization and internal controls.

ADMINISTRATIVE PECUNIARY SANCTIONS – Quantification of sanctions

In the context of judicial proceedings against administrative pecuniary sanctions imposed by Banca d'Italia on a credit institution or on a member of the management body of a credit institution for breach of prudential rules, the court has the power to review the amount of the contested sanction, within the upper and below limits established by law, in order to ensure its proportionality considering all the subjective and objective elements and the seriousness of the infringement.

The court's assessment cannot be questioned before the Corte di Cassazione, if the court respected the limits established by law and, in determining the amount of the sanction, it took into account the criteria for the quantification of the sanction as provided for by Article 144-*quater* TUB.

[.] v BANCA D'ITALIA

1. Keywords and summary

[.] v *Banca d'Italia*

Corte di Cassazione, sect. II, Judgment of 24 April 2024, No 11127

Administrative pecuniary sanctions against the general manager of a credit institution

ADMINISTRATIVE PECUNIARY SANCTIONS – Duties of members of credit institutions' bodies – Liability of members of credit institutions' bodies – Burden of proof in sanctioning proceedings – Presumption of negligence

With the aim of guaranteeing the safe and sound management of credit institutions, the legislator set out duties of particular significance with respect to individuals who perform functions of management or control of said institutions.

The liability of those individuals is framed by the legislator focusing on their mere conduct, which, for the purpose of a sanctioning proceeding, must be characterised in itself as being in violation of law. It follows that, by virtue of the presumption of negligence pursuant to Article 3 of Law No 689/1981, once Banca d'Italia has proved that a non-compliant conduct has occurred and is imputable to the person concerned, it is for that person to prove that he nonetheless acted diligently and in compliance with the applicable rules.

ADMINISTRATIVE PECUNIARY SANCTIONS – Burden of proof in sanctioning proceedings – Inspection reports

In the judicial proceeding brought against the administrative sanctions imposed by Banca d'Italia by the sanctioned party, the inspection reports produced by the Supervisory Authority to prove the existence of the violation and all other circumstances established therein constitute evidence that the court must evaluate together with the other elements gathered in the judicial proceeding, that can be disregarded if unreliable or in contrast with other elements of proof.

[.] AND OTHERS v BANCA D'ITALIA

1. Keywords and summary

[.] and others v Banca d'Italia

Corte di Cassazione, sect. II, Judgment of 7 May 2024, No 12323

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

ADMINISTRATIVE PECUNIARY SANCTIONS – Time limit for the conclusion of the sanctioning procedure

The time limit of 240 days to conclude the sanctioning proceeding, provided for by the rules adopted by Banca d'Italia regarding its sanctioning proceedings, is not peremptory in nature and, therefore, its breach cannot cause any forfeiture of the sanctioning power, given that the regulations issued by Banca d'Italia cannot amend the provisions on the exercise of the sanctioning power dictated by Law No 689/1981. It follows that the applicable time limit can be deduced exclusively from Article 14 of the said Law No 689/1981, which establishes a peremptory time limit only for the communication to the person concerned of the statement of objections.

ADMINISTRATIVE PECUNIARY SANCTIONS – Right to defence

The sanctioning procedure carried out by Banca d'Italia does not violate the right of defence of the person concerned. In fact, even though Article 24(1) of Law No 262/2005 states that sanctioning proceedings are carried out in compliance with the principles of access to the file, of adversarial process, and of distinction between investigative and decisional functions, the direct applicability of Articles 24 and 111 of the Italian Constitution is to be excluded, as the right of defence and the main principles informing judicial proceedings enshrined therein are applicable only to judicial proceedings, where the person concerned may challenge the sanctioning decision.

DUTIES OF MEMBERS OF CREDIT INSTITUTIONS' BOARD OF DIRECTORS – Administrative pecuniary sanctions – Duty to act in an informed manner – Duty of due care – Liability of members of credit institutions' bodies – Non-executive members of the Board of Directors

In the banking sector, non-executive members of the management body must always act in an informed manner and, by virtue of the professional requirements

they must possess, must prevent, to the extent possible, violations of law by the executive members of the same body.

This duty, provided for by Articles 2381(3) and (6) and 2392 of the Italian Civil Code, is not fulfilled by merely relying on the reports of the executive directors; each non-executive member of the management body must have an adequate knowledge of the banking business and, participating in the management strategy decisions taken by the entire body, must contribute to ensure effective risk governance in all bank's activities and must also be active in monitoring the choices made by the executive directors, also in order to exercise the powers of direction or taking over of the activities delegated to certain members of the management body. The duties of the aforesaid members are of particular significance, since they correlate not only to the contractual liability of those members towards the shareholders of the bank, but also to the liability towards the supervisory Authority.

Therefore, liability of non-executive members of the management body of a credit institution arises from their failure to prevent damaging conducts of others of which they had knowledge or should have acquired knowledge also on their own initiative.

[.] v BANCA D'ITALIA

1. Keywords and summary

[.] v *Banca d'Italia*

Corte di Cassazione, sect. II, Judgment of 7 May 2024, No 12295¹

Administrative pecuniary sanctions against non-executive members of the management body of a credit institution

DUTIES OF MEMBERS OF CREDIT INSTITUTIONS' BOARD OF DIRECTORS – Administrative pecuniary sanctions – Duty to act in an informed manner – Duty of due care – Liability of members of credit institutions' bodies – Non-executive members of the Board of Directors

In the banking sector, non-executive members of the management body must always act in an informed manner and, by virtue of the professional requirements they must possess, must prevent, to the extent possible, violations of law by the executive members of the same body.

This duty, provided for by Articles 2381(3) and (6) and 2392 of the Italian Civil Code, is not fulfilled by merely relying on the reports of the executive directors; each non-executive member of the management body must have an adequate knowledge of the banking business and, participating in the management strategy decisions taken by the entire body, must contribute to ensure effective risk governance in all bank's activities and must also be active in monitoring the choices made by the executive directors, also in order to exercise the powers of direction or taking over of the activities delegated to certain members of the management body. The duties of the aforesaid members are of particular significance, since they correlate not only to the contractual liability of those members towards the shareholders of the bank, but also to the liability towards the supervisory Authority.

Therefore, liability of non-executive members of the management body of a credit institution arises from their failure to prevent damaging conducts of others of which they had knowledge or should have acquired knowledge also on their own initiative.

ADMINISTRATIVE PECUNIARY SANCTIONS – Principle of *lex mitior*

The principle of retroactivity of the more lenient criminal law (so called principle of *lex mitior*) does not apply to administrative sanctions, unless they are criminal

¹ Italian version available [here](#).

in nature. This is consistent with the interpretation of the ECHR provided for by the ECtHR, according to which the Convention does not provide for this principle in a generalized manner; therefore, the Convention does not require member states to introduce this principle into their national jurisdiction as regards administrative sanctions. Nor does such an obligation derive from the Italian Constitution, since it is within the discretion of the legislature, within the limit of reason, to modulate its determinations in a more or less severe way: in particular, the more favourable treatment reserved for certain violations has its basis on the peculiarities of the respective characteristics and is not automatically extendable to different cases.

[.] v BANCA D'ITALIA

1. Keywords and summary

[.] v *Banca d'Italia*

Corte di Cassazione, sect. II, Judgment of 28 May 2024, No 14863¹

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

Corte di Cassazione, sect. II, Judgment of 31 May 2024, No 15293

Administrative pecuniary sanctions imposed by Banca d'Italia under the TUB on a member of the Board of Auditors of a credit institution

DUTIES OF CREDIT INSTITUTIONS' STATUTORY AUDITORS – Administrative pecuniary sanctions – Liability of Statutory Auditors of credit institutions – Powers of Statutory Auditors of credit institutions – Participation of multiple persons to the same administrative offence

The obligation of the Board of Statutory Auditors of a credit institution to inform Banca d'Italia without undue delay of all acts or facts of which it becomes aware in the performance of its duties, which may constitute an irregularity in the management of the credit institution and a breach of the rules governing banking activity, falls not only on the body as a whole, but also individually on each Auditor.

This implies that each Auditor must fulfil an obligation of active supervision, resulting from a continuous, specific and wide-ranging control of the formal legitimacy and on the merits of the Board of Director's decisions in order to ensure the proper functioning of the credit institution.

Moreover, the individual liability of Auditors for breach of the duty to inform Banca d'Italia is in line with the principles on participation of multiple persons to the same administrative offence.

DUTIES OF CREDIT INSTITUTIONS' STATUTORY AUDITORS – Administrative pecuniary sanctions – Liability of Statutory Auditors of credit institutions – Powers of Statutory Auditors of credit institutions

Members of the Board of Statutory Auditors of a credit institutions are liable to be sanctioned by the supervisory authority where shortcomings in the credit

¹ Italian version available [here](#).

institution's management processes and the same Auditors wilfully or negligently fail to promptly exercise their powers of control.

The Auditors' obligation to monitor the Board of Directors' actions is designed not only to safeguard the interests of shareholders of the credit institution, but also to verify the adequacy of the methodologies and processes for the internal control of the banking activity, according to the parameters set out in the pertinent regulations. Such an obligation is also a prerequisite to their legal obligation to immediately report to Banca d'Italia any wrongdoing on the part of the Board of Directors.

Therefore, Auditors are not liable for irregular operations carried out by the Board of Directors, but for omitting to correctly and timely exercising their powers of control on those operations.

DUTIES OF CREDIT INSTITUTIONS' STATUTORY AUDITORS – Administrative pecuniary sanctions – Liability of Statutory Auditors of credit institutions – Powers of Statutory Auditors of credit institutions – Presumption of negligence

Pursuant to the presumption of negligence provided for by Article 3 of Law No 689 of 1981, where Banca d'Italia imposed a sanction on the members of the Board of Statutory Auditors for failure to comply with instructions relating to administrative and accounting organisation and failure to send the prescribed reports to the same supervisory authority, it is for the persons concerned to prove that they have diligently complied with the obligations imposed on them by the sectoral legislation, that is to say, that they have exercised the powers of control incumbent on them. To this effect, it is not sufficient, in the presence of an unlawful conduct of the directors of the credit institution, to prove that the auditors were kept unaware of it.

ADMINISTRATIVE PECUNIARY SANCTIONS – Judicial review of sanctioning decisions – Duty to state reasons

The sanctioning decision of the supervisory authority can be challenged before the court where it lacks the statement of reasons either entirely or in substance because that statement is merely illusive, but not where the statement of reasons is allegedly insufficient, as it is for the court to autonomously assess and decide on the merits of the administrative sanctions imposed, with powers of full jurisdiction.

APPENDIX

TEXT OF THE JUDGMENTS OF THE NATIONAL APICAL COURTS

Corte di Cassazione, [.] v Banca d'Italia, 29/03/2024, No 8581

Svolgimento del processo – Motivi della decisione

1. Con provvedimento del 30 giugno 2015 n. prot. (Omissis), la Banca d'Italia ha irrogato a A.A., ex componente del CdA della Banca Popolare delle Province Calabre ("BPPC"), sottoposta a ispezione dall'11 marzo 2014 al 16 maggio 2014, e successivamente posta in amministrazione straordinaria (decreto del ministero dell'economia e delle finanze datato 08/08/2014), la sanzione amministrativa pecuniaria di Euro 22.000,00, per: (i) "carenze nell'organizzazione e nei controlli interni, con particolare riferimento ai rischi di credito e operativi, da parte di componenti del CdA e del direttore generale" (art. 53, 1° comma, lett. b, d, D.Lgs. n. 385/1993, etc.); (ii) "mancato rispetto del requisito patrimoniale minimo complessivo da parte dei componenti del CdA e del collegio sindacale e del direttore generale (art. 53, 1° comma, lett. a, 2° e 3° comma, lett. d, D.Lgs. n. 385/1993, etc.).

2. A.A. ha proposto opposizione, ex art. 145, t.u.b., chiedendo l'annullamento della sanzione o, in subordine, la sua riduzione al minimo edittale e la Corte d'appello di Roma, con sentenza n. 7923/2017, nella resistenza della Banca d'Italia, ha respinto il ricorso.

3. Queste, in sintesi le ragioni della decisione:

(a) non sussistono i prospettati vizi del procedimento di applicazione della sanzione in quanto: (i) il Servizio Costituzione e Gestione della Crisi (Servizio CGC), quale unità responsabile del procedimento, è indicato nella lettera di contestazione notificata al trasgressore; (ii) la Banca d'Italia non è obbligata ad acquisire tutta documentazione aziendale utile ai fini della valutazione delle controdeduzioni (nella specie, soprattutto, si tratta dei verbali del CdA); (iii) quanto alla dedotta mancata separazione tra fase istruttoria e fase decisoria, la disciplina organizzativa in tema di illecito amministrativo emanata dalla Banca d'Italia non contrasta né con i principi costituzionali né con l'art. 6 CEDU, come affermato dalla Cassazione;

(b) non sussiste alcuna violazione di legge correlata alla individuazione di una responsabilità oggettiva di tipo collegiale, svincolata dalla verifica del requisito psicologico della colpa.

La colpa ex art. 3, legge n. 689 del 1981, si presume e spetta all'incolpato provare di avere adempiuto all'obbligo di vigilanza oppure di essersi trovato incolpevolmente in condizione di non potere agire in maniera diversa;

(c) va disattesa anche la censura secondo cui la Banca d'Italia non avrebbe valutato, al fine della determinazione della sanzione, l'operato dei singoli componenti del CdA, quale circostanza contraddetta dalla parte del provvedimento sanzionatorio che specifica i criteri di commisurazione concretamente impiegati (rilevanza delle violazioni; effetti delle violazioni sulla situazione della banca; reiterazione della condotta);

(d) all'opponente non è stata attribuita una responsabilità oggettiva per omessa vigilanza, ma piuttosto la mancata realizzazione di interventi correttivi, sollecitati dalla vigilanza, idonei a contrastare il degrado della situazione aziendale e a riportare in equilibrio i profili tecnici;

(e) la giurisprudenza sugli obblighi del componente del CdA di una banca non munito di deleghe è contraria alla ricostruzione del contenuto di tali obblighi offerta dall'opponente, e mette in risalto che tutti gli amministratori debbono agire in modo informato ed enfatizza gli elevati requisiti di professionalità dei manager delle banche;

(f) con riferimento al rilievo 1, sulle violazioni in materia di controllo e governo dell'impresa (incapacità di assicurare condizioni di sana e prudente gestione; deficit del patrimonio di vigilanza; elevata esposizione al rischio di liquidità; mancato concretizzarsi dei presupposti del piano di risanamento varato; omessa attuazione del programma di riallineamento del patrimonio al minimo di legge; rilevante contrazione della raccolta; natura estemporanea delle ipotesi di rafforzamento patrimoniale e di ingresso di nuovi partner nella compagine della banca), le deduzioni difensive dell'incolpato, che puntano soprattutto sull'incidenza di fattori esogeni, non imputabili ai componenti aziendali, che avrebbero influito sulla situazione della banca, non sono idonee a contrastare i rilievi della vigilanza, che non contesta agli amministratori di avere cagionato la crisi aziendale, ma addebita loro di non avere realizzato gli interventi correttivi, sollecitati dall'autorità di controllo, finalizzati a ristabilire l'equilibrio dei profili tecnici;

(g) a proposito del rilievo 2, che riguarda le carenze nell'organizzazione e nei controlli interni con riferimento al rischio di credito e ai rischi operativi, la difesa dell'opponente si fonda sull'erronea premessa dell'assenza di responsabilità dell'organo amministrativo per carenze ascrivibili ad altre strutture, non portate a conoscenza del CdA al fine degli opportuni interventi correttivi. L'impostazione dell'opponente trascura che l'addebito al CdA riguarda proprio le carenze nell'organizzazione e nell'attività di controllo;

(h) quanto alla contestazione dell'elevato rischio di credito (rilievo 3), va messo in evidenza che la rimodulazione dei crediti senza l'acquisizione di maggiori garanzie denota scarsa prudenza ed è, pertanto, rilevante ai fini della sanzione; inoltre, l'assenza di una policy di classificazione di e di valutazione del credito è all'origine della sottovalutazione della situazione finanziaria della clientela;

(i) sul rilievo 4 – anomalie in tema di trasparenza – la parte ha ammesso di avere appreso delle relative anomalie soltanto al momento dell'ispezione;

(l) infine, è infondata la censura sull'importo della sanzione, determinata in misura molto più bassa dei massimi edittali, che appare congrua rispetto alle violazioni rilevate.

4. A.A. ha proposto ricorso per cassazione, con venti motivi, illustrati da una memoria.

La Banca d'Italia ha resistito con controricorso.

1. Il primo motivo di ricorso – “Ex 360, n. 4, c.p.c., per violazione degli artt. 24 Cost., 111 Cost. e 112 c.p.c.” – deduce la nullità della sentenza, per violazione dei diritti di difesa della parte, del principio del giusto processo e del principio dispositivo, per omesso esame del contenuto delle note depositate il 6 giugno 2017, nelle quali il ricorrente evidenziava: (i) la configurabilità di uno specifico obbligo di acquisizione, a carico della P.A. e nel contesto dell'istruttoria procedimentale, della documentazione puntualmente indicata dall'incolpato (e oggetto di richiesta di acquisizione), non accessibile allo stesso e, nel contempo, nota e/o agevolmente reperibile dalla Banca d'Italia; (ii) la possibile attribuzione della coloration pénale ai provvedimenti sanzionatori della Banca d'Italia in ragione degli effetti limitativi che dagli stessi derivano, con specifico riferimento

alla sfera patrimoniale del sanzionato e alle concrete capacità di determinazione negoziale, a seguito della pubblicazione e della generalizzata (e indiscriminata) accessibilità di tali atti da parte di qualsivoglia soggetto e del conseguente utilizzo degli stessi nel contesto della procedura informativa denominata “World-Check”; (iii) la trasmissione al Direttorio della Banca d’Italia delle difese degli incolpati esclusivamente “mediata” dal filtro interpretativo-valutativo della funzione istruttoria e accusatoria.

1.1. Il motivo non è fondato.

1.2. Per giurisprudenza consolidata non ricorre il vizio di omessa pronuncia, nonostante la mancata decisione su un punto specifico, quando la decisione adottata comporti una statuizione implicita di rigetto sul medesimo (Cass. 6/12/2017, n. 29191 – conf. ex multis: 08/03/2007, n. 5351; 13/10/2017, n. 24155; 04/06/2019, n. 15255; 30/01/2020 n. 2153; 02/04/2020, n. 7662; 13/01/2022, n. 864; 01/03/2022, n. 6786 – ha affermato che: “Ad integrare gli estremi del vizio di omessa pronuncia non basta la mancanza di un’espressa statuizione del giudice, ma è necessario che sia stato completamente omesso il provvedimento che si palesa indispensabile alla soluzione del caso concreto: ciò non si verifica quando la decisione adottata comporti la reiezione della pretesa fatta valere dalla parte, anche se manchi in proposito una specifica argomentazione, dovendo ravvisarsi una statuizione implicita di rigetto quando la pretesa avanzata col capo di domanda non espressamente esaminato risulti incompatibile con l’impostazione logico-giuridica della pronuncia”).

In questa controversia il ricorrente denuncia l’omesso esame, da parte della Corte di Roma, delle note depositate il 06/06/2017: escluso che ciò configuri un error in procedendo ex art. 112, cod. proc. civ., è il caso di ricordare l’orientamento di questa Corte (ex multis, Sez. 3, Ordinanza n. 3126 del 09/02/2021, Rv. 660547 – 01), secondo cui, al fine di assolvere l’onere di adeguatezza della motivazione, il giudice di merito non è tenuto ad esaminare tutte le allegazioni delle parti, essendo necessario e sufficiente che egli esponga concisamente le ragioni della decisione, così da doversi ritenere implicitamente rigettate le argomentazioni logicamente incompatibili con esse.

2. Il secondo motivo – “Ex art. 360, n. 3, c.p.c., per violazione e falsa od omessa applicazione dell’art. 97 Cost., dell’art. 1 della L. 241/1990, del principio del “giusto procedimento” così come definito dalla giurisprudenza costituzionale, dell’art. 18 della l. n. 689/1981, nonché del paragrafo 1.3, sez. II, delle disposizioni di vigilanza in materia di sanzioni e procedimento amministrativo sanzionatorio, del 18 dicembre 2012” – censura la sentenza che, in violazione del principio del giusto procedimento, ha disconosciuto che vi sia un obbligo di acquisizione d’ufficio della documentazione specificamente indicata dall’incolpato all’interno delle controdeduzioni presentate nel procedimento amministrativo, nonostante l’impossibilità di acquisire la stessa a cura della parte privata. Con la precisazione, in punto di decisività della stessa documentazione, che non si trattava soltanto dei verbali del CdA, ma anche di documenti, inaccessibili all’incolpato in quanto non più componente dell’organo amministrativo, idonei a confutare molteplici aspetti oggetto di rilievo.

2.1. Il motivo è inammissibile.

2.2. La censura è generica e non soddisfa il requisito dell’autosufficienza: segnatamente, la parte non fornisce alcuna indicazione dei documenti la cui acquisizione d’ufficio, da parte della Banca d’Italia, nel corso del procedimento sanzionatorio avrebbe determinato un esito favorevole all’incolpato.

3. Il terzo motivo – “Ex art. 360, n. 3, c.p.c., per violazione e falsa od omessa applicazione dell’art. 97 Cost., nell’art. 1 della L. 241/1990, del principio del “giusto procedimento” così come definito dalla giurisprudenza costituzionale, dell’art. 18 della L. n. 689/1981, nonché del paragrafo 1.3, sez. II, delle disposizioni di vigilanza in materia di sanzioni e procedimento amministrativo sanzionatorio, del 18 dicembre 2012” – censura la sentenza impugnata che ha omissso di rilevare e valutare che al Direttorio della Banca d’Italia non erano state trasmesse, in forma integrale, le controdeduzioni e la documentazione prodotte dagli incolpati, e che tali elementi erano stati veicolati tramite il filtro interpretativo-valutativo dell’accusa amministrativa, contenuto nella proposta sanzionatoria.

4. Il quarto motivo – “Ex art. 360, n. 5 c.p.c., per omesso esame di un fatto decisivo, che è stato oggetto di discussione tra le parti” – reca la medesima censura di cui al precedente mezzo di impugnazione, sussunta, questa volta, entro il vizio di cui al n. 5 dell’articolo 360.

4.1. Il terzo e il quarto motivo, suscettibili di esame congiunto per connessione, sono infondati.

4.2. Questa Corte (Sez. 2, Sentenza n. 16517 del 31/07/2020, Rv. 659018 – 05) ha enunciato il principio di diritto secondo cui il procedimento sanzionatorio davanti alla Banca d’Italia non viola il diritto di difesa dell’incolpato, atteso che, sebbene l’art. 24, comma 1, della L. n. 262 del 2005, disponga che “i procedimenti sanzionatori sono svolti nel rispetto dei principi della piena conoscenza degli atti istruttori, del contraddittorio, della verbalizzazione, nonché della distinzione tra funzioni istruttorie e funzioni decisorie”, è tuttavia esclusa la diretta applicabilità, in tale ambito, dei precetti costituzionali degli artt. 24 e 111, Cost., invocabili solo con riferimento al processo che si svolge davanti al giudice, innanzi al quale l’incolpato può impugnare il provvedimento sanzionatorio con piena garanzia del diritto di difesa e del contraddittorio.

4.3. Correttamente la Corte d’appello ha negato che il provvedimento sanzionatorio fosse viziato a causa dell’asserita mancanza di separazione tra fase istruttoria e fase decisoria, dovendosi al riguardo notare che nulla osta a che il Direttorio della Banca d’Italia condivida la valutazione da altri compiuta in fase di ispezione.

5. Il quinto motivo – “Ex art. 360, nn. 3 e 4, c.p.c., per violazione dell’art. 6 CEDU, dell’art. 112 c.p.c. e dell’art. 132, n. 4 c.p.c.” – censura la sentenza impugnata per avere trascurato che le sanzioni inflitte dalla Banca d’Italia causano limitazioni alla sfera patrimoniale e relazionale dei sanzionati, derivanti dalla pubblicazione dei provvedimenti sanzionatori e della generalizzata diffusione ed accessibilità degli stessi ad opera di chiunque, con incidenza negativa sulla possibilità di instaurare rapporti finanziari e creditizi, a seguito dell’inclusione dei nominativi all’interno del database denominato “WorldCheck”, utilizzato dalla quasi totalità degli intermediari finanziari, creditizi ed assicurativi, il che determina conseguenze tali da consentire una possibile rivalutazione (rispetto ai precedenti giurisprudenziali che non hanno ponderato tale aspetto) circa la coloration pénale dei detti provvedimenti sanzionatori.

6. Il sesto motivo – “Ex art. 360, n. 5 c.p.c., per omesso esame di un fatto decisivo, che è stato oggetto di discussione tra le parti” – ripercorre, nella sostanza, le considerazioni del quinto motivo, e sottolinea che il fatto storico/processuale non esaminato consiste nel censimento dei soggetti sanzionati all’interno del database denominato “World-Check”, utilizzato dalla quasi totalità degli intermediari finanziari, creditizi ed assicurativi, all’interno della lista “Crime”, la quale assimila i destinatari delle sanzioni amministrative inflitte dalle Autorità di vigilanza, ivi compresa la Banca d’Italia, ai soggetti che hanno riportato condanne penali per reati in materia

finanziaria, e nella preclusione che tali iscrizioni comportano ai fini dell'instaurazione di rapporti finanziari e creditizi.

6.1. Il quinto e il sesto motivo, suscettibili di esame congiunto per connessione, sono infondati.

6.2. Le doglianze ruotano attorno all'asse concettuale della natura particolarmente afflittiva delle sanzioni amministrative irrogate dalla Banca d'Italia, che avrebbero tutti i crismi della sanzione penale, e rimproverano alla Corte di Roma di non avere riesaminato la questione, anche in relazione agli aspetti di novità dovuti all'evoluzione tecnologica.

6.3. A prescindere dai profili d'inammissibilità delle censure, che non paiono sussumibili entro i parametri dei nn. 3, 4, 5, dell'art. 360, cod. proc. civ., va data continuità al costante indirizzo nomofilattico per il quale le sanzioni amministrative pecuniarie irrogate dalla Banca d'Italia, ai sensi degli artt. 144 e ss., del D.Lgs. n. 385 del 1993, nei confronti di soggetti che svolgono funzioni di direzione, amministrazione o controllo di istituti bancari, non sono equiparabili, quanto a gravosità economica ed incidenza sui diritti e libertà fondamentali, avuto riguardo alle concrete estrinsecazioni professionali, imprenditoriali e manageriali della persona, a quelle previste dall'art. 187-ter, t.u.f., per manipolazione del mercato, sicché esse non hanno natura sostanzialmente penale e non pongono, quindi, un problema di compatibilità con le garanzie riservate ai processi penali dall'art. 6 CEDU (Cass. n. 16517/2020).

Inoltre, al fine di escludere che le sanzioni irrogate dalla Banca d'Italia, pur qualificate come amministrative, abbiano, alla stregua dei criteri elaborati dalla Corte EDU, natura sostanzialmente penale, oltre che dell'afflittività economica della sanzione, occorre altresì tenere conto dell'assenza di sanzioni accessorie e della mancata previsione di una confisca obbligatoria (ex multis, in tema di sanzioni Consob, Sez. 2, Sentenza n. 20689 del 09/08/2018, Rv. 650004 – 03, Sez. 2, Sentenza n. 31239 del 03/11/2021, Rv. 662708 – 01).

7. Il settimo motivo – “Ex art. 360, n. 3 e n. 4, c.p.c., per violazione e falsa applicazione dell'art. 1 della l. n. 241/1990, dell'art. 18 della l. n. 689/1981, nonché dell'art. 132, n. 4, c.p.c.” – censura la sentenza che, senza affrontare la questione della carenza di sussunzione delle condotte contestate entro un paradigma normativo di riferimento, reputa congruamente motivato il provvedimento sanzionatorio, sebbene esso rinvii a un coacervo di disposizioni normative (per un totale di 178 pagine), articolate in interi titoli e capitoli, senza procedere nel contempo: (i) alla indicazione delle concrete ragioni in forza delle quali le attività allegare e documentate non potrebbero ritenersi conformi ai principi di sana e prudente gestione; (ii) alla individuazione, anche a titolo esemplificativo, di eventuali condotte alternative che il sanzionato avrebbe dovuto tenere in luogo di quelle contestate.

7.1. Il motivo è inammissibile.

7.2. Si tratta di una questione nuova (la parte non individua i luoghi del processo di merito dove la stessa sia stata posta o trattata) che, presupponendo indagini di fatto (con riferimento alla completezza o meno della motivazione del provvedimento sanzionatorio), non può essere sollevata per la prima volta in cassazione (Sez. U, Sentenza n. 6459 del 06/03/2020, punto 10.1., Rv. 657212 – 02).

8. L'ottavo motivo – “Ex art. 360, n. 3 e 4, c.p.c., per violazione e falsa applicazione degli artt. 2381, 6° comma, c.c., e 2392, c.c., nonché violazione degli artt. 112, 116 e 132, n. 4, c.p.c.” – censura la sentenza che, con motivazione apparente, incentrata sulla configurazione della presunzione di colpa

“a carico dell’autore del fatto vietato”, ritiene che il ricorrente, anche al di fuori del perimetro delle funzioni esecutive esercitate all’interno del CdA (circoscritte alla sicurezza sui luoghi di lavoro), avesse un obbligo di vigilanza sul generale andamento della gestione.

La parte ascrive alla Corte di Roma di avere ritenuto, facendo leva su dati ipotetici, dimostrata, in via presuntiva e/o comunque con inversione dell’onere della prova, la sussistenza delle condotte contestate e operante una presunzione di colpa (non vinta in sede giudiziale), pur in assenza, nel provvedimento sanzionatorio impugnato, dell’indicazione delle concrete ragioni per le quali le giustificazioni addotte dall’incolpato, in sede amministrativa e nel giudizio, erano state reputate inidonee a fornire la prova positiva dell’ottemperanza ai principi di sana e prudente gestione, e in mancanza, sia nel provvedimento sanzionatorio che nelle difese svolte in giudizio dalla Banca d’Italia, dell’illustrazione di concrete condotte alternative che, in ipotesi, il ricorrente avrebbe dovuto adottare in luogo di quelle contestate.

8.1. Il motivo è infondato.

8.2. Innanzitutto, rileva il Collegio – anche con riferimento all’identica critica enunciata nei motivi successivi – che la sentenza non è viziata da motivazione apparente.

8.3. Il vizio di motivazione apparente ricorre quando la motivazione, 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 (ex multis, Sez. U, Ordinanza n. 2767 del 30/01/2023, Rv. 666639, che, in motivazione (punto 3.), richiama Sez. U, Sentenza n. 22232 del 03/11/2016, Rv. 641526; Sez. U, Sentenza n. 16599 del 2016; Sez. 6 – 1, Ordinanza n. 6758 del 01/03/2022, Rv. 664061; Sez. 6 – 5, Ordinanza n. 13977 del 23/05/2019, Rv. 654145).

8.4. La Corte capitolina espone, con chiarezza, in relazione a ciascun rilievo contenuto nel provvedimento sanzionatorio, le ragioni per le quali condivide e reputa legittima l’irrogazione della sanzione amministrativa pecuniaria a carico dell’ex componente del CdA della banca.

8.5. La decisione del giudice di merito è corretta anche là dove ravvisa la sussistenza della responsabilità del trasgressore benché egli fosse un amministratore non esecutivo e privo di deleghe (fatta eccezione per quella attinente alla sicurezza sul luogo del lavoro).

Il dictum della Corte territoriale collima con il consolidato indirizzo di legittimità.

Tra i numerosi precedenti di questa Corte, merita attenzione Sez. 1, Sentenza n. 22848 del 09/11/2015, Rv. 637769 – 01 (menzionato dall’opponente), secondo cui “Ai fini del contenimento del rischio creditizio nelle sue diverse configurazioni nonché dell’organizzazione societaria e dei controlli interni, l’art. 53, lett. b) e d), del D.Lgs. n. 385 del 1993 e le disposizioni attuative dettate con le istruzioni di vigilanza per le banche, mediante la circolare n. 229 del 1999 (e successive modificazioni e integrazioni), sanciscono doveri di particolare pregnanza in capo al consiglio di amministrazione delle società bancarie, che riguardano l’intero organo collegiale e, dunque, anche i consiglieri non esecutivi, i quali sono tenuti ad agire in modo informato e, in ragione dei loro requisiti di professionalità, ad ostacolare l’evento dannoso, sicché rispondono del mancato utile attivarsi. Ne consegue, inoltre, che in caso di irrogazione di sanzioni amministrative, la Banca d’Italia, anche in virtù della presunzione di colpa vigente in materia, ha unicamente l’onere di dimostrare l’esistenza

dei segnali di allarme che avrebbero dovuto indurre gli amministratori non esecutivi, rimasti inerti, ad esigere un supplemento di informazioni o ad attivarsi in altro modo, mentre spetta a questi ultimi provare di avere tenuto la condotta attiva dovuta o, comunque, mirante a scongiurare il danno”.

Analogamente, Sez. 2, Sentenza n. 19556 del 18/09/2020, Rv. 659134 – 01, afferma che “In tema di sanzioni amministrative previste dall’art. 144 del D.Lgs. n. 385 del 1993, l’obbligo imposto dall’art. 2381, ultimo comma, c.c. agli amministratori delle società per azioni di “agire in modo informato”, pur quando non siano titolari di deleghe, si declina, da un lato, nel dovere di attivarsi, esercitando tutti i poteri connessi alla carica, per prevenire o eliminare ovvero attenuare le situazioni di criticità aziendale di cui siano, o debbano essere, a conoscenza, dall’altro, in quello di informarsi, affinché tanto la scelta di agire quanto quella di non agire risultino fondate sulla conoscenza della situazione aziendale che gli stessi possano procurarsi esercitando tutti i poteri di iniziativa cognitoria connessi alla carica con la diligenza richiesta dalla natura dell’incarico e dalle loro specifiche competenze. Tali obblighi si connotano in termini particolarmente incisivi per gli amministratori di società che esercitano l’attività bancaria, prospettandosi, in tali ipotesi, non solo una responsabilità di natura contrattuale nei confronti dei soci della società, ma anche quella, di natura pubblicistica, nei confronti dell’Autorità di vigilanza”.

Quest’ultima pronuncia riecheggia il (già citato) arresto sezionale (Cass. n. 16517/2020) che, in parte motiva (punto 2.), evidenzia che “La tesi secondo cui la responsabilità dei consiglieri sarebbe predicabile solo se questi ultimi abbiano ricevuto informazioni in modo completo ed esauriente sulle singole operazioni poste in essere dai titolari di deleghe operative, è già stata motivatamente respinta, in fattispecie analoghe, da questa Corte e non trova alcun sostegno nei precedenti richiamati in ricorso. Nello specifico settore delle attività bancarie o di intermediazione finanziaria, ai fini del contenimento del rischio creditizio nelle sue diverse configurazioni, nonché dell’organizzazione societaria e dei controlli interni, l’art. 53, lettere b) e d), D.Lgs. 385/1993 e le disposizioni attuative dettate con le istruzioni di vigilanza per le banche, sanciscono doveri di particolare pregnanza in capo al Consiglio di amministrazione nel suo complesso e ai singoli consiglieri (anche se privi di deleghe operative). Questi ultimi sono sempre tenuti ad agire in modo informato e, in ragione dei requisiti di professionalità di cui sono e devono essere in possesso, ad impedire possibili violazioni. Tale dovere, sancito dall’art. 2381 c.c., commi terzo e sesto, e dall’ art. 2392 c.c., non va rimesso, nella sua concreta operatività, alle segnalazioni provenienti dai rapporti degli amministratori delegati, giacché anche i singoli consiglieri devono possedere e attivare una costante e adeguata conoscenza del business bancario e, essendo compartecipi delle decisioni di strategia gestionale assunte dall’intero Consiglio, hanno l’obbligo di contribuire ad assicurare un governo efficace dei rischi in tutti i settori di operatività della banca, oltre che ad attivarsi in modo da esercitare efficacemente la funzione di monitoraggio sulle scelte compiute, non solo in vista della valutazione delle relazioni degli amministratori delegati, ma anche ai fini dell’esercizio dei poteri di direttiva o avocazione riguardo alle attività rientranti nella delega (Cass. 2737/2013; Cass. 17799/2014; Cass. 18683/2014; Cass. 5606/2019; Cass. 24851/2019). L’ambito entro il quale deve esprimersi la diligenza dei consiglieri non è mutato neppure a seguito della riforma del diritto societario adottata con D.Lgs. 6/2006. L’art. 2381, comma sesto, c.c., nel testo in vigore, impone un dovere di agire in modo informato, disponendo infine che “ciascun amministratore può chiedere agli organi delegati che in consiglio siano fornite informazioni relative alla gestione della società”. Il comma terzo recita che il consiglio di amministrazione “può sempre impartire direttive agli organi delegati e avocare a sé operazioni rientranti nella delega”. Il comma secondo dell’art. 2392 c.c. continua a prevedere che gli amministratori “sono in

ogni caso solidalmente responsabili se, essendo a conoscenza di fatti pregiudizievoli, non hanno fatto quanto potevano per impedirne il compimento o eliminarne o attenuarne le conseguenze dannose” (Cass. 24851/2019). Resta da confermare che la responsabilità degli amministratori privi di deleghe operative non discende da una generica condotta di omessa vigilanza, né implica l'imputazione della responsabilità a titolo oggettivo o per le condotte altrui, ma deriva dal fatto di non aver impedito “fatti pregiudizievoli” dei quali abbiano acquisito (o avrebbero potuto acquisire) conoscenza anche di propria iniziativa, ai sensi dell'obbligo previsto dall'art. 2381 c.c. (Cass. n. 17441 del 2016; Cass. 2038/2018”).

8.6. La sentenza, nel ravvisare la colpevolezza del ricorrente, segue la scia della giurisprudenza di legittimità anche in relazione al tema del profilo psicologico che informa le violazioni amministrative in materia bancaria.

Ed infatti, è stato chiarito (Sez. 2, Sentenza n. 9546 del 18/04/2018, Rv. 648049 – 01; in termini: Sez. 1, Sentenza n. 2406 del 08/02/2016, Rv. 638467 – 01; Sez. 2, Sentenza n. 27432 del 09/12/2013, Rv. 628845 – 01; Sez. 2, Ordinanza n. 24386 del 10/08/2023, Rv. 668804 – 02) che, in tema di sanzioni amministrative pecuniarie irrogate dalla Banca d'Italia, ex art. 144 del D.Lgs. n. 385 del 1993, nei confronti di soggetti che svolgono funzioni di direzione, amministrazione o controllo di istituti bancari, il legislatore individua una serie di fattispecie, destinate a salvaguardare procedure e funzioni ed incentrate sulla mera condotta, secondo un criterio di agire o di omettere doveroso, ricollegando il giudizio di colpevolezza a parametri normativi estranei al dato puramente psicologico e limitando l'indagine sull'elemento oggettivo dell'illecito all'accertamento della “suità” della condotta inosservante sicché, integrata e provata dall'autorità amministrativa la fattispecie tipica dell'illecito, grava sul trasgressore, in virtù della presunzione di colpa posta dall'art. 3, della legge n. 689 del 1981, l'onere di provare di aver agito in assenza di colpevolezza.

9. Il nono motivo – “Ex 360, n. 3 e n. 4, c.p.c., per violazione e falsa applicazione degli artt. 3, 4, 18, 23 della l. n. 689/1981, nonché degli artt. 116 c.p.c. e 2729 c.c.” – censura la sentenza che, invertendo l'onere probatorio, non considera che la principale contestazione attiene al mancato reperimento, da parte della BPPC, di un partner bancario di elevato standing che potesse fornire all'istituto di credito collegamenti funzionali, strategici e operativi idonei a rimuovere le criticità pregresse, e che quanto richiesto dalla Banca d'Italia comportava la necessaria adesione di un soggetto terzo, quale evento “esogeno”, che non può essere in alcun modo assunto a componente del requisito psicologico prescritto dall'art. 3, della L. n. 689 del 1981, neppure in via presuntiva, perché disgiunto da ogni possibilità di intervento del sanzionato, che lo subisce senza poterlo modificare.

9.1. Il motivo è in parte inammissibile e in parte infondato.

9.2. Dal primo punto di vista (inammissibilità del motivo), rileva la Corte che, con la proposizione del ricorso per cassazione, il ricorrente non può rimettere in discussione, contrapponendone uno difforme, l'apprezzamento di fatto compiuto dal giudice di merito, tratto dall'analisi degli elementi di valutazione disponibili ed in sé coerente, atteso che lo scrutinio dei fatti e delle prove è sottratto al sindacato di legittimità, dal momento che, nell'ambito di quest'ultimo, non è conferito il potere di riesaminare e valutare il merito della causa, ma solo quello di controllare, sotto il profilo logico formale e della correttezza giuridica, l'esame e la valutazione che ne ha fatto il giudice di merito, cui resta riservato di individuare le fonti del proprio convincimento e, all'uopo, di valutare le prove, controllarne attendibilità e concludenza e scegliere, tra le risultanze

probatorie, quelle ritenute idonee a dimostrare i fatti in discussione (ex plurimis, Cass. 7/04/2017, n. 9097; Cass. 07/03/2018, n. 5355; Cass. 13/06/2023, n. 16781).

9.3. Nello specifico, è inammissibile la censura di cui all'art. 116, cod. proc. civ., alla stregua di una considerazione di carattere generale, da estendere a ciascuno dei motivi di ricorso in cui si lamenta la violazione di questa disposizione.

Insegnano le Sezioni unite di questa Corte di Cassazione (Cass. Sez. U., 30/09/2020, n. 20867, che menziona: Cass. Sez. U., 05/08/2016, n. 16598; Cass. Sez. U., 27/12/2019, n. 34474, con richiami pure a Cass. 19/06/2014, n. 13960, e a Cass. 20/12/2007, n. 26965) che “(i)n tema di ricorso per cassazione, la doglianza circa la violazione dell'art. 116 c.p.c. è ammissibile solo ove si allegghi che il giudice, nel valutare una prova o, comunque, una risultanza probatoria, non abbia operato – in assenza di diversa indicazione normativa – secondo il suo “prudente apprezzamento”, pretendendo di attribuirle un altro e diverso valore oppure il valore che il legislatore attribuisce ad una differente risultanza probatoria (come, ad esempio, valore di prova legale), oppure, qualora la prova sia soggetta ad una specifica regola di valutazione, abbia dichiarato di valutare la stessa secondo il suo prudente apprezzamento, mentre, ove si deduca che il giudice ha solamente male esercitato il proprio prudente apprezzamento della prova, la censura è ammissibile, ai sensi del novellato art. 360, primo comma, n. 5, c.p.c., solo nei rigorosi limiti in cui esso ancora consente il sindacato di legittimità sui vizi di motivazione”.

9.4. Nella specie, il ricorrente, là dove denuncia la violazione dell'art. 116, cod. proc. civ., in realtà mira a ottenere una diversa ricostruzione dei momenti salienti del procedimento sanzionatorio, e si duole dell'accertamento di fatto in forza del quale la Corte distrettuale ha respinto l'opposizione al provvedimento sanzionatorio della Banca di Italia.

Una simile formulazione del motivo di ricorso non è consentita in ragione del fatto che l'ipotetica erronea ricognizione della fattispecie concreta, di necessità mediata dalla contestata valutazione delle risultanze probatorie di causa, non integra il vizio di violazione di legge.

9.5. Dal secondo punto di vista (infondatezza del motivo), risulta dalla sentenza che la BPPC, dati gli esiti negativi dei precedenti accertamenti ispettivi, si era impegnata a individuare un nuovo partner bancario al fine di assicurarsi l'immissione di mezzi patrimoniali aggiuntivi.

Al riguardo, la Corte di Roma (pag. 16 della sentenza), con accertamento di fatto insindacabile in cassazione, afferma: “Per quanto concerne la mancata realizzazione di una partnership o di un'aggregazione con controparti bancarie la suggestiva difesa dell'opponente insiste nella non imputabilità al CdA della mancanza di interesse mostrato dal settore bancario nei confronti della Banca Popolare delle Province Calabre, sicché la scelta di autonomia era per così dire necessitata. In realtà però risulta dalla relazione ispettiva che i componenti del CdA si sono limitati ad un'attività meramente esplorativa, essendosi concretamente realizzato qualche contatto solo nel corso dell'estate del 2012, senza tuttavia mai concretizzarsi in un piano dettagliato e credibile”.

10. Il decimo motivo – “Ex 360, n. 3 e n. 4, c.p.c., per violazione e falsa applicazione degli artt. 3, e 18 della l. n. 689/1981, nonché degli artt. 116 c.p.c. e 2729 c.c., nonché della Circolare della Banca d'Italia n. 263/2006, 14° aggiornamento del 23 aprile 2013” – si fonda sulla premessa che, ai sensi del 14° aggiornamento della circolare n. 263 del 2006, la BPPC aveva termine, fino al 1°/04/2016, per il raggiungimento del patrimonio di vigilanza di Euro 10.000.000,00, senza che la Banca d'Italia potesse abbreviare tale termine.

Ciò precisato, il ricorrente imputa alla Corte territoriale di avere attribuito alla Banca d'Italia un potere discrezionale, sorretto da valutazioni di tipo prognostico, in relazione alle tempistiche stabilite per il raggiungimento del nuovo limite di Euro 10.000.000,00, fissato per il patrimonio di vigilanza delle banche, in luogo del diverso potere vincolato, da esercitarsi a posteriori, una volta decorso il termine previsto dalla normativa regolamentare, e di avere utilizzato una prova per presunzioni, basata esclusivamente sulla valutazione prognostica effettuata dalla P.A. a sostegno del ravvisato perfezionamento di un'infrazione non attuale.

11. L'undicesimo motivo – “Ex 360, n. 3, c.p.c., per violazione e falsa applicazione degli artt. 3, e 18 della l. n. 689/1981, nonché della Circolare della Banca d'Italia n. 263/2006, 14° aggiornamento del 23 aprile 2013” – censura la sentenza che tralascia la circostanza esimente, dedotta dal ricorrente, relativa non già all'avvio della procedura di amministrazione straordinaria in quanto tale, ma alla condotta tenuta dagli organi straordinari della procedura – consistente nella mancata esecuzione della deliberazione dell'assemblea della banca del 24/05/2014, di aumento del capitale sociale per complessivi Euro 4.400.000,00, in modo da consentire la copertura delle perdite pregresse e di raggiungere (anticipatamente rispetto alla scadenza del 1°/04/2016) un patrimonio di rilevanza superiore al nuovo limite di dieci milioni – quale fattore esogeno (ed esimente), dotato di rilevanza causale, rispetto alla contestazione attinente alla riduzione del patrimonio di vigilanza al di sotto del limite legale.

11.1. Il decimo e l'undicesimo motivo, suscettibili di esame congiunto per connessione, sono in parte inammissibili e in parte infondati.

11.2. Dal primo punto di vista (inammissibilità del motivo), è il caso di richiamare quanto osservato sub 9.2.

11.3. Dal secondo punto di vista (infondatezza del motivo), il rilievo della vigilanza attiene al deficit del capitale di rischio, la cui soglia minima per le banche popolari era stata innalzata dal precedente limite di Euro 6,3 milioni a quello di dieci milioni.

Ebbene, la Corte d'appello nega che il mancato riallineamento sia stato impedito dalla procedura di amministrazione straordinaria, non prima di avere posto l'accento su una serie di elementi di fatto, il cui scrutinio spetta soltanto al giudice di merito.

Nel dettaglio, rileva la sentenza, il patrimonio della BPPC, al 31 marzo 2014, era pari a Euro 7.424.000,00, minore del nuovo limite di dieci milioni, e la banca, che aveva a disposizione 36 mesi per colmare il disavanzo, aveva dato avvio ad un piano di adeguamento che, per così dire, era rimasto sulla carta: l'aumento di capitale deliberato era stato attuato nella misura di Euro 170.000,00, donde la scelta dell'organo amministrativo, del 30/04/2014, di orientarsi verso la trasformazione in Spa per favorire l'ingresso di un socio qualificato (individuato prima in un fondo di investimento di private equity e dopo in Fincalabria), ipotesi, questa, valutata poco credibile dagli ispettori perché non accompagnata da alcun atto concreto. Con la conseguenza che, nonostante la deliberazione di un secondo aumento di capitale, si era reso necessario l'avvio della procedura di a.s. per la riduzione del patrimonio al disotto della soglia prevista per l'autorizzazione all'esercizio dell'attività bancaria.

12. Il dodicesimo motivo – “Ex 360, n. 3 e n. 4, c.p.c., per violazione e falsa applicazione degli artt. 3, 18 e 23 della l. n. 689/1981, degli artt. 116 c.p.c. e 2729 c.c., nonché dell'art. 132, n. 4, c.p.c.” – censura la sentenza che esclude che la contrazione della raccolta (derivante dalla fuoriuscita di

tre depositi di notevole consistenza) conseguisse a fattori esogeni, sui quali l'incolpato non aveva alcun potere di intervenire, confonde tale aspetto con il diverso profilo del monitoraggio del rischio di liquidità e che, quindi, afferma, con motivazione apparente (avallando un'inversione dell'onere probatorio, non consentita dall'art. 23, cit.), che dovessero essere adottati interventi correttivi (per altro, nemmeno esplicitati), senza considerare che, in presenza di un'unica filiale operativa, era oggettivamente impossibile sostituire una raccolta più concentrata con una raccolta frazionata e diffusa.

12.1. Il motivo è infondato.

12.2. La Corte di Roma, senza incorrere nel vizio di motivazione apparente e senza violare le regole di riparto dell'onere della prova e nemmeno quelle del ragionamento presuntivo, ha ritenuto fondato il rilievo concernente l'elevata esposizione al rischio di liquidità e il difetto di monitoraggio di tale situazione, dipendente dalla concentrazione della raccolta, che avrebbe richiesto interventi correttivi che invece non erano stati adottati. Al riguardo, è appena il caso di notare che, al contrario di quanto sostiene la parte, non spettava alla Corte d'appello enumerare gli interventi correttivi che, in concreto, la BPPC avrebbe dovuto adottare per fare fronte alla situazione di crisi in cui versava.

13. Il tredicesimo motivo – “Ex 360, n. 3 e n. 4, c.p.c., per violazione e falsa applicazione degli artt. 3, 18, 23 della L. n. 689/1981, nonché degli artt. 116 c.p.c. e 2729 c.c.” – censura la sentenza che, operando un'indebita inversione dell'onere della prova e applicando la prova presuntiva sulla base di dati puramente ipotetici, ha ritenuto che vi fossero stati dei ritardi nell'avvio dei giudizi per recuperare i crediti “a sofferenza”, e ha reputato “deboli” le relative difese addotte dall'incolpato, senza considerare che l'onere della prova degli asseriti ritardi gravava sulla P.A., e, ancora, che la banca non aveva indicato quali fossero le posizioni classificate a sofferenza, alla data del 31 dicembre 2013, rispetto alle quali si sarebbero registrati detti ritardi, ferma la constatazione che un consistente stock di sofferenze era stato deliberato nei mesi di novembre e dicembre 2013, sicché in relazione ad esso non era configurabile alcun ritardo patologico nell'attività di recupero.

In altri termini, la parte sottolinea la genericità della infrazione, fondata esclusivamente sulla valutazione della Banca d'Italia – in assenza di termini, anche soltanto orientativi, per il recupero giudiziale di crediti deteriorati – e recepita nel provvedimento sanzionatorio.

13.1. Il motivo è infondato.

13.2. Il ricorrente, in sostanza, pur criticando la sentenza della Corte d'appello, non nega l'infrazione.

Nello specifico, la parte – che pure riconosce l'esistenza di un consistente stock di crediti a sofferenza (in controricorso, pag. 46, la Banca d'Italia ne quantificare l'ammontare, al 31/12/2013 – e l'asserzione non è contestata dal ricorrente – in Euro 8,2 milioni, pari al 30 per cento del totale portafoglio prestiti, e aggiunge che per il 30 per cento delle sofferenze in essere a quella data non era stata trasmessa la documentazione ai legali) – fa valere, a titolo di esimente, una circostanza di fatto (la deliberazione delle sofferenze tra novembre e dicembre del 2013), non accertata dal giudice di merito e che, pertanto, non può essere ammissibilmente dedotta in cassazione.

14. Il quattordicesimo motivo – “Ex art. 360, n. 5 c.p.c., per omesso esame di un fatto decisivo, che è stato oggetto di discussione tra le parti” – censura la sentenza che ha tralasciato che, come

ripetutamente eccepito dal ricorrente, la Banca d'Italia non aveva provveduto ad indicare quali fossero, nello specifico, le posizioni in relazione alle quali si sarebbe registrata, alla data del 31 dicembre 2013, una tardiva trasmissione della documentazione ai legali esterni per il recupero giudiziale dei crediti.

14.1. Il motivo è inammissibile.

14.2. Fin da Cass. Sez. U. 07/04/2014, n. 8053, si è andato consolidando il principio di diritto per cui l'attuale art. 360, primo comma, n. 5, cod. proc. civ., nella specie applicabile *ratione temporis*, ha introdotto nell'ordinamento un vizio specifico denunciabile per cassazione, relativo all'omesso esame di un fatto storico, principale o secondario, la cui esistenza risulti dal testo della sentenza o dagli atti processuali, che abbia costituito oggetto di discussione tra le parti e abbia carattere decisivo (vale a dire che, se esaminato, avrebbe determinato un esito diverso della controversia). Ne consegue che, nel rigoroso rispetto delle previsioni degli artt. 366, primo comma, n. 6, e 369, secondo comma, n. 4, cod. proc. civ., il ricorrente deve indicare il "fatto storico", il cui esame sia stato omesso, il "dato", testuale o extratestuale, da cui esso risulti esistente, il "come" e il "quando" tale fatto sia stato oggetto di discussione processuale tra le parti e la sua "decisività", fermo restando che l'omesso esame di elementi istruttori non integra, di per sé, il vizio di omesso esame di un fatto decisivo qualora il fatto storico, rilevante in causa, sia stato comunque preso in considerazione dal giudice, ancorché la sentenza non abbia dato conto di tutte le risultanze probatorie.

14.3. Nel caso in esame, il ricorrente non rivolge alla sentenza d'appello rilievi riconducibili al paradigma legale di cui al novellato n. 5, dell'art. 360, in quanto non individua alcun fatto storico il cui esame sia stato omesso, ma si limita ad affermare che le posizioni a sofferenza non sarebbero state individuate dalla vigilanza, pur ammettendo che ne esisteva un consistente stock.

15. Il quindicesimo motivo – "Ex 360, n. 3 e n. 4, c.p.c., per violazione e falsa applicazione degli artt. 3, 18, 23 della l. n. 689/1981, nonché degli artt. 2729 c.c. e 116 c.p.c., nonché dell'art. 132, n. 4, c.p.c." – censura la sentenza che, sul terzo rilievo (elevato rischio di credito), con motivazione apparente, afferma che la circostanza che i piani di rientro fossero stati accordati senza l'acquisizione di maggiori garanzie e in assenza di valutazione circa l'effettiva sostenibilità degli impegni, sarebbe indicativa di scarsa prudenza e, in conseguenza di ciò, rilevante ai fini sanzionatori.

Il ricorrente ascrive alla Corte di Roma: di avere adottato una motivazione apparente; di avere operato un'inversione dell'onere della prova; di avere acriticamente condiviso il giudizio della Banca d'Italia; di non avere valutato che i quattro piani di rientro avevano consentito alla BPPC di recuperare, in via bonaria, quote sostanziose dei propri crediti; che i piani di rientro comportano dei benefici processuali (per la loro natura di ricognizione del debito) e, in caso di adempimento del piano, consentono il risparmio dei costi legali.

15.1. Il motivo è inammissibile.

15.2. Posto che la sentenza non è viziata da motivazione apparente, poiché essa spiega (a pag. 17) le ragioni di condivisione del rilievo in punto di rimodulazione dei crediti, la censura si sostanzia nella diversa prospettazione di aspetti meritali, già insindacabilmente vagliati dalla Corte d'appello.

16. Il sedicesimo motivo – “Ex art. 360, n. 5 c.p.c., per omesso esame di un fatto decisivo, che è stato oggetto di discussione tra le parti” – censura la sentenza che non ha esaminato i piani di rientro prodotti dall’opponente e, conseguentemente, non ha affrontato il tema del rapporto costi-benefici sotteso alla conclusione dei quattro piani di rientro oggetto di contestazione.

16.1. Il motivo è inammissibile.

16.2. Si deve ribadire (cfr. punto 14.2.) che l’omesso esame di elementi istruttori (documentazione concernente i contestati piani di rientro) non integra, di per sé, il vizio di omesso esame di un fatto decisivo qualora il fatto storico, rilevante in causa, sia stato comunque preso in considerazione dal giudice, ancorché la sentenza non abbia dato conto di tutte le risultanze probatorie.

17. Il diciassettesimo motivo – “Ex 360, n. 3 e n. 4, c.p.c., per violazione e falsa applicazione degli artt. 3 e 18 della l. n. 689/1981, degli artt. 2729 c.c. e 116 c.p.c., nonché dell’art. 132, n. 4, c.p.c.” – censura la sentenza che, con motivazione apparente, afferma che la mancata adozione, da parte della BPPC, al tempo della verifica (marzo-maggio 2014), di una formale policy di classificazione e valutazione del credito configurasse un illecito, sebbene, al tempo, l’adozione di un regolamento per il processo del credito fosse facoltativa e non obbligatoria.

17.1. Il motivo è infondato.

17.2. Il giudice di merito, con accertamento di fatto, incensurabile in cassazione, ha stabilito che la mancanza di una policy di classificazione e valutazione del credito ha fatto sì che la banca ignorasse i segnali di allarme della situazione finanziaria della clientela (insoluti, fatture non rientrate a scadenza, prolungato immobilizzo dei conti, segnalazione a sofferenza sul sistema), ciò che aveva causato gravi ritardi nella individuazione di posizioni anomale.

Il ricorrente sostiene che, all’epoca dell’ispezione della vigilanza, le banche non erano obbligate a dotarsi di un regolamento per la policy. Il che, tuttavia, non esclude che un sistema di classificazione e valutazione del credito dovesse essere predisposto da parte della BPPC.

La tesi difensiva è priva di pregio e non supera la convincente obiezione del controricorso (pag. 54), ove si evidenzia che, all’epoca dell’ispezione, l’adozione di politiche di policy era imposta all’intero sistema bancario dalle istruzioni per la vigilanza (Circolare della Banca d’Italia n. 229 del 21/04/1999).

Sul piano dei principi generali, in tema di controlli interni, le “istruzioni” (titolo IV, capitolo 11, sezione II, par. 1), nell’ottica della sana e prudente gestione, impongono alle banche l’assunzione dei rischi consapevole e compatibile con le condizioni economico-patrimoniale, e stabiliscono che è indispensabile che, a tale fine, gli istituti di credito si dotino di adeguati sistemi di rilevazione, misurazione e controllo dei rischi, coerentemente con la complessità e le dimensioni delle attività svolte.

Inoltre (par. 1.1), per il conseguimento di un sistema dei controlli interni efficiente ed efficace un ruolo fondamentale è attribuito ai soggetti che, nelle banche, svolgono funzioni di amministrazione e di direzione.

È poi stabilito (par. 2.1 “Rischio di credito”) che, coerentemente con le politiche di erogazione del credito, “l’alta direzione definisce le metodologie di misurazione del rischio di credito nonché le tecniche di controllo andamentale. Entrambe devono essere conosciute e approvate dal consiglio

di amministrazione. L'intero processo riguardante il credito (istruttoria, erogazione, monitoraggio delle posizioni, revisione delle linee di credito, interventi in caso di anomalia) deve risultare dal regolamento interno e deve essere periodicamente sottoposto a verifica (...) Gli adempimenti delle unità operative nella fase di monitoraggio del credito erogato devono essere desumibili dalla regolamentazione interna. In particolare, devono essere fissati termini e modalità di intervento in caso di anomalia. I criteri di valutazione, gestione e classificazione dei crediti anomali, nonché le relative unità responsabili, devono essere fissati con delibera del consiglio di amministrazione, nella quale sono indicate le modalità di raccordo fra tali criteri e quelli previsti per le segnalazioni di vigilanza. Il consiglio di amministrazione deve essere regolarmente informato sull'andamento dei crediti anomali e delle relative procedure di recupero”.

18. Il diciottesimo motivo – “Ex 360, n. 3 e n. 4, c.p.c., per violazione e falsa applicazione degli artt. 3, 18 e 23 della L. n. 689/1981, degli artt. 2381, 6° comma, c.c. e 2392 c.c., degli artt. 2729 c.c. e 116 c.p.c., nonché dell’art. 132, n. 4, c.p.c.” – censura la sentenza nella parte in cui, con riferimento al rilievo 4 (anomalie in tema di trasparenza), con motivazione apparente, ravvisa l’infrazione, ma non svolge alcuna indagine in merito alla sussistenza di segnali di alert idonei a generare un obbligo di indagine supplementare da parte degli amministratori (art. 2381, sesto comma, cod. civ.), e dimentica che le criticità in tema di trasparenza, emerse solo in sede di verifica ispettiva, derivavano da meri errori umani, non preventivamente evitabili e correggibili soltanto a posteriori.

Il ricorrente aggiunge che l’attribuzione della responsabilità scaturisce dalla ritenuta sussistenza di un obbligo dell’amministratore di vigilare sul generale andamento della gestione, sebbene la riforma del diritto societario abbia espunto tale obbligo dal contenuto dell’art. 2392, cod. civ.

19. Il diciannovesimo motivo – “Ex art. 360, n. 5 c.p.c., per omesso esame di un fatto decisivo, che è stato oggetto di discussione tra le parti” – censura la sentenza che non considera la pronta restituzione, da parte della banca alla clientela, degli addebiti effettuati in eccedenza, non appena riscontrati gli errori umani che avevano portato all’applicazione di oneri superiori al dovuto, quale (pag. 106 del ricorso per cassazione) “unica condotta proattiva esigibile dall’esponente aziendale”, idonea a elidere e/o comunque a mitigare i rischi legali e reputazionali.

19.1. Il diciottesimo e il diciannovesimo motivo, suscettibili di esame congiunto per connessione, sono infondati.

19.2. Escluso, anche in relazione a queste censure, che la sentenza sia viziata da motivazione apparente, la Corte distrettuale pone l’accento sul fatto che la parte ha ammesso di avere appreso delle anomalie in tema di trasparenza soltanto al momento dell’ispezione, il che, secondo l’insindacabile scrutinio del giudice di merito, denota (pag. 18) l’“inadeguata condotta” dell’amministratore e la scarsa sensibilità per i rischi legali e reputazionali conseguenti al carente presidio dei rapporti con la clientela.

19.3. La tesi difensiva secondo cui il ricorrente, quale amministratore privo di deleghe esecutive nel comparto di riferimento, non aveva un obbligo di vigilanza sulla gestione, è superata alla luce delle considerazioni svolte al punto 17.2., in ragione del fatto che (anche) i rilievi in tema di trasparenza attengono alle carenze organizzative e dei controlli interni in relazione al rischio di credito.

In merito agli obblighi degli amministratori delle imprese bancarie, ancorché privi di deleghe operative, valgono le precedenti considerazioni (punto 8.5).

Quanto all'omesso esame di un fatto decisivo (diciannovesimo motivo), la censura è priva di pregio perché si risolve nella deduzione di un fatto – i rimborsi riconosciuti alla clientela – successivo al perfezionamento dell'infrazione (come tale idoneo, al più, a incidere sul trattamento sanzionatorio), nonché nell'allegazione di un elemento del tutto valutativo – l'asserita tempestività dei rimborsi alla clientela – che sta oltre il confine del giudizio di cassazione.

20. Il ventesimo motivo – “Ex 360, n. 3 e n. 4, c.p.c., per violazione e falsa applicazione degli artt. 3, 11 e 18 della L. n. 689/1981, delle disposizioni di vigilanza della Banca d'Italia del 18 dicembre 2012, Sezione II, art. 1.6, in materia di sanzioni e procedura amministrativa sanzionatoria, nonché dell'art. 132, n. 4, c.p.c.” – censura la sentenza impugnata che, con motivazione apparente e priva di qualsiasi elemento idoneo a consentire la comprensione di quale sia stato il peso ponderale attribuito, in concreto, agli elementi utilizzati dalla Banca d'Italia per la determinazione del quantum della sanzione amministrativa pecuniaria, ritiene congrua la pena inflitta al ricorrente.

20.1. Il motivo è infondato.

20.2. Con riferimento alla carenza strutturale della motivazione, è dato rilevare che la sentenza d'appello reca una motivazione, chiara e sintetica, che soddisfa senz'altro il requisito del “minimo costituzionale”, come delineato dalla giurisprudenza di questa Corte (cfr. la giurisprudenza indicata al punto 8.3. In termini: Cass. Sez. U. 27/12/2019, n. 34476, la quale cita, in motivazione, Cass. Sez. U., 07/04/2014, n. 8053; Sez. U. 18/04/2018, n. 9558; Sez. U. 31/12/2018, n. 33679).

Il giudice di merito spiega che la sanzione risponde ai requisiti di ragionevolezza e proporzionalità enunciati dall'art. 11, della legge n. 689 del 1981, in quanto: è stata irrogata in misura (Euro 22.000,00) ben sotto la soglia del massimo edittali (Euro 129.110,00), tenendo conto delle dimensioni della banca, della rilevanza delle irregolarità, che hanno portato all'adozione dell'amministrazione straordinaria, e tenuto conto della consistenza delle accertate carenze organizzative nell'attività di rilancio della BPPC.

È da escludere la denunciata violazione di legge, dovendosi fare applicazione del principio di diritto consolidato (ex multis, Sez. 2, Ordinanza n. 4844 del 23/02/2021, Rv. 660460 – 01, in connessione con Cass. n. 5877/2004 e Cass. n. 9255/2013), secondo cui, in tema di sanzioni amministrative pecuniarie, ove la norma indichi un minimo e un massimo della sanzione, spetta al potere discrezionale del giudice determinarne l'entità entro tali limiti, allo scopo di commisurarla alla gravità del fatto concreto, globalmente desunta dai suoi elementi oggettivi e soggettivi. Peraltro, il giudice non è tenuto a specificare nella sentenza i criteri adottati nel procedere a detta determinazione, né la Corte di cassazione può censurare la statuizione adottata, ove tali limiti siano stati rispettati e dal complesso della motivazione risulti che quella valutazione è stata compiuta.

21. In conclusione, dichiarati inammissibili il secondo, il settimo, il quattordicesimo, il quindicesimo e il sedicesimo motivo, e infondati tutti gli altri, il ricorso è rigettato.

22. Le spese del giudizio di cassazione, liquidate in dispositivo, seguono la soccombenza.

23. Ai sensi dell'art. 13, comma 1-quater, del D.P.R. n. 115/2002, si dà atto della sussistenza dei presupposti processuali per il versamento, da parte del ricorrente, di un ulteriore importo a titolo di contributo unificato pari a quello previsto per il ricorso a norma del comma 1-bis del citato art. 13, se dovuto.

Corte di Cassazione, [.] v Banca d'Italia, 16/04/2024, No 10277

Svolgimento del processo – Motivi della decisione

1. A seguito di accertamenti ispettivi dell'Autorità di Vigilanza esperiti nel corso dell'anno 2010 nei confronti della Spa Cape Natixis Società di gestione del risparmio – in acronimo SGR (poi collocata in L.C.A.), di cui era amministratore delegato A.A., venivano riscontrate a suo carico alcune violazioni sanzionabili, in sede amministrativa, ai sensi dell'art. 190 del T.U.F. (D.Lgs. n. 58/1998), consistenti, in particolare, in carenze nell'organizzazione e nei controlli interni da parte dei componenti del Consiglio di amministrazione, nella mancata verifica dei requisiti di indipendenza del Presidente del Collegio sindacale e dei componenti dello stesso Consiglio di amministrazione, oltre che in non corrette valorizzazioni delle quote dei fondi e modalità di redazione dei prospetti contabili da parte del Consiglio di amministrazione. Le suddette violazioni venivano contestate al menzionato A.A. e, all'esito del conseguente procedimento nell'ambito del quale il destinatario dell'atto di contestazione presentava anche le sue controdeduzioni, la Banca d'Italia, con provvedimento n. 245 del 20 marzo 2012, irrogava, nei riguardi del medesimo A.A., sanzioni amministrative pecuniarie per complessivi Euro 135.000,00, con riferimento alle anzidette violazioni a lui ascritte ed appositamente contestate.

Il predetto provvedimento sanzionatorio della Banca d'Italia veniva tempestivamente impugnato dinanzi al TAR Lazio, e poi riassunto, a seguito della declaratoria di difetto di giurisdizione, dinanzi alla Corte di appello di Milano, che, nella costituzione dell'opposta Banca d'Italia, con decreto n. 1736/2018 (depositato il 19 aprile 2018), rigettava integralmente la formulata opposizione, condannando l'opponente alla rifusione delle spese giudiziali.

A sostegno della ravvisata infondatezza totale dell'opposizione, la Corte d'Appello rigettava, in primo luogo, le doglianze relative all'assunta illegittimità del procedimento di contestazione prodromico all'emanazione della sanzione, con specifico riferimento alle prospettate violazioni del principio del contraddittorio e della conoscenza degli atti istruttori, alla supposta inosservanza del termine decadenziale delle contestazioni, al mancato rispetto del termine generale di conclusione del procedimento ai sensi dell'art. 2, comma 5, della legge n. 241/1990, all'omessa indicazione della persona responsabile del procedimento e dell'ufficio in cui prendere visione degli atti, al dedotto difetto assoluto di istruttoria. Il giudice dell'opposizione riteneva, poi, l'infondatezza delle censure attinenti propriamente al merito degli accertati addebiti, e, infine, considerava destituita di fondamento giuridico anche la prospettata violazione e falsa applicazione dell'art. 11 della legge n. 689/1981 in ordine alla determinazione della misura delle sanzioni inflitte per i vari gruppi di infrazioni.

2. A.A. ha proposto ricorso per cassazione avverso la suddetta pronuncia sulla base di tredici motivi.

La Banca d'Italia ha resistito con controricorso.

Entrambe le parti con memoria depositata in prossimità dell'udienza hanno insistito nelle rispettive richieste.

3. Il primo motivo di ricorso denuncia la violazione dell'art. 2, co. 2, 5 e 8 della legge n. 241/1990 e dell'art. 7 del Regolamento Banca d'Italia del 25 giugno 2008 e relativo punto 129 della legenda, nonché dell'art. 28 della legge n. 689/81 in relazione all'art. 24 del D.Lgs. n. 262/2005.

Si sostiene che la Banca d'Italia non ha rispettato il termine di 240 giorni per la definizione del procedimento sanzionatorio, come appunto individuato dal citato regolamento.

Alla luce della previsione dell'art. 195 TUF deve reputarsi che tale termine abbia una sua portata precettiva e vincolante, così che la sua violazione determina il venir meno della potestà sanzionatoria.

Il motivo è inammissibile ex art. 360 bis n. 1 c.p.c., avendo la decisione gravata deciso in conformità della giurisprudenza di questa Corte, in merito al carattere meramente ordinatorio del termine de quo, e senza che il motivo offra elementi per indurre a rivedere il proprio orientamento.

Nel ribadire la correttezza del richiamo ai precedenti giurisprudenziali compiuto dalla Corte d'Appello, va qui confermato che deve affermarsi l'inconciliabilità della legge n. 241/1990 con la disciplina delle sanzioni amministrative, contenuta nella legge 24 novembre 1981, n. 689, in quanto la regolamentazione dell'irrogazione delle sanzioni amministrative si pone in rapporto di specialità rispetto a quella dei procedimenti amministrativi in genere e, quindi, quest'ultima, anche se posteriore alla prima, non comporta la caducazione della precedente, considerato, inoltre, che le disposizioni della legge n. 689 del 1981, "costituiscono un sistema organico e compiuto, nel quale non occorrono inserimenti esterni" (Cass. Sez. U. n. 9591/2006 e Cass. n. 15019/2013). Va, perciò, ribadito che i procedimenti sanzionatori bancari sono temporalmente soggetti solo al termine quinquennale di prescrizione della pretesa punitiva previsto dal citato art. 28 della legge n. 689/1981, e non a termini ulteriori di decadenza e/o perenzione, non previsti dalla legge stessa. È stato, altresì, condivisibilmente puntualizzato che, in tema di sanzioni amministrative per violazione delle disposizioni in materia di intermediazione finanziaria, avuto riguardo all'art. 21-octies, comma 2, della citata legge n. 241/1990, gli eventuali vizi del procedimento amministrativo previsto dall'art. 195 del T.U.F. non sono rilevanti, in ragione tanto della natura vincolata del provvedimento sanzionatorio, quanto della immodificabilità del suo contenuto (cfr. Cass. n. 24784/2010; Cass. n. 7777/2011; Cass. n. 15019/2013, cit., e Cass. n. 4363/2015), principio del contraddittorio, della conoscenza degli atti istruttori e della distinzione tra funzioni istruttorie e funzioni decisorie di cui all'art. 195 co. 2 TUF ed all'art. 24 co. 1, della legge n. 262/2005.

4. Il secondo motivo di ricorso denuncia la violazione dell'art. 8, lett. d), della legge n. 241/1990 in relazione agli artt. 24 della legge n. 262/2005 e 195 TUF ed art. 1.2 del Provvedimento Sanzioni e Procedure Sanzionatoria di Banca d'Italia, quanto al rigetto della censura con la quale si assumeva che al ricorrente non era stato assicurato il diritto di difesa per essere carente nella missiva di contestazione la puntuale indicazione dell'Ufficio al quale l'incolpato avrebbe dovuto far pervenire le proprie osservazioni e richiedere copia degli atti necessari.

Il terzo motivo denuncia la violazione e falsa applicazione dell'art. 8, lett. d) della legge n. 241/1990 in relazione agli artt. 24 della legge n. 262/2005, 195 TUF e 6, co. 3, lett. a) della CEDU, in quanto il contenuto della lettera di contestazione notificata al ricorrente ha vulnerato il proprio diritto ad essere compiutamente ed adeguatamente informato circa gli esatti profili dell'addebito mossogli.

I motivi, da esaminare congiuntamente per la loro connessione, sono manifestamente infondati.

Come già affermato da Cass. n. 12503/2018 (occupatasi della medesima vicenda, e relativa all'opposizione proposta da altro amministratore della medesima società), deve escludersi la genericità degli addebiti di cui alla lettera di contestazione.

La Corte d'Appello ha accertato adeguatamente che le "lettere di contestazioni" non si esaurivano nei soli riferimenti normativi a cui erano correlate le infrazioni mosse al A.A. ma erano congruamente corredate dall'illustrazione di cospicui rilievi e dell'allegazione dei rilievi ispettivi, tanto è vero che la completezza delle contestazioni ha reso possibile al trasgressore di poter approntare esaustivamente le sue controdeduzioni.

Da ciò deriva la pacifica infondatezza della censura.

Né appare meritevole di miglior sorte il rilievo circa la pretesa assenza dell'indicazione dell'autorità cui il ricorrente avrebbe dovuto rivolgersi, avendo la decisione gravata puntualmente sottolineato come la lettera di contestazione indicava l'unità organizzativa responsabile del procedimento, identificata nel Servizio rapporti esterni ed affari generali, di tal che era evidentemente suscettibile di immediata individuazione anche il soggetto cui inoltrare le richieste di accesso (diritto esercitato pacificamente da altri soggetti sanzionati), dovendosi quindi reputare che la tesi del ricorrente sia frutto di un approccio eccessivamente formalistico e volto nella sostanza a contestare anche quello che deve reputarsi essere stato un accertamento di fatto del giudice di merito.

5. Il quarto motivo di ricorso denuncia la violazione e falsa applicazione dell'art. 2697 e degli artt. 2727-2729 c.c., quanto alla soluzione data dal giudice di merito circa la vicenda dell'opzione di vendita concessa dal dott. B.B. sulle azioni di Arkimedica, partecipata dal fondo CNPEF.

Il ricorrente ha sempre assunto l'estraneità della SGR rispetto a tale vicenda, sostenendo che l'opzione era stata concessa dal B.B. in proprio e non nella qualità di Presidente del CDA della società.

Tale concessione ha trovato poi l'avallo di una decisione in primo grado del Tribunale di Firenze che ha dichiarato il difetto di legittimazione passiva di Cape Natixis SGR, sia di Opera SGR. Ne consegue che è stata ribadita la propria responsabilità per l'accaduto in contrasto con le prove raccolte nel giudizio, e senza tenere conto degli esiti del diverso giudizio, da valere quanto meno come prova atipica, ovvero come elementi presuntivi.

Il quinto motivo denuncia la violazione e falsa applicazione dell'art. 23 della legge n. 689/81 nonché l'omesso esame di un fatto decisivo per il giudizio, in quanto l'accertamento dell'estraneità della SGR alla vicenda di concessione dell'opzione, ancorché sulla base di sentenze non definitive, avrebbe dovuto fondare il giudizio di insussistenza della responsabilità del ricorrente.

Il sesto motivo di ricorso denuncia la violazione dell'art. 295 c.p.c., in quanto, una volta intervenuta la sentenza non definitiva del Tribunale di Firenze, della stessa occorreva tenere conto, non potendosi far semplicemente richiamo alla circostanza che essendo una sentenza non ancora passata in giudicato, era suscettibile di eventuale riforma nei successivi gradi di giudizio.

La Corte d'Appello avrebbe dovuto quindi disporre la sospensione del giudizio in attesa del suo passaggio in giudicato.

I motivi, da esaminare congiuntamente per la loro connessione, sono manifestamente infondati.

In primo luogo, la censura non si confronta con la ratio che sottende la decisione del giudice di merito circa il rigetto del corrispondente motivo di opposizione.

Infatti, nel decreto impugnato è stato ricordato come le ragioni che sostenevano l'irrogazione della sanzione risiedevano nel fatto che della vicenda non fosse stata data alcuna informazione

agli organi collegiali della SGR ed alla società di revisione, in assenza di una preventiva registrazione in contabilità, e ciò sebbene dalla medesima fosse scaturito un contenzioso civile (quello appunto definito in primo grado dalla sentenza del Tribunale di Firenze), che vedeva come parte convenuta, non solo il Presidente del CDA in proprio, ma la stessa società ed il Fondo.

La decisione gravata ha nella sostanza ritenuto che, anche a voler reputare attendibile quanto affermato dal Tribunale di Firenze (con una decisione ancora non suscettibile di essere reputata definitiva), tuttavia residuavano in capo al ricorrente una serie di violazioni di carattere formale, e precisamente quelle consistenti nell'omissione di informazione, che prescindevano dal profilo relativo alla individuazione della effettiva parte contraente il contratto di opzione, in quanto, anche a voler accedere alla soluzione che la stessa fosse stata data dal B.B. in proprio, era lo stesso coinvolgimento della società in una controversia civile che imponeva che della circostanza fossero edotti gli organi della società, e di riflesso gli investitori.

In tale prospettiva la decisione di primo grado del Tribunale di Firenze deve reputarsi non avere il carattere di fatto decisivo ai fini della valutazione della illegittimità della condotta tenuta dal A.A.. Inoltre deve anche escludersi che sussista un rapporto di pregiudizialità necessario tra quanto oggetto del presente procedimento ed il diverso contenzioso che vede contrapposte le parti del contratto d'opzione (e ciò anche in ragione della diversità soggettiva delle parti dei due processi), il che rende evidente come sia priva di fondamento anche la dedotta violazione dell'art. 295 c.p.c., non potendosi reputare sussistente un obbligo del giudice del giudizio di opposizione di dover sospendere lo stesso in attesa della definizione del diverso giudizio di natura contrattuale.

6. Il settimo motivo di ricorso denuncia l'omesso esame di fatto decisivo per il giudizio in relazione agli artt. 3 e 16 del Regolamento del Fondo CNPEF.

In relazione alla cd. operazione Tech Med, nella quale si imputava al A.A. di avere favorito una canalizzazione dei proventi netti derivanti dalle dimissioni dell'OICR alla capitalizzazione della società, sino alla concorrenza di un finanziamento che alla stessa era stato concesso dalle banche, il ricorrente aveva obiettato che si trattava di operazione sicuramente consentita in base alle regole dettate dal regolamento del fondo.

La decisione gravata ha reputato che la sanzione dovesse essere confermata in base al rilievo che l'operazione era stata fortemente ritagliata sugli interessi delle banche creditrici, risolvendosi ad esclusivo loro vantaggio, con grave danno invece degli investitori.

In tal modo la pronuncia ha adottato una motivazione meramente apparente senza esplicitare le ragioni del proprio convincimento.

Il settimo motivo, in relazione alla medesima questione, al punto 1, evidenzia che vi sarebbe la violazione e falsa applicazione degli artt. 195 TUF e 14 della legge n. 689/81, in relazione all'art. 6 par. 3 CEDU, in quanto la contestazione era stata sollevata in relazione alla violazione delle prescrizioni del regolamento del fondo, nel mentre la sanzione è stata confermata sulla base di una diversa ragione giustificativa. Il punto 2 del settimo motivo denuncia la violazione e falsa applicazione dell'art. 132, co. 2, n. 4, c.p.c., quanto all'assenza di una motivazione da parte del giudice di merito circa le ragioni di fatto che inducono a reputare che la condotta della società sia avvenuta in violazione dei criteri di sana e prudente gestione.

Il punto 3 del medesimo motivo lamenta la violazione dell'art. 3 della legge n. 689/81 quanto alla valutazione ex post dei criteri di sana e prudente gestione, mancando la specificazione delle ragioni in base alle quali la cd. canalizzazione fosse da considerare imprudente e/o malsana già alla data della sua deliberazione.

Le doglianze, da esaminare congiuntamente per la loro connessione, sono complessivamente infondate.

Va sicuramente disattesa l'eccezione di nullità della sentenza per la violazione dell'art. 132, co. 2, n. 4, c.p.c., atteso che la pronuncia gravata risulta ampiamente soddisfattiva del principio del cd. minimo costituzionale della motivazione (Cass. S.U. n. 8053/2014).

Va altresì ricordato che questa Corte (Cass. n. 12503/2018), chiamata ad esaminare la medesima vicenda, in relazione ad altro soggetto sanzionato, ha già ritenuto incensurabile l'apprezzamento del giudice di merito che ha reputato meritevole di sanzione la c.d. "operazione di canalizzazione Tech Med", anche in ragione del contrasto con il regolamento del fondo CNPEF, risultando quantomeno dubbia la conformità allo stesso, non avendo quest'ultima trovato un univoco riscontro in idonei pareri legali.

Inoltre, la Corte d'Appello, con accertamento in fatto, ha ritenuto che l'operazione si palesasse ab initio idonea a determinare un pregiudizio per gli investitori (pregiudizio poi in concreto manifestatosi), avendo la medesima inteso privilegiare in maniera assorbente gli interessi dalla banca mutuante.

Lo stesso ricorrente a pag. 52 del ricorso riporta la previsione di cui all'art. 3, co. 5 del regolamento del fondo che prevede che possano assumersi altre scelte di investimento nell'interesse degli investitori.

A fronte delle varie opzioni rimesse alla valutazione degli amministratori, sono proprio le previsioni del regolamento che debbono essere interpretate alla luce della necessità di assicurare il rispetto delle esigenze di sana e prudente gestione, così che la scelta di canalizzare i proventi della dismissione con un'opzione unilateralmente e smaccatamente favorevole alla posizione dei creditori, denota come sia stata violata anche la prescrizione del regolamento, dovendo i principi di sana e prudente gestione presiedere anche all'applicazione delle regole frutto dell'autonomia negoziale.

7. L'ottavo motivo di ricorso denuncia la violazione dell'art. 2 della legge n. 241/1990, dell'art. 24 della legge n. 262/2005, dell'art. 3.2.4 delle disposizioni di vigilanza in materia di sanzioni e procedura sanzionatoria amministrativa, anche in relazione all'art. 132, co. 2, n. 4, c.p.c.

Si deduce che in relazione al quinto motivo di opposizione, concernente la mancata contabilizzazione di una opzione put sulla partecipata Sinteco Srl, la Corte d'Appello avrebbe dato atto della sua sanatoria, ma ha in tal modo disapplicato il citato art. 3.2.4, non avendo tenuto conto dell'avvenuta inclusione nel rendiconto al 31 dicembre 2010.

Il motivo è evidentemente privo di fondamento.

In disparte il rilievo che anche Cass. n. 12503/2018 ha reputato irrilevante ai fini sanzionatori la avvenuta tardiva registrazione dell'operazione, correttamente la decisione impugnata ha sottolineato come la contabilizzazione sia frutto di una tardiva resipiscenza del sanzionato che

si è attivato solo in epoca successiva all'esecuzione degli accertamenti ispettivi, condotta questa che denota come alla medesima non possa attribuirsi efficacia determinante ai fini dell'esclusione della responsabilità.

Peraltro la stessa norma di cui alle Disposizioni di Vigilanza della Banca d'Italia, con l'uso dell'espressione "ne tiene conto", in relazione alla eventuale rimozione degli effetti della violazione (ed anche a tacere del fatto che una successiva registrazione non elide, sul piano del riscontro del difetto di trasparenza, le conseguenze della iniziale omissione nella contabilizzazione) non impone in termini di doverosità l'adozione di un provvedimento di esclusione della responsabilità, riservando sempre all'apprezzamento discrezionale dell'autorità la valutazione circa l'effettiva rilevanza della condotta ad incidere sul piano sanzionatorio.

8. Il nono motivo di ricorso denuncia la violazione e falsa applicazione degli artt. 22 e 23 del D.Lgs. n. 231/2007, 2697 c.c. e 115 c.p.c., con omesso esame di fatto decisivo per il giudizio. In relazione alla contestazione concernente la violazione dell'obbligo di astensione nei casi di cui all'art. 23 del D.Lgs. n. 231/07, il A.A. aveva sottolineato come il terzo comma preveda che debbano porsi in essere le operazioni per loro natura non rinviabili. Inoltre, l'art. 22, ove il rapporto sia anteriore all'entrata in vigore della legge, prevede che gli adempimenti previsti dalla legge sopravvenuta siano effettuati in occasione del primo contatto utile.

La Corte d'Appello ha rigettato la deduzione sostenendo che in relazione agli investitori reticenti non sussistevano le specifiche ipotesi di esenzione dall'obbligo di astensione, in quanto non ricorrevano le condizioni che imponevano per legge il compimento di determinate operazioni, né si era al cospetto di investitori interessati da indagini, il cui esito sarebbe stato danneggiato in caso di astensione dal compimento dell'operazione.

Assume il ricorrente che la legge contempla anche l'esenzione dall'astensione per le operazioni che per loro natura non possono essere rinunciate, e tale fattispecie non è stata indagata dalla Corte d'Appello. Inoltre, non è stata dimostrata la circostanza che la SGR avesse intrapreso nuove operazioni con soggetti non compiutamente identificati ovvero non avesse ottemperato all'obbligo di identificazione in occasione del primo contatto utile.

Il punto 1 del nono motivo denuncia la violazione dell'art. 195 TUF e dell'art. 14 della legge n. 689/81 e 6 CEDU, in quanto non vi sarebbe correlazione tra il fatto contestato e quanto invece sorregge la decisione sanzionatoria, poiché non era mai stata contestata l'esecuzione di operazioni sospette.

Il motivo è infondato.

La Corte d'appello ha correttamente evidenziato che non era stata fornita alcuna prova che si fosse in presenza di operazioni per le quali vi fosse l'esenzione dall'obbligo di astensione, e deve certamente reputarsi che, a fronte della contestazione sollevata, era specifico onere del ricorrente, se non altro per il principio di vicinanza della prova, quello di dover fornire la dimostrazione che ricorrevano una delle ipotesi rientranti nella terza fattispecie di esenzione, e cioè di operazione insuscettibile per sua natura di essere rinviata.

Né infine è sostenibile che vi sarebbe stata una modificazione della contestazione in relazione all'illecito originariamente dedotto, in quanto l'addebito resta confermato per l'avvenuta esecuzione di operazioni con investitori non correttamente identificati, essendosi solo aggiunto

ad abundantiam, che, ove anche fosse ricorsa una ipotesi di esenzione, risultava violata la prescrizione che imponeva coevamente al compimento dell'operazione di dover effettuare la segnalazione dell'operazione sospetta.

9. Il decimo motivo denuncia la violazione del principio di correlazione tra fatto contestato e fatto assunto a base della sanzione irrogata con violazione dell'art. 14 della legge n. 689/81 e dell'art. 195 TUF.

In relazione alla contestazione che investiva la tardiva valutazione della situazione di interessenza del Presidente del collegio sindacale, Dott. C.C., si sostiene che la contestazione atteneva al mancato riscontro dell'assenza del requisito dell'indipendenza.

La Corte d'Appello ha confermato la sanzione reputando, in contrasto con il contenuto dell'addebito, che la violazione risiedeva nell'omessa sottoposizione della questione all'attenzione del CDA.

Ciò ha determinato quindi un'immutazione della originaria contestazione.

L'undicesimo motivo denuncia la violazione dell'art. 115 c.p.c., con omesso esame di un fatto decisivo, non essendosi tenuto conto delle copie dei verbali del 23 febbraio 2005, del 16 maggio 2006 e del 20 aprile 2009, nei quali venivano esaminate le dichiarazioni di indipendenza ed inesistenza di incompatibilità dei sindaci.

I motivi, da esaminare congiuntamente per la loro connessione, sono infondati.

La Corte d'Appello, con accertamento in fatto, adeguatamente motivato, ha condivisibilmente sottolineato che il rilievo ispettivo concerneva non già la verifica dell'effettiva incompatibilità del C.C. a ricoprire l'incarico di Presidente del collegio sindacale, ma piuttosto la circostanza che il ricorrente non avesse sollecitato la dovuta valutazione da parte del CDA, omettendo di informarlo della situazione in cui versava il C.C., pur essendo allo stesso nota, accertamento questo che esclude che ricorra la dedotta modificazione della contestazione, essendo conforme al contenuto di quella originaria, quale emerge dagli atti riprodotti nel controricorso.

Risulta poi del tutto privo di specificità il motivo che invoca il contenuto dei verbali nei quali asseritamente sarebbe stata fornita l'informazione di cui si lamenta invece l'omissione, in quanto non ne risulta riprodotto il contenuto per la parte qui di interesse, ed essendo l'affermazione del ricorrente contrastata da quanto riportato nel decreto impugnato, ove si riferisce che gli altri consiglieri avevano riferito che la circostanza de qua non era mai stata portata a conoscenza del CDA.

10. Il dodicesimo motivo denuncia la violazione dell'art. 2697 c.c. nonché degli artt. 115 c.p.c., 2727 e 2729 c.c., con omesso esame di un fatto rilevante ex art. 360, co. 1, n. 5, c.p.c.

Assume il A.A. che, quanto alla non corretta valorizzazione delle quote dei fondi, la Corte d'Appello ha omesso di valutare le eccezioni sollevate al riguardo nel mentre l'art. 10 del regolamento del fondo CNPEF individuava i criteri per fissare il valore unitario delle quote.

Inoltre, è stata affermata l'assenza di linee guida per la stima trascurando la documentazione prodotta dal ricorrente, con la violazione delle regole di riparto dell'onere della prova.

Analogamente a quanto già affermato da Cass. n. 12053/2018 rispetto alle analoghe censure mosse da altro sanzionato in relazione alla medesima vicenda, il motivo mira ad invocare una rivalutazione delle risultanze riferibili alle accertate circostanze fattuali conducenti all'affermazione della responsabilità

dello stesso ricorrente, con specifico riferimento alle specifiche condotte, consistita nella non corretta valorizzazione della quota dei fondi e delle modalità di redazione dei prospetti contabili.

In punto di diritto è significativo ricordare come sempre la giurisprudenza di questa Corte (cfr., ad esempio, Cass. n. 2737/2013 e Cass. n. 2406/2016) abbia stabilito che, nella materia delle sanzioni amministrative, l'art. 3 della legge n. 689/1981 pone una presunzione di colpa a carico dell'autore del fatto vietato, riservando a questi l'onere di provare di aver agito senza colpa, sicché, in caso di provvedimento sanzionatorio emesso dalla Banca d'Italia nei confronti dei componenti del consiglio di amministrazione, del collegio sindacale e della direzione di una banca, per inosservanza delle istruzioni relative all'organizzazione amministrativa e contabile ed omesso invio delle prescritte segnalazioni all'istituto d'emissione, spetta ai destinatari della sanzione dimostrare di aver adempiuto diligentemente agli obblighi imposti dalla normativa di settore (rimanendo, comunque, irrilevante, ai fini dell'esclusione della colpa, che la situazione in cui versava la banca fosse preesistente al loro insediamento).

La Corte d'Appello, peraltro con accertamento in fatto, ampiamente e logicamente motivato, ha evidenziato come le critiche sollevate dalla Banca d'Italia fossero non già generiche, quanto generali, e cioè che a monte era carente la puntuale individuazione di precisi ed omogenei criteri di valutazione dei beni, in contrasto con le regole di settore, e precisamente con l'art. del titolo V, cap. IV, sez. II, 1.1 del regolamento della Banca d'Italia del 14/4/2005, sottolineando come effettivamente i rilievi mossi trovassero riscontro nelle anomalie in base alle quali la SGR aveva provveduto alla determinazione del valore.

Il ricorrente, nel richiamare un documento quale la revisione del regolamento del fondo, che non permette di ricavare l'esistenza di criteri precisi ed omogenei, nella sostanza sollecita un apprezzamento del fatto in maniera difforme da quanto operato dal giudice di merito, con motivazione adeguata, esito questo precluso in sede di legittimità.

11. Il tredicesimo motivo, erroneamente riportato sub 12, lamenta la violazione e falsa applicazione dell'art. 11 della legge n. 689/81 e degli artt. 190 e 195 TUF in relazione all'entità delle sanzioni inflitte, con omessa valutazione circa un fatto decisivo per il giudizio.

La censura investe il rigetto del motivo di opposizione concernente l'entità della sanzione irrogata. Non si sarebbe tenuto conto dell'effettivo assetto dei poteri che competevano al A.A. in seno al CDA, che gli attribuiva una limitata capacità decisionale. Inoltre, le anomalie erano da addebitare in prevalenza a condotte di terzi. Né si era tenuto conto della condizione personale del ricorrente, separato e padre di due minorenni, ormai fruente di un reddito non elevato, a causa della messa in liquidazione della società e della perdita dei risparmi nella stessa investiti.

Anche tale motivo è manifestamente infondato.

La Corte d'Appello ha adeguatamente motivato circa le ragioni per le quali la sanzione irrogata al ricorrente doveva ritenersi congrua, tenuto conto dei parametri di cui all'art. 11 L. n. 689 del 1981 (assolvendo in tal modo all'onere del cd. minimo costituzionale della motivazione – Cass. S.U. n. 8053/2014), ponendo al riparo la decisione dalla denuncia di violazione dell'art. 132, co. 2, n. 4, c.p.c.

In particolare, la Corte d'Appello ha sottolineato il ruolo apicale che il A.A. ricopriva nella SGR, essendo fin dalla sua costituzione amministratore delegato, con una qualità inferiore solo a

quella del Presidente del CDA, dovendosi reputare che tutte le operazioni fossero il frutto di una condivisione, se non una connivenza, tra i due vertici aziendali.

Quanto alla gravità oggettiva, il decreto ha rilevato che, nonostante la gravità delle condotte contestate, la sanzione era stata elevata in misura ben inferiore al massimo edittale e che delle condizioni economiche in cui versava il ricorrente era egli stesso a dover esserne reputato responsabile, avendo contribuito con la sua incuria e connivenza a determinare lo stato di decozione della società.

In tema di opposizione a sanzione amministrativa, nel caso di contestazione della misura della stessa, il giudice è autonomamente chiamato a controllarne la rispondenza alle previsioni di legge, senza essere soggetto a parametri fissi di proporzionalità correlati al numero ed alla consistenza degli addebiti, e può reputare congrua l'entità della sanzione inflitta in riferimento ad una molteplicità di incolpazioni anche qualora escluda l'esistenza di alcune di esse (cfr. Cass. n. 6778 del 2015). Tale valutazione, una volta riscontrata l'astratta corrispondenza dei fatti contestati all'illecito amministrativo tipizzato, si sottrae al sindacato di legittimità, dovendo il Giudice di merito valutare la legittimità e congruità della sanzione inflitta, tenendo conto di ogni aspetto concreto della vicenda. Nella specie, alla luce delle argomentazioni spese dalla Corte d'Appello sulle ragioni del rigetto del motivo di opposizione relativo alla quantificazione della sanzione in maniera, come detto, soddisfattiva dei requisiti del cd. minimo costituzionale della motivazione, la decisione sfugge quindi alle censure del ricorrente.

Va per l'effetto ribadito il principio per cui “Nel procedimento di opposizione avverso le sanzioni amministrative pecuniarie irrogate per violazione del TUB o del TUF, il giudice ha il potere discrezionale di quantificare l'entità della sanzione, entro i limiti edittali previsti, allo scopo di commisurarla all'effettiva gravità del fatto concreto, desumendola globalmente dai suoi elementi oggettivi e soggettivi, senza che sia tenuto a specificare i criteri seguiti, dovendosi escludere che la sua statuizione sia censurabile in sede di legittimità ove quei limiti siano stati rispettati e dalla motivazione emerga come, nella determinazione, si sia tenuto conto dei parametri previsti dall'art. 11 della L. n. 689 del 1981” (Cass. n. 11481 del 15/06/2020).

12. Il ricorso è pertanto rigettato, ed il ricorrente va condannato al rimborso delle spese in favore della controricorrente, come liquidate in dispositivo.

13. Poiché il ricorso è rigettato, sussistono le condizioni per dare atto – ai sensi dell'art. 1, comma 17, della legge 24 dicembre 2012, n. 228 (Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato – Legge di stabilità 2013), che ha aggiunto il comma 1-quater dell'art. 13 del testo unico di cui al D.P.R. 30 maggio 2002, n. 115 – della sussistenza dei presupposti processuali dell'obbligo di versamento, da parte del ricorrente, di un ulteriore importo a titolo di contributo unificato pari a quello dovuto per l'impugnazione.

Corte di Cassazione, [.] v Banca d'Italia, 16/04/2024, No 10288

Svolgimento del processo – Motivi della decisione

1. A.A., consigliere di amministrazione non esecutivo del Monte dei Paschi Di Siena, proponeva opposizione avverso il provvedimento sanzionatorio n. 316593 del 28 marzo 2013, approvato con delibera del direttorio della Banca d'Italia n. 180 del 2013, con il quale, all'esito dell'ispezione

relativa al periodo 27 settembre 2011 – 9 marzo 2012, gli erano state irrogate due sanzioni amministrative pecuniarie per violazione della normativa in materia di contenimento dei rischi finanziari e per carenze nell'organizzazione e nei controlli interni da parte dei componenti del Cda e del direttore generale, e precisamente per la violazione della normativa in materia di contenimento dei rischi finanziari da parte dei componenti il consiglio di amministrazione per l'importo di Euro 135.000,00 (sub 1), e per le carenze nell'organizzazione e nei controlli interni per la somma di Euro 90.000,00 (sub 3).

Riassunto il giudizio a seguito della declaratoria di difetto di giurisdizione del Tar Lazio, cui inizialmente l'opposizione era stata indirizzata, la Corte d'Appello di Roma con la sentenza n. 5030 del 22 luglio 2019 ha rigettato l'opposizione.

Rigettate le contestazioni che afferivano alla regolarità del procedimento sanzionatorio e quella relativa alla pretesa tardività del provvedimento sanzionatorio, per quanto ancora rileva in questa sede, rigettava il terzo motivo di opposizione, con il quale il ricorrente lamentava la violazione dell'art. 8 della legge n. 689/81.

Osservava che in realtà la decisione impugnata, rispetto all'originaria proposta, era pervenuta ad incrementare fino al triplo la sanzione prevista per la violazione sub 1, ma senza che però fosse intervenuta alcuna modificazione della contestazione, posto che alla base della sanzione erano rimasti i medesimi fatti inizialmente contestati.

Non vi era quindi alcuna contestazione suppletiva, ma semplicemente una rivalutazione della peculiare gravità delle contestazioni effettuate, tenuto conto del loro carattere sistematico e diffuso. Inoltre, anche l'applicazione del cumulo giuridico (che introduce un regime più favorevole per il sanzionato, rispetto a quanto invece imposto dal regime del cumulo materiale) risultava correlata ai fatti già contestati. Né poteva tacciarsi di genericità ed indeterminatezza la circostanza che la fattispecie sanzionatoria fosse integrata con il richiamo alle previsioni regolamentari impartite dalla Banca d'Italia, trattandosi di un rinvio giustificato proprio per l'elevato tecnicismo della materia bancaria, e tenuto conto del fatto che per l'illecito amministrativo non è possibile invocare il principio di stretta legalità, nei medesimi termini in cui invece si richiama per illecito penale.

In relazione al quarto ed al quinto motivo di opposizione, la Corte d'Appello ricostruiva il quadro normativo di riferimento relativo alla responsabilità degli amministratori privi di deleghe, per effetto della riforma del diritto societario, reputando che l'assenza di incarichi operativi in capo al ricorrente non escludesse una sua responsabilità per i fatti oggetto della contestazione.

La natura collegiale del CDA non esime i singoli componenti dall'obbligo di agire in maniera informata né giustifica un loro atteggiamento inerte, così che, tenuto conto delle vicende oggetto di causa, doveva reputarsi sussistente la responsabilità del A.A., anche in considerazione degli elevati standard di professionalità cui sono sottoposti i componenti del CDA.

Trattavasi, peraltro, di una responsabilità non già di tipo oggettivo, ma per colpa, correlata ad una condotta negligente ed inerte.

In relazione poi al sesto motivo di opposizione, che investiva il quantum della sanzione irrogata, la Corte distrettuale, oltre a ricordare che l'eventuale difetto di motivazione del provvedimento sanzionatorio non esclude il dovere del giudice dell'opposizione di dover autonomamente provvedere alla valutazione omessa dall'autorità emanante il provvedimento sanzionatorio,

nella specie la sanzione era da reputarsi congrua, in quanto fondata su parametri di valutazione condivisibili e specifici, avendo la delibera impugnata adeguatamente differenziato i vari soggetti sanzionati, e senza che potesse reputarsi sussistente un intento connotato da una preconcepita volontà punitiva.

2. A.A. ha proposto ricorso per cassazione avverso la suddetta pronuncia sulla base di quattro motivi.

Banca d'Italia ha resistito con controricorso.

Il ricorrente con memoria depositata in prossimità dell'udienza ha insistito nelle sue richieste.

3. Il primo motivo di ricorso, in relazione al rigetto del quarto e del quinto motivo di opposizione, denuncia la violazione e falsa applicazione degli artt. 2381 e 2392 c.c.

Si sostiene che la sentenza, nel ricostruire il quadro normativo di riferimento per la responsabilità dei consiglieri deleganti, è pervenuta ad un'errata e contraddittoria enunciazione dei principi informatori, pervenendo a conclusioni che contravvengono al senso delle innovazioni normative.

Oggi non è più dato riferire di un generico dovere di vigilanza per gli amministratori privi di deleghe operative, così che la conclusione della Corte d'Appello si sostanzia nella reiterazione di orientamenti ormai privi di attuale conforto sul piano disciplinare. La sentenza si palesa poi erronea anche nella parte in cui sostiene la presenza di indici di anomalia che avrebbero dovuto indurre il ricorrente ad attivarsi, con la conseguenza che, non avendo mai il A.A. ricevuto una adeguata e tempestiva informazione in merito alle vicende contestate, non aveva motivo di ritenere che non vi fosse un adeguato monitoraggio e presidio da parte delle strutture esecutive del Monte dei Paschi.

Inoltre, aveva varie volte richiesto dei chiarimenti al management bancario, avendo sempre ricevuto delle rassicurazioni.

Il secondo motivo denuncia sempre in relazione al rigetto dei medesimi motivi di opposizione, la nullità della sentenza per la violazione dell'art. 132, co. 2, n. 4, c.p.c. per sostanziale assenza di motivazione.

Si rileva che la motivazione è connotata da contraddittorietà irriducibile in quanto lo scrutinio in ordine alla condotta tenuta dal ricorrente è meramente apparente, essendosi ancorata la sua responsabilità ad apodittiche affermazioni, prive di ogni riferimento ai fatti concreti di causa.

I motivi, da esaminare congiuntamente per la loro connessione, sono infondati.

Osserva la Corte che si palesa incensurabile la ricostruzione offerta dalla Corte d'Appello del quadro normativo di riferimento al fine di individuare i presupposti della responsabilità degli amministratori privi di deleghe operative, quali scaturenti dalla novella del diritto societario del 2006.

In disparte il richiamo in sentenza a qualche precedente giurisprudenziale effettivamente maturato nel previgente regime normativo, vale al riguardo ricordare che, in tema di sanzioni amministrative previste dall'art. 144 del D.Lgs. n. 385 del 1993, l'obbligo imposto dall'art. 2381, ultimo comma, c.c. agli amministratori delle società per azioni di "agire in modo informato", pur quando non siano titolari di deleghe, si declina, da un lato, nel dovere di attivarsi, esercitando

tutti i poteri connessi alla carica, per prevenire o eliminare ovvero attenuare le situazioni di criticità aziendale di cui siano, o debbano essere, a conoscenza, dall'altro, in quello di informarsi, affinché tanto la scelta di agire quanto quella di non agire risultino fondate sulla conoscenza della situazione aziendale che gli stessi possano procurarsi esercitando tutti i poteri di iniziativa cognitoria connessi alla carica con la diligenza richiesta dalla natura dell'incarico e dalle loro specifiche competenze. Tali obblighi si connotano in termini particolarmente incisivi per gli amministratori di società che esercitano l'attività bancaria, prospettandosi, in tali ipotesi, non solo una responsabilità di natura contrattuale nei confronti dei soci della società, ma anche quella, di natura pubblicistica, nei confronti dell'Autorità di vigilanza (Cass. n. 19556/2020).

Inoltre, il dovere di agire informati dei consiglieri non esecutivi delle società bancarie, sancito dagli artt. 2381, commi 3 e 6, e 2392 c.c. non va rimesso, nella sua concreta operatività, alle segnalazioni provenienti dai rapporti degli amministratori delegati, giacché anche i primi devono possedere ed esprimere costante e adeguata conoscenza del "business" bancario e, essendo compartecipi delle decisioni di strategia gestionale assunte dall'intero consiglio, hanno l'obbligo di contribuire ad assicurare un governo efficace dei rischi di tutte le aree della banca e di attivarsi in modo da poter efficacemente esercitare una funzione di monitoraggio sulle scelte compiute dagli organi esecutivi non solo in vista della valutazione delle relazioni degli amministratori delegati, ma anche ai fini dell'esercizio dei poteri, spettanti al consiglio di amministrazione, di direttiva o avocazione concernenti operazioni rientranti nella delega. Ne consegue che il consigliere di amministrazione non esecutivo di società per azioni, in conformità al disposto dell'art. 2392, comma 2, c.c., che concorre a connotare le funzioni gestorie tanto dei consiglieri non esecutivi, quanto di quelli esecutivi, è solidalmente responsabile della violazione commessa quando non intervenga al fine di impedirne il compimento o eliminarne o attenuarne le conseguenze dannose (Cass. n. 24851/2019; Cass. n. 5606/2019).

Pertanto, ancorché, in virtù della modifica dell'art. 2392 c.c. che fa seguito alla riforma delle società di capitali del 2003, gli amministratori privi di deleghe (cd. non operativi) non siano più sottoposti ad un generale obbligo di vigilanza, tale da trasmodare di fatto in una responsabilità oggettiva, per le condotte dannose degli altri amministratori, tuttavia gli stessi rispondono solo quando non abbiano impedito fatti pregiudizievoli di quest'ultimi in virtù della conoscenza – o della possibilità di conoscenza, per il loro dovere di agire informati ex art. 2381 c.c. – di elementi tali da sollecitare il loro intervento alla stregua della diligenza richiesta dalla natura dell'incarico e dalle loro specifiche competenze (Cass. n. 17441/2016).

Perciò, ai fini del contenimento del rischio creditizio nelle sue diverse configurazioni nonché dell'organizzazione societaria e dei controlli interni, l'art. 53, lett. b) e d), del D.Lgs. n. 385 del 1993 e le disposizioni attuative dettate con le Istruzioni di vigilanza per le banche, mediante la circolare n. 229 del 1999 (e successive modificazioni e integrazioni), sanciscono doveri di particolare pregnanza in capo al consiglio di amministrazione delle società bancarie, che riguardano l'intero organo collegiale e, dunque, anche i consiglieri non esecutivi, i quali sono tenuti ad agire in modo informato e, in ragione dei loro requisiti di professionalità, ad ostacolare l'evento dannoso, sicché rispondono del mancato utile attivarsi. Ne consegue, inoltre, che, in caso di irrogazione di sanzioni amministrative, la Banca d'Italia, anche in virtù della presunzione di colpa vigente in materia, ha unicamente l'onere di dimostrare l'esistenza dei segnali di allarme che avrebbero dovuto indurre gli amministratori non esecutivi, rimasti inerti, ad esigere un supplemento di informazioni o ad attivarsi in altro modo, mentre spetta a questi ultimi provare di avere tenuto la condotta attiva dovuta o, comunque, mirante a scongiurare il danno (Cass. n. 22848/2015).

Così richiamati i più recenti principi che costituiscono veri e propri punti fermi nella giurisprudenza di questa Corte, deve escludersi che l'esito cui sia giunta la sentenza impugnata sia in violazione degli stessi.

La sentenza gravata alla pag. 10, nel ricordare quali fossero i doveri incombenti sul componente del CDA, sebbene privo di deleghe, ed in ragione degli standard di professionalità richiesti nel settore bancario, ha ritenuto che dovesse condividersi (esprimendo quindi al riguardo una valutazione in fatto, non suscettibile di sindacato in questa sede), quanto era emerso dai rilievi ispettivi della Banca d'Italia alle pag. 15 e ss. della proposta del 13 marzo 2013, risultando quindi un inadeguato presidio dei rischi finanziari, avuto riguardo all'architettura dei controlli ed al disegno del processo di gestione dei rischi.

La pronuncia della Corte d'Appello di Roma è conforme agli orientamenti di questa Corte circa l'efficacia probatoria nei giudizi di opposizione a sanzioni amministrative dei verbali ispettivi e degli esiti delle attività ispettive, essendo stato affermato che per tutti gli aspetti, anche relativi all'esame della documentazione, costituiscono comunque elemento di prova, che il giudice deve in ogni caso valutare, in concorso con gli altri elementi, potendo essere disattesi solo in caso di motivata intrinseca inattendibilità o di contrasto con altri elementi acquisiti nel giudizio.

Risulta quindi appurato, con valutazione non adeguatamente contrastata, e con motivazione che, sebbene sintetica, risulta ampiamente soddisfattiva del principio del cd. minimo costituzionale della motivazione (Cass. S.U. n. 8053/2014), che emergeva la prova di elementi di allarme (non già individuati ex post, ma suscettibili di rilievo ex ante, ove l'attività fosse stata conformata agli oneri di diligenza di chi è chiamato a ricoprire ruoli di rilievo all'interno della società), che avrebbero dovuto quindi imporre quel dovere di attivazione che incombe anche sugli amministratori deleganti, come appunto evidenziato nella stessa ricostruzione in diritto che è alla base della tesi del ricorrente.

Né può costituire causa di esenzione da responsabilità quanto sostenuto a pag. 16 del ricorso circa la mancata ricezione di adeguate informazioni del ricorrente da parte degli amministratori e delle strutture deputate, posto che, in presenza di alert di situazioni connotate da criticità, come emerse dagli accertamenti ispettivi, era proprio l'omissione informativa a dover essere contrastata da una condotta proattiva del ricorrente, finalizzata a sottrarlo alla condizione di inconsapevolezza nella quale versava ed a permettergli di poter agire in modo informato.

4. Il terzo motivo di ricorso denuncia la violazione dell'art. 132, co. 2, n. 4, c.p.c. con la conseguente nullità della sentenza impugnata, nonché la violazione dell'art. 11 della legge n. 689/81 quanto al rigetto della censura che investiva la determinazione della sanzione irrogata.

Si deduce che nella Proposta sanzionatoria si era fatto riferimento, per giustificare l'entità della sanzione irrogata, oltre che all'aggravamento di cui all'art. 8 della legge n. 689/81, alla gravità obiettiva delle violazioni riscontrate ed alla gravità soggettiva delle condotte poste in essere, ma senza che però il peso di tali elementi fosse stato adeguatamente chiarito.

La risposta della Corte d'Appello alla censura mossa risulta però essenzialmente elusiva delle critiche, essendosi fatto generico riferimento alla congruità della quantificazione, senza esplicitare le ragioni della ponderazione della sanzione irrogata.

Anche tale motivo è manifestamente infondato.

La Corte d'Appello ha adeguatamente motivato circa le ragioni per le quali la sanzione irrogata al ricorrente doveva ritenersi congrua, tenuto conto dei parametri di cui all'art. 11 l. n. 689 del 1981 (assolvendo in tal modo all'onere del cd. Minimo costituzionale della motivazione – Cass. S.U. n. 8053/2014), ponendo al riparo la decisione dalla denuncia di violazione dell'art. 132, co. 2, n. 4, c.p.c.

In particolare, la Corte d'Appello, oltre a sottolineare la stessa genericità del motivo di opposizione, ha evidenziato che la sanzione in esame era fondata su parametri di valutazione condivisibili e sufficientemente specifici, come peraltro confermato dal differente trattamento sanzionatorio riservato ai vari esponenti aziendali per la medesima vicenda, che permetteva di ravvisare una equilibrata esplicazione del potere di commisurazione della sanzione.

In tema di opposizione a sanzione amministrativa, nel caso di contestazione della misura della stessa, il giudice è autonomamente chiamato a controllarne la rispondenza alle previsioni di legge, senza essere soggetto a parametri fissi di proporzionalità correlati al numero ed alla consistenza degli addebiti, e può reputare congrua l'entità della sanzione inflitta in riferimento ad una molteplicità di incolpazioni anche qualora escluda l'esistenza di alcune di esse (cfr. Cass. n. 6778 del 2015). Tale valutazione, una volta riscontrata l'astratta corrispondenza dei fatti contestati all'illecito amministrativo tipizzato, si sottrae al sindacato di legittimità, dovendo il Giudice di merito valutare la legittimità e congruità della sanzione inflitta, tenendo conto di ogni aspetto concreto della vicenda. Nella specie, alla luce delle argomentazioni spese dalla Corte d'Appello sulle ragioni del rigetto del motivo di opposizione relativo alla quantificazione della sanzione in maniera, come detto, soddisfacente dei requisiti del cd. minimo costituzionale della motivazione, la sentenza sfugge quindi alle censure del ricorrente.

Va per l'effetto ribadito il principio per cui “Nel procedimento di opposizione avverso le sanzioni amministrative pecuniarie irrogate per violazione del TUB o del TUF, il giudice ha il potere discrezionale di quantificare l'entità della sanzione, entro i limiti edittali previsti, allo scopo di commisurarla all'effettiva gravità del fatto concreto, desumendola globalmente dai suoi elementi oggettivi e soggettivi, senza che sia tenuto a specificare i criteri seguiti, dovendosi escludere che la sua statuizione sia censurabile in sede di legittimità ove quei limiti siano stati rispettati e dalla motivazione emerga come, nella determinazione, si sia tenuto conto dei parametri previsti dall'art. 11 della l. n. 689 del 1981” (Cass. n. 11481 del 15/06/2020).

5. Il quarto motivo di ricorso denuncia quanto al rigetto del terzo motivo di opposizione, la violazione e falsa applicazione degli artt. 8, 8 bis e 18 della legge n. 689/1981, quanto al cumulo giuridico e materiale delle sanzioni, con violazione dell'art. 145 del TUB e del diritto di difesa.

Si deduce che la critica del ricorrente investiva l'aumento fino al triplo della sanzione irrogata per la violazione sub 1, che era stato operato a seguito di sollecitazione del Direttorio della Banca d'Italia.

Poiché il ricorrente non era anche destinatario della sanzione sub 2, deve reputarsi che l'incremento della sanzione sia frutto di una vera e propria riqualificazione giuridica del fatto, con un innalzamento della pena privo di supporto giuridico.

Il motivo è inammissibile per la assoluta genericità, avendo la sentenza impugnata sottolineato come in realtà l'incremento della sanzione per la prima violazione contestata non derivi da alcuna allegazione di fatti nuovi, rispetto a quelli originariamente contestati, ma che sia invece frutto

di una sollecitazione ad un novello apprezzamento dei medesimi fatti in punto di loro gravità, essendosi provveduto ad una “differente modulazione del carico sanzionatorio per i medesimi fatti già oggetto di contestazione”. La sentenza ha poi anche ritenuto che la pluralità di fatti cui correlare l’applicazione dell’art. 8 emergeva già dalla contestazione originaria, ed a fronte di tale affermazione il motivo si limita apoditticamente a sostenere la tesi della riqualificazione giuridica del fatto, omettendo però di richiamare in ricorso l’originaria contestazione e quella scaturente dalla seconda proposta, onde effettivamente permettere di verificare l’immutazione denunciata nel motivo.

6. Il ricorso è pertanto rigettato, ed il ricorrente va condannato al rimborso delle spese in favore della controricorrente, come liquidate in dispositivo.

7. Poiché il ricorso è rigettato, sussistono le condizioni per dare atto – ai sensi dell’art. 1, comma 17, della legge 24 dicembre 2012, n. 228 (Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato – Legge di stabilità 2013), che ha aggiunto il comma 1-quater dell’art. 13 del testo unico di cui al d.P.R. 30 maggio 2002, n. 115 – della sussistenza dei presupposti processuali dell’obbligo di versamento, da parte del ricorrente, di un ulteriore importo a titolo di contributo unificato pari a quello dovuto per l’impugnazione.

Corte di Cassazione, [.] v Banca d’Italia, 17/04/2024, No 10357

Svolgimento del processo – Motivi della decisione

1. La Banca d’Italia irrogava a A.A., nella sua qualità di componente del Consiglio di amministrazione e del Comitato Interno per la Remunerazione della Banca Monte dei Paschi di Siena (d’ora innanzi MPS), la sanzione pecuniaria di Euro 129.110,00, in relazione alla violazione delle disposizioni in materia di politiche e prassi di remunerazione, incentivazione e violazione degli obblighi di comunicazione all’organo di vigilanza da parte dei componenti del collegio sindacale (art. 53, comma 1, lett. d), TUB e art. 52 TUB).

Il ricorrente proponeva ricorso dinanzi al Tar del Lazio avverso il suddetto provvedimento, e il giudice amministrativo, con sentenza del 20 febbraio 2015, dichiarava il proprio difetto di giurisdizione a conoscere della controversia.

Con ricorso in riassunzione l’esponente riassumeva l’opposizione dinanzi la Corte d’Appello di Roma che con l’ordinanza n. 4578 del 12 aprile 2018 la rigettava. In particolare, rilevava la Corte che la contestazione aveva origine dalla analitica informativa richiesta con lettera del 9 luglio 2012 da parte della Banca d’Italia a MPS per conoscere l’ammontare dei criteri utilizzati per la determinazione dei compensi riconosciuti al direttore generale, B.B., all’atto della cessazione dell’incarico nonostante i negativi risultati conseguiti nella gestione della banca. Con la medesima nota era stata richiesta la delibera del consiglio di amministrazione del 12 gennaio 2012, nonché quelle del collegio sindacale in ordine alla coerenza delle decisioni assunte con il quadro normativo all’epoca vigente, rispetto alle politiche retributive approvate dall’assemblea dei soci di MPS, anche in relazione alla delicata situazione della banca. MPS trasmetteva la suddetta delibera del 12 gennaio 2012 dalla quale emergeva che il CdA di MPS aveva preso atto che gli incarichi affidati al direttore generale erano stati correttamente e diligentemente adempiuti, e, dopo aver raccolto il parere del comitato per la remunerazione, aveva autorizzato la risoluzione del rapporto di lavoro con il direttore generale B.B. per mutuo consenso con la corresponsione della somma

lorda di Euro 4 milioni a titolo di incentivo per agevolare la risoluzione anticipata del rapporto di lavoro e quale integrazione del trattamento di fine rapporto, oltre alla competenza di fine rapporto, al TFR maturato e ad ogni altra spettanza prevista dalla legge e dal contratto nazionale di lavoro per i dirigenti di aziende di credito. MPS si era anche impegnata affinché il B.B. venisse tenuto indenne rispetto ad eventuali rivendicazioni di terzi nei suoi confronti. La Banca d'Italia, dunque, aveva contestato la violazione delle disposizioni in materia di politica e prassi di remunerazione e incentivazione nelle banche e nei gruppi bancari emanato dalla Banca d'Italia il 30 marzo 2011, in particolare il paragrafo 5.3 che stabiliva che i compensi pattuiti in caso di conclusione anticipata del rapporto di lavoro dovessero essere collegati alla performance realizzata ed ai rischi assunti in linea con quanto previsto per la componente variabile della remunerazione, tenendo in considerazione anche il livello delle risorse patrimoniali, la liquidità necessaria a fronteggiare le attività intraprese ed i risultati effettivi e duraturi conseguiti dalla banca. Inoltre, per le banche e i gruppi bancari beneficiari di interventi pubblici, la remunerazione variabile doveva essere rigorosamente limitata rispetto alla percentuale del risultato netto della gestione in caso di sua non compatibilità con il mantenimento di un elevato e adeguato livello di patrimonializzazione. Nel caso di specie Banca d'Italia rilevava che i parametri e i criteri di remunerazione erano stati violati anche alla luce della complessiva situazione tecnica del gruppo MPS che presentava già note criticità sotto diversi profili per effetto di scelte strategiche manageriali non ispirate a criteri di sana e prudente gestione, tanto da rendere necessario il ricorso ad aiuti di Stato.

Le valutazioni effettuate dall'organo consiliare nella citata seduta non erano state ispirate a criteri chiari e predeterminati, ed il processo decisionale non era stato opportunamente esplicitato e documentato. In tale contesto emergeva che anche il collegio sindacale non aveva rilevato le richiamate violazioni delle disposizioni di vigilanza, né tantomeno le aveva comunicate alla Banca d'Italia. E, dunque, venivano accertate le irregolarità poi sanzionate con il provvedimento impugnato e veniva avviata la procedura sanzionatoria nei confronti dei componenti del consiglio di amministrazione e del collegio sindacale in carica all'epoca dei fatti.

A conclusione del procedimento sanzionatorio la Banca d'Italia irrogava la sanzione amministrativa pecuniaria nella misura di Euro 129.100,00 a carico del ricorrente.

Secondo la Corte d'Appello, disattese le contestazioni di carattere formale, in merito alle modalità di svolgimento del procedimento sanzionatorio, la mancanza nella buonuscita accordata al B.B. di una componente variabile collegata alle performance della banca integrava gli estremi della condotta contestata. Infatti, le disposizioni in materia di remunerazioni all'epoca vigenti richiedevano espressamente che i compensi pattuiti in caso di conclusione anticipata del rapporto di lavoro dovessero essere collegati alla performance realizzata e ai rischi assunti. Peraltro, il fatto che la banca si fosse impegnata a tenere indenne il B.B. in caso di azione di terzi in relazione al suo operato di direttore generale integrava anche un elemento variabile dei benefici economici riconosciuti, non essendo possibile definire preventivamente l'esborso necessario a tenere indenne il B.B. dalle pretese di terzi. Tale accordo, perciò, costituiva una componente variabile correlata proporzionalmente non alla performance ma all'eventuale responsabilità del B.B. per l'ipotesi di mala gestio. Riguardo ai richiami dell'Autorità di Vigilanza erano emerse evidenze inconfutabili circa la situazione di difficoltà in cui si trovava la banca già prima della fine del 2011.

L'accordo stipulato con il B.B. non costituiva la necessaria applicazione delle clausole del contratto collettivo sul recesso senza giusta causa che prevedevano condizioni differenti da quelle pattuite e si trattava dunque di una libera scelta della Banca. Peraltro, le disposizioni di

Vigilanza prescrivevano che fosse necessario prevedere dei sistemi di pagamento differiti per una quota della somma accordata, in modo che la remunerazione tenesse conto dell'andamento nel tempo dei rischi assunti dalla banca (cd. meccanismi di malus), quota destinata a variare anche facendo ricorso a dei sistemi di correzione ex post. Purtroppo, la somma era stata attribuita al B.B. mediante la sua corresponsione immediata ed in un'unica soluzione.

Ancora, la Corte d'Appello rigettava il motivo riguardante la mancanza dell'elemento soggettivo della colpa.

La Corte d'Appello evidenziava la compatibilità della presunzione di colpa prevista dall'art. 3 della l. n. 689 del 1981 in materia di sanzione amministrativa con il principio di presunzione di innocenza contenuto nell'art. 6, comma 2, CEDU, la cui applicazione era circoscritta alla materia penale o alle sanzioni amministrative sostanzialmente penali. Le sanzioni di cui all'articolo 144 TUB non avevano tale natura, sia con riferimento al loro ammontare, sia per l'assenza di sanzioni accessorie.

Infine, quanto alla determinazione della sanzione, la stessa risultava congrua all'esito di un processo valutativo già operato dall'autorità di vigilanza, che aveva differenziato le sanzioni, applicando quella più grave ai membri del comitato per la remunerazione, in ragione della contemporanea partecipazione anche al CDA, e dovendosi tenere conto che la gravità della condotta era da ascrivere, non tanto al dato quantitativo del compenso erogato al B.B., quanto alle modalità di corresponsione, che non tenevano conto della situazione di grave crisi finanziaria in cui versava la Banca.

Tantomeno era imputabile una disparità di trattamento rispetto agli altri sanzionati, dovendosi tenere conto della specifica posizione del A.A. componente sia del Cda che del Comitato per la remunerazione, atteso che tale duplice qualità aggravava la sua responsabilità in ragione dello specifico mandato che gli imponeva, quale componente del Comitato, di dover verificare la conformità dei compensi alle disposizioni di Vigilanza ed alle regole interne della Banca.

2. A.A. ha proposto ricorso per cassazione avverso la suddetta pronuncia sulla base di tre motivi.

Banca d'Italia ha resistito con controricorso.

Il ricorrente con memoria depositata in prossimità dell'udienza ha insistito nelle sue richieste.

3. Il primo motivo di ricorso, in relazione al rigetto del secondo motivo di opposizione, denuncia la violazione e falsa applicazione dell'art. 1 della legge n. 689/1981, degli artt. 53 e 144 del TUB (DPR n. 385/1993), della legge n. 217/2011 e della Direttiva Europea n. 2010/76/CE.

Si lamenta che nel provvedimento sanzionatorio l'autorità di vigilanza aveva contestato la violazione delle disposizioni in materia di politiche e prassi di remunerazione e incentivazione del 30 marzo 2011; tali disposizioni sarebbero state emanate in attuazione dell'articolo 53 del TUB e, di conseguenza, la loro violazione costituirebbe illecito amministrativo ai sensi dell'articolo 144 del TUB.

Si evidenzia che in realtà la condotta contestata era risalente ad una data anteriore alla modifica di cui all'art. 53, lett. d), del TUB che con carattere di novità ha previsto nuovi poteri di vigilanza regolamentare in tema di remunerazione degli esponenti aziendali. Deve tuttavia reputarsi che la novella legislativa abbia una portata chiaramente innovativa rispetto al previgente quadro

normativo, sicché si palesa erronea la considerazione del giudice di merito che ha invece sostenuto che già precedentemente alla riforma la Banca d'Italia avesse poteri valutativi e sanzionatori con riferimento alle politiche di remunerazione adottate dagli istituti finanziari, con la conseguenza che alla legge n. 217/2011 dovesse assegnarsi una portata specificatoria e ricognitiva di poteri che già competevano all'organo di vigilanza.

Assume il ricorrente che i lavori preparatori e la lettura delle norme di cui alla rubrica depongono invece in maniera univoca per la natura ampliativa dell'intervento del 2011, così che l'applicazione della sanzione ad una fattispecie risalente ad epoca anteriore risulta in evidente violazione del principio di irretroattività della norma sanzionatoria di cui all'art. 1 della legge n. 689/1981.

Ciò avrebbe anche determinato un'inammissibile modificazione del capo di imputazione, in quanto sarebbe stata sanzionata una violazione diversa da quella originaria nella quale si faceva richiamo alla violazione delle regole di vigilanza prudenziale e non già di fonte regolamentare.

Il motivo è infondato, ritenendo la Corte di dover dare continuità alla propria precedente giurisprudenza che, proprio in relazione alla medesima vicenda oggetto del presente procedimento, ha affermato il principio per cui l'art. 22, comma 2, lett. a), n. 1, della l. n. 217 del 2011, che ha sostituito la lett. d) dell'art. 53, comma 1, del D.Lgs. n. 385 del 1993 (c.d. TUB), laddove attribuisce alla Banca d'Italia il potere regolamentare anche in materia di governo societario, organizzazione amministrativa e contabile, nonché di controlli interni e di sistemi di remunerazione e di incentivazione, introduce una norma interpretativa, volta a dare attuazione alla direttiva comunitaria 2010/76/CE, al fine di evidenziare l'importanza dei meccanismi di remunerazione dell'alta dirigenza delle banche e per impedire l'assunzione di rischi ingiustificati, eccessivi e imprudenti da parte degli amministratori; tale potere regolamentare preesisteva, infatti, alla novella del 2011, trovando fondamento nelle previsioni di cui alle lett. b) e d) del previgente art. 53 TUB, concernenti, rispettivamente, le voci del contenimento dei rischi e dell'organizzazione amministrativa e contabile e dei controlli interni (Cass. n. 6625/2020).

Nella motivazione del precedente richiamato, è stato evidenziato che la Banca d'Italia, sin dal 2008, aveva emanato disposizioni di vigilanza in materia di remunerazione. A seguito della crisi finanziaria si era reso necessario intervenire in modo più incisivo nella materia delle politiche di remunerazione dell'alta dirigenza delle banche. Nel preambolo al provvedimento del 30 marzo 2011, recante nuove disposizioni in materia di politiche e prassi di remunerazione e incentivazione delle banche e dei gruppi bancari, infatti, si legge testualmente che: "Con il presente provvedimento vengono emanate nuove disposizioni per le banche e i gruppi bancari in materia di politiche e prassi di remunerazione e incentivazione, che danno attuazione al quadro normativo Europeo. Esse confermano, in larga parte, principi e criteri già contenuti nelle disposizioni emanate dalla Banca d'Italia sin dal 2008 e oggetto di successivi chiarimenti e integrazioni; si caratterizzano per un maggior grado di dettaglio su alcuni aspetti, in conformità con l'impostazione comunitaria e internazionale. Le nuove norme hanno sostituito integralmente quelle precedentemente emanate dalla Banca d'Italia in tema di remunerazione. Sono quindi abrogati, a decorrere dalla data di entrata in vigore del presente provvedimento: il paragrafo 4, "Meccanismi di remunerazione e incentivazione", delle Disposizioni di vigilanza in materia di organizzazione e governo societario delle banche del 04.03.2008; il par. 7, "Meccanismi di remunerazione e incentivazione", della Nota di chiarimenti del 1902-2009; la Comunicazione del 28.10.2009 "Sistemi di remunerazione e incentivazione"“. Nella premessa, inoltre, si fa espresso riferimento alle fonti primarie di

conferimento del potere normativo secondario alla Banca d'Italia, chiarendo che: “Le presenti disposizioni danno attuazione alla direttiva 2010/76/UE del 24 novembre 2010 (di seguito CRD 3) relativamente alle previsioni in essa contenute in materia di politiche e prassi di remunerazione e incentivazione nelle banche e nei gruppi bancari. Esse sono adottate sulla base degli art. 53 e 67 del Testo unico bancario e del decreto del Ministro dell'Economia e delle Finanze, in qualità di Presidente del CICR, del 5 agosto 2004 in materia di Organizzazione e governo societario”.

Anche la disciplina comunitaria ricomprendeva già espressamente le politiche e le prassi di remunerazione e incentivazione nell'ambito degli assetti organizzativi e di governo societario delle banche e dell'attività di controllo da parte delle autorità di vigilanza. Nel preambolo della direttiva 2010/76/UE del 24 novembre 2010, a sua volta, si legge testualmente che: “Le politiche remunerative che incentivano un'assunzione di rischi oltre il livello generale di rischio tollerato dall'istituto possono compromettere la gestione sana ed efficace dei rischi ed esacerbare comportamenti tendenti ad un'eccessiva assunzione di rischi. Per contrastare gli effetti potenzialmente negativi di regimi remunerativi mal concepiti sulla gestione sana dei rischi, e sul controllo dell'assunzione dei rischi da parte di singole persone, occorre integrare gli obblighi imposti dalla direttiva 2006/48/CE con un obbligo espresso, a carico degli enti creditizi e delle imprese di investimento, di creare e mantenere, per le categorie di persone la cui attività professionale ha un impatto significativo sul loro profilo di rischio, politiche e prassi remunerative in linea con una gestione efficace dei rischi. Dato che un'assunzione di rischi eccessiva e imprudente potrebbe minare la solidità finanziaria degli enti creditizi o delle imprese di investimento e destabilizzare il sistema bancario, è importante che il nuovo obbligo in materia di politiche e di prassi remunerative sia attuato in maniera uniforme, ed è opportuno che copra tutti gli aspetti della remunerazione, tra cui stipendi, benefici pensionistici discrezionali e qualsiasi altro contributo analogo”. L'art. 53 vigente prima della modifica di cui alla legge n. 217 del 2011, entrata in vigore solo il 17 gennaio 2012, recitava: “1. La Banca d'Italia, in conformità delle deliberazioni del CICR, emana disposizioni di carattere generale aventi a oggetto: a) l'adeguatezza patrimoniale; b) il contenimento del rischio nelle sue diverse configurazioni; c) le partecipazioni detenibili; d) l'organizzazione amministrativa e contabile e i controlli interni”.

In base a tale quadro normativo di riferimento deve affermarsi che le disposizioni di vigilanza in materia di remunerazione, al momento della loro emanazione, erano riconducibili alle voci contenimento dei rischi di cui alla lett. b) del citato art. 53 (nella versione dell'art. 53 *ratione temporis* applicabile, prima della modifica di cui all'art. 22 della l. n. 217 del 2011) e alla materia dell'organizzazione amministrativa e contabile e dei controlli interni di cui alla successiva lett. d) dell'art. 53, così come la stessa direttiva sopra citata chiarisce.

Nell'ambito dell'organizzazione delle banche i sistemi di remunerazione e di incentivazione dei responsabili aziendali rappresentano, infatti, un modo per favorirne la sana competitività, assicurare adeguate capacità di governo e mantenere una sana e prudente gestione dei rischi oltre che il mantenimento della stabilità di lungo periodo. I meccanismi retributivi possono indurre l'assunzione di rischi eccessivi a discapito della stabilità e tendere a risultati di breve periodo con costi incompatibili con il patrimonio della banca e con il venir in essere di conflitti di interesse. Circostanze emerse con tutta evidenza anche nel caso in esame. In questa cornice, dunque, si inseriscono le disposizioni di vigilanza della Banca d'Italia che, al momento della loro emanazione, dovevano ricondursi nel più ampio contesto delle regole in materia di organizzazione amministrativa e di contenimento del rischio di cui alle lett. b) e d) dell'art. 53 TUB. L'art. 22,

comma 2, lett. a), n. 1), della l. n. 217 del 2011 che ha sostituito la lett. d dell'art. 53, primo comma, del TUB facendo specifico riferimento al "governo societario, l'organizzazione amministrativa e contabile, nonché i controlli interni e i sistemi di remunerazione e di incentivazione", come correttamente rilevato dalla Corte d'Appello, è una norma sostanzialmente interpretativa e specificativa, frutto di una tecnica legislativa con la quale il legislatore ha ritenuto di dare attuazione alla direttiva comunitaria 2010/76/UE del 24 novembre 2010 mediante l'introduzione di una voce autonoma, al fine di evidenziare l'importanza dei meccanismi di remunerazione dell'alta dirigenza delle banche per impedire l'assunzione di rischi ingiustificati, eccessivi e imprudenti da parte degli amministratori, che come si è detto, potenzialmente possono minare la solidità finanziaria degli enti creditizi o delle imprese di investimento e destabilizzare il sistema bancario, come del resto imponeva la citata legislazione Europea. Sulla base di tali considerazioni è indubitabile che il potere normativo secondario della Banca d'Italia risiedesse pienamente già nelle lett. b) e d) dell'art. 53 TUB e che nessuna violazione del principio di legalità di cui all'art. 1 l. n. 689 del 1981 si è determinata. Inoltre, deve anche evidenziarsi che il rinvio alla regolamentazione secondaria, contenuto nell'articolo 53 per i diversi profili di vigilanza prudenziale, rappresenta una tecnica normativa flessibile che facilita il pronto ricevimento delle indicazioni concordate in sede internazionale e consente l'adeguamento delle regole di vigilanza alle modifiche che la mutevole realtà operativa delle banche suggerisce.

4. Il secondo motivo di ricorso, relativo al rigetto del terzo e del quarto motivo di opposizione, denuncia la violazione e falsa applicazione dell'art. 1965 c.c., in tema di transazione e delle disposizioni della Banca d'Italia del 30 marzo 2011.

Si deduce che, anche a ritenere sussistente la potestà sanzionatoria ai sensi dell'art. 53 co. 1, lett. d) novellato, non si è tenuto conto del fatto che la somma liquidata al B.B. ha la sua giustificazione causale in un accordo transattivo.

Tale carattere, inizialmente disatteso nella proposta di irrogazione della sanzione da parte della Banca d'Italia, ha invece trovato conferma nella decisione impugnata.

Tuttavia, quest'ultima, pur dando atto della natura transattiva del riconoscimento della somma, ha però reputato parimenti sussistente la violazione delle disposizioni in materia di politiche e prassi di remunerazione ed incentivazione emesse dalla Banca d'Italia.

Tali previsioni trovano applicazione alle sole erogazioni che si pongano come sistemi di remunerazione, e non possono invece estendersi a quelle diverse erogazioni che abbiano la loro giustificazione causale in una transazione.

Anche tale motivo è manifestamente infondato.

Questa Corte ha già avuto modo di occuparsi della vicenda relativa al riconoscimento dei compensi in favore del dott. B.B. per effetto della anticipata cessazione del rapporto con la Banca, quanto alla sua incidenza sulla responsabilità amministrativa dei componenti del Cda, avendo reiteratamente affermato come le modalità con le quali è stato riconosciuto e liquidato il compenso siano in evidente violazione delle regole in materia.

Cass. n. 17567/2022 ha sottolineato come l'accordo di risoluzione consensuale del rapporto con il direttore B.B. aveva comportato altre erogazioni rispetto a quelle contrattualmente previste, in quanto veniva infatti erogata con la delibera del 12/1/2012, oltre ai benefici contrattuali,

l'ulteriore somma lorda di Euro 4 milioni "a titolo di incentivo per agevolare la risoluzione anticipata del rapporto di lavoro e quale integrazione del trattamento di fine rapporto, oltre alle competenze di fine rapporto, al t.f.r. maturato e ad ogni altra spettanza prevista dalla legge e dal contratto nazionale di lavoro per i dirigenti di aziende di credito", nonché veniva rilasciata garanzia idonea a tenerlo "immune da azioni, anche di terzi, in relazione al suo operato di direttore generale".

È stata perciò reputata incensurabile la conclusione della Corte d'Appello circa il fatto che l'accordo raggiunto non rispettava le disposizioni legittimamente emanate sia in forza dei poteri riconosciuti dall'art. 53, primo comma, lett. d), D.Lgs. n. 385/1993, sia delle modifiche apportate dalla legge comunitaria del 2010. Da ciò conseguiva ad avviso del giudice del merito, l'applicabilità delle norme in tema di compensi aggiuntivi, posto che la natura aggiuntiva dei benefici, al di fuori del riconoscimento della c.d. retribuzione minima ai sensi dell'art.36 Cost., priva di ogni fondamento la tesi della debenza degli stessi in base al c.c.n.l.

Inoltre, è stata ravvisata la contrarietà dell'accordo di risoluzione in esame con le disposizioni del 2011 volte a introdurre meccanismi incentivanti correlati alla performance della banca e con correzioni ex post (o claw back), nonché a prevedere che una quota non fosse in contanti e altra quota fosse a pagamento differito, risultando anche il contrasto con tali norme della clausola volta a tenere indenne il direttore generale da responsabilità (Cass. n. 9371/2020).

Analogamente Cass. n. 17291/2020 ha rigettato la doglianza del sanzionato, richiamando l'art. 5 delle disposizioni in materia di prassi e di politiche di remunerazione ed incentivazione, adottate dalla Banca d'Italia con provvedimento del 30.3.2011, che prevedeva espressamente che l'intera remunerazione dovesse essere divisa tra la quota fissa e quella variabile e che tra queste componenti dovesse esserci una rigorosa distinzione. La norma imponeva inoltre che il rapporto tra dette componenti fosse opportunamente bilanciato, puntualmente determinato ed attentamente valutato in relazione alle caratteristiche dell'intermediario e delle diverse categorie di personale, in specie di quello rientrante tra il "personale più rilevante", prescrivendo che la parte fissa fosse sufficientemente elevata in modo da consentire alla parte variabile di contrarsi sensibilmente e, in casi estremi, anche azzerarsi, in relazione ai risultati, corretti per i rischi, effettivamente conseguiti. L'art. 5.3, oltre a stabilire che i compensi pattuiti in caso di conclusione anticipata del rapporto di lavoro (cd. golden parachutes) fossero collegati alla performance realizzata e ai rischi assunti, in linea con quanto previsto nel par. 5.2, stabiliva anche che, indipendentemente dalle modalità di determinazione, l'ammontare complessivo di remunerazione variabile dovesse basarsi su risultati, oltre che effettivi, anche "duraturi", tenendo conto inoltre degli obiettivi qualitativi. Non solo quindi, sul piano testuale, l'art. 5.3. richiamava – senza alcuna limitazione – l'intero contenuto dell'art. 5.2, ma, inoltre, proprio la necessità di una verifica sulla stabilità dei risultati conseguiti in modo durevole, da compiere in una prospettiva temporale più ampia, implicava – sul piano logico e pratico – il rispetto anche delle prescrizioni del punto 3) dell'art. 5.2, riguardante misure volte a parametrare il trattamento ad una performance adeguatamente monitorata, cui l'erogazione in azioni o strumenti finanziari agganciati ai risultati della banca era strettamente funzionale, unitamente alla previsione di misure di eventuale recupero delle somme indebitamente corrisposte.

Cass. n. 9371/2020 ha a sua volta rimarcato che l'accordo di risoluzione consensuale del rapporto avesse comportato ben altre erogazioni rispetto a quelle contrattualmente previste (come ricordato, veniva erogata con la delibera del 12/1/2012, oltre ai benefici contrattuali, l'ulteriore

somma lorda di Euro 4 milioni “a titolo di incentivo per agevolare la risoluzione anticipata del rapporto di lavoro e quale integrazione del trattamento di fine rapporto, oltre alle competenze di fine rapporto, al t.f.r. maturato e ad ogni altra spettanza prevista dalla legge e dal contratto nazionale di lavoro per i dirigenti di aziende di credito”, nonché veniva rilasciata garanzia idonea a tenerlo “immune da azioni, anche di terzi, in relazione al suo operato di direttore generale”).

Trattasi di erogazioni che si sono aggiunte, e non già conformate, a quelle spettanti contrattualmente, ciò da cui conseguiva l'applicabilità delle norme in tema di compensi aggiuntivi, posto anche che la natura aggiuntiva dei benefici priva di ogni fondamento la tesi del ricorrente circa la previsione degli stessi in base al c.c.n.l. (in tesi, prevalente sulle disposizioni di vigilanza).

Analogamente anche la decisione impugnata ha sottolineato come l'accordo raggiunto, sebbene avente una funzione latamente transattiva, non potesse sottrarsi al rispetto delle prescrizioni prudenziali in tema di adempimento degli obblighi assunti, in quanto, anche a voler riconoscere la legittimità delle somme attribuite ed a voler rilevare come la loro erogazione fosse finalizzata a prevenire un futuro contenzioso, si imponeva in ogni caso il rispetto delle disposizioni di vigilanza che impongono un sistema di pagamento differito, al fine di consentire un adeguamento nel tempo dei rischi assunti dalla banca.

Ne deriva che, ove anche qualificata l'intesa in termini transattivi, non poteva però sottrarsi il suo adempimento alla necessità di un differimento nel tempo, come imposto dalle regole di settore, palesandosi quindi idonea a legittimare la responsabilità del ricorrente la previsione del pagamento in un'unica soluzione.

5. Il terzo motivo di ricorso denuncia la violazione dell'art. 132, co. 2, n. 4, c.p.c. con la conseguente nullità dell'ordinanza impugnata, nonché la violazione degli artt. 11 e 16 della legge n. 689/81, quanto al rigetto della censura che investiva la determinazione della sanzione irrogata.

Si deduce che erroneamente la Corte d'Appello si è soffermata sulla inapplicabilità dell'art. 16 della legge n. 689/81, senza cogliere il senso della critica che invece atteneva alla corretta applicazione dell'art. 11 della medesima legge, in quanto il provvedimento impugnato non chiariva in alcun modo quali fossero stati i fattori che avevano inciso sulla concreta determinazione della sanzione.

La decisione della Corte d'Appello sarebbe sul punto da ritenersi del tutto carente di motivazione, in quanto si è limitata laconicamente a sostenere che invece la decisione fosse munita di adeguata giustificazione.

Si evidenzia, poi, che il ricorrente aveva messo in risalto la vantaggiosità dell'accordo raggiunto con il B.B. e che non si giustificava il differente trattamento sanzionatorio riservato ad altri componenti del CDA.

Anche tale motivo è manifestamente infondato.

Una volta ribadita l'inconferenza ai fini della correttezza della decisione del richiamo della Corte d'Appello alla inapplicabilità alla fattispecie della previsione di cui all'art. 16 della legge n. 689/81 (essendo tale richiamo privo di specifica incidenza sull'esito della decisione), la Corte d'Appello ha adeguatamente motivato circa le ragioni per le quali la sanzione irrogata al ricorrente doveva ritenersi congrua, tenuto conto dei parametri di cui all'art. 11 della l. n. 689 del 1981 (assolvendo

in tal modo all'onere del cd. minimo costituzionale della motivazione – Cass. S.U. n. 8053/2014), ponendo al riparo la decisione della denuncia di violazione dell'art. 132, co. 2, n. 4, c.p.c.

In particolare, la Corte d'Appello ha evidenziato che la sanzione in esame, era commisurata ad una valutazione di gravità che derivava, non tanto dall'aver effettivamente riconosciuto un compenso al B.B., quanto piuttosto dalle modalità con le quali si era prevista la sua corresponsione (modalità che, come detto, non appaiono in grado di poter essere giustificate nemmeno invocando il carattere transattivo dell'accordo).

L'ordinanza, oltre a contenere l'integrale rigetto delle censure dell'opponente, ha altresì sottolineato, quanto alla pretesa discriminazione di trattamento sanzionatorio, come il A.A. fosse membro anche del Comitato per la Remunerazione, incarico questo che lo onerava di una verifica della regolarità dei compensi più penetrante di quella già incombente per la coesistente qualità di componente del CDA, e che evidentemente gli imponeva approfondimenti maggiori (che avrebbero, ove eventualmente compiuti, potuto prevenire quella situazione di omogeneità del quadro informativo rispetto ai semplici componenti del CDA che il ricorrente riferisce in ricorso). In tema di opposizione a sanzione amministrativa, nel caso di contestazione della misura della stessa, il giudice è autonomamente chiamato a controllarne la rispondenza alle previsioni di legge, senza essere soggetto a parametri fissi di proporzionalità correlati al numero ed alla consistenza degli addebiti, e può reputare congrua l'entità della sanzione inflitta in riferimento ad una molteplicità di incolpazioni anche qualora escluda l'esistenza di alcune di esse (cfr. Cass. n. 6778 del 2015). Tale valutazione, una volta riscontrata l'astratta corrispondenza dei fatti contestati all'illecito amministrativo tipizzato, si sottrae al sindacato di legittimità, dovendo il Giudice di merito valutare la legittimità e congruità della sanzione inflitta, tenendo conto di ogni aspetto concreto della vicenda. Nella specie, alla luce delle argomentazioni spese dalla Corte d'Appello sulle ragioni del rigetto del motivo di opposizione relativo alla quantificazione della sanzione in maniera, come detto, soddisfattiva dei requisiti del cd. minimo costituzionale della motivazione, la decisione sfugge quindi alle censure del ricorrente.

Va per l'effetto ribadito il principio per cui “Nel procedimento di opposizione avverso le sanzioni amministrative pecuniarie irrogate per violazione del TUB o del TUF, il giudice ha il potere discrezionale di quantificare l'entità della sanzione, entro i limiti edittali previsti, allo scopo di commisurarla all'effettiva gravità del fatto concreto, desumendola globalmente dai suoi elementi oggettivi e soggettivi, senza che sia tenuto a specificare i criteri seguiti, dovendosi escludere che la sua statuizione sia censurabile in sede di legittimità ove quei limiti siano stati rispettati e dalla motivazione emerga come, nella determinazione, si sia tenuto conto dei parametri previsti dall'art. 11 della l. n. 689 del 1981” (Cass. n. 11481 del 15/06/2020).

6. Il ricorso è pertanto rigettato, ed il ricorrente va condannato al rimborso delle spese in favore della controricorrente, come liquidate in dispositivo.

7. Poiché il ricorso è rigettato, sussistono le condizioni per dare atto – ai sensi dell'art. 1, comma 17, della legge 24 dicembre 2012, n. 228 (Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato – Legge di stabilità 2013), che ha aggiunto il comma 1-quater dell'art. 13 del testo unico di cui al d.P.R. 30 maggio 2002, n. 115 – della sussistenza dei presupposti processuali dell'obbligo di versamento, da parte del ricorrente, di un ulteriore importo a titolo di contributo unificato pari a quello dovuto per l'impugnazione.

Corte di Cassazione, [.] v Banca d'Italia, 24/04/2024, No 11127

Svolgimento del processo – Motivi della decisione

1. A.A., Direttore Generale della Banca Romagna Credito Cooperativo Romagna Centro e Macerone Soc. Coop. (la “Banca”) ha proposto opposizione innanzi alla Corte d’Appello di Roma avverso il provvedimento sanzionatorio della Banca d’Italia del 07.10.2014, che irrogava sanzione amministrativa (dell’importo di Euro 24.500,00) nei confronti del A.A. per carenze nell’organizzazione e nei controlli interni, con particolare riferimento ai rischi di credito operativi.

2. La Corte d’Appello di Roma, con decreto n. 1595/2019 rigettava l’opposizione, osservando che (per quel che qui ancora rileva):

- l’insieme delle disposizioni (Disposizioni di vigilanza in materia di organizzazione e governo societario delle banche, emanate dalla Banca d’Italia il 4 marzo 2008; circolare della Banca d’Italia 21/04/1999, n. 229: Istruzioni di vigilanza per le banche) delinea un sistema di responsabilità che coinvolge tutti i livelli decisionali dell’intermediario creditizio, e in particolare il suo vertice esecutivo, cui compete la cura dell’organizzazione e del buon funzionamento della struttura e la predisposizione, a livello istruttorio, di tutte le decisioni aziendali, anche quelle la cui deliberazione definitiva è competenza del consiglio di amministrazione. Pertanto, è infondato il motivo di opposizione con cui il A.A. tende a circoscrivere l’ambito dei propri doveri e della propria responsabilità, e a valorizzare la sufficienza della propria attività;

- è da escludere in radice che la contestazione dell’organo di vigilanza sia stata effettuata quasi a titolo di responsabilità oggettiva: è sufficiente a tal proposito richiamare, in ordine all’elemento soggettivo, la presunzione di colpa in materia, che nella specie non è stata superata per la preesistenza della crisi e per l’interpretazione del proprio ruolo in maniera esecutiva in senso stretto. Inoltre, emerge nella motivazione del provvedimento sanzionatorio un dato centrale, a riprova dell’insufficienza dell’attività svolta anche dal ricorrente nel periodo di sua permanenza in carica, relativo agli accertamenti che hanno evidenziato variazioni in aumento per le sofferenze e le previsioni di perdite rispetto alle evidenze aziendali, nonché disfunzioni nei rischi operativi: aspetti sui quali la Banca d’Italia aveva già posto l’accento, sia in occasione della precedente ispezione sia in epoca successiva;

- anche con riferimento al mancato rispetto del requisito patrimoniale minimo complessivo, tali violazioni risultano direttamente riconducibili non solo alla precedente gestione ma anche alle perdite originate nell’attività creditizia imputabili anche alla gestione de qua che, se correttamente attuata, avrebbe potuto ridurre ulteriormente il deficit.

3. Avverso il predetto decreto proponeva ricorso per Cassazione A.A., affidandolo a tre motivi.

Si difendeva Banca d’Italia depositando controricorso.

In prossimità dell’adunanza entrambe le parti depositavano memorie.

1. Con il primo motivo si deduce violazione e falsa applicazione di legge, in relazione all’art. 3, legge 24 novembre 1981, n. 689, e all’art. 145 D.Lgs. 1° settembre 1993, n. 385 (T.U.B.). Il ricorrente censura l’errata applicazione del principio espresso dall’art. 3 legge n. 689 del 1981 nella parte in cui si limita ad affermare genericamente che la presunzione di colpevolezza non

sarebbe stata superata, omettendo di rilevare la sussistenza di accadimenti estranei alla condotta del ricorrente, in tal modo trasformando una presunzione semplice in assoluta, e la responsabilità del Direttore da imputabile ex art. 145 T.U.B. (Cass. n. 5394/2004) ad oggettiva. Nel caso di specie, gli accadimenti estranei andrebbero identificati nel fatto che, essendo pacifico che le carenze organizzative – con particolare riferimento ai rischi di credito operativi contestati – fossero riferibili a problematiche strutturali risalenti nel tempo e attribuibili alla gestione precedente, avrebbero dovuto essere oggetto di attenzione: il periodo di operatività del A.A. nella sua qualità di Direttore Generale aveva avuto una durata di circa 13 mesi, dalla data di insediamento dell’opponente, 24.05.2012, alla data di chiusura della situazione semestrale, 31.03.2013, presa in considerazione nel corso dell’ispezione di Banca d’Italia al 05.06.2013; la contestazione del successo solo parziale delle attività di risanamento da questi poste in essere in un periodo così limitato. Sì che, in sintesi, il superamento della presunzione di cui all’art. 3 legge n. 689 del 1981 sarebbe stato possibile solo in caso di totale risanamento della situazione aziendale in un lasso di tempo che, invero, non lo consentiva.

1.1. Il motivo non può trovare accoglimento. Innanzitutto, il giudice del merito – ricostruita la disciplina in materia di organizzazione e governo societario delle banche contenuta soprattutto nelle Istruzioni di vigilanza della Banca d’Italia – nel valutare il provvedimento dell’organo di vigilanza con riferimento al procedimento di attribuzione del corretto grado di rischio delle posizioni e alle variazioni in aumento per le sofferenze e previsioni di perdite, ha tenuto conto del (breve) periodo di permanenza in carica del A.A. (v. decreto, p. 5, righe 2° e 3°); con riferimento al mancato rispetto del requisito patrimoniale minimo complessivo, ha ugualmente tenuto conto non solo della precedente gestione, ma anche della gestione riferibile all’incarico assunto dal A.A. (v. decreto p. 5, 4° capoverso). In altri termini, il decreto impugnato ricostruisce il sistema di responsabilità che coinvolge, in particolare, il vertice esecutivo dell’intermediario creditizio e, pure tenuto conto del breve tempo della carica rivestita nonché delle violazioni commesse dalla precedente gestione, non ha ritenuto sussistente la scusabilità del comportamento del dirigente sotto il profilo della diligenza.

1.2. Tanto chiarito, il mezzo è infondato: questa Corte ha reiteratamente affermato il principio per cui, in tema di sanzioni amministrative pecuniarie irrogate dalla Banca d’Italia ai sensi dell’art. 144 del D.Lgs. 10 settembre 1993, n. 385, ai fini del contenimento del rischio creditizio nelle sue diverse configurazioni, l’art. 53, lett. b) e d), del D.Lgs. n. 385 del 1993 e le disposizioni attuative dettate con le Istruzioni di vigilanza per le banche, mediante la circolare n. 229 del 1999 (e successive modificazioni e integrazioni), sanciscono doveri di particolare pregnanza nei confronti dei soggetti che svolgono funzioni di amministrazione, di direzione o di controllo di istituti bancari; il legislatore individua una serie di fattispecie, destinate a salvaguardare procedure e funzioni incentrate sulla mera condotta, secondo un criterio di agire o di omettere doveroso, e così ricollega il giudizio di colpevolezza a parametri normativi estranei al dato puramente psicologico, limitando l’indagine sull’elemento oggettivo dell’illecito all’accertamento della “suità” del comportamento inosservante, con la conseguenza che, una volta integrata e provata dall’autorità amministrativa la fattispecie tipica dell’illecito, grava sul trasgressore, in virtù della presunzione di colpa posta dall’art. 3 della legge 24 novembre 1981, n. 689, l’onere di provare di aver agito diligentemente e in osservanza ai precetti normativi (Cass. Sez. 2, Sentenza n. 9546 del 18/04/2018, Rv. 648049 – 01, richiamata nel decreto impugnato; Cass. Sez. U, 30/09/2009, n. 20930).

Del resto, a smentire la sussistenza di una responsabilità di tipo oggettivo paventata dal ricorrente, è stato ulteriormente precisato da questa Corte che nel giudizio di opposizione a sanzioni

amministrative irrogate dalla Banca d'Italia, mentre l'onere della prova dell'illecito, gravante sull'organo di vigilanza, può essere soddisfatto con la produzione dei verbali ispettivi che, con riferimento agli aspetti non coperti da efficacia probatoria privilegiata, costituiscono comunque elemento di prova, spetta poi al giudice del merito valutarli, in concorso con gli altri elementi, potendo disattenderli in caso di motivata intrinseca inattendibilità o di contrasto con altri elementi acquisiti nel giudizio (Cass. Sez. 2, Ordinanza n. 4006 del 08/02/2022, Rv. 663823 – 01).

1.3. In linea con i principi sopra ricordati, la valutazione a cura della Corte d'Appello di Roma dell'incidenza del comportamento dell'opponente rispetto ai risultati attesi si pone al di fuori della fattispecie sanzionatoria, rilevando invece la violazione delle Istruzioni della Banca d'Italia con riferimento ai procedimenti e metodologie adottate dal Dirigente proprio per affrontare una situazione di importante crisi ereditata dalla gestione precedente.

2. Con il secondo motivo si deduce, ex art 360, comma 1, nn. 1 (recte: n. 4) e 5) cod. proc. civ., la motivazione solo apparente del capo della sentenza relativo alle carenze nell'organizzazione e nei controlli, con particolare riferimento ai rischi di credito e operativi (art. 53, comma 1, lett. b) e d) T.U.B.). In particolare, con riferimento all'esame ed alla valutazione delle attività poste in essere dal Direttore Generale per far fronte alle preesistenti carenze organizzative nonché della loro inidoneità a costituire fatti idonei a superare la presunzione di colpa: omesso esame circa un fatto decisivo per il giudizio che è stato oggetto di discussione tra le parti, con riferimento all'esame delle attività poste in essere dal Direttore Generale. Il ricorrente censura la motivazione apodittica resa dalla Corte d'Appello, che non prende in considerazione la ricostruzione minuziosa delle attività poste in essere dal A.A. per il risanamento, pure oggetto di discussione tra le parti.

3. Con il terzo motivo si deduce, ex art 360, comma 1, nn. 1) (recte: n. 4) e 5) cod. proc. civ., la motivazione solo apparente del capo della sentenza relativo al mancato rispetto del requisito patrimoniale minimo complessivo (art. 53, comma 1, lett. a), comma 3, T.U.B.). In particolare, con riferimento all'esame ed alla valutazione della circostanza dell'intervenuto, significativo miglioramento degli indici patrimoniali, e delle circostanze pregresse che avevano portato al mancato rispetto del requisito; omesso esame circa un fatto decisivo per il giudizio che è stato oggetto di discussione tra le parti con riferimento alle medesime circostanze. Il ricorrente lamenta la motivazione apodittica resa dal giudice territoriale, dalla quale è totalmente assente, con riferimento specifico all'addebito del mancato rispetto del requisito patrimoniale oggetto di discussione tra le parti, la ragione per cui gli interventi di risanamento effettuati dal Direttore Generale siano ritenuti inadeguati, pur avendo portato a risultati addirittura migliori di quelli previsti nel Piano di risanamento e rilancio 2012/2014.

4. I due motivi possono essere trattati congiuntamente, in quanto entrambi censurano la pronuncia impugnata con riferimento all'omesso esame delle attività in concreto poste in essere dall'opponente per far fronte alla situazione di crisi della Banca. Entrambi sono inammissibili per quanto si dirà appresso.

4.1. Il decreto impugnato ha puntualmente esaminato la sussistenza degli addebiti rivolti al Direttore Generale, soffermandosi sull'analisi delle Istruzioni della Banca d'Italia e sul sistema di responsabilità che da esse emerge, tale da escludere un'interpretazione puramente esecutiva del suo ruolo. Il giudice territoriale ha tratto conferma di quanto addebitato al A.A. nel provvedimento sanzionatorio, ritenendo espressamente insufficiente l'attività da questi svolta nell'arco di tempo in cui ha esercitato le sue funzioni di alto dirigente rispetto ai doveri su di lui gravanti, ancora più

stringenti nella situazione di crisi in cui la Banca già versava al tempo del suo insediamento (v. decreto p. 3, 2° capoverso).

4.2. Alla luce di quanto evidenziato, anche supra, ai punti 1.1. e 1.3., la motivazione non è apodittica né apparente, vizio che ricorre – secondo la costante giurisprudenza di questa Corte – quando la motivazione, 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 (v. tra le tante: Cass Sez. U, Ordinanza n. 2767 del 30/01/2023, Rv. 666639 – 01; Cass. Sez. U, Sentenza n. 22232 del 03/11/2016, Rv. 641526; Cass. Sez. U, Sentenza n. 16599 del 2016; Cass. Sez. 6 – 1, Ordinanza n. 6758 del 01/03/2022, Rv. 664061; Cass. Sez. 6 – 5, Ordinanza n. 13977 del 23/05/2019, Rv. 654145; Cass. Sez. 3, Ordinanza n. 23123 del 28/07/2023, Rv. 668609 – 01).

4.2.1. In definitiva, i due mezzi si risolvono nel chiedere inammissibilmente a questa Corte di valorizzare il contenuto delle azioni dell’odierno ricorrente, di guisa che il ricorso non rivolge alla sentenza d’appello rilievi riconducibili al paradigma legale di cui al novellato n. 5), dell’art. 360, comma 1, poiché non denuncia l’omesso esame di un fatto “storico” decisivo, ma si duole, piuttosto, di un asserito errore di valutazione commesso dal giudice di merito.

5. Il Collegio rigetta il ricorso, liquida le spese secondo soccombenza come da dispositivo.

Ai sensi dell’art. 13, comma 1-quater D.P.R. n. 115 del 2002, sussistono i presupposti processuali per il versamento, da parte del ricorrente, di un ulteriore importo a titolo di contributo unificato pari a quello previsto per il ricorso, a norma dell’art. 13, comma 1-bis, del D.P.R. n. 115 del 2002, se dovuto.

Corte di Cassazione, [.] and others v Banca d’Italia, 07/05/2024, No 12323

Svolgimento del processo – Motivi della decisione

1. Con provvedimento n. 1122449 del 3 dicembre 2012, notificato il 18 dicembre 2012, la Banca d’Italia definiva il procedimento sanzionatorio avviato contro componenti ed ex componenti degli organi della Banca Intermobiliare di Investimenti e Gestioni Spa (tra i quali, per quanto rileva specificamente nella presente sede, B.B. e A.A. Felice, quali componenti del CdA, e C.C., nella qualità di presidente dello stesso CdA) in seguito ad un serie di accertamenti ispettivi di vigilanza che si erano protratti nell’intervallo temporale dal 4 luglio 2012 al 30 novembre 2012.

Con detto provvedimento agli incolpati (in relazione alle distinte cariche da ciascuno ricoperte) venivano contestati i seguenti illeciti:

- a) carenza nel processo del credito da parte di componenti ed ex componenti del consiglio di amministrazione e dell’amministratore delegato, in violazione della prescrizione sancita dall’art. 53, comma 1°, lett. b) e d) del D.Lgs. n. 385/1993, tit. IV cap. II Istr. Vig. banche – circ. 229/1999; tit. I cap. I parte IV, nuove disposizioni di vigilanza prudenziale per le banche, circ. 263/2006;
- b) carenze nella gestione e nel controllo dei rischi aziendali da parte di componenti ed ex componenti del consiglio di amministrazione e dell’amministratore delegato, in violazione della prescrizione riconducibile all’art. 53, comma 1°, lett. b) e d) del D.Lgs. n. 385/1993, tit. IV

cap. II Istr. Vig. banche – circ. 229/1999; tit. I cap. I parte IV, nuove disposizioni di vigilanza prudenziale per le banche, circ. 263/2006 – disposizioni di vigilanza del 4 marzo 2008 in materia di organizzazione e governo societario delle banche;

c) carenze nei controlli da parte di componenti del collegio sindacale, in violazione della prescrizione prevista dall'art. 53, comma 1°, lett. b) e d) del D.Lgs. n. 385/1993, tit. IV cap. II Istr. Vig. banche – circ. 229/1999; tit. I cap. I parte IV, nuove disposizioni di vigilanza prudenziale per le banche, circ. 263/2006 – disposizioni di vigilanza del 4 marzo 2008 in materia di organizzazione e governo societario delle banche;

d) posizioni ad andamento anomalo e previsioni di perdite non segnalate all'Organo di Vigilanza da parte dei componenti del Consiglio di amministrazione in carica alla data dell'approvazione della semestrale 2012, dei componenti del collegio sindacale e dell'amministratore delegato, in violazione della prescrizione di cui all'art. 51 del D.Lgs. n. 385/1993, tit. VI cap. I istr. Vigilanza banche – circ. 229/1999.

Per ciascuna delle violazioni di cui alle richiamate lett. a), b) e c) veniva applicata, tra gli altri, a B.B. e A.A., la sanzione di Euro 24.500,00 (per complessivi Euro 73.500,00 a carico di ognuno) e a C.C. (quale amministratore delegato della suddetta Banca) quella dell'importo totale di Euro 190.610,00 (di cui Euro 129.110,00 per l'illecito di cui alla lett. a), Euro 37.000,00 per l'illecito di cui alla lett. b) ed Euro 24.500,00 per l'illecito di cui alla lett. c).

Dopo aver proposto opposizione avverso il citato provvedimento sanzionatorio dinanzi al TAR Lazio, il quale si dichiarava difettante di giurisdizione, il relativo giudizio veniva riassunto avanti alla Corte di appello di Roma con ricorso notificato il 3 agosto 2015 e depositato il 5 agosto 2015, mediante il quale tutti gli oppositori chiedevano l'annullamento del provvedimento stesso per insussistenza delle contestate violazioni e, in subordine, instavano per l'ottenimento della riduzione delle sanzioni pecuniarie applicate a ciascuno di essi.

La Corte di appello di Roma – con sentenza n. 132/2018 (pubblicata il 9 gennaio 2018) – respingeva tutte le opposizioni, rilevando l'infondatezza delle complessive doglianze degli oppositori.

Avverso la citata sentenza hanno proposto distinti ricorsi per cassazione B.B. (sulla base di quattro motivi), C.C. (con sei motivi) e A.A. (sulla scorta di tre motivi).

L'intimata Banca d'Italia ha resistito con tre separati controricorsi.

Il ricorrente A.A. ha depositato dichiarazione del 13 febbraio 2024 di rinuncia al ricorso, ritualmente accettata dalla Banca d'Italia con dichiarazione in data 28 febbraio 2024.

I difensori di C.C. e B.B. hanno anche depositato memorie ai sensi dell'art. 378 c.p.c.

Ricorso di B.B.

1) Con il primo motivo il B.B. denuncia – ai sensi dell'art. 360, comma 1, nn. 3 e 5, c.p.c. – la violazione o falsa applicazione di (non meglio precisate) norme di diritto e l'omesso esame circa un fatto decisivo per il giudizio oggetto di discussione tra le parti, avuto riguardo al primo motivo di appello.

In particolare, con questa censura, viene – per quanto emerge dal suo svolgimento – dedotta la violazione e falsa applicazione dell'art. 2 della legge n. 241/1990 e del Regolamento della

Banca d'Italia del 25.06.2008, oltre che del punto 1.5. delle "Disposizioni di vigilanza in materia di sanzioni e procedura sanzionatoria amministrativa" sul presupposto che, nel caso di specie il procedimento si era protratto oltre il prescritto termine di 240 giorni, tenuto conto della sua decorrenza dall'inizio del procedimento d'ufficio.

2. Con il secondo motivo il B.B. lamenta – ai sensi dell'art. 360, comma 1, nn. 3 e 5, c.p.c. – la violazione o falsa applicazione di (non meglio precisate) norme di diritto, oltre all'omesso esame circa un fatto decisivo per il giudizio oggetto di discussione tra le parti, con riferimento al secondo motivo di appello.

Si confuta, con questo motivo, la valutazione operata nel provvedimento impugnato in ordine all'accentramento delle attività ispettive, di valutazione dell'esito dell'ispezione, di contestazione degli addebiti e di istruzione del procedimento in capo a soggetti facenti capo alla Direzione Centrale della Vigilanza, laddove si è ritenuto che tale accentramento non contrasta con i principi stabiliti dalla legge n. 262/2005 e che i relativi principi riguarderebbero "solo la separazione tra attività istruttoria e quella decisoria".

3. Con il terzo motivo il B.B. prospetta – ai sensi dell'art. 360, comma 1, n. 5, c.p.c. – un ulteriore omesso esame circa un fatto decisivo per il giudizio oggetto di discussione tra le parti, in ordine al terzo motivo di appello.

Si evidenzia al riguardo che la Corte di appello, pur avendo richiamato la peculiare governance della Banca caratterizzata dalla posizione predominante dell'amministratore delegato, non ha preso in considerazione quest'ultima circostanza se non al fine di accertare una maggiore responsabilità di quest'ultimo, ovviamente collegata alle censure rivolte al proprio operato, ma mancando, tuttavia, di considerare la stessa circostanza al fine di escludere o circoscrivere la responsabilità dei componendi del Consiglio di amministrazione, con riferimento appunto alle operazioni poste in essere dall'organo delegato.

4. Con il quarto ed ultimo motivo il B.B. deduce – ai sensi dell'art. 360, comma 1, n. 5, c.p.c. – la violazione e falsa applicazione di (non meglio precisate) violazioni di legge in relazione al terzo motivo di appello, per non aver la Corte di appello legittimamente applicato la normativa di riferimento (desumibile, in particolare, dagli artt. 2392, comma 1, e 2381 c.c.) con riguardo alla distinzione tra la posizione di responsabilità aggravata, da un lato, dell'amministratore delegato e la responsabilità attenuata e circoscritta degli amministratori senza deleghe.

Ricorso di C.C.

1. Con il suo primo motivo il C.C. denuncia – ai sensi dell'art. 360, comma 1, n. 3, c.p.c. – la violazione e falsa applicazione degli artt. 2 e 21-octies della legge n. 241/1990, degli artt. 1, 3 e 6 del Regolamento della Banca d'Italia del 25.06.2008 e del punto 124 del relativo allegato, del punto 1.5, Sezione II, delle Disposizioni di vigilanza in materia di sanzioni e procedura sanzionatoria amministrativa della Banca d'Italia del 18.12.2021, nonché degli artt. 4 e 5, allegato E, della legge n. 2246/1865, con riferimento alla prospettata erroneità e non condivisibilità della sentenza impugnata sull'esclusione della natura perentoria del termine di 240 giorni per la conclusione del procedimento di contestazione, non tenendo conto, in senso contrario, del carattere discrezionale del potere esercitato dalla Banca d'Italia, della gravità delle sanzioni applicabili (e in concreto applicate) e delle esigenze di difesa degli incolpati, non rilevando, nella fattispecie, la proroga concessa agli incolpati per controdedurre.

2. Con il secondo motivo il C.C. denuncia – ai sensi dell’art. 360, comma 1, n. 3, c.p.c. – la violazione e falsa applicazione dell’art. 24 della legge n. 262/2005, nella parte in cui stabilisce il principio della distinzione tra funzioni istruttorie e funzioni decisorie (ritenuta non rilevante nella sentenza impugnata), delle Disposizioni di Vigilanza in materia di sanzioni e procedura sanzionatoria amministrativa del 18.12.2010, del Provvedimento della Banca d’Italia del 27.06.2011 e degli artt. 4 e 5, allegato E, della legge n. 2248/1865.

3. Con il terzo motivo il C.C. lamenta – ai sensi dell’art. 360, comma 1, n. 3, c.p.c. – un’ulteriore violazione e falsa applicazione dell’art. 24 della legge n. 262/2005, nella parte in cui stabilisce il principio della distinzione tra funzioni istruttorie e funzioni decisorie, delle Disposizioni di Vigilanza in materia di sanzioni e procedura sanzionatoria amministrativa del 18.12.2010, del Provvedimento della Banca d’Italia del 27.06.2011 e degli artt. 4 e 5, allegato E, della legge n. 2248/1865, prospettando l’illegittimità (esclusa nella sentenza impugnata) del provvedimento sanzionatorio individuale emesso a suo carico, in quanto adottato in violazione dei principi del contraddittorio e della conoscenza degli atti istruttori sanciti dal citato art. 24 della legge n. 262/2005.

4. Con il quarto motivo il C.C. prospetta – ai sensi dell’art. 360, comma 1, n. 5, c.p.c. – l’omesso esame circa un fatto decisivo per il giudizio che ha costituito oggetto di discussione tra le parti, avuto riguardo alla mancata considerazione dell’errore di 100 milioni di Euro commesso dagli ispettori nel calcolare il patrimonio di vigilanza, ragion per cui se la base patrimoniale di BIM non avesse subito l’erosione affermata dagli ispettori non si sarebbe verificato il supposto danno e le sanzioni applicate sulla base di tale, errato, presupposto non avrebbero potuto ritenersi giustificate o, comunque, non nella misura in cui erano state applicate in concreto.

5. Con il quinto motivo il C.C. lamenta – sempre ai sensi dell’art. 360, comma 1, n. 5, c.p.c. – un altro omesso esame circa un fatto decisivo per il giudizio che è stato oggetto di discussione tra le parti avuto riguardo alla mancata considerazione – nella sentenza impugnata – della circostanza relativa al numero e alla rilevanza degli ordini di iniziativa del cliente, da cui non sarebbe dovuta derivare la contestazione, a suo carico, delle carenze nella gestione e nel controllo dei rischi aziendali.

6. Con il sesto ed ultimo motivo il C.C. denuncia – ai sensi dell’art. 360, comma 1, n. 4, c.p.c. – il vizio di omessa pronuncia su di un’eccezione e, quindi, la violazione dell’art. 112 c.p.c., avuto riguardo alla mancata presa di posizione, da parte della Corte di appello, circa la formulata contestazione, nei confronti di esso ricorrente, dell’omissione di dare “notizia al Consiglio della sussistenza di propri interessi, omettendo di astenersi in occasione di operazioni della banca ovvero sottoponendole a un organo non competente”.

Ricorso di A.A.

1. Con il primo motivo il A.A. denuncia – ai sensi dell’art. 360, comma 1, n. 3, c.p.c. – la violazione e falsa applicazione della legge n. 689/1981, dell’art. 24 della legge n. 262/2005 in relazione all’art. 145, comma 1, del TUB (nella versione “ratione temporis” vigente) e agli artt. 1, 3, 6 e 7 del Provvedimento della Banca d’Italia del 25 giugno 2008, nonché dell’art. 21-octies della legge n. 241/1990, prospettando la violazione del termine di durata del procedimento sanzionatorio, l’erronea individuazione delle norme applicabili a detto procedimento e l’inapplicabilità del citato art. 21-octies, comma 2, della legge n. 241/1990 ai provvedimenti sanzionatori applicati dalla Banca d’Italia.

2. Con il secondo motivo il A.A. deduce – ai sensi dell’art. 360, comma 1, n. 3, c.p.c. – la violazione e falsa applicazione dell’art. 144 del TUB (come modificato dall’art. 1, comma 51, del D.Lgs. n. 72/2015) e dell’art. 2, comma 3, dello stesso D.Lgs. n. 72/2015, per inosservanza del principio della retroattività “in mitius” della disciplina delle sanzioni afflittive, come definito e riconosciuto dalla Carta dei diritti fondamentali dell’UE e dalla CEDU, nonché del principio di retroattività delle modifiche alle sanzioni amministrative di origine comunitaria.

3. Con il terzo ed ultimo motivo il A.A. lamenta – ai sensi dell’art. 360, comma 1, n. 3, c.p.c. – la violazione e falsa applicazione dell’art. 2697 c.c., dell’art. 145 del TUB (come modificato dall’art. 1, comma 53, del D.Lgs. n. 72/2015) e degli artt. 2381 e 2392 c.c., unitamente a quella degli artt. 115 e 116 c.p.c.

Esame dei distinti ricorsi

Ricorso di A.A.

1. In virtù della formalizzata rinuncia al ricorso, ritualmente accettata dal procuratore speciale dalla controricorrente Banca d’Italia, occorre dichiarare – ai sensi dell’art. 391 c.p.c. – l’estinzione parziale del giudizio di cassazione limitatamente al relativo rapporto processuale, con il riconoscimento – come concordato tra le parti – del contributo delle spese di giudizio per l’importo complessivo di Euro 3.000,00, in favore della stessa Banca d’Italia.

Ricorso di B.B.

1. Il primo motivo di questo ricorso non è fondato.

Infatti – come accertato in fatto dalla Corte di appello – il provvedimento sanzionatorio è stato adottato entro il termine prescritto dalla normativa regolamentare decorrente dalla scadenza del termine concesso all’autorità di vigilanza per deliberare, decorrente dalla scadenza di quello concesso all’ultimo degli incolpati (nell’ambito, quindi, della stessa attività ispettiva) a ricevere la notificazione dell’atto di contestazione delle violazioni che risulta essersi in concreto – per quanto emergente “ex actis” – consumato il 28 febbraio 2013 (allorquando è stata effettuata l’ultima notifica al sig. P.P.); poiché tale termine è stato prorogato per tutti gli incolpati di 30 giorni, il successivo termine di 240 giorni è iniziato a decorrere dal 27 aprile 2013 ed è spirato il 23 dicembre (e non novembre, come per mero errore materiale indicato nella sentenza qui impugnata), ragion per cui l’atto finale è stato adottato tempestivamente il 3 dicembre 2013, restando irrilevante la data in cui è poi avvenuta la sua notificazione.

Peraltro, la giurisprudenza di questa Corte ha – in modo assorbente – precisato che nel procedimento di irrogazione delle sanzioni amministrative previste in tema di intermediazione finanziaria, il termine di 240 giorni di cui all’art. 145 del D.Lgs. n. 385 del 1993 non ha natura perentoria e, pertanto, non può determinare alcuna decadenza dall’esercizio della potestà sanzionatoria attesa la inidoneità del regolamento interno a modificare le disposizioni sul procedimento di irrogazione delle sanzioni amministrative dettate dalla legge n. 689 del 1981. Ne consegue che il regime decadenziale e prescrizione applicabile può essere desunto esclusivamente dall’art. 14 della citata legge n. 689 del 1981, che prescrive un termine perentorio soltanto per la contestazione differita (cfr. Cass. n. 9517/2018 e, in via generale, per il procedimento anche relativo a sanzioni diverse da quelle di cui al t.u.f., Cass. n. 21706/2018; Cass. n. 6965/2018; Cass. n. 1740/2022 e Cass. n. 1154/2024), senza che possa trovare applicazione, sul punto, nemmeno la legge n. 241/1990.

2. Anche il secondo motivo è privo di fondamento.

Pure a questo riguardo deve trovare applicazione il principio consolidato nella giurisprudenza di questa Corte secondo cui il procedimento sanzionatorio davanti alla Banca d'Italia non viola il diritto di difesa dell'incolpato, atteso che, sebbene l'art. 24, comma 1, della l. n. 262 del 2005 disponga che "i procedimenti sanzionatori sono svolti nel rispetto dei principi della piena conoscenza degli atti istruttori, del contraddittorio, della verbalizzazione, nonché della distinzione tra funzioni istruttorie e funzioni decisorie", è tuttavia esclusa la diretta applicabilità, in tale ambito, dei precetti costituzionali degli artt. 24 e 111 Cost., invocabili solo con riferimento al processo che si svolge davanti al giudice, innanzi al quale l'incolpato può impugnare il provvedimento sanzionatorio con piena garanzia del diritto di difesa e del contraddittorio (cfr., per tutte, Cass. n. 16157/2020).

Peraltro, con il motivo in questione, si deduce anche un vizio di omesso esame ex art. 360 n. 5 c.p.c., ma non si comprende a quale titolo, non risultando dedotto un "fatto storico" decisivo ai fini della supposta inapplicabilità dei principi stabiliti dalla legge n. 262/2005, oltretutto rispettati dal momento che essi riguardano la sola separazione tra l'attività istruttoria e quella decisoria, in concreto osservati con l'attribuzione al Direttorio della Banca d'Italia della delibera sanzionatoria sulla proposta dell'organo ispettivo competente per il compimento dell'attività istruttoria.

3. Il terzo motivo è inammissibile perché – sotto forma della deduzione del vizio ricondotto all'art. 360, comma 1, n. 5, c.p.c. – investe la complessiva valutazione di merito della condotta addebitata al B.B., nella qualità di componente del CdA, per il quale vale l'applicazione del principio generale, in base al quale l'art. 53, lett. b) e d), D.Lgs. n. 385/1993 e le disposizioni attuative dettate con le istruzioni di vigilanza per le banche sanciscono doveri di particolare pregnanza in capo ai componenti del consiglio di amministrazione nel suo complesso e ai singoli consiglieri (anche se privi di deleghe operative), poiché essi sono sempre tenuti ad agire in modo informato e, in ragione dei requisiti di professionalità di cui sono e devono essere in possesso, ad impedire possibili violazioni.

In ogni caso la censura è infondata perché la sentenza impugnata – oltre a sottolineare la prevalente (ma non certo esclusiva) responsabilità del Presidente del CDA – ha considerato e valorizzato anche le responsabilità del Consiglio di amministrazione, di cui era componente il B.B., evidenziando i concreti comportamenti di omessa vigilanza nonostante l'emersione di notevoli criticità nella gestione bancaria, mancando di adottare i necessari e conferenti provvedimenti finalizzati a garantire una migliore efficienza operativa della Banca, ritenuti dalla Corte di appello di Roma certamente insufficienti ad impedire la gestione anomala della banca pur se caratterizzata dalla posizione predominante (ma non per questo soppressiva delle funzioni di controllo demandate al Consiglio di amministrazione sulla gestione bancaria) dell'amministratore delegato, congiuntamente alla scorretta erogazione di credito al settore immobiliare con numerose posizioni anomale, mantenute "in bonis" ancorché deteriorate.

In particolare, la Corte di appello ha motivatamente ravvisato l'inadeguatezza di tutte le giustificazioni addotte dai componenti del CDA con riferimento agli addebiti di mancato rilievo delle connessioni economiche tra gruppi in difficoltà (specificamente indicati a pag. 11 della sentenza impugnata), all'insufficiente approfondimento delle finalità dei finanziamenti richiesti, al ricorso a forme tecniche non correlate alle finalità delle operazioni, all'inidoneità delle modalità di stima degli immobili offerti in garanzia, all'omessa comunicazione all'organo di vigilanza di

posizione ad andamento anomalo e di previsioni di perdita, alla mancata segnalazione di posizioni deteriorate, tutte condotte accertate sulla scorta della complessiva attività ispettiva svoltasi nel periodo considerato.

4. Il quarto motivo – con il quale si contesta la violazione dell’art. 53 lett. b) e d), del TUB in relazione alla mancata o inadeguata considerazione della graduazione della responsabilità degli amministratori nel diritto societario e alla diversità dei ruoli e delle funzioni tra le due figure (quella apicale e quella di mero consigliere del CdA) nel rispetto delle relative prescrizioni – è infondato.

La giurisprudenza di questa Corte è ormai J.J.data (v., per tutte, Cass. n. 2737/2013 e Cass. n. 22848/2015) nell’affermare che nello specifico settore delle attività bancarie o di intermediazione finanziaria, ai fini del contenimento del rischio creditizio nelle sue diverse configurazioni, nonché dell’organizzazione societaria e dei controlli interni, l’art. 53, lett. b) e d), D.Lgs. n. 385/1993 e le disposizioni attuative dettate con le istruzioni di vigilanza per le banche sanciscono doveri di particolare pregnanza in capo ai componenti del consiglio di amministrazione nel suo complesso e ai singoli consiglieri (anche se privi di deleghe operative). Essi sono sempre tenuti ad agire in modo informato e, in ragione dei requisiti di professionalità di cui sono e devono essere in possesso, ad impedire possibili violazioni. Tale dovere, sancito dall’art. 2381 c.c., commi 3 e 6, e dall’art 2392 c.c., non va rimesso, nella sua concreta operatività, alle segnalazioni provenienti dai rapporti degli amministratori delegati, giacché anche i singoli consiglieri devono possedere e attivare una costante ed adeguata conoscenza del business bancario ed, essendo compartecipi delle decisioni di strategia gestionale assunte dall’intero consiglio, hanno l’obbligo di contribuire ad assicurare un governo efficace dei rischi in tutti i settori di operatività della banca, oltre che ad attivarsi in modo da esercitare proficuamente la funzione di monitoraggio sulle scelte compiute, non solo in vista della valutazione delle relazioni degli amministratori delegati, ma anche ai fini dell’esercizio dei poteri di direttiva o avocazione riguardo alle attività rientranti nella delega. L’ambito entro il quale deve esprimersi la diligenza dei consiglieri non è mutato neppure a seguito della riforma del diritto societario adottata con D.Lgs. n. 6/2003: l’art. 2381, comma 6, c.c., impone un dovere di agire in modo informato, disponendo infine che “ciascun amministratore può chiedere agli organi delegati che in consiglio siano fornite informazioni relative alla gestione della società”; il comma 2 dell’art. 2392 c.c. continua a prevedere che gli amministratori “sono in ogni caso solidalmente responsabili se, essendo a conoscenza di fatti pregiudizievoli, non hanno fatto quanto potevano per impedirne il compimento o eliminarne o attenuarne le conseguenze dannose”.

Occorre, inoltre, evidenziare che, per quanto specificamente attiene ai consiglieri non esecutivi di società bancaria, l’art. 53, lett. b) e d), del t.u.b. prevede che la Banca d’Italia emani disposizioni di carattere generale aventi ad oggetto, per quanto in questa sede rileva, il contenimento del rischio nelle sue diverse configurazioni e l’organizzazione societaria e dei controlli interni. Le disposizioni attuative sono state dettate con le Istruzioni di vigilanza per le banche, mediante la circolare 21 aprile 1999 n. 229 oltre che con le successive modificazioni ed integrazioni, le quali sanciscono doveri di particolare pregnanza in capo al consiglio di amministrazione di azienda bancaria, che si incentrano, per l’intero organo collegiale, proprio in quel compito di monitoraggio e valutazione della struttura operativa. In particolare, il dovere di agire in modo informato gravante sui consiglieri non esecutivi è stato chiarito da questa Corte – con la sentenza n. 2737/2013 – essere “particolarmente stringente in materia di organizzazione e governo societario delle banche, anche in ragione degli interessi protetti dall’art. 47 Cost., la cui rilevanza

pubblicistica plasma l'interpretazione delle norme dettate dal codice civile": ciò, in quanto la "diligenza richiesta agli amministratori risente della "natura dell'incarico" ad essi affidato ed è commisurata alle "loro specifiche competenze" (art. 2392 c.c.)".

La sentenza appena richiamata ha ricordato come, sotto questo profilo, il D.Lgs. n. 385 del 1993 esiga il possesso, in capo ai soggetti investiti di funzioni di amministrazione presso banche, di determinati requisiti di professionalità (art. 26), mentre le predette Istruzioni di vigilanza attribuiscono al consiglio di amministrazione una quantità di compiti specifici afferenti ai rischi ed al sistema informativo interno, con l'obbligo espresso di adottare "con tempestività idonee misure correttive" "nel caso emergano carenze o anomalie" (titolo IV, capitolo 11, sezione II). Tanto più, pertanto, nell'ambito delle società bancarie, è stato enfatizzato il dovere di agire informati dei consiglieri non esecutivi: che – come è già stato posto in risalto – "non è rimesso, nella sua concreta operatività, alle segnalazioni provenienti dagli amministratori delegati attraverso i rapporti dei quali la legge onera questi ultimi, giacché anche i primi devono possedere ed esprimere costante ed adeguata conoscenza del business bancario e, essendo compartecipi delle decisioni assunte dall'intero consiglio (al quale è affidata l'approvazione degli orientamenti strategici e delle politiche di gestione del rischio dell'intermediario), hanno l'obbligo di contribuire ad assicurare un governo efficace dei rischi in tutte le aree della banca e di attivarsi in modo da poter utilmente ed esercitare utilmente una funzione dialettica e di monitoraggio sulle scelte compiute dagli organi esecutivi attraverso un costante flusso informativo; e ciò non solo in vista della valutazione del rapporto degli amministratori delegati, ma anche ai fini della diretta ingerenza nella delega attraverso l'esercizio del poteri, di spettanza del consiglio di amministrazione, di direttiva e di avocazione" (v. anche Cass. n. 17799/2014).

Mediante le richiamate disposizioni del testo unico di cui al D.Lgs. n. 385 del 1993 e della normativa secondaria, l'ordinamento ripone, dunque, un particolare affidamento nella specifica competenza degli amministratori, sia pure non esecutivi, in ragione dei loro requisiti di professionalità e, perciò, di una dovuta sensibilità percettiva, nonché nella connessa reazione, che concreta il dovere di ostacolare l'accadimento dannoso: in presenza di segnali d'allarme percepibili da un amministratore diligente secondo la specifica competenza, egli risponde del mancato dovere di attivarsi.

Ricorso di C.C.

1. Per il primo motivo – che pongono la stessa questione giuridica – valgono le motivazioni, alle quali ci si richiama integralmente, già svolte con riferimento al primo motivo del ricorso proposto da B.B..

Va, perciò, riaffermato il seguente principio di diritto:

nel procedimento di irrogazione delle sanzioni amministrative previste in tema di intermediazione finanziaria, il termine di 240 giorni di cui all'art. 145 del D.Lgs. n. 385 del 1993 non ha natura perentoria e, pertanto, non può determinare alcuna decadenza dall'esercizio della potestà sanzionatoria attesa la inidoneità del regolamento interno a modificare le disposizioni sul procedimento di irrogazione delle sanzioni amministrative dettate dalla legge n. 689 del 1981. Ne consegue che il regime decadenziale e prescrizione applicabile può essere desunto esclusivamente dall'art. 14 della citata legge n. 689 del 1981, che prescrive un termine perentorio soltanto per la contestazione differita, e non trova alcuna applicazione nemmeno la disciplina di cui alla legge n. 241/1990.

2. Anche per il secondo e terzo motivo – con i quali viene prospettata la medesima questione giuridica – ci si richiama integralmente alle motivazioni già adottate con riguardo al secondo motivo del ricorso formulato da B.B..

Deve, pertanto, ribadirsi in proposito il generale principio di diritto alla stregua del quale il procedimento sanzionatorio davanti alla Banca d'Italia non viola il diritto di difesa dell'incolpato, atteso che, sebbene l'art. 24, comma 1, della l. n. 262 del 2005 disponga che “i procedimenti sanzionatori sono svolti nel rispetto dei principi della piena conoscenza degli atti istruttori, del contraddittorio, della verbalizzazione, nonché della distinzione tra funzioni istruttorie e funzioni decisorie”, è tuttavia esclusa la diretta applicabilità, in tale ambito, dei precetti costituzionali degli artt. 24 e 111 Cost., invocabili solo con riferimento al processo che si svolge davanti al giudice, innanzi al quale l'incolpato può impugnare il provvedimento sanzionatorio con piena garanzia del diritto di difesa e del contraddittorio.

3. Il quarto motivo è inammissibile e, comunque, infondato.

La censura, in primo luogo, difetta di specificità.

Infatti, va rilevato che, in ordine all'eccezione che il patrimonio di vigilanza al 30 giugno 2012 era stato calcolato erroneamente in sede ispettiva nella somma di 158 milioni di Euro, anziché nella misura effettiva di Euro 258 milioni di Euro, il ricorrente pone meramente riferimento alla produzione (avvenuta nel giudizio dinanzi alla Corte di appello) di una relazione resa dal Q.Q. & R.R. del 12.09.2016 (oltremodo ponderosa), ma di quest'ultima non vengono riportate – nemmeno per estratto o con la rappresentazione di un quadro di sintesi – le risultanze idonee ad avvalorare in concreto la prospettazione dell'errore nella determinazione del suddetto patrimonio di vigilanza, non potendosi – per effetto della necessaria autosufficienza dei motivi di ricorso per cassazione – ritenere bastevole il solo richiamo alle emergenze e alle difese nella fase di merito.

Ad ogni modo, occorre osservare che – avuto riguardo alle concrete contestazioni mosse nei confronti del C.C., quale amministratore delegato della Banca – l'omessa considerazione della circostanza relativa al prospettato errore di Euro 100 milioni che gli ispettori avrebbero commesso nel calcolare il patrimonio di vigilanza non ha avuto carattere decisivo in rapporto alla natura e al contenuto delle violazioni ascritte al ricorrente, siccome attinenti alla diversa condotta (e, comunque, più ampia) rilevante come illecito amministrativo riconducibile alle plurime carenze riscontrate nel processo di erogazione del credito, idoneamente e concretamente contestate allo stesso C.C. (e non, quindi, propriamente e direttamente – o, comunque, non solo – impattanti sul profilo dell'adeguatezza patrimoniale).

4. Il quinto motivo è infondato, perché – al di là dell'aspetto che impinge nel merito delle valutazioni della Corte di appello – non sussiste la prospettata omissione dell'esame del fatto asserito come decisivo, dal momento che nella sentenza impugnata, nel valutare le difese dell'odierno ricorrente (ponenti riferimento anche alla richiamata tabella), è stato attribuito preminente rilievo alla “sistematica esecuzione di ordini di iniziativa cliente”, così ponendo in essere una condotta di anomalia gestoria non certo irrilevante ma implicante “carenze nella gestione e nel controllo dei rischi aziendali”. Pertanto, in ogni caso, il fatto storico dedotto risulta esaminato.

5. Il sesto ed ultimo motivo si profila inammissibile perché la deduzione alla quale esso pone riferimento non è qualificabile come un'eccezione in senso proprio rispetto alla quale potersi configurare la violazione dell'art. 112 c.p.c., risolvendosi, piuttosto, nella prospettazione di una

circostanza – di cui non si assume la decisività – relativa all’insussistenza di pretesi conflitti in capo al C.C., come tali, in ogni caso, non incidenti sulle violazioni contestategli e ricondotte – come rilevato anche dalla Corte di appello – alle carenze nella gestione e nel controllo dei rischi aziendali aggravate anche dall’eccessivo accentramento di poteri in capo allo stesso (quale amministratore delegato), comportante la configurazione di un sua posizione egemone nel mancato impedimento della gestione anomala della banca.

Conclusioni

In definitiva, alla stregua delle complessive motivazioni svolte, deve essere dichiarata l’estinzione parziale del giudizio di cassazione con riferimento, cioè, al solo rapporto processuale instauratosi tra il ricorrente A.A. e la controricorrente Banca d’Italia (con la regolazione delle spese tra gli stessi nei sensi tra loro concordati), nel mentre vanno rigettati gli altri due ricorsi, distintamente proposti da B.B. e C.C., con la loro separata condanna al pagamento delle spese giudiziali, nei termini di cui in dispositivo, tenuto conto delle attività difensive svolte e del valore delle sanzioni irrogate.

Infine, ai sensi dell’art. 13, comma 1-quater, del D.P.R. n. 115 del 2002, occorre dare atto della sussistenza dei presupposti processuali per il versamento, da parte dei ricorrenti B.B. e C.C., di un ulteriore importo a titolo di contributo unificato pari a quello previsto per il ricorso, a norma del comma 1-bis dello stesso articolo 13, se dovuto.

Corte di Cassazione, [.] and others v Banca d’Italia, 31/05/2024, No 15293

Svolgimento del processo – Motivi della decisione

1. Con provvedimento del 23 ottobre 2012 n. 890349, approvato con deliberazione del Direttorio n. 689/2012, la Banca d’Italia definitiva il procedimento sanzionatorio instaurato, tra gli altri, contro A.A. e B.B., quali componenti del collegio sindacale della Banca Network Investimenti Spa, a seguito degli accertamenti ispettivi di vigilanza eseguiti dal 30 maggio al 30 settembre 2012, all’esito dei quali veniva irrogata, nei riguardi di ciascuno degli stessi, la sanzione pecuniaria di euro 15.000,00.

Ai citati sanzionati era stato contestato l’illecito riconducibile alle carenze nei controlli imposti dall’art. 53, comma 1, lett. b) e d) del D.Lgs. n. 385/1993, nonché delle norme contenute nel tit. IV cap. 11 delle Istruzioni di vigilanza delle banche – circ. 229/1999, nonché nel tit. I cap. I, parte IV, delle nuove disposizioni di vigilanza prudenziale per le banche, circ. 263/2006 – disposizioni di vigilanza del 4 marzo 2008 in materia di organizzazione e governo societario delle banche.

Il A.A. e il B.B. proponevano opposizione avverso la suddetta delibera sanzionatoria dinanzi al TAR Lazio, il quale – con sentenza del 25 febbraio 2015 – dichiarava il proprio difetto di giurisdizione. A seguito della riassunzione avanti alla Corte di appello di Roma, nella resistenza della Banca d’Italia e con l’intervento del PG presso la stessa Corte laziale, le opposizioni venivano integralmente respinte con sentenza n. 4459/2018, ravvisandosi l’insussistenza:

a) della dedotta violazione dell’art. 14 della Legge n. 689/1981, avuto riguardo all’asserita tardività della contestazione dell’addebito, avvenuta oltre il novantesimo giorno dall’accertamento del 30 settembre 2011;

- b) della denunciata violazione della mancata corrispondenza tra contestazione e condotta sanzionata;
- c) della prospettata carenza, erroneità e motivazione dell'impugnata delibera sanzionatoria;
- d) dell'erroneità dell'accertamento di condotte illecite ascrivibili a componenti del collegio sindacale della Banca Network Investimenti;
- e) della sproporzione ed incongruità della misura delle sanzioni irrogate.

2. Contro la suddetta sentenza di rigetto della Corte di appello di Roma hanno formulato un congiunto ricorso per cassazione A.A. e B.B., affidato a otto motivi (di cui il primo riferibile, in via esclusiva, al solo B.B.).

Ha resistito con controricorso la Banca d'Italia.

Il PG e i difensori di entrambe le parti hanno depositato memorie ai sensi dell'art. 378 c.p.c.

1. Con il primo motivo B.B. denuncia la violazione e falsa applicazione degli artt. 112 e 140 c.p.c., per aver la Corte di appello ritenuto – con la sentenza impugnata – tempestiva la notifica del verbale di avvio del procedimento sanzionatorio, da considerarsi, invece, affetta da nullità.

In particolare, il B.B. lamenta che la procedura notificatoria di cui all'art. 140 c.p.c. non era stata correttamente eseguita, in quanto esso ricorrente non aveva reperito l'avviso del deposito presso la Casa comunale, che avrebbe dovuto essere affisso sulla porta della sua casa di abitazione. Per contro, si evidenzia che la Corte di appello aveva preso in esame la questione della scissione degli effetti della notificazione fra mittente e destinatario, la quale, tuttavia, non era stata dallo stesso sollevata in giudizio con l'atto di opposizione.

1.1. Il motivo non coglie nel segno e va disatteso. Diversamente da quanto con esso prospettato, la Corte di appello non è incorsa nella dedotta violazione dell'art. 112 c.p.c., dal momento che ha posto riferimento alla richiamata rilevata distinzione relativa alla scissione degli effetti della notificazione fra notificante e notificatario proprio per desumerne che, nella fattispecie, non si era venuta a verificare la supposta violazione dell'art. 140 c.p.c.

La Corte laziale, proprio sulla base di questo ormai pacifico presupposto giuridico (che trova applicazione anche nell'ambito dei procedimenti sanzionatori amministrativi: cfr. Cass. SU n. 12332/2017, Cass. n. 28388/2017 e Cass. n. 20515/2020), ha ritenuto legittima e tempestiva la notificazione dell'atto di contestazione dell'addebito nei confronti del B.B., rilevando che, a fronte della definizione dell'accertamento avvenuto il 30 settembre 2011, si era provveduto all'invio del suddetto atto di contestazione, da parte della Banca d'Italia, con la consegna dell'atto all'ufficiale giudiziario il 21 dicembre 2011 e, quindi, entro il termine decadenziale di Legge.

A tal proposito la Corte di appello ha opportunamente richiamato, considerandolo applicabile, quanto statuito dalle Sezioni unite di questa Corte con la sentenza n. 12332/2017, con cui è stato affermato che il principio della scissione degli effetti della notificazione tra il notificante ed il destinatario dell'atto trova applicazione anche per gli atti del procedimento amministrativo sanzionatorio – non ostandovi la loro natura recettizia – tutte le volte in cui dalla conoscenza dell'atto stesso decorrano i termini per l'esercizio del diritto di difesa dell'incolpato e, ad un tempo, si verifichi la decadenza dalla facoltà di proseguire nel procedimento sanzionatorio

in caso di omessa comunicazione delle condotte censurate entro un certo termine, dovendo bilanciarsi l'interesse del notificante a non vedersi imputare conseguenze negative per il mancato perfezionamento della fattispecie "comunicativa" a causa del fatto di terzi che intervengano nella fase di trasmissione del contenuto dell'atto e quello del destinatario a non essere impedito nell'esercizio di propri diritti, compiutamente esercitabili solo a seguito dell'acquisita conoscenza del contenuto dell'atto medesimo. Pertanto, a questi fini, non rileva che l'esecuzione della notificazione sia avvenuta ai sensi dell'art. 140 c.p.c., senza trascurare il dato che lo stesso ricorrente ha attestato di aver ricevuto il plico, con effetto perciò sanante e tale da consentirgli il pieno dispiegamento delle sue attività difensive (cfr. Cass. n. 11713/2011 e Cass. n. 19522/2016).

Oltretutto, per quanto evincibile dagli atti acquisiti in causa (esaminabili anche nella presente sede, vertendosi in un caso di denuncia di un vizio processuale), è emerso che il timbro apposto dall'ufficiale giudiziario che aveva proceduto alla notificazione dell'atto di contestazione degli addebiti ai sensi dell'art. 140 c.p.c. reca la data del 28 dicembre 2011 e nella stessa data il medesimo aveva compiuto le attestazioni relative all'affissione dell'avviso di deposito alla porta del destinatario e all'invio di altro avviso R.R. con spedizione presso il domicilio dello stesso B.B. comunicandogli l'avvenuto deposito, così risultando completata la procedura notificatoria prevista dal citato art. 140 del codice di rito (peraltro, per vincere tali attestazioni effettuate dall'ufficiale giudiziario, occorreva proporre – rimedio che non risulta, invece, essere stato esperito dal B.B. – querela di falso, stante la natura fidefaciente della relazione di notificazione: v., ad es., Cass. n. 1699/2019 e, già, Cass. n. 1125/1998).

Pertanto, deve ritenersi che, ai fini del rispetto del termine di cui all'art. 14 della Legge n. 689/1981, non costituisce elemento integrante della notificazione l'effettiva conoscenza acquisita dal destinatario in una data successiva, la quale – semmai – esercita la sua efficacia sulle attività di cui costui ha diritto di avvalersi, quali la presentazione delle proprie controdeduzioni, il cui termine di 30 giorni previsto dal TUB viene a decorrere dalla data di ricezione del plico, avvenuta, nel caso di specie, il 10 gennaio 2012 (come dallo stesso ricorrente ammesso: cfr. pag. 8 del ricorso). 2. Con il secondo motivo di ricorso sia il A.A. che il B.B. deducono la violazione e falsa applicazione dell'art. 3 della Legge n. 241/1990 e dell'art. 97 Cost., sul presupposto che la Corte di appello avrebbe, erroneamente, ritenuto corretta la motivazione del provvedimento sanzionatorio.

La censura è priva di pregio.

A tale proposito, occorre rilevare che l'atto sanzionatorio, pur se sostanzialmente riproduttivo degli esiti delle operazioni ispettive, non può certo, per tale motivo soltanto, essere considerato insufficientemente motivato (v., ad es., Cass. n. 10745/2015), rispondendo, pertanto, per quanto in modo essenziale, alle doglianze mosse dai ricorrenti, non risultando, perciò, integrata la violazione del diritto di difesa ed al contraddittorio degli stessi.

Va, oltretutto, ricordato che – sul piano generale – il provvedimento sanzionatorio con cui la P.A., disattendendone le deduzioni difensive, irroga al trasgressore una sanzione amministrativa è censurabile dal giudice dell'opposizione, sotto il profilo del vizio motivazionale, unicamente nel caso in cui sia del tutto privo di motivazione (ovvero quando questa sia solo apparente) e non anche se la stessa risulti insufficiente, atteso che l'eventuale giudizio di inadeguatezza motivazionale involge una valutazione di merito che non compete al giudice ordinario, concernendo il giudizio di opposizione non l'atto della P.A., ma il rapporto sottostante (Cass. SU n. 1786/2010, Cass. n. 2959/2016 e Cass. n. 12503/2018).

Nel caso di specie, oltretutto, vengono in rilievo sanzioni amministrative irrogate ex art. 144 TUB, le quali non sono comparabili a quelle di cui all'art. 187-ter TUB, e quindi non possono considerarsi del tutto soggette al regime di garanzie proprio del processo penale (Cass. n. 3656/2016 e Cass. n. 16517/2020).

3. Con il terzo motivo i due ricorrenti denunciano la nullità della sentenza o del procedimento per omessa pronuncia sull'eccezione di violazione dei principi di colpevolezza e personalità, previsti dagli artt. 3 e 6 della legge n. 689/1981, stante l'uniformità degli addebiti mossi indistintamente a tutti i membri degli organi amministrativi e di controllo della BANCA NETWORK INVESTIMENTI – BNI Spa Diversamente da quanto denunciato, il Collegio rileva che – per come chiaramente emergente dallo sviluppo motivazionale contenuto nelle pagg. 10-11 della sentenza impugnata – risultano essere stati evidenziati i puntuali doveri incombenti sugli organi di controllo societari e, in particolare, le carenze concretamente rilevate nello svolgimento di tale specifica attività rispetto agli organi di amministrazione.

Da ciò consegue l'insussistenza del dedotto vizio di omessa pronuncia.

4. Con il quarto motivo i ricorrenti prospettano la violazione e falsa applicazione dell'art. 2403 c.c., dell'art. 53, comma 1, lett. b) e d), TUB, nonché delle norme contenute nel Titolo IV, Capitolo 1 delle Istruzioni di vigilanza per le Banche di cui alla Circolare n. 229/99 della Banca d'Italia; nel Titolo I, Capitolo 1, parte quarta delle Nuove disposizioni di vigilanza prudenziale per le Banche, di cui alla circolare n. 263/06 della Banca d'Italia e, infine, nelle Disposizioni di vigilanza in materia di organizzazione e governo societario delle banche, adottate dalla Banca d'Italia con provvedimento del 4 marzo 2008, in ordine al contenuto degli obblighi di controllo del Collegio sindacale.

In sostanza, con tale censura, i ricorrenti denunciano, nel ripercorrere le motivazioni del provvedimento sanzionatorio, che la Corte di appello avrebbe avvalorato l'attribuzione ai sindaci della citata banca (qualità rivestita dal A.A. e dal B.B.) della funzione di valutare nel merito la convenienza ed opportunità delle scelte gestorie societarie, obliterando, però, di considerare che al collegio sindacale non compete l'organizzazione delle funzioni di controllo interno, spettanti alla governance bancaria.

La censura è priva di fondamento.

La sentenza impugnata si è, infatti, uniformata alla giurisprudenza –ormai costante – di questa Corte, alla stregua della quale sono stati enunciati i seguenti principi:

- in tema di sanzioni amministrative pecuniarie applicabili ai sensi degli artt. 144 e 145 TUB, il componente del collegio sindacale è imputabile a titolo di dolo o di colpa per l'omesso o il difettoso compimento, cosciente e volontario, dei doveri di controllo e di ispezione di cui all'art. 2403, terzo comma, c.c., non diversamente da quanto previsto dalla disciplina generale dell'illecito amministrativo di cui alla Legge n. 689 del 1981 che esclude forme di responsabilità oggettiva;

- in materia di sanzioni amministrative per violazione delle disposizioni in materia bancaria, i componenti del collegio sindacale, i quali, in caso di accertate carenze delle procedure aziendali predisposte per la corretta gestione societaria, sono sanzionabili a titolo di concorso omissivo "quoad functione", gravando sui sindaci, da un lato, l'obbligo di vigilanza in funzione non soltanto della salvaguardia degli interessi degli azionisti nei confronti di atti di abuso di gestione da parte degli amministratori, ma anche della verifica dell'adeguatezza delle metodologie finalizzate

al controllo interno della società, secondo i parametri procedurali dettati dalla normativa regolamentare di vigilanza e, dall'altro lato, l'obbligo legale di denuncia immediata alla Banca d'Italia.

In altri termini, diversamente da quanto prospettato con il motivo in esame, non si tratta di imputare ai sindaci una responsabilità per il compimento di operazioni irregolari o illecite da parte di altri, né di sottoporre gli organi amministrativi ad un controllo sul merito delle scelte gestionali, ma di esigere l'esercizio tempestivo dei poteri ispettivi che la Legge pone a carico dei sindaci, esercizio che, nella specie, la Corte di appello di Roma ha accertato essere mancato con una motivazione del tutto logica e sufficiente, perciò insindacabile nella presente sede di legittimità.

Al riguardo, la citata Corte (v., soprattutto, pagg. 13-14 della motivazione della sentenza qui impugnata) ha adeguatamente evidenziato l'assenza di iniziative volte a far emergere e a rimuovere le anomalie e le irregolarità rilevate (sul punto, v. Cass. SU n. 20934/2009 e, già con specifico riferimento alle sanzioni ex art. 144 TUB, Cass. n. 5239/2008), non essendosi i medesimi attivati per far emergere gli indizi di criticità correlati all'attività gestoria bancaria (tra i quali la larga diffusione di condotte scorrette dei promotori, la vendita di prodotti rischiosi senza adeguate cautele, il ritardo nella segnalazione dell'applicazione della normativa antiriciclaggio).

5. Con il quinto motivo i ricorrenti lamentano la violazione e falsa applicazione della disciplina normativa regolatrice del riparto dell'onere probatorio, di cui all'art. 2697 c.c. ed all'art. 3 della Legge n. 689/1981 (in rapporto all'art. 115 c.p.c.), sostenendosi che la Corte di appello avrebbe conferito rilevanza unicamente alle risultanze degli accertamenti ispettivi, senza considerare le controdeduzioni documentali degli stessi ricorrenti, fra le quali il rapporto della Banca d'Italia 18.10.2012 prot. (Omissis), che aveva escluso qualsivoglia responsabilità, e degli organi gestori e degli organi di controllo, per le perdite patrimoniali subite da BNI.

Contrariamente a quanto sostenuto con la formulata censura, deve evidenziarsi che la Corte di appello non si è limitata a recepire acriticamente e pedissequamente le risultanze degli accertamenti ispettivi, ma ha provveduto a vagliare autonomamente e in modo tra loro coordinato varie circostanze fattuali, fra cui: il significativo contenzioso sviluppatosi a seguito della offerta di prodotti finanziari non adeguati, nel periodo di operatività dell'organo sindacale di controllo; il non aver impedito, quindi, un'estesa diffusione di vendita incauta di prodotti ad elevata rischiosità per la clientela (oltretutto riferita ad una banca di piccole dimensioni) e – come già evidenziato – il ritardo nell'adozione della normativa antiriciclaggio.

Pertanto, è appena il caso di aggiungere che il riferimento al su citato rapporto della Banca d'Italia concerne unicamente lo specifico problema della diminuzione della patrimonialità della BNI, ma non esclude in alcun modo che all'organo di controllo fossero addebitabili specifiche omissioni nelle loro funzioni.

6. Con il sesto motivo i ricorrenti denunciano l'omesso esame di un fatto decisivo per il giudizio che è stato oggetto di discussione fra le parti, con riferimento all'arco temporale degli accertamenti ispettivi.

Si deduce che tali accertamenti avrebbero posto riferimento unicamente a fatti occorsi fra il maggio 2010 e il settembre 2011, senza considerare quelli anteriori, sui quali la stessa Banca d'Italia aveva condotto un accertamento ispettivo diverso da quello oggetto della presente causa, riferibile sino alla data del 17.10.2008, conclusosi senza la contestazione di addebiti.

Diversamente da quanto opinato dai ricorrenti, la Corte di appello ha adeguatamente chiarito che l'esclusione della responsabilità del sindaco C.C. era giustificata dal fatto che egli aveva cominciato a svolgere il suo incarico dal 27 aprile 2010, nel mentre il A.A. e il B.B. lo avevano assunto a far data dal 26.9.2007 e che le loro omissioni di vigilanza – nel corso del periodo in cui essi avevano rivestito tale qualità – erano state verificate con gli accertamenti ispettivi che erano stati poi posti a fondamento della impugnata delibera sanzionatoria.

La circostanza della contestata “perimetrazione temporale” risulta, dunque, essere stata esaminata.

7. Con il settimo motivo i ricorrenti deducono la violazione e falsa applicazione degli artt. 53, 144 e 145 TUB in relazione al rilievo ispettivo n. 11), con il quale si contestava la mancata osservanza delle prescrizioni antiriciclaggio, di cui all'art. 7, D.Lgs. 231/2007, fattispecie estranea al potere di controllo degli Istituti di credito e di normazione secondaria della Banca d'Italia, di cui al citato art. 53 TUB.

A tal proposito va rilevato che l'area applicativa dell'art. 53 TUB concerne il controllo interno (comma 1, lett. d) e il contenimento del rischio (comma 1, lett. b) e la violazione della relativa normativa secondaria trova la disciplina sanzionatoria nell'art. 144 TUB.

Nel caso, non risulta essere stato applicato il procedimento sanzionatorio previsto dall'art. 56 del D.Lgs. 231/2007, che pertanto non viene in rilievo nella vicenda dedotta in causa.

8. Con l'ottavo ed ultimo motivo i ricorrenti denunciano l'omessa pronuncia sulla dedotta incompetenza della Banca d'Italia all'irrogazione di sanzioni concernenti la prestazione di servizi di investimento, da intendersi, invece, devoluta alla competenza CONSOB dal TUF.

La doglianza è priva di fondamento, dal momento che la Corte di appello ha preso specifica posizione sulla questione (v. ultima parte di pag. 11 e la prima della successiva pag. 12), rilevando che le sanzioni irrogate al A.A. e al B.B. attenevano alla violazione della disciplina dell'attività di controllo interno e non invadevano, pertanto, la sfera di attribuzioni propria della CONSOB.

Più specificamente nella sentenza impugnata è stato correttamente posto in risalto che non aveva rilievo che la contestata carenza nei controlli interni concernesse anche l'attività di collocamento tra i clienti della banca di prodotti finanziari soggetta a vigilanza della CONSOB, poiché la contestazione e la conseguente sanzione applicata avevano riguardato i controlli interni della banca e l'adeguatezza dell'attività di controllo da esercitarsi sulle funzioni societarie e non esorbitavano, quindi, dai compiti di vigilanza sulle banche assegnati alla Banca d'Italia.

È da escludersi, quindi, la sussistenza della dedotta violazione dell'art. 112 c.p.c.

9. In definitiva, il ricorso va integralmente respinto, con conseguente condanna dei ricorrenti, in solido, al pagamento delle spese del presente giudizio, che si liquidano nei sensi di cui in dispositivo.

Infine, ai sensi dell'art. 13, comma 1-quater, del d.P.R. n. 115 del 2002, occorre dare atto della sussistenza dei presupposti processuali per il versamento, da parte dei ricorrenti, di un ulteriore importo a titolo di contributo unificato pari a quello previsto per il ricorso, a norma del comma 1-bis dello stesso articolo 13, se dovuto.

INDEX

I – The case-law of the CJEU

1. Synthesis

Annulment of the SRB's decision fixing the ex ante contribution to the SRF due to the lack of correspondence between the methodology actually applied by the SRB and that described in the contested decision

Case T-405/21, Case T-390/21, Case T-391/21, Case T-392/21,

Case T-394/21, Case T-395/21, Case T-404/21

Unlawfulness of the SRB decision calculating the annual target for the SRF because its statement of reasons was contradicted by the same Institution before the General Court

Case T-347/21

Case T-348/21

Board of Directors of a credit institution's standing to challenge ECB's decision withdrawing that institution's authorisation

Case C-256/22 P

SRB's decision on the calculation of the ex ante contributions, application of the exclusions under Article 5 of Commission Delegated Regulation (EU) 2015/63, and duty to state reasons

Case T-466/16 RENV

Unlawfulness of ECB's decision automatically levying absorption interests pursuant to Austrian law for breach of Article 395 of CRR

Case T-647/21 (Joined Cases T-647/21, T-99/22); Case T-667/21

Shareholder of a credit institution lacks interest in the result of an action for annulment brought by that credit institution before the General Court

Case C-676/23 P, Case C-690/23 P, Case C-693/23 P

Unlawfulness of the SRB's decision determining the ex ante contributions for 2022 for breach of the 12.5% cap provided for by Article 70(2) of SRMR

Case T-411/22

Where a credit institution transfers some of its assets from a Member State to another, its contributions to the original DGS owed proportionally to those

assets in the preceding 12 months are to be transferred to the receiving DGS in the jurisdiction in which those assets were transferred

Case C-822/21

SRB's calculation of the ex ante contributions and application of the exclusions under Article 5 of Commission Delegated Regulation (EU) 2015/63

Case T-393/21

The General Court annuls the SRB's decision on the ex ante contributions to the SRF because the methodology actually applied by the SRB to determine the annual target level, as explained at the hearing, does not correspond to that described in the contested decision

Case T-360/21

Unlawfulness of Articles 70(7) of SRMR and 8(1)(g) of Council Implementing Regulation (EU) 2015/81 for breach of Article 291(2) TFEU and unlawfulness of the SRB's decision determining the ex ante contributions for 2022 for breach of the 12.5% cap provided for by Article 70(2) of SRMR

Case T-395/22

ECB's non-contractual liability within the SSM

Case T-134/21

ECB's second pillar measure to deduct from CET1 capital the amount of Irrevocable Payment Commitments to the Single Resolution Fund

Case T-182/22

Case T-186/22, Case T-187/22, Case T-188/22, Case T-189/22, Case T-190/22, Case T-191/22

The resolution scheme adopted by the SRB under Article 18(7) of SRMR is not a challengeable act within the meaning of Article 263 TFEU

Case C-551/22 P

2. Series of keywords

KEYWORDS	CASES
Absorption interest measure	Case T-647/21; Case T-667/21
Adjustment of <i>ex ante</i> contributions to the risk profile of the institution	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x9); Case T-347/21 – Case T-348/21; T-466/16 RENV (x2); Case T-393/21 (x4); Case T-360/21
Administrative measure under Article 65 of CRD	Case T-647/21; Case T-667/21
Administrative pecuniary sanctions	Case T-647/21
Amendments to credit institutions' statutes	Case T-134/21

Annual target level for the SRF	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-347/21 – Case T-348/21 (x2); T-466/16 RENV; Case T-393/21; Case T-360/21
Articles 4 and 16(1) and (2) of SSMR do not confer rights on individuals	Case T-134/21
Article 5(1) of Commission Delegated Regulation (EU) 2015/63	T-466/16 RENV (x3); Case T-393/21 (x2)
Article 8(1) of Council Implementing Regulation (EU) 2015/81	Case T-395/22
Article 14(3) of DGSD	Case C-822/21
Articles 53(1)(da), 53a(1)(d), 56, 67(1)(e), and Article 69octiesdecies(1)(a) of TUB do not confer rights on individuals	Case T-134/21
Article 71(6) of TUB confers rights on individuals	Case T-134/21
Binning method	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
Cap of 12.5% of the final target level for the SRF under Article 70(2) SRMR	Case T-395/22; Case T-411/22
CET 1 capital	Case T-182/22 (x4); Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22 (x5)
Challengeable act under Article 263 TFEU	Case C-551/22 P
Commission and Council's participation in the decision-making under Article 18(7) of SRMR	Case C-551/22 P (x2)
Commission Delegated Regulation (EU) 2015/63	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x9); Case T-347/21 – Case T-348/21; T-466/16 RENV (x5); Case T-393/21 (x5); Case T-360/21 (x3)
Commission Delegated Regulation (EU) 2015/63 takes account of the risk profile of institutions	Case T-360/21
Compatibility with the “Meroni doctrine”	Case C-551/22 P
Confidential information in an anonymised or aggregated form	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
Contradictions between statement of reasons of the decision and reasons given before the Court	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-347/21 – Case T-348/21; Case T-393/21; Case T-360/21
Contributions to deposit guarantee schemes	Case C-822/21 (x2)
Council Implementing Regulation (EU) 2015/81	Case T-395/22 (x2)
Council's power to implement a legally binding act of the Union	Case T-395/22
Debt securities acquired by a promotional bank not excluded from calculation of ex ante contributions	T-466/16 RENV
Decision placing a credit institution in resolution	Case C-551/22 P (x3)
Duty to state reasons	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x5); Case T-347/21 – Case T-348/21 (x4); T-466/16 RENV (x2); Case T-667/21; Case T-393/21; Case T-360/21 (x2); Case T-395/22
ECB's competence and powers	Case T-647/21 (x2); Case T-667/21 (x5); Case T-182/22 (x2); Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22
ECB's discretion	Case T-134/21 (x4); Case T-182/22
ECB's failure to act	Case T-134/21
ECB's individual examination of credit institutions	Case T-182/22; Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22
ECB's non-contractual liability	Case T-134/21 (x10)
ECB's supervisory tasks	Case T-134/21 (x10)
European Commission's competence and powers	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x8); T-466/16 RENV; Case T-393/21; Case T-360/21

<i>Ex ante</i> contributions to resolution financing arrangements	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x16); Case T-347/21 – Case T-348/21 (x8); T-466/16 RENV (x8); Case T-393/21 (x6); Case T-360/21 (x7)
<i>Ex ante</i> contributions to the Single Resolution Fund	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x16); Case T-347/21 – Case T-348/21 (x8); T-466/16 RENV (x8); Case T-411/22; Case T-393/21 (x6); Case T-360/21 (x7); Case T-395/22 (x3); Case T-182/22 (x2); Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22 (x4)
Exclusion of certain promotional loans from the calculation of <i>ex ante</i> contributions	T-466/16 RENV (x2)
Fiduciary liabilities	Case T-393/21
Final composite risk indicator	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
Freedom to conduct a business	Case T-360/21
Individual data of other institutions	T-466/16 RENV
Institutional Protection Schemes	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x5)
Institutions in the process of being dismantled	Case T-360/21
Institutions subject to the obligation to pay <i>ex ante</i> contributions obligation	Case T-360/21 (x2)
Insurance-based logic of <i>ex ante</i> contributions to resolution financing arrangements	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-360/21
Interpretation of national law provisions by EU Institutions	Case T-647/21; Case T-667/21
Irrevocable payment commitments	Case T-182/22 (x2); Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22 (x4)
National orderly resolution plan	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2)
No delegation of power to the SRB for the calculation of <i>ex ante</i> contributions to the SRF	Case T-360/21
No discretion to exclude certain liabilities when adjusting <i>ex ante</i> contributions in proportion to risk	T-466/16 RENV; Case T-393/21
No ECB obligation to correct misleading statements of stakeholders of a credit institution	Case T-134/21 (x3)
No exclusion of fiduciary liabilities for calculating <i>ex ante</i> contributions to resolution financing arrangements	Case T-393/21
No exemption from the obligation to pay <i>ex ante</i> contributions for institutions with minimal risks	Case T-360/21 (x2)
No integration of the statement of reasons before the EU Court	Case T-667/21
No interest of the shareholder of a credit institution in the result of a case brought by that credit institution	Case C-676/23 P – Case C-690/23 P – Case C-693/23 P
No limitation of the ECB's non-contractual liability from rules on NCA's liability	Case T-134/21
Non-automatic application of absorption interests	Case T-647/21; Case T-667/21
Own funds requirement	Case T-182/22 (x2); Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22 (x4)
Power conferred on the Commission to adopt delegated acts	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x8); T-466/16 RENV; Case T-393/21; Case T-360/21
Precautionary buffers	Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22
Primacy of EU law	Case T-647/21; Case T-667/21
Principle of equal treatment	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x5); Case T-393/21; Case T-360/21; Case T-134/21

Principle of legal certainty	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2); Case T-347/21 – Case T-348/21 (x3); T-466/16 RENV
Principle of proportionality	Case T-647/21; Case T-667/21 (x2); Case T-360/21; Case T-134/21; Case T-182/22; Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22
Principle of the protection of legitimate expectations	Case T-134/21
Promotional banks	T-466/16 RENV
Promotional loans	T-466/16 RENV (x2)
Protection of business secrets	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x4); Case T-347/21 – Case T-348/21 (x2); T-466/16 RENV; Case T-360/21
Provisional banks' liabilities for calculating <i>ex ante</i> contributions	T-466/16 RENV
Public authorities shareholders or creditors of a bank subject to a resolution procedure	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
Public financial support	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-360/21
Representation of the credit institution	Case C-256/22 P
Resolution procedure	Case C-551/22 P (x3)
Resolution scheme	Case C-551/22 P (x3)
Retroactive effects of an SRB's decision	T-466/16 RENV
Right to be heard	Case T-347/21 – Case T-348/21
Right to effective judicial protection	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2); Case T-347/21 – Case T-348/21 (x3); T-466/16 RENV; Case T-393/21; Case T-360/21 (x2)
Right to property	Case T-134/21
Risk of overstatement of CET 1 capital	Case T-182/22 (x4); Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22 (x5)
Rules conferring rights on individuals	Case T-134/21 (x8)
Sanctions criminal in nature	Case T-647/21
Second pillar measure	Case T-182/22 (x4); Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22 (x6)
Shareholders of a credit institution	Case C-676/23 P – Case C-690/23 P – Case C-693/23 P
SRB's competence and powers	Case T-360/21
SRB's discretion	Case T-360/21
SRF contribution period of 2022	Case T-411/22; Case T-395/22
SRMR and BRRD lawfully based on Article 114 TFEU	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2); Case T-360/21 (x2)
SRMR and BRRD provisions on <i>ex ante</i> contributions are not fiscal provisions under Article 114(2) TFEU	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-360/21
Statement of reasons of the decision imposing <i>ex ante</i> contributions	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x3); Case T-347/21 – Case T-348/21 (x2); T-466/16 RENV (x2); Case T-360/21 (x2)
Temporary administration	Case T-134/21 (x2)
Transfer of contributions from a DGS to another DGS of another Member State for transferral of assets of the contributing institution	Case C-822/21
Transitional provisions of Commission Delegated Regulation (EU) 2015/63	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-347/21 – Case T-348/21
"Union law" as including national law transposing EU directives	Case T-647/21 (x4); Case T-667/21 (x3)
Unlawfulness of Article 70(7) SRMR	Case T-395/22
Withdrawal of a credit institution's authorisation	Case C-256/22 P

3. Series of legal provisions

ARTICLES	CASES
TEU, Article 5(4)	Case T-134/21; Case T-182/22; Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22
TEU, Articles 24 and 26	Case T-395/22 (x2)
TFEU, Protocol No 2	Case T-182/22; Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22
TFEU, Article 107(1)	Case T-360/21
TFEU, Article 114	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x3); Case T-360/21 (x3)
TFEU, Article 114(1)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2); Case T-360/21 (x2)
TFEU, Article 114(2)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x3); Case T-360/21 (x4)
TFEU, Article 263	Case C-551/22 P (x4)
TFEU, Article 263, para 4	Case C-551/22 P
TFEU, Article 277	Case T-395/22
TFEU, Article 290	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
TFEU, Article 290(1)	Case T-360/21 (x4)
TFEU, Article 291(2)	Case T-395/22 (x7)
TFEU, Article 296	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2); Case T-360/21; Case T-347/21 – T-348/21
TFEU, Article 339	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2); Case T-466/16 RENV; Case T-360/21; Case T-347/21 – T-348/21
TFEU, Article 340, para 3	Case T-134/21 (x2)
Charter, Article 16	Case T-360/21
Charter, Article 17(1)	Case T-134/21
Charter, Article 20	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-134/21; Case T-360/21
Charter, Article 21	Case T-134/21
Charter, Article 41(2)(a)	Case T-347/21 – T-348/21
Charter, Article 47	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-347/21 – T-348/21 (x2)
Charter, Article 50	Case T-647/21 (x2)
Charter, Article 52(1)	Case T-360/21
CRR, Article 3	Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22
CRR, Article 4(1), point (2)	Case T-393/21
CRR, Article 4(1)(1)	Case T-360/21 (x2)
CRR, Article 36	Case T-182/22 (x3)
CRR, Article 113(6) and (7)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
CRR, Article 113(7)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2)
CRR, Article 395	Case T-667/21
SSMR, Article 4	Case T-134/21 (x5)
SSMR, Article 4(1)(f)	Case T-182/22

SSMR, Article 9	Case T-134/21
SSMR, Article 9(1), second subpara, second sentence	Case T-667/21
SSMR, Article 16(1)	Case T-134/21 (x3)
SSMR, Article 16(1)(c)	Case T-182/22 (x2); Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22 (x2)
SSMR, Article 16(2)	Case T-134/21 (x3); Case T-182/22
SSMR, Article 16(2)(a)	Case T-182/22; Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22
SSMR, Article 16(2)(d)	Case T-182/22; Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22
SSMR, Article 16(2)(i)	Case T-182/22; Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22
SSMR, Article 18	Case T-667/21
SSMR, Article 18(1)	Case T-647/21 (x3)
SSMR, Article 18(3)	Case T-647/21
SRMR, recitals 8 to 12	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-360/21
SRMR, recital 24	Case C-551/22 P
SRMR, recital 26	Case C-551/22 P
SRMR, recital 41	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2); Case T-360/21 (x2); Case T-347/21 – T-348/21
SRMR, recital 100	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-360/21
SRMR, recital 102	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
SRMR, recital 109	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-360/21
SRMR, recital 114	Case T-395/22
SRMR, Article 1	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-360/21
SRMR, Article 2	Case T-347/21 – T-348/21
SRMR, Article 5	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
SRMR, Article 7	Case C-551/22 P
SRMR, Article 18	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-360/21; Case C-551/22 P (x4)
SRMR, Article 18(1) and (4) to (6)	Case C-551/22 P
SRMR, Article 18(1)(c) and (5)	Case T-393/21
SRMR, Articles 67(4)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
SRMR, Article 69	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2)
SRMR, Article 69(1)	Case T-466/16 RENV; Case T-411/22; Case T-395/22; Case T-347/21 – T-348/21
SRMR, Article 69(2)	Case T-466/16 RENV; Case T-411/22 (x2); Case T-395/22 (x2); Case T-347/21 – T-348/21
SRMR, Articles 69 and 70	Case T-360/21; Case T-347/21 – T-348/21
SRMR, Article 70	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x3); Case T-411/22; Case T-395/22

SRMR, Article 70(1)	Case T-395/22 (x2)
SRMR, Article 70(1) and (2)	Case T-395/22 (x2)
SRMR, Article 70(1), (2) and (3)	Case T-395/22
SRMR, Article 70(2)	Case T-466/16 RENV (x2); Case T-411/22 (x5); Case T-395/22 (x2); Case T-347/21 – T-348/21
SRMR, Article 70(2), first subpara	Case T-395/22 (x3)
SRMR, Article 70(2), fourth subpara	Case T-395/22 (x3)
SRMR, Article 70(2), second para	Case T-395/22 (x2)
SRMR, Article 70(3)	Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22
SRMR, Article 70(7)	Case T-395/22 (x5)
SRMR, Article 88(1), first subpara	Case T-347/21 – T-348/21
IFR, Article 4(1), point (22)	Case T-393/21
Council Regulation (EC) 1/2003, Article 23(2)	Case T-647/21
Commission Delegated Regulation (EU) 2015/63, recital 13	Case T-466/16 RENV
Commission Delegated Regulation (EU) 2015/63, Article 3	Case T-360/21
Commission Delegated Regulation (EU) 2015/63, Article 3(2)	Case T-393/21
Commission Delegated Regulation (EU) 2015/63, Article 3(27)	Case T-466/16 RENV
Commission Delegated Regulation (EU) 2015/63, Article 3(28)	Case T-466/16 RENV
Commission Delegated Regulation (EU) 2015/63, Article 4	Case T-360/21
Commission Delegated Regulation (EU) 2015/63, Article 4(2)	Case T-466/16 RENV; Case T-347/21 – T-348/21
Commission Delegated Regulation (EU) 2015/63, Articles 4 to 7	Case T-347/21 – T-348/21
Commission Delegated Regulation (EU) 2015/63, Article 5	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-466/16 RENV; Case T-393/21
Commission Delegated Regulation (EU) 2015/63, Article 5(1)	Case T-393/21 (x4); Case T-466/16 RENV (x5)
Commission Delegated Regulation (EU) 2015/63, Article 5(1)(e)	Case T-393/21 (x3)
Commission Delegated Regulation (EU) 2015/63, Article 5(1)(f)	Case T-466/16 RENV
Commission Delegated Regulation (EU) 2015/63, Article 6	Case T-360/21
Commission Delegated Regulation (EU) 2015/63, Article 6(1)(d)	Case T-360/21 (x2); Case T-347/21 – T-348/21
Commission Delegated Regulation (EU) 2015/63, Article 6(4)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
Commission Delegated Regulation (EU) 2015/63, Article 6, paras 5 to 7	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
Commission Delegated Regulation (EU) 2015/63, Articles 6(5) to (8)	Case T-360/21 (x2)
Commission Delegated Regulation (EU) 2015/63, Article 6(5)(c)	Case T-360/21 (x2)
Commission Delegated Regulation (EU) 2015/63, Article 6(8)(a)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
Commission Delegated Regulation (EU) 2015/63, Articles 6 and 7	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-347/21 – T-348/21
Commission Delegated Regulation (EU) 2015/63, Articles 6 to 9	Case T-360/21
Commission Delegated Regulation (EU) 2015/63, Article 7(4)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2); Case T-360/21 (x2)

Commission Delegated Regulation (EU) 2015/63, Article 7(4)(a)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
Commission Delegated Regulation (EU) 2015/63, Article 9	Case T-347/21 – T-348/21
Commission Delegated Regulation (EU) 2015/63, Article 9(3)	Case T-347/21 – T-348/21
Commission Delegated Regulation (EU) 2015/63, Article 14	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-347/21 – T-348/21
Commission Delegated Regulation (EU) 2015/63, Article 20	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
Commission Delegated Regulation (EU) 2015/63, Article 20(1)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2); Case T-347/21 – T-348/21 (x2)
Commission Delegated Regulation (EU) 2015/63, Annex I	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2); Case T-347/21 – T-348/21
Commission Delegated Regulation (EU) 2015/63, Annex I, Step 2, (2)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-347/21 – T-348/21
Commission Delegated Regulation (EU) 2015/63, Annex I, Step 2, (3)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-347/21 – T-348/21
Commission Delegated Regulation (EU) 2015/63, Annex II	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-347/21 – T-348/21
Council Implementing Regulation (EU) 2015/81, recitals 14 and 15	Case T-395/22
Council Implementing Regulation (EU) 2015/81, Article 4	Case T-466/16 RENV; Case T-347/21 – T-348/21
Council Implementing Regulation (EU) 2015/81, Article 8(1)	Case T-395/22 (x7)
Council Implementing Regulation (EU) 2015/81, Article 8(1)(g)	Case T-395/22
MiFID I, Article 4(1), point (1)	Case T-393/21
CRD, recital 2	Case T-667/21
CRD, recital 5	Case T-667/21
CRD, recital 37	Case T-647/21; Case T-667/21
CRD, Article 2(5)	Case T-360/21 (x2)
CRD, Article 4(1)	Case T-647/21; Case T-667/21
CRD, Title VII	Case T-667/21
CRD, Article 65	Case T-647/21 (x3); Case T-667/21
CRD, Article 65(1)	Case T-647/21; Case T-667/21 (x3)
CRD, Article 67(2)	Case T-667/21
CRD, Article 70	Case T-647/21 (x2); Case T-667/21
Directive 2014/49/EU, Article 10(1)	C-822/21
Directive 2014/49/EU, Article 10(3)	Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22
Directive 2014/49/EU, Article 14	C-822/21
Directive 2014/49/EU, Article 14(3)	C-822/21 (x4)
BRRD, recitals 3 to 5	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-360/21
BRRD, recital 103	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-360/21
BRRD, recitals 105 to 107	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2); Case T-360/21 (x2); Case T-347/21 – T-348/21
BRRD, recital 107	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-360/21

BRRD, Article 1	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-360/21
BRRD, Article 2(1), point (3)	Case T-393/21 (x3)
BRRD, Article 2(1)(8)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
BRRD, Article 2(1)(23)	Case T-360/21
BRRD, Article 2(1)(28)	Case T-360/21 (x2)
BRRD, Article 7(4), second subpara	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2)
BRRD, Article 32	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-360/21
BRRD, Articles 102 and 103	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21; Case T-347/21 – T-348/21; Case T-360/21
BRRD, Article 103	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
BRRD, Article 103(2)	Case T-466/16 RENV; Case T-393/21; Case T-360/21 (x3)
BRRD, Article 103(3)	Case T-186/22 – Case T-187/22 – Case T-188/22 – Case T-189/22 – Case T-190/22 – Case T-191/22
BRRD, Article 103(7)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x7); Case T-393/21 (x2); Case T-360/21 (x3); Case T-466/16 RENV (x4); Case T-395/22
BRRD, Article 103(7)(a) to (h)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21
BRRD, Article 103(7)(e)	Case T-360/21
BRRD, Article 103(7)(h)	Case T-405/21 – Case T-390/21 – Case T-391/21 – Case T-392/21 – Case T-394/21 – Case T-395/21 – Case T-404/21 (x2)
MiFID II, Article 4(1), point (1)	Case T-393/21
IFD, recital 4	Case T-393/21
IFD, Article 63(1)	Case T-393/21
Court of Justice, Statute, Article 40	Case C-676/23 P – Case C-690/23 P – Case C-693/23 P
TUB, Article 53(1)(da)	Case T-134/21 (x3)
TUB, Article 53a(1)(d)	Case T-134/21 (x4)
TUB, Article 56	Case T-134/21 (x5)
TUB, Article 67(1)(e)	Case T-134/21 (x3)
TUB, Article 69 <i>octiesdecies</i> (1)(a)	Case T-134/21 (x2)
TUB, Article 71(6)	Case T-134/21 (x5)
Austrian banking law, para 97	Case T-667/21

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

1. Synthesis

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

AP Cases 2/2023 and 3/2023

AP Case 5/2023

AP Case 1/2023

SRB's decision denying access to confidential documents pertaining to the resolution of a credit institution, as amended in compliance with the decision of the Appeal Panel under Article 85(8) of SRMR

AP Case 2/2024

2. Series of keywords

KEYWORDS	CASES
"Commercial interest" exception to the right to access under Regulation (EC) 1049/2001	AP Case 2/2024 (x2)
"Policy" exception to the right to access under Regulation (EC) 1049/2001	AP Case 2/2024
"Privacy and integrity" exception to the right to access under Regulation (EC) 1049/2001	AP Case 2/2024
Access to the file under Article 90(4) of SRMR	AP Case 2/2024
Amendments to MREL determination	AP Case 1/2023
Amendments to the statement of reasons by the SRB after the remittal by the Appeal Panel	AP Case 2/2024
Appeal proceedings before the Appeal Panel	AP Cases 2/2023 and 3/2023
<i>Baumeister</i> case	AP Case 2/2024
Binding effects of the Appeal Panel's remittal decision	AP Case 2/2024
Burden of proof in right to access procedures	AP Case 2/2024 (x2)
Case-by-case approach when determining MREL	AP Case 1/2023
Combined buffer requirement	AP Case 5/2023; AP Case 1/2023
Commission Implementing Regulation (EU) 2018/1624	AP Case 5/2023; AP Case 1/2023
Commission Implementing Regulation (EU) 2021/451	AP Case 5/2023; AP Case 1/2023
Concept of confidential information	AP Case 2/2024
Concept of personal data	AP Case 2/2024
Contractual guarantees for a waiver to internal MREL	AP Case 5/2023
Deposit outflows, liquidity coverage and counterbalancing capacity of a credit institution preceding its resolution	AP Case 2/2024 (x2)
Downward adjustment of MREL in case of no "no creditor worse off" risk	AP Cases 2/2023 and 3/2023
Duty to state reasons	AP Cases 2/2023 and 3/2023; AP Case 5/2023 (x2); AP Case 1/2023 (x3); AP Case 2/2024
ECB Decision 2004/258	AP Case 2/2024
Increasing of MREL-LRE to nominal amount of 8% TLOF	AP Cases 2/2023 and 3/2023 (x2)
Information on the negotiation and offer of the acquirer of a resolved credit institution	AP Case 2/2024

Intragroup support	AP Case 1/2023
Joint decision on MREL under Article 45h of BRRD	AP Cases 2/2023 and 3/2023
Market Confidence Charge	AP Case 5/2023 (x4); AP Case 1/2023 (x4)
Material change of the status of a credit institution	AP Case 1/2023
MREL additional requirement	AP Case 5/2023; AP Case 1/2023 (x2)
MREL decision	AP Case 5/2023 (x5); AP Case 1/2023
MREL determination	AP Cases 2/2023 and 3/2023 (x4); AP Case 5/2023 (x3); AP Case 1/2023 (x7)
MREL Policy	AP Case 5/2023 (x4); AP Case 1/2023 (x3)
MREL proceeding before the Appeal Panel	AP Case 1/2023
Non-existence of the document requested	AP Case 2/2024
Overriding public interest	AP Case 2/2024
Parent entity's guarantee for a waiver to internal MREL	AP Case 5/2023
Period of "one year" for the Market Confidence Charge	AP Case 1/2023
Presumption of validity of Union acts	AP Cases 2/2023 and 3/2023
Principle of equal treatment	AP Case 5/2023
Principle of protection of legitimate expectations	AP Case 5/2023
Proceeding before the Appeal Panel	AP Case 5/2023 (x2); AP Case 2/2024 (x3)
Professional secrecy under Article 88 of SRMR	AP Case 2/2024
Prohibition on ruling <i>ultra petita</i>	AP Case 1/2023
Protection of confidentiality	AP Case 2/2024 (x2)
Protection of confidentiality under ECB Decision 2004/258	AP Case 2/2024
Reasonable time for SRB's decision after the Appeal Panel's remittal	AP Case 2/2024
Reasons to refuse disclosure	AP Case 2/2024
Regulation (EC) 1049/2001	AP Case 2/2024 (x3)
Resolution plan	AP Case 1/2023
Right to access	AP Case 2/2024 (x8)
Right to be heard	AP Case 5/2023
Scope of an appeal against a SRB's decision adopted after the Appeal Panel's remittal	AP Case 2/2024
Statistical methodologies	AP Case 5/2023
Strong reliance on wholesale funding	AP Case 5/2023; AP Case 1/2023
TLAC	AP Case 5/2023; AP Case 1/2023 (x2)
Waiver to internal MREL	AP Case 5/2023 (x2)

3. Series of legal provisions

ARTICLES	CASES
Charter, Article 41	AP Case 5/2023
TFEU, Article 266	AP Case 2/2024
TFEU, Article 296	AP Cases 2/2023 and 3/2023 (x2)
Regulation (EC) 1049/2001, Article 4(1)(a) fourth indent	AP Case 2/2024
Regulation (EC) 1049/2001, Article 4(1)(b)	AP Case 2/2024
Regulation (EC) 1049/2001, Article 4(2)	AP Case 2/2024
Regulation (EC) 1049/2001, Article 4(2) first indent	AP Case 2/2024 (x2)
SRMR, Article 8(12)	AP Case 1/2023
SRMR, Article 12c(4)	AP Cases 2/2023 and 3/2023 (x3)
SRMR, Article 12d	AP Case 1/2023 (x2)
SRMR, Article 12d(1)	AP Case 5/2023
SRMR, Article 12d(3)	AP Cases 2/2023 and 3/2023
SRMR, Article 12d(3), first subpara (a)(ii)	AP Case 5/2023; AP Case 1/2023
SRMR, Article 12d(3), subpara 4	AP Cases 2/2023 and 3/2023
SRMR, Article 12d(3), subpara 6	AP Case 5/2023; AP Case 1/2023

SRMR, Article 12d(4)	AP Cases 2/2023 and 3/2023
SRMR, Article 12d(6)	AP Case 5/2023; AP Case 1/2023 (x2)
SRMR, Article 12d(6), subpara 8	AP Case 1/2023
SRMR, Article 12e	AP Case 5/2023 (x2); AP Case 1/2023 (x2)
SRMR, Article 12e(3)	AP Case 1/2023
SRMR, Articles 12e and 12d	AP Case 5/2023; AP Case 1/2023
SRMR, Article 12g	AP Case 5/2023
SRMR, Article 12g(3)	AP Case 1/2023
SRMR, Article 12h	AP Case 5/2023 (x2); AP Case 1/2023
SRMR, Article 12h(1)(c)	AP Case 5/2023 (x4)
SRMR, Article 12h(2)(c)	AP Case 5/2023
SRMR, Article 12h(c)	AP Case 5/2023 (x3)
SRMR, Article 27(5) to 27(7)	AP Cases 2/2023 and 3/2023
SRMR, Article 27(7)	AP Cases 2/2023 and 3/2023
SRMR, Article 27(7)(a)	AP Cases 2/2023 and 3/2023
SRMR, Article 85	AP Case 2/2024 (x2)
SRMR, Article 85(3)	AP Case 2/2024
SRMR, Articles 85(3) and 12(1)	AP Case 5/2023
SRMR, Article 85(8)	AP Case 2/2024 (x2)
SRMR, Article 86	AP Case 2/2024
SRMR, Article 88	AP Case 2/2024 (x2)
SRMR, Article 90(4)	AP Case 2/2024 (x2)
Commission Implementing Regulation 2018/1624	AP Case 5/2023 (x2); AP Case 1/2023 (x2)
Commission Implementing Regulation 2021/451	AP Case 5/2023 (x2); AP Case 1/2023 (x2)
Directive 86/635/EEC, Article 4	AP Cases 2/2023 and 3/2023
Directive 2004/39/EC, Article 54(1)	AP Case 2/2024
CRD, Article 128(6)(a)	AP Case 5/2023; AP Case 1/2023
BRRD, Articles 11 and 13	AP Case 5/2023; AP Case 1/2023
BRRD, Article 45(12)	AP Case 5/2023 (x2)
BRRD, Articles 45f(3) and 45f(4)	AP Case 5/2023
BRRD, Article 45h	AP Cases 2/2023 and 3/2023 (x2)
BRRD, Article 45h(7)	AP Cases 2/2023 and 3/2023
BRRD, Article 88	AP Cases 2/2023 and 3/2023
Court of Justice, Statute, Article 58a	AP Case 2/2024
ECB Decision 2004/258, Article 4(1)(c)	AP Case 2/2024 (x2)
Appeal Panel, Rules of procedure, Article 21(4)	AP Case 2/2024

III – The judgments of the national apical Courts

ITALY

1. Synthesis

Confidentiality of the annual report on the compulsory administrative liquidation of a bank

Consiglio di Stato, sect. VI, Judgment of 5 April 2024, No 3131

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

Corte di Cassazione, sect. II, Judgment of 29 March 2024, No 8581

Administrative pecuniary sanctions imposed by Banca d'Italia under the TUF

Corte di Cassazione, sect. II, Judgment of 16 April 2024, No 10277

Liability of non-executive directors in the light of their obligation to “act in an informed manner”

Corte di Cassazione, sect. II, Judgment of 16 April 2024, No 10288

Administrative pecuniary sanctions imposed by Banca d'Italia under the TUB and duty of the Court to state reasons for the rejection of defensive arguments of the person concerned

Corte di Cassazione, sect. II, Judgment of 17 April 2024, No 10348

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

Corte di Cassazione, sect. II, Judgment of 17 April 2024, No 10357

Administrative pecuniary sanctions against the general manager of a credit institution

Corte di Cassazione, sect. II, Judgment of 24 April 2024, No 11127

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

Corte di Cassazione, sect. II, Judgment of 7 May 2024, No 12323

Administrative pecuniary sanctions against non-executive members of the management body of a credit institution

Corte di Cassazione, sect. II, Judgment of 7 May 2024, No 12295

Administrative pecuniary sanctions imposed by Banca d'Italia under the TUB on a member of the Board of Auditors of a credit institution

Corte di Cassazione, sect. II, Judgment of 28 May 2024, No 14863

Corte di Cassazione, sect. II, Judgment of 31 May 2024, No 15293

2. Series of keywords

KEYWORDS	CASES
Administrative nature of the activity of the liquidator appointed by Banca d'Italia	CdS 3131/2024
Administrative pecuniary sanctions	Cass. 14863/2024 – Cass. 15293/2024 (x4); Cass. 10288/2024 (x2); Cass. 10277/2024 (x4); Cass. 10348/2024 (x5); Cass. 10357/2024 (x2); Cass. 8581/2024 (x2); Cass. 11127/2024 (x2); Cass. 12295/2024 (x2); Cass. 12323/2024 (x3)
Burden of proof in sanctioning proceedings	Cass. 10288/2024; Cass. 8581/2024; Cass. 11127/2024 (x2)
Compulsory administrative liquidation of banks	CdS 3131/2024 (x2)
Confidentiality of the annual report on the compulsory administrative liquidation procedure of banks	CdS 3131/2024
Discretion of the court in assessing proportionality of sanctions	Cass. 10277/2024; Cass. 10288/2024
Duties of credit institutions' Statutory Auditors	Cass. 14863/2024 – Cass. 15293/2024 (x3)
Duties of members of credit institutions' Board of Directors	Cass. 10288/2024; Cass. 12323/2024; Cass. 12295/2024
Duties of members of credit institutions' bodies	Cass. 8581/2024 (x2); Cass. 11127/2024
Duty of due care	Cass. 10288/2024 (x2); Cass. 8581/2024; Cass. 12295/2024; Cass. 12323/2024
Duty to act in an informed manner	Cass. 10288/2024 (x2); Cass. 8581/2024; Cass. 12295/2024; Cass. 12323/2024
Duty to state reasons	Cass. 14863/2024 – Cass. 15293/2024; Cass. 10348/2024
Inspection reports	Cass. 11127/2024
Irrelevance of procedural defects for sanctioning decisions	Cass. 10277/2024; Cass. 10348/2024
Judicial review of sanctioning decisions	Cass. 14863/2024 – Cass. 15293/2024
Liability of members of credit institutions' Board of Directors	Cass. 10288/2024 (x2)
Liability of members of credit institutions' bodies	Cass. 8581/2024 (x2); Cass. 11127/2024; Cass. 12295/2024; Cass. 12323/2024
Liability of Statutory Auditors of credit institutions	Cass. 14863/2024 – Cass. 15293/2024 (x3)
Liquidators	CdS 3131/2024
NCA's competence and powers	Cass. 10357/2024
Non-executive members of the Board of Directors	Cass. 10288/2024 (x2); Cass. 8581/2024 (x2); Cass. 12295/2024; Cass. 12323/2024
Participation of multiple persons to the same administrative offence	Cass. 14863/2024 – Cass. 15293/2024
Powers of Statutory Auditors of credit institutions	Cass. 14863/2024 – Cass. 15293/2024 (x3)
Presumption of negligence	Cass. 8581/2024; Cass. 14863/2024 – Cass. 15293/2024; Cass. 10277/2024; Cass. 10288/2024; Cass. 11127/2024
Principle of <i>lex mitior</i>	Cass. 10348/2024; Cass. 12295/2024
Protection of confidentiality	CdS 3131/2024
Quantification of sanctions	Cass. 10277/2024; Cass. 10288/2024; Cass. 10357/2024
Remuneration policies and practice	Cass. 10357/2024
Right to a fair trial	Cass. 10348/2024
Right to access	CdS 3131/2024
Right to defence	Cass. 8581/2024; Cass. 12323/2024

Sanctions not criminal in nature	Cass. 10348/2024; Cass. 8581/2024
Specific nature of law on administrative sanctioning procedure	Cass. 10277/2024; Cass. 10348/2024
Time limit for the conclusion of a sanctioning procedure	Cass. 10277/2024; Cass. 10348/2024; Cass. 12323/2024

3. Series of legal provisions

ARTICLES	CASES
ECHR, Article 6	Cass. 10348/2024; Cass. 8581/2024
Italian Constitution, Article 24	Cass. 10348/2024; Cass. 8581/2024; Cass. 12323/2024
Italian Constitution, Article 111	Cass. 10348/2024; Cass. 8581/2024; Cass. 12323/2024
Italian civil code, Article 2381	Cass. 10288/2024
Italian civil code, Article 2381(3) and (6)	Cass. 8581/2024; Cass. 12295/2024; Cass. 12323/2024
Italian civil code, Article 2392	Cass. 8581/2024; Cass. 12295/2024; Cass. 12323/2024
TUB, Article 7	CdS 3131/2024
TUB, Article 53(1)(b) and (d)	Cass. 10357/2024
TUB, Article 53(1)(d)	Cass. 10357/2024
TUB, Article 81	CdS 3131/2024 (x2)
TUB, Article 84	CdS 3131/2024
TUB, Article 144	Cass. 8581/2024
TUB, Article 144- <i>quater</i>	Cass. 10357/2024
TUF, Article 187- <i>ter</i>	Cass. 8581/2024
Law No 689/1981, Article 3	Cass. 14863/2024 – Cass. 15293/2024; Cass. 10277/2024; Cass. 10288/2024; Cass. 8581/2024; Cass. 11127/2024
Law No 689/1981, Article 14	Cass. 12323/2024
Law No 241/1990, Article 21- <i>octies</i> , second para	Cass. 10277/2024; Cass. 10348/2024
Law No 262/2005, Article 24(1)	Cass. 8581/2024; Cass. 12323/2024
Law No 217/2011, Article 22(2)(a)(1)	Cass. 10357/2024

QUADERNI PUBBLICATI

- n. 1 – FRANCESCO CAPRIGLIONE, *Evoluzione tecnica e disciplina giuridica dell'intermediazione finanziaria*, ottobre 1985 (esaurito).
- n. 2 – FRANCESCO CARBONETTI, *Moneta*, dicembre 1985.
- n. 3 – PIETRO DE VECCHIS, *L'istituto di emissione*, febbraio 1986 (esaurito).
- n. 4 – GIUSEPPE CARRIERO, *Governo del credito e Regioni a statuto speciale: il quadro istituzionale*, aprile 1986.
- n. 5 – GIORGIO OPPO, *Una svolta dei titoli di massa (il progetto Monte Titoli)*, aprile 1986.
- n. 6 – LUIGI DESIDERIO, *Le norme di recepimento della Direttiva comunitaria n. 780/77 in materia creditizia*, maggio 1986 (esaurito).
- n. 7 – GIORGIO SANGIORGIO – FRANCESCO CAPRIGLIONE, *La legge bancaria: evoluzione normativa e orientamenti esegetici*, giugno 1986.
- n. 8 – VINCENZO MEZZACAPO, *L'attività bancaria nell'ambito dei movimenti di capitali nella CEE*, giugno 1986 (esaurito).
- n. 9 – FRANCESCO CAPRIGLIONE, *Le gestioni bancarie di patrimoni mobiliari*, luglio 1986.
- n. 10 – FRANCESCO CARBONETTI, *I cinquant'anni della legge bancaria*, settembre 1986.
- n. 11 – *La legge bancaria*, ottobre 1986.
- n. 12 – CARMINE LAMANDA, *L'evoluzione della disciplina del controllo sul sistema creditizio dalla legge bancaria ad oggi*, dicembre 1986 (esaurito).
- n. 13 – GIOVANNI IMPERATRICE, *L'accertamento dell'illecito amministrativo nel diritto valutario e nel diritto tributario*, marzo 1987.
- n. 14 – GIORGIO SANGIORGIO, *Profilo istituzionale della disciplina pubblicistica del credito*, maggio 1987.
- n. 15 – FRANCESCO CAPRIGLIONE, (a cura di) *La disciplina comunitaria del credito al consumo*, luglio 1987.
- n. 16 – CARLO TAGLIENTI, *Il credito documentario: nozione, fondamento, problematica*, settembre 1987.
- n. 17 – PIETRO DE VECCHIS, *Aspetti legali delle crisi bancarie in Italia*, gennaio 1988.
- n. 18 – VINCENZO MEZZACAPO, *Il mercato secondario organizzato dei titoli emessi o garantiti dallo Stato*, agosto 1988.
- n. 19 – FRANCESCO CARBONETTI, *Il controllo della Banca d'Italia sulle emissioni di titoli atipici*, ottobre 1988.
- n. 20 – FRANCESCO CAPRIGLIONE, *Le polizze di credito commerciale*, dicembre 1988.
- n. 21 – FRANCESCO CAPRIGLIONE, *La responsabilità penale del banchiere: evoluzione giurisprudenziale e prospettive di riforma*, dicembre 1989 (esaurito).
- n. 22 – MARCELLO CONDEMI, *Le sanzioni amministrative bancarie e la giurisprudenza della Corte d'Appello di Roma*, aprile 1991.
- n. 23 – MARCO MANCINI – MARINO PERASSI, *I trasferimenti elettronici di fondi*, maggio 1991.

- n. 24 – ENRICO GALANTI, *La crisi degli enti creditizi nella giurisprudenza: la liquidazione coatta amministrativa*, giugno 1991.
- n. 25 – FRANCESCO CAPRIGLIONE, *Note introduttive alla disciplina delle s.i.m. e dell'organizzazione dei mercati finanziari*, giugno 1991.
- n. 26 – AA.VV., *La ristrutturazione della banca pubblica e la disciplina del gruppo creditizio*, gennaio 1992.
- n. 27 – GIORGIO SANGIORGIO, *Le Autorità creditizie e i loro poteri*, marzo 1992.
- n. 28 – FRANCESCO CAPRIGLIONE, *Il recepimento della seconda direttiva Cee in materia bancaria. Prime riflessioni*, febbraio 1993.
- n. 29 – *Il Sistema dei pagamenti. Atti del Convegno giuridico* (Perugia S.A.Di.Ba., 23-24 ottobre 1992), settembre 1993.
- n. 30 – OLINA CAPOLINO, *L'amministrazione straordinaria delle banche nella giurisprudenza*, ottobre 1993.
- n. 31 – P. FERRO-LUZZI – P. G. MARCHETTI, *Riflessioni sul gruppo creditizio*, dicembre 1993 (esaurito).
- n. 32 – *Testo Unico delle leggi in materia bancaria e creditizia*, marzo 1994.
- n. 33 – *Testo Unico delle leggi in materia bancaria e creditizia. The 1993 Banking Law*, marzo 1994.
- n. 34 – GIUSEPPE CARRIERO, *Struttura ed obiettivi della legge sui fondi immobiliari chiusi*, novembre 1994.
- n. 35 – LUCIO CERENZA, *Profilo giuridico del sistema dei pagamenti in Italia*, febbraio 1995.
- n. 36 – GIOVANNI CASTALDI, *Il riassetto della disciplina bancaria: principali aspetti innovativi*, marzo 1995.
- n. 37 – VINCENZO PONTOLILLO, *L'evoluzione della disciplina dell'attività di emissione di valori mobiliari*, giugno 1995.
- n. 38 – O. CAPOLINO – G. CARRIERO – P. DE VECCHIS – M. PERASSI, *Contributi allo studio del Testo Unico delle leggi in materia bancaria e creditizia*, dicembre 1995.
- n. 39 – FRANCESCO CAPRIGLIONE, *Cooperazione di credito e Testo Unico bancario*, dicembre 1995 (esaurito).
- n. 40 – MARINO PERASSI, *L'attività delle banche in "securities" e la disciplina dei contratti-derivati in Giappone*, aprile 1996.
- n. 41 – ENRICO GALANTI, *Norme delle autorità indipendenti e regolamento del mercato: alcune riflessioni*, novembre 1996.
- n. 42 – M. PERASSI – R. D'AMBROSIO – G. CARRIERO – O. CAPOLINO – M. CONDEMI, *Studi in materia bancaria e finanziaria*, novembre 1996.
- n. 43 – *Convegno Per un diritto della concorrenza* (Perugia, giugno 1996), dicembre 1996.
- n. 44 – *Crisi d'impresa, procedure concorsuali e ruolo delle banche*, marzo 1997.
- n. 45 – DONATELLA LA LICATA, *La cessione di rapporti giuridici "individuabili in blocco" nell'art. 58 del T.U. bancario*, aprile 1997.
- n. 46 – PAOLO CIOCCA – ANTONELLA MAGLIOCCO – MATILDE CARLA PANZERI, *Il trattamento fiscale dei rischi sui crediti*, aprile 1997.

- n. 47 – P. DE VECCHIS – G.L. CARRIERO – O. CAPOLINO, M. MANCINI, R. D'AMBROSIO, *Studi in materia bancaria e finanziaria* 1996, settembre 1997.
- n. 48 – GIUSEPPE CARRIERO, *Il credito al consumo*, ottobre 1998 (esaurito).
- n. 49 – *Fondamento, implicazioni e limiti dell'intervento regolamentare nei rapporti tra intermediari finanziari e clientela*, marzo 1999.
- n. 50 – A. MAGLIOCCO – D. PITARO – G. RICOTTI – A. SANELLI, *Tassazione del risparmio gestito e integrazione finanziaria europea*, settembre 1999.
- n. 51 – ENRICO GALANTI, *Garanzia non possessoria e controllo della crisi di impresa: la floating charge e l'administrative receivership*, gennaio 2000.
- n. 52 – *Bankruptcy Legislation in Belgium, Italy and the Netherlands* (Brussels, 7 July 2000), giugno 2001.
- n. 53 – VINCENZO TROIANO, *Gli Istituti di moneta elettronica*, luglio 2001.
- n. 54 – STEFANO CAPIELLO, *Prospettive di riforma del diritto di recesso dalle società di capitali: fondamento e limiti dell'autonomia statutaria*, luglio 2001.
- n. 55 – BRUNA SZEGO, *Il venture capital come strumento per lo sviluppo delle piccole e medie imprese: un'analisi di adeguatezza dell'ordinamento italiano*, giugno 2002.
- n. 56 – AA.VV., *Diritto Societario e Competitività in Italia e in Germania*, luglio 2003.
- n. 57 – GIANMARIA MARANO, *I patrimoni destinati in una prospettiva di analisi giuseconomica*, giugno 2004.
- n. 58 – ENRICO GALANTI E MARIO MARANGONI, *La disciplina italiana dei Covered Bond*, giugno 2007.
- n. 59 – MARCO MANCINI, VINCENZA PROFETA E NICOLA DE GIORGI, *La Centrale d'Allarme Interbancaria nella disciplina sanzionatoria dell'assegno*, settembre 2007 (esaurito).
- n. 60 – MARCELLO CONDEMI E FRANCESCO DE PASQUALE, *Lineamenti della disciplina internazionale di prevenzione e contrasto del riciclaggio e del finanziamento del terrorismo*, febbraio 2008.
- n. 61 – BRUNA SZEGO, *Le impugnazioni in Italia: perché le riforme non hanno funzionato?*, luglio 2008.
- n. 62 – RENZO COSTI E FRANCESCO VELLA, *Banche, governo societario e funzione di vigilanza*, settembre 2008.
- n. 63 – MARCO MANCINI E MARINO PERASSI, *Il nuovo quadro normativo comunitario dei servizi di pagamento. Prime riflessioni*, dicembre 2008.
- n. 64 – ENRICO GALANTI, *Discrezionalità delle autorità indipendenti e controllo giudiziale*, giugno 2009.
- n. 65 – DAVID PITARO, *Le disposizioni italiane di contrasto all'elusione fiscale internazionale*, luglio 2009.
- n. 66 – CRISTINA GIORGIANTONIO, *Le riforme del processo civile italiano tra adversarial system e case management*, settembre 2009.
- n.66en – CRISTINA GIORGIANTONIO, *Civil procedure reforms in Italy: concentration principle, adversarial system or case management?*, September 2009.

- n. 67 – OLINA CAPOLINO E RAFFAELE D'AMBROSIO, *La tutela penale dell'attività di Vigilanza*, ottobre 2009.
- n. 68 – GIUSEPPE BOCCUZZI, *I sistemi alternativi di risoluzione delle controversie nel settore bancario e finanziario: un'analisi comparata*, settembre 2010.
- n. 69 – AA.VV., *Insolvency and Cross-border Groups. UNCITRAL Recommendations for a European Perspective?*, febbraio 2011.
- n. 70 – BRUNO DE CAROLIS, *L'Arbitro bancario finanziario come strumento di tutela della trasparenza*, giugno 2011.
- n. 71 – GIUSEPPE BOCCUZZI, *Towards a new framework for banking crisis management. The international debate and the italian model*, ottobre 2011 (esaurito).
- n. 72 – *Legislazione bancaria, finanziaria e assicurativa: la storia, il presente, il futuro*. Atti della conferenza tenutasi a Roma il 14 ottobre 2011, ottobre 2012.
- n.72app – ENRICO GALANTI, *Cronologia della crisi 2007-2012*, maggio 2013.
- n. 73 – MARCO MANCINI, *Dalla vigilanza nazionale armonizzata alla Banking Union*, settembre 2013.
- n. 74 – RAFFAELE D'AMBROSIO, *Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings*, dicembre 2013.
- n. 75 – *Dal Testo unico bancario all'Unione bancaria: tecniche normative e allocazione di poteri*. Atti del convegno tenutosi a Roma il 16 settembre 2013, marzo 2014.
- n. 76 – GIUSEPPE NAPOLETANO, *Legal aspects of macroprudential policy in the United States and in the European Union*, giugno 2014.
- n. 77 – NICOLA DE GIORGI E MARIA IRIDE VANGELISTI, *La funzione di sorveglianza sul sistema dei pagamenti in Italia – Il provvedimento della Banca d'Italia del 18.9.2012 sui sistemi di pagamento al dettaglio*, settembre 2014.
- n. 78 – RAFFAELE D'AMBROSIO, *The ECB and NCA liability within the Single Supervisory Mechanism*, gennaio 2015.
- n. 79 – MARCO LAMANDINI – DAVID RAMOS MUÑOZ – JAVIER SOLANA ÁLVAREZ, *Depicting the limits to the SSM's supervisory powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection*, novembre 2015.
- n. 80 – LUIGI DONATO, *La riforma delle stazioni appaltanti. Ricerca della qualità e disciplina europea*, febbraio 2016.
- n. 81 – RAFFAELE D'AMBROSIO, *Scritti sull'Unione Bancaria*, luglio 2016.
- n. 82 – Gustavo Bonelli, *Un giurista in Banca d'Italia*, dicembre 2017.
- n. 83 – *Qualità ed efficienza nel nuovo codice dei contratti pubblici. Prospettive e questioni aperte*, aprile 2018.
- n. 84 – *Judicial review in the Banking Union and in the EU financial architecture. Conference jointly organized by Banca d'Italia and the European Banking Institute*, giugno 2018.
- n. 85 – *The role of the CJEU in shaping the Banking Union: notes on Tercas (T-98/16) and Fininvest (C-219/17)*, maggio 2019.
- n. 86 – *A 20 anni dal TUF (1998-2018): verso la disciplina della Capital Market Union?*, agosto 2019.

- n. 87 – FABRIZIO MAIMERI E MARCO MANCINI, *Le nuove frontiere dei servizi bancari e di pagamento fra PSD2, criptovalute e rivoluzione digitale*, settembre 2019.
- n. 88 – RAFFAELE D’AMBROSIO, *Law and Practice of the Banking Union and of its governing Institutions (Cases and Materials)*, aprile 2020.
- n. 89 – LUIGI DONATO, *Gli appalti pubblici tra istanze di semplificazione e normativa anticorruzione. Alla ricerca di un equilibrio tra legalità ed efficienza*, giugno 2020.
- n. 90 – RAFFAELE D’AMBROSIO E STEFANO MONTEMAGGI, *Private and public enforcement of EU investor protection regulation*, ottobre 2020.
- n. 91 – RAFFAELE D’AMBROSIO E DONATO MESSINEO, *The German Federal Constitutional Court and the Banking Union*, marzo 2021.
- n. 92 – RAFFAELE D’AMBROSIO, FRANCESCO PAOLO CHIRICO, LEONARDO DROGHINI E GIUSEPPE PALA, *Pandectae. Digest of the case-law on the Banking Union – Jan-Jun 2022*, dicembre 2022.
- n. 93 – VINCENZA PROFETA, *Competition and Payment Services. Conference Papers*, dicembre 2022.
- n. 94 – GIUSEPPE NAPOLETANO, *An EU Legal Framework for Macroprudential Supervision through Borrower-Based Measures. Conference Papers*, febbraio 2023.
- n. 95 – OLINA CAPOLINO, *Le crisi bancarie: risoluzione, liquidazione e prospettive di riforma alla luce dell’esperienza spagnola e italiana – Crisis bancarias: resolución, liquidación y perspectivas de reforma a la luz de la experiencia española e italiana*, aprile 2023.
- n. 96 – RAFFAELE D’AMBROSIO, FRANCESCO PAOLO CHIRICO, LEONARDO DROGHINI E GIUSEPPE PALA, *Pandectae. Digest of the case-law on the Banking Union – Jul-Dec 2022*, maggio 2023.
- n. 97 – OLINA CAPOLINO, *Regole di settore, compliance e responsabilità da reato: l’applicazione del d.lgs. n. 231/2001 alle società bancarie*, maggio 2023.
- n. 98 – RAFFAELE D’AMBROSIO, FRANCESCO PAOLO CHIRICO, LEONARDO DROGHINI E GIUSEPPE PALA, *Pandectae. Digest of the case-law on the Banking Union – Jan-Jun 2023*, dicembre 2023.
- n. 99 – ALBERTO URBANI, ROBERTO NATOLI E DIEGO ROSSANO, *A 30 anni dal Testo unico bancario (1993-2023): The Test of Time. Atti dei workshops*, febbraio 2024.
- n. 100 – MARINO PERASSI, MADDALENA RABITTI, FILIPPO SARTORI E VINCENZO TROIANO, *A 30 anni dal Testo unico bancario (1993-2023): The Test of Time. Atti del convegno*, marzo 2024.
- n. 101 – *SSM Regulation, ten years since. Conference Papers*, luglio 2024.
- n. 102 – DIANE FROMAGE, *EU financial integration since the Great Financial Crisis: Consequences for EU and national authorities*, settembre 2024.
- n. 103 – VINCENZA PROFETA, *Il Regolamento MiCA nel contesto della disciplina bancaria e dei servizi di pagamento*, gennaio 2025.
- n. 104 – RAFFAELE D’AMBROSIO E DIANE FROMAGE, *Resolution Authorities and their institutional settings in EU Member States*, giugno 2025.
- n. 105 – RAFFAELE D’AMBROSIO, FRANCESCO PAOLO CHIRICO, LEONARDO DROGHINI E GIUSEPPE PALA, *Pandectae. Digest of the case-law on the Banking Union – Jul-Dec 2023*, ottobre 2025.

