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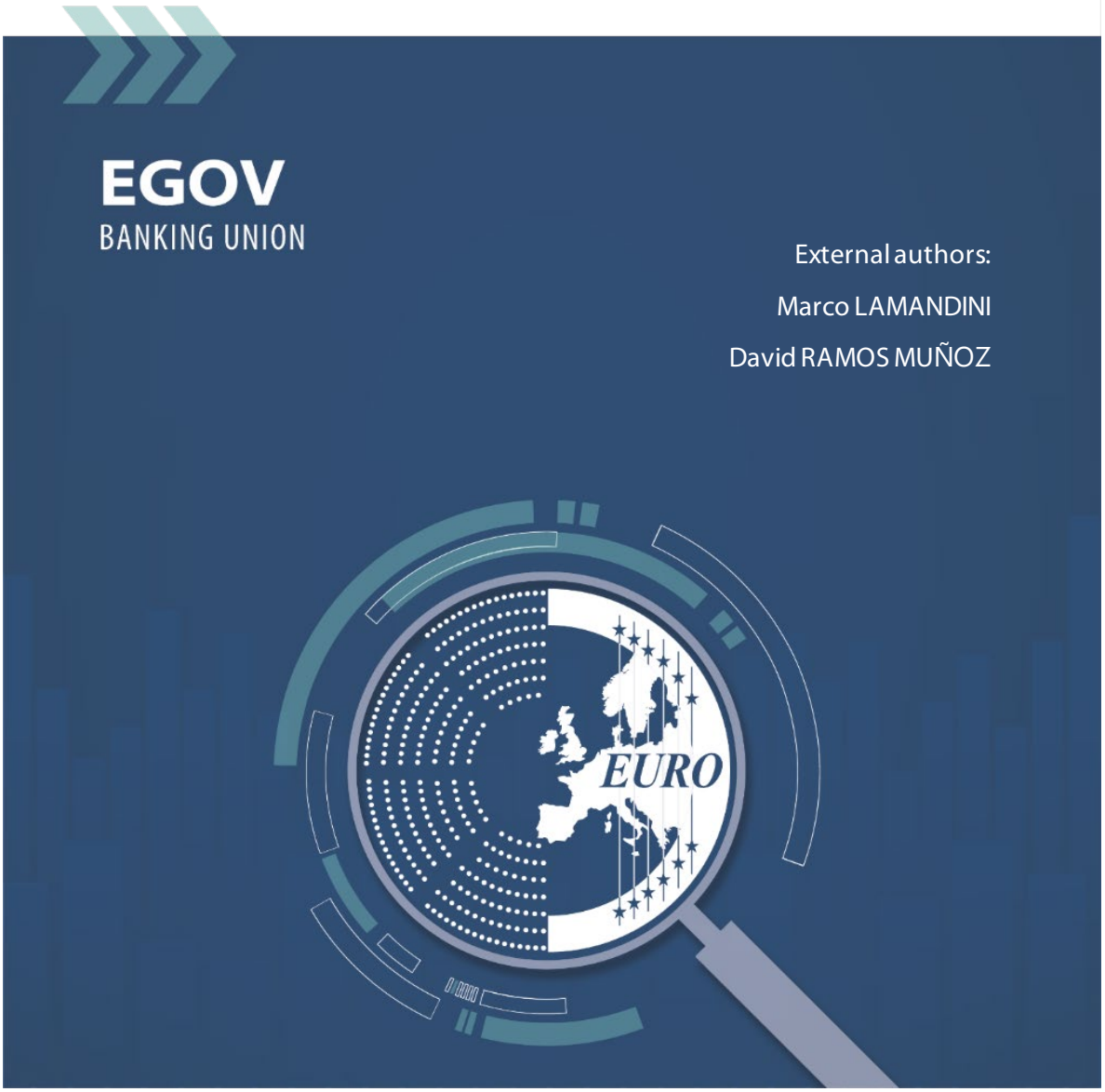
10 years of Banking Union's case-law: How did European courts shape supervision and resolution practice in the Banking Union?



Economic Governance and EMU Scrutiny Unit (EGOV)
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10 years of Banking Union's case-law: how did European courts shape supervision and resolution practice in the Banking Union?

In loving memory of Professor Luis Silva Morais, as a tribute to his crucial contribution to 9-years of successful practice of the SRB Appeal Panel.

Abstract

The Banking Union makes ten years. It is a story of success. Courts have been crucial for this success. This study explains why, and what should be done to preserve (and improve) their role.

This document was provided by the Economic Governance and EMU Scrutiny Unit at the request of the ECON Committee.

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AUTHORS
Marco LAMANDINI, Professor of Law, Alma Mater Studiorum Università di Bologna, Former President (the second) of the Joint Board of Appeal of the European Financial Supervisory Authorities (ESAs) and current member of the SRB Appeal Panel

David RAMOS MUÑOZ, Associate Professor of Law, Universidad Carlos III Madrid, alternate member of the Joint Board of Appeal of the ESAs and of the SRB Appeal Panel.

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ADMINISTRATOR RESPONSIBLE
Kai Gereon SPITZER

EDITORIAL ASSISTANT
Donella BOLDI

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To contact Economic Governance and EMU Scrutiny Unit or to subscribe to its newsletter please write to:
Economic Governance and EMU Scrutiny Unit
European Parliament
B-1047 Brussels
E-mail: egov@ep.europa.eu

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CONTENTS

LIST OF ABBREVIATIONS

ABoR	Administrative Board of Review
ACPR	Autorité du Control Prudentielle et resolution
AG	Advocate General
AP	Appeal Panel
CRD	Capital Requirements Directive
CRR	Capital requirements Regulation
CJEU	Court of Justice of the European Union
CMU	Capital Markets Union
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EBA	European Banking Authority
EIOPA	European Insurance and Occupational Pensions Authority
ESMA	European Securities markets Authority
ESAs	European Supervisory Authorities
EU	European Union
FCC	(German) Federal Constitutional Court
FOLTF	Failing or Likely to Fail
ITS	Implementing Technical Standards
LSI	Less Significant Institutions
NCA	National Competent (Supervisory) Authority
NRA	National Resolution Authority
RTS	Regulatory Technical Standards
SRB	Single Resolution Board
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism
SSMR	Single Supervisory Mechanism Regulation
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

The Banking Union cannot be understood without the courts. Their interactions are complex, and essential to understand the Banking Union's current solidity, and its challenges. Courts have helped to navigate constitutional (and ultimately political) conflicts, bolstered the Banking Union's legitimacy, and have clarified the practical implications of a multi-level (national and supranational) structure and the fitting of new realities into legislative concepts.

- In bank supervision cases European courts have shaped the Single Supervisory Mechanism (SSM) 'constitutional' legitimacy (*Landeskreditbank-SSM/SRM* cases), and the tensions between national and supranational levels, including the application by the ECB of national laws (*Berlusconi, Crédit Agricole, Corneli* cases). However, they also show how Courts' interpretation has decisively given meaning to key legal concepts (*Crédit Mutuel, Adusbef, Pilatus* cases) or balanced the respective roles of courts and financial authorities in applying the law (*Crédit Lyonnais* case).
- In bank resolution cases European courts have dispelled doubts about the Single Resolution Mechanism (SRM) constitutional legitimacy, both by balancing the tensions between national and supranational levels (*SSM/SRM* case), and the doctrines of delegation to (and accountability of) agencies (*ESMA/shortselling, Banco Popular* cases). Courts have also been essential in delineating the substantive contours of crisis interventions, and the applicable procedural safeguards (*Banco Popular, ABLV* cases), leaving, however, open to future practice (*Santander* cases) some important practical implications of their findings (in particular how affected investors can seek repayment or compensation under the safeguards provided by Directive 2014/59 for shares or other capital instruments cancelled or converted in resolution when the sale of such instruments occurred in violation of their rights under applicable securities laws)
- Cases on sanctions and enforcement measures deserve specific attention, as European courts are gradually moving towards a more precise assessment of the role of general principles, such as proportionality (*VQ v ECB, Versobank* cases), and of specific safeguards, such as the 'right to silence' (*DB v CONSOB*), or *non bis in idem* (*Garlsson, Menci, Di Puma* cases).

All in all, courts have been a key element in the Banking Union's success, and its assimilation within EU law. That does not mean that everything is perfect, though. In our view, three aspects merit attention by co-legislators:

- First, there is room for more legislative harmonisation of Banking Union law, using Article 114 TFEU. Although European Courts have played an invaluable role in trying to harmonise the interpretation of legal concepts and legislation according to its finality, some divergences persist, often with no clear or robust rationale.
- Second, the standard of review in decisions under conditions of uncertainty may benefit from legislative clarifications in line with current court practice. If the standard of review serves to state in advance how courts will revise Banking Union authorities' decisions, to enhance certainty, and balance accountability with respect for authorities' discretion, the standard of "manifest" error (or "error" in some cases) provides little guidance on concrete situations, and does not fully capture how Banking Union's authorities assess alternative future scenarios and how European courts revise the plausibility of such scenarios and their assessment. These aspects are particularly relevant, and thus the lack of guidance more conspicuous, because in most cases authorities must adopt decisions under conditions of uncertainty.

- Third, the role of administrative boards of appeal has been positive, but reforms are warranted. If reforms streamline their organization and vest these bodies with more formal independence, and ensure that they have adequate resources, this could unleash economies of scale and cement their role as a first instance, and a useful filter of financial disputes.

Such comments aside, the balance of the Banking Union's first ten years is very positive. It tells a story of success, thanks to the ECB and SRB, but also, in great measure, to the role of courts. If the key elements of success are looked after with care, and those aspects that may be improved are duly considered, this will ensure success in the years to come.

1. INTRODUCTION

The Banking Union cannot be understood without the courts. Their coexistence and interactions provide a fascinating story for anyone with an interest in financial regulation or the rule of law.

Ten years ago, EU lawmakers made the most ambitious re-design of competences in the history of the Union. Today, this rearrangement of banking supervision and resolution for the Euro zone is a success story. This was in no way a foregone conclusion. The Banking Union brought about a multilevel administrative governance on a scale never attempted before. It was institutionally designed and assembled from scratch, in a rush, in the midst of twin financial and sovereign debt crises. Despite these challenges, both the single supervisory mechanism ("**SSM**") and the single resolution mechanism ("**SRM**") have lived up to expectations and provided a workable blueprint for any ambitious project for shared administration within the European Union. The Banking Union's first ten years have converted 'retreat into advance', to quote from President Roosevelt's consequential 1933 address. Both mechanisms have improved the quality of supervision and crisis management in the European Union, and banks' safety, soundness and resilience for subsequent crises, as shown in the pandemic context.

Although this ambitious plan of deeper integration has delivered on its promises, it is not enough for banks to reap the fruits of a functioning internal market. There are still many obstacles for cross-border consolidation, which is long overdue and a major step to disperse risk on a European scale, enhance overall resilience, and close the gap with US and Chinese financial giants. A truly functioning single market for banks - finally blessed by the emergence of a handful of pan-European champions - could also ignite the Capital Markets Union (CMU) and foster a parallel consolidation of the mutual funds and investment firms industry, since most are affiliated to banking groups. Yet again, in Roosvelt's words, "the only fear that [Europe] should have is fear itself". This is a challenge.

However, the Banking Union's 'fit' presents an even bigger challenge *and* opportunity for EU law. The European Union is a union of law and a union of values; one where, with the political power diffused across levels and bodies, courts play a fundamental role in holding the whole structure together and ensuring its accountability. The Banking Union is too large and distinct to be discreet. Assimilating it requires openly acknowledging its challenges. EU courts, and, occasionally, national courts, have shaped this process. The journey has not been easy, but it has advanced remarkably, although it has not yet reached its final destination.

By way of example, some foundational elements of the Banking Union were 'stitched up'. The adoption of the Regulation No 1024/2013 ("**SSMR**") and especially the change in scope of the supervisory remit over less significant institutions ("**LSI**") was agreed in the Council only at a late stage of the legislative process. This led to ambiguities in the text of Articles 4 and 6 of SSMR. The tensions underpinning the compromise and its ambiguities morphed into a legal 'drama' about the validity of Article 127(6) TFEU as a 'constitutional' foundation for the SSM, where the Court of Justice (in *Landeskreditbank*) and the German Federal Constitutional Court ("**FCC**") (in *SSM/SRM*) acrobatically tiptoed on a tight rope, managing to avoid a clash, but coming to different conclusions about the "exclusive competence" granted by Article 4 to the ECB within the SSM (see *infra* section 3).

As a second example, the Banking Union vested an agency, the Single Resolution Board (SRB), with powers that are unprecedented in scope and scale, creating a tension with the doctrine of 'delegation' and accountability, expressed in *Meroni*, a landmark judicial precedent, decided however in a very different Union. As it will be shown in the next sections, the SRB competences were examined by the FCC (a national court) in *SSM/SRM*, with ambiguous implications. Meanwhile the *Meroni* doctrine has to some extent been re-shaped, further developed and clarified by European courts in *ESMA/Short selling* (a case

involving another EU financial agency) and in *Banco Popular*, a case involving the SRB. At the same time, the exercise of 'quasi-regulatory' competences through 'soft law' constitutes a crucial aspect, analyzed in *FBF v ACPR*.

As a third example, the Banking Union has created a multi-level system with an unprecedented level of complexity, raising the question of how to ensure effective judicial protection. As it will be thoroughly discussed below in section 2, the Court of Justice clarified in *Berlusconi I*[1] that European Courts have the exclusive competence to review the resulting acts in composite proceedings, but this comprises their national preparatory acts, a finding that gave rise to thorny legal questions in subsequent cases, as shown in *Pilatus* (especially Advocate General Kokott's Opinion[2]) and in the *Berlusconi II* case.[3]

As a fourth example, pursuant to Article 4(3) SSMR, the ECB not only applies EU law, such as regulation 575/2013 ("**CRR**") but also national laws implementing directive 2013/36/EU ("**CRD**"). In *Berlusconi II*, the appellant asked how European courts can ensure the necessary constitutionality check. The General Court in the end did not answer the question for reasons of inadmissibility, but on appeal the final word is still on the Court of Justice and is to be heard on 19 September 2024. This legal question would, in our view, justify an unprecedented (but necessary) 'reverse referral' from European courts to national Constitutional courts. Dialogue between supreme courts should be a fundamental ingredient of a Union of Law. Article 4(3) SSMR also opens a much wider array of interpretative questions, some of which are currently discussed in *Anglo Austrian*[4] and in *Corneli*[5], as it will be discussed in section 3.

However, these 'existential' questions should not obscure another reality: European courts' *regular* review is also essential to both empower the SSM and SRM and render them accountable. By claiming the ultimate authority to interpret legal concepts in financial regulation, European courts give meaning to the Banking Union and integrate it into the broader framework of EU law. By adjusting their review to the circumstances of the case, they delineate, in an iterative fashion, the role of EU banking authorities. This is most visibly seen (i) by the landmark opinion and judgment in *Credit Lyonnais*[6], which defined the latitude of the ECB margin of technical discretion in supervisory matters and (ii) by the pilot cases in the *Banco Popular* saga, which clarified many controversial issues in the resolution framework, giving the necessary degree of clarity and predictability to that relatively new institutional environment.

As it has been noted, the law of finance must reconcile rigidity in its margins with flexibility at its core, to adapt to an inherently unstable financial system, without undermining credibility or legal certainty.[7] This task cannot be done without courts. Whilst judge-made law has a long tradition in the US, and also partly in the United Kingdom, European courts tend to define their role (solely) as 'saying what the law is'.[8]

However, in so doing European courts interpret primary EU law 'as a living constitution capable of coping with societal change'[9]. Thus they go well beyond 'a formalistic understanding of the rule of law', and perform a 'gap-filling function', i.e., they 'complete the constitutional lacunae left by the authors of the Treaties'. Courts perform this gap-filling role using the founding principles of the EU legal order by having

[1] Case C-219/17, ECLI:EU:C:2018:502

[2] Cases C-750/21 P and C-256/P ECLI:EU:2023:431

[3] Case T-913/16, ECLI:EU:T:2022:279, on appeal in Joined Cases C-512/22 P and C-513/22 P

[4] Case C-579/22 P, *Anglo Austrian AAB v ECB* (compare Opinion of AG Capeta on 11 April 2024 ECLI:EU:C:2024:296)

[5] Case T-502/19 ECLI:EU:C:2022:627, on appeal in Joined Cases C-777/22 P and C-779/22 P

[6] Case C-389/21 P, ECLI:EU:C:2023:368

[7] Katharina Pistor, 'Towards a Legal Theory of Finance' (2013) ECGI Law Working Paper n. 196/2013, 48.

[8] Koen Lenaerts, 'The Court's Outer and Inner Selves' in Maurice Adams, Henry de Waele, John Meeusen and Gert Straetmans (eds.), *Judging Europe's Judges* (Hart Publishing, 2015), 13.

[9] Ibid, 26

recourse to the general principles of law'.[10] The construction of the Single Market, and its interplay of positive (through legislative harmonization) and negative (where the Court of Justice pointed at national legislation contrary to EU Treaty freedoms) harmonization in the construction of the Single Market is a landmark example,[11] showing that, as it has been noted, 'at a minimum there is a tension' between the statements proclaiming court's self-restraint and its gap-filling function'.[12]

This is also true of the Banking Union, where *European courts exert a maieutic function which helps to develop and complete the Banking Union*. Their case law 'connects the dots' and defines 'the contours of a developed new legal order, and also opportunities for its application, improvement and expansion',[13] often tackling problems that political institutions find hard to solve. Furthermore, in this endeavor courts' fundamental mandate is to ensure the rule of law, and the principles of legal certainty and of effective judicial protection. The exercise of this role also helps draw useful lessons for subsequent legislation.

Courts and co-legislators, in our view, have an essential policymaking partnership, one where European courts' role is often overlooked, and should not be. Legislators are often relieved to close a thorny issue and move on, leaving some ambiguity behind. They can afford to do so only if they know that the courts that will be subsequently called to fill the gap will act responsibly and work their utmost to ensure coherence.

This study is organized as follows. Section 2 discusses European courts' case law over Banking Union's supervisory decisions. Section 3 discusses their scrutiny over Banking Union's crisis management decisions. Section 4 discusses European courts' review of administrative enforcement measures and sanctions in the Banking Union. Section 5 concludes, by pointing to three main areas that warrant reform or reflection (the respective roles of directives (and national law) and regulations in the Banking Union, the standard of review of European courts in scenarios of uncertainty, and the role of administrative (quasi-judicial) bodies.

[10] Ibid, 15.

[11] Lenaerts, 'The Court's Outer and Inner Selves', 16.

[12] Joseph Weiler, 'Epilogue: Judging the Judges' in Maurice Adams, Henry de Waele, John Meeusen and Gert Straetmans (eds.), *Judging Europe's Judges* (Hart Publishing, 2015), 238 and 241.

[13] Lady Arden of Heswall, 'Foreword', in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union* (Elgar Edward 2021), XXVI.

2. EUROPEAN COURT'S SCRUTINY OVER SUPERVISORY DECISIONS.

In principle, supervisory authorities are expected to exercise strictly rule-bound competences. In practice, this depends on the text, context, logic and finality of the legal provisions devising those competences; in particular the interplay between open-textured provisions and supervisory discretion. The questions facing the courts may be grouped into two main areas: first, the 'vertical' allocation of competences between EU and national levels (2.1.); second, the 'horizontal' dimension of courts' control over the application of the law by supervisors (2.2.)

2.1. Supervision, vertical allocation of powers and the courts.

2.1.1. Supervision, vertical conflicts and legitimacy challenges: Landeskreditbank (Court of Justice) and SSM/SRM (German Constitutional Court).

Vertical tensions are a defining feature of the EU: the doctrine of 'supremacy' is not uniformly accepted by national constitutional courts, and some, like the German Federal Constitutional Court ("**FCC**"), have collided with the Court of Justice in monetary policy cases like *Gauweiler* in 2015[14] and *Weiss,* in 2020.[15] The FCC went (in our opinion) too far in its conclusion, its tone, and its assessment of the facts in *Weiss*. Less noticeably, *Weiss* had a rehearsal in the parallel cases of *Landeskreditbank*, by the General Court and the Court of Justice,[16] and the *SSM/SRM* case, by the German Constitutional Court,[17] which dealt with the redesign of supervisory and resolution competences.

The *Landeskreditbank* case was superficially simple, and a 'hard case' deep down. The ECB classified *Landeskreditbank* as a 'significant' credit institution based on its assets (above EUR 30 billion). The SSMR excluded ECB supervision in *'particular circumstances'*, and the appellant alleged that the 'significant' institution concept should be reinterpreted in light of the principles of proportionality and subsidiarity,[18] to exclude ECB supervision as not 'necessary' or 'appropriate', for a bank with a low-risk model where supervision by the Bundesbank was enough. The General Court interpreted the SSM Regulation in light of its context and objectives,[19] upholding the ECB position: the 'specific factual circumstances' could exclude ECB supervision of 'significant' institutions only if direct supervision by German authorities would ensure 'better' attainment of SSM objectives.[20] The appellant's failed to prove that it was so.

However, the Court went one step further, holding *obiter* that SSM *did not distribute* supervisory powers *between national* authorities *and the ECB*, but created a *single* mechanism, which *exclusively* vested all competences on the ECB; NCAs exercised them by re-delegation from the ECB,[21] or 'assisted' the ECB in performing its tasks.[22] The Court of Justice confirmed these findings.[23]

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[14] Case C-62/14, *Peter Gauweiler*, ECLI:EU:C:2015:400

[15] Case C-493/17, *Heinrich Weiss and Others*, ECLI:EU:C:2018:1000 and the FCC judgment of 5 May 2020.

[16] Case T-122/15 *Landeskreditbank Baden Württemberg v ECB* [2017] ECLI:EU:T:2017:337 (hereafter Case T-122/15 *Landeskreditbank*); on appeal Case C-450/17 P *Landeskreditbank Baden Württemberg v ECB* [2019] ECLI:EU:C:2019:372 (hereafter . C-450/17 P *Landeskreditbank*)

[17] 30 July 2019, 2 BvR 1685/14, 2 BvR 2631/14 (hereinafter *SSM/SRM judgment).* Compare Raffaele D'Ambrosio, Donato Messineo eds., *The German Federal Constitutional Court and the Banking Union*, Quaderni di Ricerca Giuridica della Consulenza Legale, Bank of Italy No 91, March 2021, 7-117 (and an English translation of relevant excerpts of the judgment at 255).

[18] Art 5 of the Treaty of the European Union (TEU). We note that this was the primary basis for the proportionality analysis by the Court of Justice in *Gauweiler* and *Weiss*.

[19] C-450/17 P *Landeskreditbank*, paras 40-41.

[20] T-122/15 *Landeskreditbank*, para 81.

[21] Ibid, paras 54, 59.

[22] C-450/17 P *Landeskreditbank*, paras 38 and 41.

[23] C-450/17 P *Landeskreditbank*.

In the parallel case, the German FCC decided whether the Banking Union's components (ECB's SSM powers, SRB's SRM powers and Single Resolution Fund (SRF)) were *ultra vires* and unconstitutional. The FCC dismissed the complaint, but only after holding that, given their 'constitutional' basis in articles 127(6) and 114 TFEU, the SSM and SRM were constitutional *provided that* they were *interpreted restrictively*.[24] Furthermore, both "mechanisms" established a *division of competences* where *only some tasks* were attributed to the ECB and to the SRB,[25] while *substantial tasks* were left to NCAs, and NRAs.[26] For the SSM, NCAs' tasks were exercised under *national* law, and *not through re-delegation*.[27] Despite the blatant inconsistencies with *Landeskreditbank,* the FCC expressly denied any contradiction between them.

Although this case created a potential constitutional conflict, like *Weiss,* it was different. *Weiss* was extreme, *SSM/SRM* was restrained; *Weiss* (in our view) misinterpreted facts and basic EU law principles, *SSM/SRM* was closely attached to the Treaty text; *Weiss* was confrontational, *SSM/SRM* tiptoed around the contradiction. A 'mixed' example of EU inter-court dialogue.[28]

Another key aspect of the FCC ruling was its concern about the ECB's and SRB's diminished '**democratic legitimacy**',[29] which should be compensated by enhanced accountability, including the ECB's administrative review by the Administrative Board of Review ("**ABoR**"), and the SRB's quasi-judicial review by the Appeal Panel ("**SRB AP**"), judicial accountability, or political accountability before the European Parliament and Council, and national parliaments over ECB/SRB, and NCAs/NRAs.[30] Germany's government (in the FCC's view) could also influence EU bodies 'indirectly' through its presence in the Council, and the national parliament could participate in this process if it was duly informed.[31]

Despite the clash with the FCC, the Court of Justice has reiterated the idea of 'exclusive power + decentralised implementation' e.g., in *Berlusconi II,*[32] where the Court also held that the fact that Article 127(6) TFEU excluded 'insurance undertakings' could not deprive the ECB from a competence to authorize the acquisition of qualifying holdings by the mere fact that the banking group also included an insurance undertaking,[33] or *Versobank,*,[34] where the General Court used the *Landeskreditbank* doctrine to delineate the competences of NCAs/NRAs and the ECB.

2.1.2. The difficulties of composite procedures with national and EU authorities: Berlusconi and beyond.

A second type of vertical tensions arises in 'composite' or 'compound' procedures. *Berlusconi I* is the leading case, followed by *Berlusconi II*.[35] Both concerned the acquisition of a significant holding in a bank. There was a proposal by the national authority (Bank of Italy) and a final decision by the ECB to refuse the acquisition. The Court of Justice held that, when the 'national leg' of a proceeding does not determine

[24] *SSM/SRM judgment*, 167-169, 233, 242, 245-246, 258, 265.

[25] Ibid, paras 173-176 (SSM), 254-256 (SRM).

[26] Ibid, paras 177-184 (SSM), 261 (SRM).

[27] Ibid, para 185 (for the SSM).

[28] Marco Lamandini, David Ramos Muñoz, and Violeta Ruiz Almendral, 'The EMU and Its Multi-Level Constitutional Structure' (2020) Legal Issues of Economic Integration 47, 295-310.

[29] *SSM/SRM judgment*, 209-210, 279.

[30] Ibid, paras 213-224, 229 (SSM) and 275, 281-283, 288-289 (SRM).

[31] Ibid, paras 272-273 (SRM).

[32] Case T-913/16 *Finanziaria d'investimento Fininvest SpA (Fininvest)/Silvio Berlusconi v ECB* [2022] ECLI:EU:T:2022:279 (hereafter: *Berlusconi II*) (on appeal in Joined Cases C-512/22 P and C-513/22 P pending).

[33] Ibid, para 66.

[34] Cases T-351/18 and T-584/18 *Ukrselhosprom and Versobank v ECB* [2021] EU:T:2021:669 (hereafter: *Versobank*).

[35] Compare also Filipe Brito Bastos, 'Judicial review of composite administrative procedures in the Single Supervisory Mechanism: Berlusconi' [2019] CMLR 56, 1355–1378.

the 'European leg' conclusion, European courts are exclusively competent to adjudicate on the final decision by EU authorities, including on any illegality present in the national leg, and national courts cannot rule on the preparatory decision by national authorities. The same finding was reiterated by the Court in the resolution context in *Iccrea*[36].

In *Berlusconi II,* however, the General Court considered inadmissible the appellant's allegation that the Italian leg of the procedure was illegal because the initial complaint did not include this plea, which was filed afterwards, once *Berlusconi I* was decided. The General Court held that the Court of Justice's findings in *Berlusconi I* were not a 'new element of law', but merely confirmed a situation of which the appellant was (or should have been) aware when it filed the appeal, and its effects were *ex tunc,* i.e., dating back to the date of entry into force of the provisions interpreted by the court.[37] On appeal, the Advocate General recently disagreed with this finding,[38] and the Court of Justice judgment is announced for the 19 September 2024. The General Court made short shrift of the allegation that the SSM 'system' does not leave room for a *constitutionality* control of national preparatory acts by national courts. This remains an open question that is most likely bound to appear in subsequent cases.

Multiple challenges can arise from the **criss-cross of various national and EU decisions on regulatory breaches (e.g., money laundering) failing-or-likely-to-fail ("FOLTF") findings, resolution, insolvency, and license withdrawal**. In *Versobank* the Estonian NRA declared a bank FOLTF) *but* found that resolution was not in the public interest. In parallel, due to money laundering violations, the Estonian NCA and the ECB found that the entity no longer fulfilled the requirements for authorization, which was withdrawn by the ECB. The Court confirmed the exclusive competence of resolution authorities to put a bank in resolution, which is not bound by supervisory findings, and the exclusive competence of the ECB to withdraw a bank's license, not bound by resolution authorities. This also presents a potential for lack of coordination and 'limbo' situations. In the *PNB Banka* saga, at the request of the Latvian supervisory authority, the ECB took over the supervision of PNB Banka, classifying it as a 'significant' entity, found that it was balance-sheet insolvent, and declared it FOLTF; this was followed by an insolvency declaration from national bankruptcy courts, and the NCA proposal and ECB decision to withdraw the bank license. The ECB's decisions were confirmed by the General Court in four separate, yet linked, appeals.[39]

In some cases, the interplay between national and EU levels may not be preordained in the normative texts. In *Anglo Austrian AAB Bank (AAB)* national authorities found that a bank had committed anti-money laundering violations, and the ECB decided to withdraw its license for failing to have 'robust governance arrangements' (Article 74 CRD).[40] The bank challenged the findings of money laundering violations as 'dating back in time, prescribed, not serious or corrected'.[41] The General Court dismissed the complaint.[42]

In the resolution context, Article 12d(5) SRMR grants the national resolution authority the right to request the SRB to impose the minimum subordination requirement set out in Article 12d(4) SRMR to the MREL requirement. This request, also known as "fishing request" has been considered by the Board and by the SRB Appeal Panel[43] as binding upon the European authority, and thus a national leg of a composite

[36] Case C-414/18, *Iccrea v Banca d'Italia* ECLI:EU:C:2019:1036

[37] *Berlusconi II,* at paras 250-255.

[38] Opinion of 16 May 2024 in Joined Cases C-512/22 P and C-513/22 P [2024] ECLI:EU:C:2024:414.

[39] Case T-275/19, *PNB Banka v ECB* (ECB decision of 14 February 2019) [2022] ECLI:EU:T:2022:781; Case T-230/20, *PNB Banka v ECB* (ECB decision of 17 February 2020) [2022] ECLI:EU:T:2022:782; Case T-301/19, *PNB Banka v ECB* (ECB decision of 1 March 2019) [2022] ECLI:EU:T:2022:774 and Case T-330/19 *PNB Banka v ECB* (ECB decision of 21 March 2019) [2022] ECLI:EU:T:2022:775..

[40] Case T-797/19 *Anglo Austrian AAB v ECB* [2022] ECLI:EU:T:2022:389 (hereafter *AAB*); on appeal, in case C-579/22, see the Opinion of Advocate General Capeta of 11 April 2024 [2024] ECLI:EU:C:2024:296 inviting the Court to dismiss the appeal

[41] *AAB*, para 27.

[42] Ibid, paras 58-62, 66, 67-72, 73-91, 124-131, 134-136, 138-147.

[43] Decision of 13 February 2023, in case 3/2022, Appellant v. SRB.

proceeding subject to the jurisdiction of national courts. The matter (which is the other side of the coin of the Berlusconi I findings) is however not fully settled and is currently under the scrutiny of a national judge[44], which is considering a possible reference of the question to the Court of Justice under Article 267 TFEU.

2.1.3. EU authorities' applying national laws: from Crédit Agricole and Crédit Mutuel to Corneli.

A third type of vertical tension arises from another SSM 'innovation': EU institutions applying national law. In *Caisse regionale de crédit agricole v. ECB*[45], the problem was how to interpret the 'four eyes' principle, which requires that the bank is 'effectively directed' by at least two persons, as transposed under Article L. 511-13 of the French Financial and Monetary Code. The ECB refused to authorise as 'effective directors' four CEOs who were *also* chairpersons, concluding that 'effective direction' comprised executive directors, i.e., those who combine their directorship with a senior management role, and that other bank rules prohibit accumulating the chairperson and chief executive roles. The EU rule, transposed by the national rule, had also been interpretated by the French *Autorité du Control Prudentielle et resolution* (ACPR) *and* by a ruling from the French Council of State, issued after the complaint was filed. The General Court analysed the relevant EU provisions and national provisions, showing deference to national law and authorities. The General Court attached much importance to the Council of State interpretation, quoting some parts verbatim; the fact that it came after the complaint was filed was no obstacle to take it into account, since the applicants could present their observations before the General Court.[46]

In *Crédit Mutuel Arkea*[47] the ECB concluded that a decentralized structure of cooperatives affiliated to a central body that was not, itself, a credit institution was nonetheless a 'group', subject to consolidated supervision, in light of Article L-511.30 of the French Financial and Monetary Code. The General Court upheld the ECB's decision, but held that the national provision was ambiguous and did not seem to impose a commitment by group entities equivalent to the one required by the EU provision it transposed (Article 10 CRR). Shortly after the General Court's ruling, the French Council of State clarified that the degree of commitment should be equivalent. Thus, on appeal, the Court of Justice, accepting the Commission's proposal, substituted the grounds, and upheld the ECB decision, using as a basis for its decision the Council of State's interpretation, which it considered in detail.[48] *This is a positive example of constructive dialogue between courts, which acknowledged the role of both national and EU law*.

In *Corneli*[49] the General Court held, on the contrary, that the ECB had mistakenly applied national law in a decision to place Banca Carige in special administration, an early intervention measure. On appeal (still pending; Grand Chamber hearing took place on 25 June 2024 and the Opinion of Advocate general Kokott is announced for October 2024) the Court of Justice was asked by the ECB, the European Commission and the Republic of Italy to set aside the judgment because the General Court erred in the

[44] In a dispute which also includes the European leg of the same procedure, and is pending before the SRB Appeal Panel as case 6/2024.

[45] Joined cases T-133/16 to T-136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence and Others v ECB* [2018] ECLI:EU:T:2018:219 (hereafter *Caisse régionale de crédit agricole*). <https://ebi-europa.eu/wp-content/uploads/2019/01/Cre%CC%81dit-Agricole-Cases-Summary.pdf>; Christos Gortsos, 'The Crédit Agricole cases: banking corporate governance and application of national law by the ECB' in Chiara Zilioli; Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar 2021), 510-520.

[46] *Caisse régionale de crédit agricole*, 87-88.

[47] Case T-712/15 *Crédit Mutuel Arkea v ECB* [2017] ECLI:EU:T:2017:900 (hereafter T-712/15 *Crédit Mutuel*); on appeal Joined Cases C-152/18 and C-153/18 *Crédit Mutuel Arkea v ECB* [2019] ECLI:EU:C:2019:810 (hereafter *Crédit Mutuel)*. See the commentary by Daniel Sarmiento, 'National Law as a Point of Law in Appeals at the Court of Justice. The case of Crédit Mutuel Arkéa/ECB' [2019] EU Law Live; Francesco Martucci, 'The Crédit Mutuel Arkéa case: central bodies and the SSM, and the interpretation of national law by the ECJ' in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union* (Elgar Financial Law and Practice 2021), 504-509.

[48] Ibid, paras 103-106.

[49] Case T-502/19 *Francesca Corneli v ECB* [2022] ECLI:EU:T:2022:627, para 100; on appeal, in Joined Cases C-777/22 P and C-789/22 P pending

interpretation of national law. In contrast with *Crédit Mutuel,* it trusted its own literal reading of Article 72 of the Italian Single Banking Act (*Testo Unico Bancario* - TUB), without considering relevant national case-law. In *Corneli*, on appeal, the Court has the opportunity to settle important questions: whether a misinterpretation of national law by the General Court is a question of 'law', or a question of 'fact' in the Banking Union, where article 4(3) SRMR treats national law as 'law', what the meaning of the requirement to interpret national law in conformity with EU law is, and to what extent Article 4(3) SSMR authorises the direct application of the CRD by the ECB, assuming that national law may have incorrectly implemented a directive (CRD). Meanwhile, in *Malacalza,*[50] a follow-up of *Corneli,* the General Court dismissed the action for damages brought against the ECB by Banca Carige's qualified shareholders, who alleged that the temporary administration was unlawful and caused them damages.

Finally, European courts have set limits to national law's influence in ECB decisions. In *AAB*, referred to above, the alleged flaws in the national authority's findings of money laundering violations could not be used to challenge the ECB's own findings of violations of governance provisions, which were based on its own assessment. The appellants also alleged that the money laundering violations 'had not been ascertained in decisions having res judicata authority', as required under national law. The General Court also dismissed that claim, relying on EU caselaw, which only requires that the decision establishing the guilty violation be 'final' (not necessarily judicial[51]) and 'serious'. However, to conclude that the ECB did not act beyond its competence, the Court made a detailed assessment of the link between CRD's 'governance' provisions and money laundering,[52] and also held that, even if the legal basis chosen by the ECB had been wrong, the outcome would not have changed, since there were other provisions to choose from.[53]

2.2. The role of courts in shaping the application of the law in supervision.

There are three main areas where courts have played a decisive role in controlling the application of the law by the ECB and financial supervisors. First, on the precise extent of the supervisory mandate, especially by shaping legal concepts in light of their finality, ranging from the perimeter regulated entities and activities, including groups to bank prudential and governance rules (2.2.1.) Second, in shaping the standard of review for bank supervision, pivoting between deferential and hard look review (2.2.2.)

2.2.1. EU Courts' role in shaping legal concepts and finalistic interpretation: from regulatory perimeter and groups to prudential and governance rules.

European courts play a crucial role in shaping central concepts of bank regulation. 'Perimeter patrol', i.e., determining which entities fall inside the regulated perimeter is a particularly sensitive area. European courts have interpreted the laws in light of their finality to ensure their effectiveness.

Romanelli[54] is a pre-Banking Union example, where the ECJ backed Italian authorities' prosecution of the Romanelli brothers for conducting banking business without a license. The brothers sold financial instruments representing an amount receivable and immediately repurchased at a price which incorporated a pre-agreed interest, and warrants representing an option to acquire debentures issued by

[50] Case T-134/21, *Malacalza Investimenti v ECB* [2024] ECLI:EU:T:2024:362.

[51] *AAB* , paras 45-46. For a comment Enrico Gagliardi, Lausa Wissink, 'So far so food: the review of national law in EU judicial proceedings', EULawLive, 8 July 2022

[52] Ibid, paras 105-109 (duty to state reasons) and paras 124-130 (breach of legality).

[53] Ibid, para 110.

[54] Case C-366/97 *Criminal proceedings against Massimo Romanelli and Paolo Romanelli* [1999] ECR I-00855 (hereafter *Romanelli*). David Ramos 'Shadow Banking: the Blind Spot in Banking and Capital Markets Reform' [2016] Eur Company & Fin Law Rev 13, 157-196.

Romanelli Finanzaria SpA.[55] The Romanellis alleged that the funds raised from the public were not 'intrinsically repayable'; repayment resulted from a separate 'restitution agreement'. The ECJ held that a narrow interpretation of 'credit institution' and 'repayable funds' would undermine the objective of protecting consumers.[56]

In a separate 'perimeter' issue the Joint Board of Appeal of the ESAs ("**BoA**") decided the four 'shadow ratings' cases against ESMA by *Svenska Handelsbanken AB, Skandinaviska Enskilda Banken AB, Swedbank AB*, and *Nordea Bank Abp*.[57] The focal point was the concept of a 'rating', as opposed to investment 'research' and 'recommendations'. Article 3(2) of CRAR is somewhat ambiguous in excluding recommendations and 'investment research' from the definition of 'credit ratings'. ESMA found that the banks' reports were investment research, but the 'shadow ratings' included in those reports were 'ratings', as they were assessments of creditworthiness made by the banks' credit analysts, based wholly or partly on the methodology of the licensed rating agencies, and used *alphanumerical ratings*. The BoA found that ESMA's decisions complied with legal certainty and due process. The banks should be CRAR-registered to undertake the activity. If the banks' interpretation were upheld, anyone could circumvent the CRAR by merely including the ratings in a document qualifying as investment research. However, the BoA also held that, due to the ambiguous wording of Article 3(2) CRAR, and the unusual circumstances, whereby the banks' practice had been carried out in the Nordic debt markets for many years, without any perception of CRAR impropriety, the infringements were not negligent, and no fines could be imposed.

This finalistic approach was maintained for **group structures** in *Crédit Mutuel Arkea*[58] Credit Mutuel was a decentralised network of local cooperatives (credit unions) each affiliated with a regional federation, and each federation affiliated with the Confédération nationale du Crédit Mutuel ('the CNCM'), the network's central body (and not a credit institution). Network members also owned Caisse centrale du Crédit Mutuel ('CCCM'), a public limited cooperative finance company with variable share capital, authorised as a credit institution. The ECB concluded that the entities were a 'group', and it exercised consolidated supervision over CNCM and direct supervision over several entities, including Crédit Mutuel Arkéa. SSM rules on consolidated supervision referred primarily to 'vertical' groups with a parent credit institution or 'mixed financial holding company',[59] but they also contemplated the case of groups formed by entities affiliated to 'a central body which supervises them', *if* certain conditions (under article 10 of CRR) were met.[60] The General Court held that consolidated prudential supervision had two aims: first, to enable the ECB to identify the risks deriving not from the institution itself, but from the group; second, to avoid the fragmentation of prudential supervision between different supervisors.[61]

On this basis, the Court concluded that the ECB could subject Crédit Mutuel's bespoke structure to consolidated supervision.[62] The Court held that the structure qualified as a group for regulatory purposes,

[55] *Romanelli*, para 5.

[56] Ibid, para 16, citing the Opinion of AG Fennelly, C-366/97 *Romanelli*, Opinion of AG Fennelly [1999] ECLI:EU:C:1998:523.

[57], BoA D 2019 02 BoA D 2019 03 BoA D 2019 04, *Svenska Handelsbanken*, BoA D 2019 01, *Skandinaviska Enskilda Banken v ESMA*, BoA D 2019 05; *Swedbank v ESMA*, BoA D 2019 06, *Nordea Bank v. ESMA*, BoA D 2019 07 www.esma.europa.eu/it/page/board-appeal.

[58] Case T-712/15 *Crédit Mutuel*. The case was appealed, and the Court of Justice largely confirmed the General Court decision in Case C-152/18 P ECLI:EU:C:2019:810..

[59] Article 2(21) (a) and (b) Regulation (EU) No 468/2014 ECB/2014/17 [2014] OJ L 141 (hereafter SSM Framework Regulation).

[60] Article 2(21) (c) SSM Framework Regulation (n 166).

[61] T-712/15 *Crédit Mutuel*, paras 58, 61.

[62] Ibid, paras 65-70.

because, if a credit institution failed, this could put the other affiliated entities at risk.[63] The fact that the central body was not a credit institution was not an obstacle to the existence of a banking 'group', nor to its consolidated supervision by the ECB. Although the ECB could only impose sanctions to 'credit institutions, financial holding companies and mixed financial holding companies', it could use other supervisory tools, and consolidated supervision complemented, i.e., not replaced, individual supervision.[64] The Court of Justice confirmed the General Court's ruling,[65] taking note of a decision by the French Council of State, which discussed in depth CNCM's central role over the group's functioning, cohesion, technical and financial scrutiny, regulatory compliance or recovery planning, issuing binding instructions to branches and impose penalties, or introducing 'joint and several liability mechanisms' between network members: these obligations were much more onerous than a mere obligation to transfer capital and liquid assets', and thus, *implied* the existence of an obligation to transfer. The ECB 'group' finding was justified.

Finalistic interpretation of open-textured concepts is essential for an effective 'perimeter monitoring', but it goes beyond those cases, and **is a distinct feature of European Courts**. US courts and European courts emphasize the role of 'discretion' and 'deference', but European courts insist in their role as the authoritative source of interpretation of legal concepts of EU law, and the ultimate guarantors of the system's legitimacy. European courts will discuss whether an agency's interpretation is 'the' reasonable interpretation, not 'a reasonable enough' interpretation, nor which would impliedly admit that the agency, not the Court, has the interpretative authority.

In *OC & Adusbef*[66] the Court reviewed the concept of ***'capital'***. Under the Basel-inspired CRD and CRR, common shares were ineligible as 'capital' (Core Equity Tier 1 (CET1) or Additional Tier 1 (AT1)[67]) if those shares contemplated shareholders right of redemption at will, or for failure to distribute dividends, unless this were subject to supervisory authorisation.[68] For banks under the cooperative form, however, the principles of variable capital and 'open door' were essential. Article 29(2) CRR acknowledged those principles, *but* also provided that the institution should be able to refuse or limit redemptions. Italian law[69] provided that, above certain thresholds, (EUR 8 billion) banks had to convert into joint-stock companies (limited by shares) and defer/limit share redemption indefinitely. The banks' challenges, under the right to property and freedom to conduct a business (articles 16-17 EU Charter) and free movement of capital (articles 63 ff TFEU) were dismissed by the Italian Constitutional Court.[70] The Court of Justice, in a preliminary ruling from the Italian council of state, held that the compatibility of the *restrictions on redeemability* with property rights corresponded to national courts, but the Court of Justice gave very precise indications suggesting that the restrictions were lawful: they were not a property deprivation, nor interfered with the essence of freedom to conduct a business; they were justified by good governance,

[63] Ibid, para 88.

[64] Ibid, paras 91-92.

[65] Case C-152/18 P *Crédit Mutuel* ECLI:EU:C:2019:810, paras. 103-107.

[66] Case C-686/18, *OC and others, Adusbef* [2020] EU:C:2020:567.

[67] Marco Lamandini and David Ramos Muñoz, 'The Definition of Common Equity Tier 1 Capital and of Contingent Capital and the Diversity of Capital Instruments issued by European Credit Institutions' in Bart Joosen, Marco Lamandini, and Tobias Tröger (eds), *Capital and Liquidity for European Banks* (OUP 2022).

[68] EBA, *Report on the monitoring of CET1 instruments issued by EU institutions, Second Update* <https://www.eba.europa.eu/sites/default/documents/files/documents/10180/2551996/51a39b9d-a68d-476a-b2c6-e2c21527a05f/EBA%20Report%20on%20the%20monitoring%20of%20CET1%20instruments%20issued%20by%20EU%20Institutions.pdf?retry=1>, accessed 23 September 2022, 21, sections 83-84.

[69] Italian Law-Decree No. 3 of 24 January 2015.

[70] The Italian Constitution Court dismissed the two cases filed (judgments no 287 of 2016, and no 99 of 2018), following a line of interpretation in Marco Lamandini, 'La riforma delle banche popolari al vaglio della Corte Costituzionale' [2017] *Crédit* Mutuel, 140.

sector stability, the prudent exercise of banking activities, and prevention of systemic risk, i.e., there was 'a clear public interest in ensuring that core equity investment in a bank is not unexpectedly withdrawn'.[71] The challenges to the 'threshold' under Italian law under the Charter of Fundamental Rights were inadmissible, since this was a choice of the Italian legislator, not something required by EU rules, and thus not subject to the EU Charter.[72] The challenge under free movement of capital was admissible, and the Court acknowledged that the measures were 'restrictions',[73] but they were based on a clear public interest; national courts should determine whether the measures were 'necessary'.

In *Caisse regionale de crédit Agricole v. ECB*[74] analysed **banks' *governance*** rules. The ECB, as the group-level competent supervisory authority, approved four candidates for **board chairmen** of four regional banks of the 'non-centralised' (ie, cooperative) Crédit Agricole group in France, but rejected their appointment as 'effective directors' (*dirigeants effectifs*) as incompatible under the provisions on 'effective direction' (article 13 CRD).[75] The ECB reasoned that, to be approved, the person also had to comply with the 'governance arrangements' provisions, which prohibit to accumulate the position of chairperson and CEO (article 88 CRD).[76] These provisions had been transposed in the French Financial and Monetary Code (FMC), *and* interpreted by the French Prudential Control and Resolution Authority.

The case was heard first by the Administrative Board of Review (ABoR), which confirmed the ECB's interpretation. Then, the General Court held that there was no definition of 'persons who effectively direct the business of the institution', but a textual analysis showed that '[I]it consists of three elements: first, a reference to the concept of direction, 'at least two persons … direct', then an adverb qualifying that direction, 'effectively', and, lastly, a reference to the subject of that direction, 'the business of … the institution.'[77] 'Direction' could refer to any member of the board,[78] but the adverb 'effectively', plus the reference to the 'business of the institution' narrowed the definition to *executive* directors.[79] The Court used the so-called 'four eyes' principle, i.e., there must be 'two sets of eyes' to manage a bank, and also control it. In the first banking directives the requirement comprised all members, including non-executives; subsequent texts, like the CRD, narrowed it down to executive directors.[80] Finally, under a contextual and finalistic interpretation, the Court did not find evidence of the 'four eyes' principle's objectives in the CRD recitals, but found it in the corporate governance provisions. In the Court's view:

[71] C-686/18 *OC and Others v Banca d'Italia and Others* [2020] ECLI:EU:C:2020:567 (hereafter *OC and Others*), paras 90-94: 'there is a clear public interest in ensuring that core equity investment in a bank is not unexpectedly withdrawn, and in thus preventing that bank and the whole of the banking sector from being exposed to instability, from a prudential perspective'.

[72] 52-53.

[73] Ibid, paras 103-104.

[74] *Caisse régionale de crédit Agricole*. See the comment of Christos Gortsos, ' The Crédit Agricole cases: banking corporate governance and application of national law by the ECB, in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing Limited, 2021), 510-520.

[75] Art 13(1) CRD states that: '[T]he competent authorities shall grant authorisation to commence the activity of a credit institution only where at least two persons effectively direct the business of the applicant credit institution'.

[76] Art 88(1) CRD, states that: 'the chairman of the management body in its supervisory function of an institution must not exercise simultaneously the functions of a chief executive officer within the same institution, unless justified by the institution and authorised by competent authorities'.

[77] *Caisse régionale de crédit Agrícole*, 56.

[78] Ibid, para 57. This could be inferred from the reference to art 3(1)(7) CRD.

[79] It thus rejected the bank's argument that it could also comprise non-executive directors involved in the day-to-day business of the institution, but more focused on the 'oversee[ing] and monitor[ing] [of] management decision-making', which art 3(1)(8) of the directive entrusts to the management body in its supervisory function'. *Caisse régionale de crédit Agricole*, paras 59-61.

[80] *Caisse régionale de crédit Agricole*, paras 66-67.

> '[I]n the general scheme of Directive 2013/36, the objective relating to good governance of credit institutions […] requires effective oversight of the senior management by the non-executive members […] the effectiveness of such oversight may be jeopardised if the chairman of the management body in its supervisory function, […] is also responsible for the effective direction of the business'.[81]

This conclusion did not depend on whether it was a single or dual-board, as it 'relates only to the organisation of powers within the management body'.[82] The ruling also analyzed in detail the transposition of CRD IV by French Law, and the views of the ACPR and the French Council of State, extensively quoting the latter's opinion verbatim, to conclude that the French ACPR and the ECB had correctly construed the relevant provisions.[83]

AAB explored the drastic **consequences of a breach of governance provisions**. The General Court upheld the ECB's decision to withdraw a bank's license for breaching the duty to have 'robust governance arrangements' (Article 74 CRD) after national authorities found violations of anti-money laundering provisions.[84] The Court rejected the appellant's argument that 'governance arrangements' should be restricted to 'financial risks', not money laundering.[85]

Berlusconi II considered the '**fit-and-proper**' rules in an acquisition of qualifying holdings. Italian courts validated Fininvest's (and, indirectly, Mr Berlusconi's) acquisition in the holding company (Mediolanum) of a bank (Banca Mediolanum). Later, the ECB treated a reverse merger between the bank and its holding company, which turned Fininvest's (and, indirectly, Mr Berlusconi's) indirect holding into a direct holding as an 'acquisition', and refused to authorise it on grounds that Mr. Berlusconi did not fulfil 'fit-and-proper' requirements. The General Court interpretation of the concept of 'acquisition of a significant holding' was independent of national law, based on the objective to ensure the *suitability* of the proposed acquirer, and broad, because under a restrictive interpretation the rules would be circumvented.[86] The restructuring was an 'acquisition', even if the 'acquirers' degree of influence had not changed.[87] The ECB could assess Mr Berlusconi also after the transaction had occurred, [88] and this did not entail a retroactive application of the law, nor was it contrary to legal certainty and *res judicata*, because it did not overrule of the decision by national courts.[89]

Pilatus Bank examined **the harsh implications of the 'fit-and-proper' requirement of 'good repute'**.[90] A director and shareholder in a Maltese bank was indicted in the United States, on charges of funnelling money, leading to massive deposit withdrawals. Maltese authorities revoked the individual's directorship and suspended his voting rights, and the ECB withdrew the bank's license. The appellants alleged that the ECB failed to examine the facts, and relied on US authorities' press releases, although the activities were only 'criminal' in the US (under the sanctions regime for Iran) not in the EU. The Court held, however, that the authorities could withdraw the license of a bank if its shareholders were considered unsuitable.[91] The finality of the provisions on 'good repute' was prudential and risk oriented, and comprised **a person's**

[81] Ibid, para 79.
[82] Ibid, para 82.
[83] Ibid, para 88.
[84] *AAB*
[85] Ibid, paras 127-128.
[86] *Berlusconi II*, paras 51-55.
[87] Ibid, paras 57, 59-60.
[88] Ibid, paras 81-85.
[89] Ibid, para 104.
[90] Case T-27/19 *Pilatus Bank plc and Pilatus Holding ltd. v ECB* [2022] ECLI:EU:T:2022:46 (hereafter *Pilatus*).
[91] Ibid, paras 63-71.

conduct, but also the perception of others, and the public's confidence.[92] The indictment and media attention were enough to cast serious doubts about the integrity of the shareholder, and, since he held 100% of the bank, this led to a massive withdrawal of deposits, an increase of the risk ratio, and a request to terminate its loan by the bank's main borrower, which represented 90% of the bank's loan book and its main source of income.[93] Thus, the truth of the allegations mattered less than their consequences. However, the facts were also peculiar: a wholly owned small bank, with a deposit base and loan book heavily dependent on a single client.

In *ABLV v SRB*[94] the U.S. Department of Treasury through the Financial Crimes Enforcement Network (FinCen) announced a draft measure to designate ABLV Bank as an institution of primary money laundering concern, prohibiting it to make payments in US dollars, and triggering a liquidity crisis which eventually led the ECB to demand the bank to post a large amount of collateral, and, after the bank failed to comply, to declare it Failing-Or-Likely-to-Fail (FOLTF). The bank challenged these measures as disproportionate, but the Court dismissed the claim, noting that the FOLTF assessment was based not on whether the US measures were fair, but on the liquidity crisis, and the appellant had not showed that the ECB conclusions were implausible.[95]

2.2.2. European courts' standard of review: 'soft' and 'hard' review.

Courts normally perform their revision of the acts of financial authorities under a certain legal 'standard', which states in advance, at a relatively general level, how the courts will approach the revision, what aspects will they focus on, and what level of deference will they grant to the authority's decisions. This can enhance legal certainty, and balance accountability and respect for discretion. European Courts' often use the idea of 'manifest error of assessment' to define their review of authorities' decisions involving 'complex assessments'.[96] Occasionally, the standard of review focuses on mere 'errors', e.g., in cases where the revising body has been an administrative appeal body with technical and not just legal expertise and ample powers, like the board of appeal of ACER, the energy regulator,[97] and also in other cases, where the General Court controlled for 'error', but did not clarify why.[98]

[92] Ibid, paras 73-80.

[93] Ibid, 83-95.

[94] Case T-280/22 *ABLV Bank v SRB* [2022] ECLI:EU:T:2022:429 (hereinafter *ABLV v SRB*).

[95] Ibid, paras 94 and 116-124.

[96] See, e.g., C-450/17 P Landeskreditbank, para. 72, T-122/15, paras. 101 and ff., T-712/15 *Crédit Mutuel*, para. 178.

[97] Case C-46/21 P European Union Agency for the Cooperation of Energy Regulators (ACER) v. Aquind, ECLI:EU:C:2023:182.

[98] Cases T-133/16 to T-137/16 *Caisse regionale de crédit Agricole v. ECB* paras. 50, 90.

However, what cases in previous sections show is that European courts' most important review function does not come defined within a formal standard. A crucial aspect of financial regulatory decisions is how to interpret certain open-textured concepts, and who has the ultimate authority to do so. The cases discussed in previous sections show that European Courts, especially the general Court, always claim the ultimate authority to determine *the* correct meaning of open-textured provisions according to their finality.

Box 1: **Courts' "standard of review": a language of its own.**

The idea of a "standard of review" is sound in theory: it states in advance what the Court will revise, and prevents a pure *ad hoc* exercise, enhancing legal certainty, and ensuring separation of powers. In practice, courts can use different concepts to define that standard, and sometimes the picture can be confusing.

Courts (both in the US and in the European Union) use the term *"de novo"* review to define a reassessment of the decision being revised, but this is rare.

US courts use the name of landmark cases that formulated the specific standard, e.g., the *"Auer"* or *"Seminole Rock"* standard (after *Auer v Robbins,* 519, U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)) the *State Farm* standard (also known as "arbitrary and capricious" review after s. 706(2) of the Administrative Procedure Act (APA)), and, until recently, to the *"Chevron* standard" (recently overruled in *Loper Bright Enterprises v Raimondo*, 603, U.S. _____ (2024)). Sometimes, they also use terms like "rational basis review" or "hard look review" to describe the review of the substantial evidence used by the agency.

The Court of Justice's review in annulment proceedings is also known as 'legality review', after the language of Article 263 TFEU. Beyond that, the Court of Justice tends to use ideas such as "manifest error", or sometimes "error" to define the standard of review of decisions involving "complex" assessments. Occasionally, it may refer to the 'reasonableness' of an interpretation. The European Court of Human Rights uses the idea of review by 'courts with full jurisdiction' (from where one derives the idea of 'full review') as a threshold matter to determine whether the revision by national courts of sanctioning measures complies with due process rights under Article 6 ECHR. This idea of 'unlimited jurisdiction' with regard to penalties is also reflected in Article 261 TFEU.

Admittedly, academics sometimes contribute to muddle the picture, mixing actual standards of review with descriptions (formal and informal) of the intensity of review, depending on whether they wish to highlight one or another idea. The authors themselves may have incurred this practice more than once and apologize for this.

However, given that, in the majority of the cases mentioned above, the actions of the ECB were upheld, a legitimate question is whether the European courts simply claim that authority only to lend it to the ECB decisions, i.e., whether in reality the General Court is rubber-stamping the ECB decisions. The answer is a clear 'no', as in other cases the Court has disagreed with the ECB, sometimes controversially.

Consider the *Banque Postale – Crédit Agricole* cases (or the 'Livret' cases),[99] and the subsequent *Crédit Lyonnais* case.[100] The General Court quashed the ECB decision to refuse to exclude from the calculation of the leverage ratio the amounts in certain tax-exempt accounts (Livret A, LEP, LDD),[101] where a part of the funds received by the banks was held centrally by the Caisse des dépôts et consignations (CDC), a French public financial institution. The leverage ratio divides a bank's capital (numerator) by its *total* liabilities[102] (denominator), i.e., not risk-weighted liabilities, like the capital ratio. If these tax-free, government-held accounts are included in the denominator, the bank needs more capital to have a healthy leverage ratio, but since the bank does not hold these accounts by choice, but as part of a government program to fund general interest investments, the result could seem unfair, and the law stated that the ECB 'may' exclude them.[103] The ECB, however, refused, and the banks appealed.

The General Court accepted that the law granted the ECB ample discretion.[104] However, the ECB refused to exclude the exposures because they were state-guaranteed assets, carrying a risk of default by the French State', and since the provision was conceived *only* for 'exposures to public service entities having a State guarantee', unless the refusal considered the likelihood of default, it would deprive the provision of any practical effect.[105]

The Court also found that the risk of excessive leverage arose from the eventual need for a bank to, e.g., effect a distressed sale of assets in scenarios of insufficient liquidity,[106] during the time lag (the 'adjustment period') between the bank's position and the CDC position. Since the ECB admitted that the adjustment period did not present a liquidity risk, it could not exceed the 'gravely stressed conditions' envisaged by the liquidity ratio, and the ECB could not refuse to exclude the instrument from the denominator without thoroughly examining its characteristics.[107] Also, the large volume (or concentration) of the exposures was not enough to exclude them, because this might be relevant only if the bank could not obtain payment, and be forced to sell assets.[108]

After *Banque Postale – Crédit Agricole*, the ECB adopted a new decision, which was challenged in *Crédit Lyonnais* where the bank alleged that the ECB had not properly implemented the Court's ruling.[109] The ECB had strengthened its reasoning, and 'analysed the likelihood of default' by the French state, by referring to data of credit ratings and credit default swaps,[110] and justified the scenarios of 'gravely distressed conditions', offering past examples of massive withdrawals in short periods.[111] With a non-

[99] Case T-745/16 *BPCE v. ECB* [2018] ECLI:EU:T:2018:476 (hereafter *BPCE v. ECB*). Six practically identical cases were decided, and the rulings had a practically identical content, involving the largest French banking groups. These included cases C-548/18 *BNP Paribas v TeamBank AG Nürnberg* [2019] ECLI:EU:C:2019:848; *Caisse régionale de crédit agricole*, T-757/16 113 *Société Générale and Crédit agricole Corporate and Investment Bank v European Commission* [2018] ECLI:EU:T:2018:73; T-751/16 *Crédit mutuel*, *BPCE v. ECB* and Case T-733/16 *Banque Postale v ECB* [2018] ECLI:EU:T:2 018:477 (hereafter *Banque Postale*). Compare Michael Ioannidis, 'The judicial review of discretion in the Banking Union: from 'soft' to hard(er)' look', in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing Limited 2021), 138-142.

[100] Case T-504/19 *Crédit Lyonnais v ECB* [2021] E LI EU :T:2 021:185 (hereafter *Crédit Lyonnais*).

[101] These included the *Livret A* (Savings passbook A), the Livret d'épargne populaire (Popular Savings Passbook) ('LEP'), and the *Livret de Développement Durable et solidaire* (LDD) accounts.

[102] Article 429(2) CRR.

[103] Art 429(14) CRR.

[104] *Banque Postale*, paras 54-55.

[105] *Banque Postale*, 72, 74-76, 86-88

[106] *Banque Postale*, para 93; *Caisse régionale de crédit agricole*, paras 70-72.

[107] *Banque Postale*, paras 96-98, 106; *Caisse régionale de crédit agricole*, paras 73-78, 81.

[108] *Banque Postale*, paras 73, 92.

[109] The appellant referred in particular to the case *Caisse régionale de crédit agricole*.

[110] *Crédit Lyonnais*, para 44.

[111] Ibid, paras 67-68.

negligible risk of default, the size or concentration of exposures may be relevant.[112] However, the Court found that the ECB's assessment of the risk of withdrawals, followed by distressed sales, failed to consider some key characteristics of the accounts, which were considered 'safe investments', which tend to increase, not decrease, in a crisis;[113] unlike deposits, they were not invested, but transferred to the CDC, and could not be invested in high-risk or illiquid assets,[114] and benefitted from a dual guarantee from the French state.[115] Thus, the analogy with past cases of massive withdrawals from 'regular' deposits was unavailing.[116]

Not surprisingly, the case was appealed by the ECB, in Case C-389/21 P. Advocate General Emiliou rendered an insightful Opinion of 28 October 2022,[117] finding that the General Court had gone a step too far and advising to set aside the general Court's view. The Court of Justice followed the AG,[118] holding that the General Court had substituted 'its own assessment of the risk of fire sales […] without establishing how the ECB's assessment […] was, in that regard, vitiated by a manifest error of assessment'.[119] The Court also held that, in its assessment, "the ECB must rely, in the context of its broad discretion, on *scenarios which are not implausible* in the light of the available information", and cannot be required to prove the existence of past events with the same characteristics as the scenario analysed.[120]

3. EUROPEAN COURT'S SCRUTINY OVER BANK RESOLUTION DECISIONS.

Resolution offers a fertile ground for the interaction between administrative authorities and courts. On supervision, the Banking Union meant allocating powers to a Treaty institution that was already a monetary authority. On resolution, it meant vesting a newly created agency, the Single Resolution Board ("**SRB**") with very intrusive powers. Those powers can severely limit the rights of banks, their creditors and shareholders when deploying resolution tools upon a crisis. Furthermore, the SRB can also impose constraints as a result of resolution planning measures and setting levels for Minimum Requirements on own funds and Eligible Liabilities ("**MREL**"), to ensure that the bank can absorb losses upon a future crisis. Both areas are likely to face judicial challenges.

The more prominent example of the former is the Banco Popular resolution on 6 June 2017, and the ensuing litigation, comprising (i) the actions to annul the resolution decision (6 pilot cases, and 99 non-pilot cases), (ii) access to documents and access to the file (with a large number of cases decided by the SRB Appeal Panel, and 5 Appeal Panel decisions currently under scrutiny of the General Court), (iii) damages claims against the SRB or the European Commission (4 cases), (iv) the valuation 2 (one case closed at the General Court and 2 closed at the Court of Justice) and valuation 3 (6 cases before the General Court and one closed at the Court of Justice). Although less abundant, there are also cases regarding the resolution of *Sberbank* Croatia and Slovenia (two pending cases before the General Court)

[112] Ibid, para 82.
[113] Ibid, paras 109-110.
[114] Ibid, paras 112-113.
[115] Ibid, para 114.
[116] Ibid, paras 118-122.
[117] Case C-389/21 P *ECB v Crédit Lyonnais* [2022] ECLI:EU:C:2022:844).
[118] C-389/21 P *ECB v Crédit lyonnais* [2023] ECLI:EU:2023:C:368
[119] *Crédit lyonnais*, 74.
[120] *Crédit lyonnais*, 93.

the decision not to adopt resolution measures for *Sberbank* Austria, for *ABLV* (one case pending and one closed at the Court of Justice and a claim for damages pending at the General Court) and *PNB Banka*.

As an example of the latter, there are the cases concerning MREL decisions, including 3 pending cases before the General Court, nine decisions already rendered by the SRB Appeal Panel (cases 8/18, 2/21, 3/21; 1/22, 2/22, 3/22, 1/23, Joined cases 2/23 and 3/23, and case 5/23), and four pending cases (3/2024, 4/2024, 5(2024 and 6/2024). One should not leave aside the challenges before national constitutional courts when the Banking Union was created (1 prominent case). Unsurprisingly, the numerous complaints have included challenges to the 'legitimacy' of the SRM's allocation of powers, both from a 'vertical' perspective, which takes Member States as a point of reference (3.1.) and from a 'horizontal' perspective, of separation of powers within the EU (3.2.) It has also included challenges to the exercise of powers, in light of both the substantive legal basis, and procedural safeguards (3.3.)

3.1. Resolution, vertical allocation of powers and the courts (legitimacy challenges (I)).

Is it legitimate to vest an administrative authority with far-reaching powers to take over a not-fully-insolvent institution, and impose losses upon its shareholders and creditors? This is a question that legislatures enacting a bank resolution system must answer, especially in a decentralised political structure. In the US the legitimacy of its federal bank crisis management system was tested in *Fahey v Malone.*[121] In the EU the SRM was challenged before the German Federal Constitutional Court (FCC) in 2019 in the *SSM/SRM judgment*.[122] The plaintiffs alleged that the SRM was *ultra vires* and contrary to the EU Treaties' principle of conferral of powers, and undermined democratic legitimacy. The FCC expressed concern about the use of the competence for the approximation of laws on the internal market (the internal market competence) to create agencies, or delegate powers to them; in its view, this did not find clear support in the text of the Treaty (article 114 TFEU), a systematic analysis of the system of conferral and multi-level administrative cooperation, or a teleological analysis, which called for a strict interpretation of enforcement powers. [123]

However, the FCC accepted the SRM and the agency (Single Resolution Board - SRB), *within* narrow limits, i.e., *provided* that its tasks and powers were interpreted strictly.[124] Harmonisation of bank crisis management could improve the internal market, limiting spill-overs into non-participating states, SRB powers and tasks were sufficiently defined and accompanied by safeguards, and the SRB decision-making was non-exclusive (e.g., the Commission also intervened) and limited to significant institutions.[125] This was acceptable if the SRB powers 'are not extended through interpretation'.[126]

The FCC also stressed that the independence of both the SRB and national resolution authorities (NRAs) limited democratic legitimacy,[127] but this was balanced by political accountability before national parliaments, which, to the FCC's (arguably mistaken) view meant that German political bodies could 'at

[121] *Fahey v Malone* [1947] 332 U.S. 245 (hereafter *Fahey v Malone*).

[122] 2 BvR 1685/14, 2 BvR 2631/14, 30 July 2019 (hereafter *SSM/SRM judgment)*. Compare Raffaele D'Ambrosio and Donato Messineo (eds), *The German Federal Constitutional Court and the Banking Union*, Quaderni di Ricerca Giuridica della Consulenza Legale, Bank of Italy No 91, March 2021, 7-117 (and an English translation of relevant excerpts of the judgment at 255).

[123] *SSM/SRM judgment*, 236-245.

[124] *SSM/SRM judgment*, 246-247.

[125] Ibid, 249-251, 253-258, 259-261.

[126] Ibid, 265.

[127] Ibid, 279, 282, 283.

least indirectly influence' the SRB's actions, and administrative review, by the Appeal Panel, and judicial review, by the CJEU.[128]

Finally, the 'bank levy' (contributions to the Single Resolution Fund – SRF) was not *ultra vires* either, because, although, to the FCC, article 114 TFEU does not authorize the EU to impose taxes or levies. In the FCC's view, the bank levy was not based on the SRM Regulation, but on domestic law, and an Intergovernmental agreement.[129] This finding , in our view, was flawed:[130] SRF contributions are grounded on EU law, not national law, and determining what is lawful or not should not be based on a national (i.e., German) conception of 'tax or contribution', but a EU-law based one. However, it raises valid points. The 'internal market competence' (Article 114 TFEU), follows the ordinary legislative procedure, with qualified majority and is apt for 'regulatory' schemes, while tax harmonization measures require 'special procedure', with unanimity.[131] Thus, creating contributions to fund European agencies under the internal market competence is lawful *if* such contributions are a consideration for a service, and form part of the logic and functioning of the specific harmonized (resolution) regime, *or if* there is a regulatory scheme for the approximation of laws in the internal market, which includes an agency, *and* the levy is key for the scheme, e.g., because it bolsters the agency's independence.[132] In any event, an independent agency with control over its funding entails a loss of democratic legitimacy, which needs to be balanced by enhanced accountability.[133]

[128] *SSM/SRM judgment*,272-276.

[129] Ibid, 300, 303, 306.

[130] For a more detailed analysis, see Marco Lamandini, David Ramos Muñoz, and Violeta Ruiz Almendral, 'The BVerfG's assessment on the contributions to the Single Resolution Fund and Article 114 TFEU' in Raffaele D'Ambrosio, Donato Messineo (eds.) *BVerfG's ruling on the Banking Union* [2021] Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia, 103-117; Marco Lamandini, David Ramos Muñoz, and Violeta Ruiz Almendral, 'The BVerfG's assessment on the contributions to the Single Resolution Fund' [2021] 21 Quaderni di Ricerca Giuridica della Consulenza Legale (hereafter Lamandini, Ramos Muñoz, and Ruiz Almendral, 'The BVerfG's assessment on the contributions to the Single Resolution Fund').

[131] Article 114 TFEU, paras (1) and (2).

[132] Lamandini, Ramos Muñoz, and Ruiz Almendral, 'The BVerfG's assessment on the contributions to the Single Resolution Fund'.

[133] For a more extensive treatment, see Marco Lamandini and David Ramos, 'Banking Union's Accountability System in Practice. A Health Check-Up to Europe's Financial Heart' [2022] Eur L J, 1-31.

3.2. Resolution, horizontal separation of powers and delegation to agencies (legitimacy challenges (II).

The Banking Union has been the testbed to the legitimacy of agency discretion. For a long time, (a quite extreme interpretation of) *Meroni* seemed to prohibit delegating discretionary powers to independent agencies,[134] and *Romano*[135] seemed to rule out agencies' power to adopt quasi-legislative acts.

These far-reaching implications, in relatively old cases, needed contextualisation in light of the new realities. In the *ESMA short selling* decision,[136] the United Kingdom challenged the regulation on short selling, which, combined with Article 9(5) of ESMA founding regulation, conferred on ESMA the power to temporarily prohibit or restrict short selling activities.[137] This, the UK alleged, was an exercise of *discretionary* powers, contrary to *Meroni*, an exercise of *regulatory* powers, contrary to *Romano*, an impermissible exercise of delegation beyond post-Lisbon Treaty articles 290-291 TFEU, which only contemplated delegation *to the European Commission*, and a misuse of Article 114 TFEU, which authorizes rules for the *'establishment and functioning of the internal market'*, not the regulation or restriction of it.

The Court of Justice rejected all the challenges. First, it differentiated between delegating 'discretionary power implying a wide margin of discretion' and to a *private law body* (unlawful) and delegating 'clearly defined executive powers', subject to strict review based on objective criteria, and to a *public law agency* (lawful).[138] ESMA (i) could only act upon a threat to financial stability or the orderly functioning/integrity of markets, (ii) had to consider the measure's side-effects, and (iii) could only adopt specific acts, e.g., requests of information, or prohibitions. These constraints made the decision amenable to judicial review, and ruled out *Meroni* challenges. The Court gave short shrift to the *Romano*-based objection against quasi-legislative acts as a byproduct of *Meroni*.[139] The Court also held that Articles 290-291 contemplated delegation to the Commission, but did not exhaust all delegation options, e.g., to agencies.[140] Finally, departing from Advocate General Jääskinen's Opinion,[141] the Court held that Article 114 TFEU's internal market competence conferred discretion on the EU legislature to choose the appropriate method of harmonization, including the establishment of agencies, especially if technical and specialised analyses were needed, and regulatory measures addressed to Member States or to individuals, *especially* in exceptional circumstances, such as serious disturbances in financial markets.[142]

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[134] Cases C-9/56 and 10/56 *Meroni & Co. Industrie Metallurgiche v. High Authority of the European Coal and Steel Community* [1958] ECLI:EU:C:1958:7 (hereafter *Meroni*).

[135] Case C-98/80 *Giuseppe Romano v. Institut national d'assurance maladie-invalidité*. [1981] ECLI:EU:C:1981:104 (hereafter *Romano*).

[136] Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union* [2014] ECLI:EU:C:2014:18 (hereafter *ESMA-Short selling)*. See C. Di Noia and M. Gargantini, 'Unleashing the ESMA: Governance and Accountability. After the CJEU Decision on the Short Selling Regulation [2014] Eur Org L Rev 24; R. Filler, 'Ask the Professors: Did the ECJ properly Rule by Dismissing the UK's Attempt to Annul ESMA's Regulation Banning Short Selling' [2014] Futures and Derivatives L Report 34, 3.

[137] Art 28 (1) of Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps [14 March 2012] (hereafter Short Selling Regulation), and Art 9(5) of each of the ESAs Regulations(regulations 1093/2010, 1094/2010, 1095/2010).

[138] *ESMA short selling*, paras 41-54.

[139] *ESMA short selling*, paras 65-67.

[140] Ibid, paras 78-86. Also, in this case the whole framework allocated different competences to ESMA and national authorities.

[141] C-270/12, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, Opinion of Advocate General Jääskinen [2013] ECLI:EU:C:2013:562.

[142] *ESMA short selling*, paras 102-114:

ESMA short selling arguably expanded the role of agencies but did not provide a clear and firm legal basis, which has resulted in different challenges for the SRB. First, **the distinction between** delegating '**wide discretionary powers**' and '**clearly defined executive powers**' **is not easy to work out in practice**, which has resulted in further challenges. The *Banco Popular* resolution resulted in a flood of cases, of which the General Court chose six pilot cases (the 'pilot cases') *Tatiana Pérez,*[143] *Del Valle,*[144] *Eleveté,*[145] *Algebris*[146], *Aeris*[147] and *Liaño Reig*[148] to deal with the majority of legal issues. Unsurprisingly, these included the SRB role as an unlawful delegation of powers. Based on *Meroni* and *ESMA Short selling*, the Court considered that, between the (unlawful) delegation of a discretionary power, and the (lawful) delegation of a clearly defined executive power, amenable to judicial review.[149] the SRM scheme fell under the second category: the initial proposal (of direct exercise of SRB powers) was modified out of concerns by the Council to introduce an endorsement (and thus control) by the Commission of whether the resolution was 'required by the public interest' (the more 'discretionary' element of the resolution scheme), and this made the delegation lawful.[150] The Court also found that the Commission's assessment also concerned the use of specific resolution tools, such as the sale of business and write-off and conversion of capital instruments, and their adequacy to resolution objectives,[151] to the point of blankly stating that the resolution tools did not entail a delegation of autonomous competences[152]. The short time for the Commission to endorse or not (24 hours) was not seen as an impediment by the Court, since, in its view, the Commission is duly informed of any actions in preparation for resolution.[153] The matter was brought to the attention of the Court of Justice on appeal in *Commission/SRB* where AG Capeta first,[154] and the Court then[155] reconceptualised the *Meroni-ESMA Short Selling* limits, concluding that this is an example of horizontal composite proceedings (the Court already determined in *Berlusconi*[156] on vertical composite proceedings) and **in fact the resolution plan is only adopted by the endorsement of the Commission**.

Second, the fact that agency acts involving a greater exercise of discretion, such as the 'regulatory' acts of European Supervisory Authorities (ESAs), i.e., EBA, ESMA, EIOPA, and the SRB's adoption of a resolution scheme, are exercised under a **two-step process**, where the agency adopts an act, and **the Commission endorses it**, raises the question of **what the challengeable act is**.

Regarding acts adopted by the ESAs, on 13 September 2019 the Joint Board of Appeal in *Creditreform AG v. EBA*[157] dismissed an appeal filed by a credit rating agency against certain draft implementing technical standards (ITS), finding that they are a preparatory act, which, under Article 15 of the ESAs Regulations, does not bind the European Commission as to its final determination. Appellants must challenge the Commission's final decision (implementing regulation) under Article 263 TFEU, and any alleged errors

[143] Case T-481/17 *Tatiana Pérez de Guzmán v SRB* [2022] ECLI:EU:T:2022:311 (hereafter: *Tatiana Pérez*)

[144] Case T-510/17 *Del Valle Ruiz v Commission & SRB* [2022] ECLI:EU:T:2022:312 (hereafter: *Del Valle*).

[145] Case T-523/17 *Eleveté v. Commission & SRB* [2022] ECLI:EU:T:2022:313 (hereafter: *Eleveté*). On appeal, in Case C-541/22, see the Opinion of AG Capeta of 14 March 2024 ECLI:EU:C:2024:233.

[146] Case T-570/17 *Algebris v Commission & SRB* [2022] ECLI:EU:T:2022:314 (hereafter: *Algebris*).

[147] Case T-628/17 *Aeris Invest Sàrl v Commission & SRB* [2022] ECLI :EU:T:2022:315 (hereafter: *Aeris*). On appeal, in Case C-535/22, see the Opinion of AG Capeta of 14 March 2024 ECLI:EU:C:2024236.

[148] Case T-557/17, now decided on appeal in Case C-947/19 [2021] ECLI:EU:C:2021:172

[149] *Aeris* paras 123-127; *Del Valle* paras 209-211.

[150] *Aeris* paras 128-134; *Del Valle* paras 212-219.

[151] *Aeris* paras 136-142, 143-145.

[152] *Aeris* paras 146-148.

[153] *Del Valle* paras 230-231.

[154] Case C-551/22 on 9 November 2023, *Commission v Tatiana Perez and SRB*, ECLI:EU:C:2023:846

[155] Judgment of 18 June 2024 [2024] ECLI:EU:C:2024:520

[156] Case C-219/17, *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023

[157] BoA D-2019-05

resulting from the ESAs preparatory act can also be revised by the General Court when it examines the Commission's decision.

On 18 June 2024 the Grand Chamber of the Court of Justice in *Commission, Fundación Tatiana Pérez de Guzmán el Bueno and SFL and SRB*[158] found that a resolution scheme prepared by the SRB is not capable of producing binding legal effects vis-à-vis third parties and should be considered a mere *intermediate* act until the necessary endorsement by the Commission follows. Thus, the SRB resolution scheme is not a challengeable act for the purposes of Art. 263 TFEU. Only the Commission's endorsement decision is, and any liability for the act should therefore be borne by the EU budget.

Third, since the SRB and other agencies lack regulatory competences, they will tend to provide guidance to the market in the form of guidelines and other **soft law acts**, raising the question of **whether such 'quasi-regulatory' acts are challengeable, and what is the standard for their review**. The Court of Justice answered both questions in *Fédération Bancaire Française (FBF) v. Autorité de contrôle prudentiel et de résolution (ACPR)*.[159] The French Banking federation (FBF) argued before the Council of State that the European Banking Authority (EBA) Guidelines on product oversight and governance arrangements for retail banking products were invalid, and the French Council of State made a preliminary reference to the Court of Justice under article 267 TFEU. On the issue of justiciability, the Court held, contrary to the Advocate General's Opinion, that the Guidelines did not produce any binding legal effect, and thus could not be subject to an action of annulment, but that entities subject to them could challenge the acts by national authorities applying the Guidelines, and the Court could revise their lawfulness in a preliminary reference procedure.[160]On its actual review of the act, and its legal basis, the Court showed a very deferential standard, against the views of the Advocate General, and, unusually, the Commission, which agreed with the plaintiff that the EBA was acting beyond its mandate.[161] The EBA can issue guidelines to harmonize supervisory practices when (i) they fit within the EBA's founding legislation's goals (step one), and (ii) there is a legal basis in the specific legislation (step two). [162] The problem was step two, since, as stated by the Advocate General, the basis used by EBA were various provisions in the Capital Requirements Directive (CRD), the Payment Services Directive (PSD), the e-money Directive, or the Consumer Credit Directive on *corporate governance* of banks, payment services and e-money firms, etc. Meanwhile, the Guidelines focused on *product governance*; while corporate governance focuses on transparent organizational structure, allocation of responsibilities, etc., product governance focuses on ensuring that products fit the target market, are properly marketed, etc. [163] Product governance under MiFID[164] may have inspired the EBA in practice, but could not be formally used as a basis by the EBA, which chose other acts, which did not regulate *product* governance. [165] This was an invitation for 'crypto-legislation' bypassing the legislative process, raising problems of legitimacy and institutional balance.[166]

[158] Case C-551/22 P [2024] ECLI:EU:C:2024:520

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

[160] *FBF v ACPR*, 38-50, 60-65.

[161] Case C-911/19 *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)*, AG Bobek Opinion [2021] ECLI:EU:C:2021:294, para 57 (hereafter *FBF v ACPR*, AG Bobek Opinion).

[162] Arts. 1 (5) and 16, and 1(2) and (3), 8 (1) (1bis) and (2) and 16 of Regulation 1093/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Banking Authority) (hereafter EBA Regulation).

[163] *FBF v ACPR*, AG Bobek Opinion, 67-68. See Marco Lamandini and David Ramos Muñoz, *EU Financial Law. An Introduction* (Wolters Kluwer 2016), 659, 733 for an analysis of these two areas.

[164] Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments (hereafter MiFID II).

[165] *FBF v ACPR*, AG Bobek Opinion, 56, 69.

[166] *FBF v ACPR*, AG Bobek Opinion, paras 85-86.

The Court of Justice, however, used the same legal basis, article 74(1) CRD, which states that (emphasis added):

> Institutions shall have *robust governance arrangements* which include a clear organisational structure with well- defined, transparent and consistent lines of responsibility, *effective processes to identify, manage, monitor and report the risks* they are or might be exposed to, adequate internal control mechanisms, including sound administration and accounting procedures, and remuneration policies and practices that are consistent with and promote sound and effective risk management.

However, instead of focusing, like the AG Opinion did, on the reference to 'governance arrangements', the Court focused on the reference to 'effective processes to identify, manage, monitor and report risks'. Guidelines referring to internal processes and structures, and not to, e.g., product suitability or intermediaries' duties, would fall within Article 74 CRD.[167] This reasoning was also used by analogy to also fit the Guidelines within the PSD and the e-money Directive.[168] It was then easy to conclude that, by promoting consumer protection, they also fit within the EBA's broader mandate[169] (step 1). The Court sidestepped the bigger issue raised by the AG's Opinion, i.e., the threat of bypassing the legislative process.

3.3. The role of courts in shaping authorities' application of the law in resolution.

3.3.1. Resolution and substantive review (I): property and other fundamental rights.

Crisis management measures normally entail a serious interference with property, raising the question whether the measures amount to an 'expropriation' or an 'unlawful interference with property'. US courts have dealt with these questions under the Fifth Amendment (the 'Takings Clause'), reserved for expropriation,[170] determining whether crisis measures have gone 'too far' to become an expropriation (if not, *procedural* safeguards apply). In Europe, under the European Convention on Human Rights (ECHR), and the EU Charter of Fundamental Rights (Charter), substantive protections encompass both 'expropriation' and 'interference with' property,[171] besides procedural protections.[172] However, this does not result in a strong objection to an exercise of powers.

An early case, *Bourdouvali* (and the identical *Chrysostomides*) analyzed Cyprus' crisis-management measures,[173] which comprised the bail-in of shares and debt, and a sale of Greek bank branches. The Court held that the measures were proportionate: bail-in was based on a clear and accessible legal framework with creditor safeguards, suitable to the end sought, and proportionate, like the sale of branches.[174]

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[167] *FBF v ACPR*, paras 104-110.

[168] Ibid, paras 114-117, 118-121.

[169] Ibid, paras 125-127.

[170] The Fifth Amendment states that 'private property [shall not] be taken for public use without just compensation.'

[171] Art 1 Protocol 1 ECHR; Arts 16 and 17 of the Charter.

[172] Arts 6 of the ECHR, article 47 (judicial protection) and art 41 (good administration) of the Charter.

[173] T-786/14 *Bourdouvali and Others v Council and Others* [2018] ECLI:EU:T:2018:487 (hereafter *Bourdouvali and Others*); T-680/13 *Chrysostomides, K. & Co. and Others v Council and Others* [2018] ECLI:EU:T:2018:486. Since its text is a verbatim copy of *Bourdouvali and Others*, references will be made to the former.

[174] *Bourdouvali and Others*, paras 268-284. Creditors were not in a position worse than would result in liquidation, the urgency of the case justified the lack of an opportunity to object, there was no manifest error in the assessment of the situation, or the conclusion that a conversion of deposits to achieve a 9% core capital ratio and separating a 'bad bank' were needed; other options were unavailable (the Cyprus parliament rejected less intrusive measures, an ESM recapitalisation was not an option, and a full-scale bail-out was unsustainable for the state), the measures effectively reduced contagion risk and the sale was open and transparent.

Official communications could not generate legitimate expectations for a 'prudent and circumspect' reader, and there was no discrimination.[175] The Court held that bank deposits are not risk-free, that investors' harm must be assessed based not on securities' nominal value, but their 'true' value in a liquidation process,[176] and that the ECB enjoys broad discretion in emergency liquidity assistance (ELA), and was not bound by any 'legitimate expectations'.[177]

These findings were confirmed in the ***Banco Popular*** saga. The General Court relied inter alia on *Chrysostomides* to emphasize that property is 'not an absolute right' and can be restricted if the elements of (a) legal basis, (b) necessity, (c) proportionality are met. Bank crisis management measures typically fulfil those requirements, and it is widely admitted that shareholders bear first losses, and their investment carries risks. The measures were (a) provided for in the SRMR, (b) necessary to ensure financial stability and prevent contagion, and (c) proportionate to the ends sought. The SRB had adequately justified why it used the sale of business and discarded other alternatives, and the differentiated treatment of shareholders and depositors amounted to no discrimination, because shareholders are not comparable to depositors. Furthermore, the NCWO principle prevented a worse treatment than under liquidation.[178]

Claims of a 'lack of compensation' were misdirected against resolution measures, and should focus on the official valuation specifically oriented at establishing compensation rights; or they were unjustified, because property rights do not guarantee immediate, unconditional payment.[179] Any compensation should take as counterfactual the shares' value in a *liquidation*, not their market value at the moment of intervention, nor their value in a hypothetical private solution, nor their value under a hypothetical 'definitive valuation'[180] which has a different purpose, and was (lawfully) not carried out in this case. Finally, property rights do not grant their holders a specific right to be heard, and restricting any such right would have been proportionate to ensure financial stability and prevent contagion, which require very short time periods.[181]

Caselaw shows, in our view, the 'evanescence' of property rights over banks' financial instruments (shares or bonds) in crisis contexts. Courts go to great lengths to protect the public interest in resolution, despite private rights.

This raised important issues in *Banco Santander v J.A.C. and M.C.P.R.*, where Banco Popular shareholders claimed that they had been mis-sold the bank's shares by way of a false prospectus[182] and the bank had hidden the real financial situation of the bank in a public offer consummated only one year before the bank's resolution. The Court of Justice concluded that, where there is a potential clash, the public interest in resolution prevailed over investor protection, and shareholders whose shares were cancelled could not claim damages for mis-selling nor (retroactive) annulment and restitution. The Court noted that the right of property under Article 17 of the Charter, and the right to an effective judicial protection under Article 47 of the Charter, are not absolute rights.[183] The Court conceded that these litigious claims should be an input in the compensation, if any, due to shareholders and creditors in resolution, i.e., the value of the claims should be considered when comparing the shareholders' treatment in resolution and in

[175] Ibid paras. 403-508.

[176] Ibid, paras 313, 317, 320.

[177] Ibid, paras 361-402.

[178] *Tatiana Pérez,* 482-501, 502-505; *Del Valle,* 504-506, 511, 512-526; *Algebris*, 406-408, 413-421, 422-427; *Eleveté,* 199-208.

[179] E.g., *Algebris* paras 416-421.

[180] *Tatiana Pérez,* 512-525; *Algebris,* 417, 422-427, *Del Valle* paras 511-526.

[181] *Tatiana Pérez* 527-530; *Del Valle* 533.

[182] Case C-410/20 *Banco Santander SA v J.A.C. and M.P.C.R* [2022] ECLI:EU:C:2022:351 (hereafter *Banco Santander*)

[183] Ibid, para 47.

liquidation.[184] However, the Court's attempt to preserve the functioning of resolution came at the price of legal uncertainty. Its broad statement, which has been reiterated more recently in a preliminary ruling case under Article 267 TFEU from the Spanish Tribunal Supremo[185], did not resolve the fundamental matter of how such a non-accrued claim for damages or restitution claim for securities laws violations should be considered when calculating compensation.

The challenges go beyond the merely technical, though.

Banco de Portugal v VR[186] offers an interesting contrast to the previous cases. In this case the Court of Justice decided a preliminary reference by the Spanish Tribunal Supremo concerning the resolution of Banco Espirito Santo (BES) by Portuguese authorities. The appellant, a holder of BES' liabilities, brought an action in February 2015 against Novo Banco, the bridge bank, to which Banco de Portugal, the national resolution authority, transferred in August 2014 BES assets, and some of its liabilities, including the liabilities held by the applicant, as held by a Spanish appellate court in October 2015. A subsequent decision by Portuguese authorities on 29 December 2015, however, 'clarified' that the liabilities had not been transferred, or rather retroactively 'transferred back' the liability to BES (as the referring Court presented it). The Court of Justice held that the Directive on the Winding Up of Credit Institutions, *interpreted in light of the principle of legal certainty and judicial protection,* precluded an automatic and unconditional recognition of measures 'aimed precisely to render inoperative' the judgment by the Spanish court. The Court could have delved deeper into whether the decision by Portuguese authorities was a 'retroactive' aim to render inoperative a (Spanish) court decision, or a 'clarification' of the scope of the transfer.[187]

However, the Court in *Banco de Portugal v VR* did well in analysing the fundamental implications of some seemingly technical (even abstruse) matters. This aspect, we regret to say, was missing in *Santander (and now in Santander II)*. Perhaps the fact that, unlike the BES measures adopted under national law, the *Banco Popular* measures were adopted under EU law weighed in on the Court's willingness to provide certainty and clarity. In any event, by failing to acknowledge the tension between bank resolution, on one hand, and securities laws and investor protection, but also the wider implications for fundamental rights, on the other hand, the Court, in our view, did not say a truly final word on this important issue, which is bound to appear again.

By way of conclusion, banks' highly regulated environment means that courts are ready to accept a relatively high level of interference to preserve financial stability. Thus, claims based on property rights are normally disregarded. Property is a substantive right, with a broad scope; courts tend to be more comfortable with claims based on procedural safeguards, and/or precise rights, based on the specific statutory scheme. It is hard to identify any added protection dispensed by property rights. In fact, applicants use property rights as an accompanying, not a 'core', claim.

3.3.2. Resolution and substantive review (II): conditions for intervention

Conditions for intervention are a litigious issue. To avoid contagion and systemic risk, forward-looking triggers are needed, to intervene when the bank may still be solvent. This inevitably makes them

[184] Ibid, paras 48-50.

[185] Judgment of 5 September 2024, in Joined Cases C-775/22, C-779/22 and C-794/22, *M.S.G. and Others v. Banco Santander* ECLI:EU:C:2024:679 (hereafter "*Santander II*")

[186] Case C-504/19 *Banco de Portugal, Fundo de Resolucao, Novo Banco v. VR* [2021] ECLI:EU:C:2021:335, para 51.

[187] In Goldman Sachs International v Novo Banco, [2018] UKSC 34 the Supreme Court of the UK, following the Court of Appeal, considered a subsequent decision by Banco de Portugal as an 'adjustment' (or interpretative clarification) of the scope of the transfer, and thus subject to automatic recognition.

contentious. In *Banco Popular* the appellants challenged the ECB's finding that the bank was Failing-or-Likely-to-Fail ("FOLTF") due to a serious liquidity crisis and deposit outflows, and the bank's lack of collateral to obtain further liquidity, even though the findings about its capital/solvency position were not conclusive. The General Court used the canonical standard, based on 'manifest error of assessment' and process-based review.[188]

However, in practice the General Court also made a substantive review, upholding the SRB's interpretation of the relevant provisions on the conditions for resolution. An FOLTF finding over a solvent, yet illiquid, institution was permitted by the law's (i) text, which expressly contemplated the FOLTF assessment due to a potential inability in the near future to pay debts as they fall due, separately from 'balance sheet insolvency'; (ii) the context, including the recitals, which supported this interpretation; and (iii) the EBA's Guidelines, which included a FOTLF finding for breach of liquidity requirements.[189]

The SRB decision properly weighed the relevant factors without any manifest error of assessment. First, Banco Popular breached liquidity requirements, and could not restore compliance, i.e., its problems were not temporary.[190] Second, no alternatives, such as supervisory or private sector measures could ensure recovery. The appellants could not point at any alternative other than Emergency Liquidity Assistance (ELA), which was not within the SRB's power to grant, and, though approved by the ECB, it was insufficient to meet the shortfall; and was eventually withdrawn by the Bank of Spain.[191] The bank's liquidity position prevented any private transaction, e.g., capital increase, sales of assets, merger, or private sale process.[192] Even the entity's board acknowledged that the bank was failing.[193] Third, and finally, the Court found no error in the finding of a public interest in resolution: ordinary insolvency could result in greater creditor losses, and shareholders' and subordinated creditors' losses were outweighed by the need to preserve critical functions and financial stability.[194]

In *ABLV v SRB,*[195] the U.S. Treasury, through the Financial Crimes Enforcement Network (FinCen), announced a draft measure to designate ABLV Bank as an institution of primary money laundering concern pursuant to Section 311 of the USA PATRIOT Act. The bank was since unable to make payments in US dollars, triggering a liquidity crisis, leading the ECB to communicate to the bank that it had to post 1 billion Euro in cash in its account with the Latvian Central Bank by a specific deadline to avoid default. The bank challenged this decision as disproportionate. The Court dismissed the claim: a liquidity crisis could trigger the FOLTF finding, and the appellant had not given evidence of the *implausibility* of the ECB conclusions about the bank's short-term liquidity needs.[196] The pending cases in *Sberbank* shall more likely give the European courts further leeway to deepen these aspects.

[188] *Tatiana Pérez* paras 167-171; *Del Valle* paras 107-110; *Eleveté* paras 111-115; *Algebris* paras 105-109; *Aeris* paras 115-119. See Koen Lenaerts 'The European Court of Justice and Process-Based Review' *Yearbook of European Law* Yearbook of European Law, Vol. 31, No. 1 (2012), pp. 3-16.

[189] *Tatiana Pérez,* 373-375, 384-388 ; *Del Valle*, 332-334, 341-345 ; *Eleveté*, 129-131, 141-145.

[190] *Tatiana Pérez,* 379-383; *Del Valle,* 337-340; *Eleveté*, 148-158.

[191] See, e.g., *Tatiana Pérez,* 394-407; *Del Valle*, 368-377; *Eleveté,* 154-158. Early intervention measures were not the SRB's competence. See *Tatiana Pérez* paras 453-454.

[192] *Tatiana Pérez,* 408-419 ; *Del Valle,* 363-366, 381-401; *Eleveté,* 193-231.

[193] *Tatiana Pérez,* 367-368; *Del Valle,* 328-329, 362.

[194] *Tatiana Pérez,* 434-440; *Eleveté,* 239-255.

[195] Case T-280/22 *ABLV Bank v SRB* [2022] ECLI:EU:T:2022:429 (hereinafter *ABLV v SRB*)

[196] *ABLV v SRB*, paras 94 and 116-124

3.3.3. Resolution and procedural safeguards: good administration and judicial protection.

Since substantive rights provide limited respite, shareholders and creditors often rely on procedural safeguards. The longer US experience focuses on the 'arbitrary and capricious' standard, while the EU standard is at an earlier stage in the specific field of bank crisis management. One must differentiate between before *Banco Popular*, and after.

Before *Banco Popular* some cases by the European Court of Human Rights (ECtHR) focused on *procedural* safeguards, showing similar features.[197] In *Credit and Industrial Bank v. Czech Republic*[198] and *Capital Bank v. Bulgaria,*[199] Czech authorities and Bulgarian authorities declared a bank insolvent, withdrawing its license, and winding it up; applicable rules made the intervention unchallengeable before the Courts;[200] in the case of Credit and Industrial Bank the board was replaced with an insolvency administrator appointed by administrative authorities, and the former directors/representatives lacked standing to appeal on behalf of the bank.[201] The ECtHR concluded that there had been a breach of procedural rights.[202] In *Credit and Industrial Bank*, the absence of powers of representation rendered review practically impossible (also, the decision was adopted without hearing the bank, and not subject to appeal. [203] In *Capital Bank*, the decision was notified after its adoption, and courts lacked 'full jurisdiction'; a hearing before the Central Bank could not replace this.[204] The ECtHR also held that the specialty of the 'banking business' and financial stability could justify stricter time limits, not absence of review, or a hearing: the license was withdrawn months after the bank was subject to administrative intervention measures.

In the *Banco Popular* cases the General Court dealt with all kinds of procedural challenges under the canonical standard for 'complex assessments', based on '**manifest error**' or misuse of powers.[205] This required the court to *also* examine the accuracy, reliability and consistency of the SRB's evidence, i.e., '**process-based review**', leaving the appellant the burden to show that the SRB's factual assessment was *implausible*.[206]

An important element of the procedure was the **valuation** prepared by the SRB on 5 June 2017 under Article 20(5) (a) SRMR, to determine the conditions for resolution (Valuation 1), and another valuation by an independent expert on 6 June 2017 (Valuation 2), and subsequent **sale process**, which adjudicated Banco Popular to Banco Santander for 1 euro, as the only bidder that made a final offer. The General Court accepted that Valuation 1 was carried out by the SRB, and not an independent person as required by the SRMR, because the urgent situation enabled the SRB to carry the valuation itself, and such valuation was rendered obsolete by the ECB's FOLTF assessment on 6 June 2017, based on more up-to-date information on deposit withdrawals.[207] The Court also dismissed allegations about the expert's independence, the methodology, which despite uncertainty and time constraints, complied with technical criteria, and was

[197] See, for example, Marco Lamandini, David Ramos, and Javier Solana, 'The European Central Bank (ECB) Powers as a Catalyst for Change in EU Law. Part 2: SSM, SRM and Fundamental Rights' 23 Col J of Eur L 2, 199-263.

[198] *CME Czech Republic B.V. v. The Czech Republic* [2003] Award by Wolfgang Kühn, Stephen Schwebel and Ian Brownlie under UNCITRAL Rules (hereafter *Credit v. Czech Republic*).

[199] *Capital Bank AD v. Bulgaria*, App no 49429/99, 24 November 2005 (hereafter *Capital Bank AD v. Bulgaria*).

[200] *Credit v. Czech Republic*, 69; *Capital Ban AD v. Bulgaria*, 27–33.

[201] *Credit v. Czech Republic*, 58.

[202] The applicants also challenged the measures on grounds of a breach of 'possessions' under article 1 of Protocol 1, but the ECtHR did not examine the claim (*Credit v. Czech Republic*), or the analysis did not result in any specialties (*Cap. Bank v. Bulgaria*).

[203] *Credit v. Czech Republic*, 69–72.

[204] Ibid, 105–109, 134–135.

[205] *Tatiana Pérez* paras 167-169; *Del Valle* paras 107-108; *Eleveté* paras 111-112; *Algebris* paras 105-106; *Aeris* paras 115-116.

[206] *Tatiana Pérez* paras 170-171; *Del Valle* paras 109-110; *Eleveté* paras 114-115; *Algebris* paras 108-109; *Aeris* paras 118-119. For a similar conclusion compare also *ABLV v SRB*, paras 94 and 116-124

[207] *Tatiana Pérez* paras 562-573; *Del Valle* paras 263-267; *Eleveté* paras 293-303.

"reasonable, prudent and realistic": it did not show large divergence between scenarios, and any difference with Valuation 1 was irrelevant, since its purpose was different, i.e., to determine the conditions of resolution.[208] The Courts also dismissed the argument that the SRB had not conducted an *ex post* definitive valuation, as required by Article 20(11) SRMR, accepting the SRB's view that the valuation served no practical purpose, and was not legally required: Article 20(12) does not mention the 'sale of business' tool because in such case the 'right' valuation results from the tender process.[209] The tender process was found transparent (the SRB addressed the 5 entities that had shown an interest in the sale[210]) and lawful; the admission of Santander's offer even after the deadline set was justified by the urgency of the situation, and the risks that an uncontrolled insolvency posed for financial stability.[211]

The Court also dismissed the allegations concerning the duty to state reasons. The sale process was conducted by the Spanish FROB, and the price resulted from a competitive process, and the SRB did not have to justify either. The SRB justified thoroughly the resolution conditions and choice of tool, providing a copy of the resolution scheme, with redacted confidential parts.[212] The SRB was not obliged to consider the hypothetical alternatives suggested by some appellants, who did not explain well (whether?) their solution would have been viable, or ensured the continuity of critical functions.[213] The Commission, for its part, could endorse the SRB's decision without giving its own reasons, and, in any event, the urgency of the situation justified its not giving any.[214]

On the right to be heard, though the measures were *addressed* to the bank, shareholders were affected. However, their right of audience could be limited if justified by resolution's objectives, especially if the effectiveness of urgent measures needs a certain 'surprise effect'; this would be hindered (and the objectives thwarted) if shareholders are given audience.[215]

Effective judicial protection was also respected. Shareholders could file annulment and other claims, and judicial protection does not impose a right to challenge *ex ante* and/or to have a court undo the measures.[216] The appellants' lack of access to the documents used by the SRB for its decision was not unlawful: the bank, not its shareholders, has a right of access to the file (Article 41 of the Charter), and cannot comprise confidential information, e.g., facilitated by third parties, who must be able to trust that such confidentiality (is observed?).[217]Also, the appellants were facilitated (provided?) non-confidential versions of several of the relevant acts.[218]

Finally, the Court rejected the allegations that the SRB Chair's interview with Bloomberg, followed by a Reuters article citing anonymous 'official' sources at the Commission or SRB breached confidentiality and triggered the liquidity crisis. The SRB Chair had made relatively general remarks and did not disclose any confidential information, the appellants could not produce evidence of that the 'official' was, in fact, someone at the Commission or SRB, and the troubles of Banco Popular were in the public domain. Even a breach of confidentiality could not annul the resolution decision, since the conditions for resolution

[208] See, e.g., *Eleveté,* 305-327, 331-345, 348-353, 354-393, 394-411.

[209] Cases C-874/19 P *Aeris* [2021] EU:C:2021:1040; and C-934/19 P *Algebris* [2021] ECLI:EU:C:2021_1042. Even the invalidity of the *expost* valuation could not affect the validity of the resolution decision, as it was subsequent to it.

[210] See, e.g., *Tatiana Pérez* paras 630-653.

[211] Ibid 654-700.

[212] See, e.g., *Eleveté,* 538-569.

[213] *Aeris* paras 669-697.

[214] *Del Valle* paras 550-562; *Algebris* paras 149-155.

[215] *Tatiana Pérez,* 209-242; *Del Valle,* 136-185; *Eleveté,* 446-493; *Algebris,* 341-387; *Aeris* 251-272.

[216] *Del Valle* paras 187-199.

[217] *Tatiana Pérez,* 321-337; *Del Valle,* 456-480; Eleveté 495-523.

[218] *Del Valle* paras 481-483; *Eleveté* paras 524-526.

were fulfilled, and the decision was not caused by the leak, but by multiple events, related to Popular's financial situation.[219]

With the cases still in the pipeline (and subsequent appeals), and the pending *Sberbank* cases, *such challenges* will continue to shape bank crisis management case law for years to come.

3.3.4. Resolution and investment treaty disputes.

Protection under investment treaties[220] originated in cases of blatant expropriation and abuse, but has significantly evolved under standards like 'Fair and Equitable Treatment', or 'Full Protection and Security',[221] to be assimilable to (or stronger than) constitutional or administrative protections.[222]

For our purposes, the more relevant standards are: (a) the doctrine of *indirect expropriation* and (b) the 'Fair and Equitable Treatment' standard. The former distinguishes between regulatory intervention, which the investor has to endure, and expropriation, which carries compensation corresponding to the severity or economic impact of the measure.[223] The 'Fair and Equitable Treatment' ("**FET**") standard protects the investor's 'legitimate expectations'[224] about the legal environment when the investment was made,[225] or the procedural 'fairness' with which the investor is treated,[226] including administrative due process and similar safeguards.[227]

The FET standard does not prevent States from passing new rules, but it recognizes the right of investors to compensation upon certain changes in regulation or licensing, even 'crisis' measures.

In *Del Valle Ruiz v Spain*[228] the claimants alleged that Spain had breached its investment treaty obligations, especially the FET standards, in the crisis management of Banco Popular. The case presented a major jurisdictional problem because the Mexico/Spain investment treaty does not cover acts of EU authorities and the failing or likely to fail and resolution decision were adopted by European authorities, and the Spanish FROB simply implemented the resolution action. Claimants alleged that Spain had failed to act to correct the acts of other parties in order to prevent the bank's failure.

The Tribunal declared itself competent to decide only on Spain's actions, taking into account all elements as factual context. The Tribunal held that Spain was not under a duty to end deposit withdrawals or correct public officials' statements or enact a short sales ban; most notably that in the ELA process the Bank of Spain had not exceeded its discretion in assessing the adequacy of collateral or applying haircuts and the ultimate decision not to grant ELA was precipitated by the bank board's assessment that the bank was FOLTF and that FROB neither pushed the SRB to use the sale of business tool nor organized a flawed action process. In conclusion, the arbitral tribunal categorically dismissed all the claimants' allegations, to

[219] *Eleveté* paras 603-627; *Algebris* paras 156-213; *Aeris* paras 431-449.

[220] See Lamandini, Ramos, and Solana, 'The European Central Bank (ECB) Powers as a Catalyst for Change in EU Law. Part 2: SSM, SRM and Fundamental Rights'.

[221] For a criticism, see Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' [2005] Fordham L Rev 73, 1521, 1558.

[222] *See* Thomas Eilmansberger, 'Bilateral investment treaties and EU law' [2009] CMLR 46, 383, 383–429.

[223] *See, eg, Metalclad Corp. v. United Mexican States* [2000] ICSID Case No. ARB(AF)/97/1; *Metalclad Corporation v. The United Mexican States* [2002] 5 ICSID Rep. 209, 225 (hereafter *Metalclad*); *CME v. Czech Republic* [2001] Partial Award. This can include the appointment of a manager if that manager interferes with the property involved. The test also considers the intent to expropriate, but this is not essential. *Metalclad Corp.*, para 101.

[224] *See, eg, Metalclad* 225.

[225] *BG Group plc v. Republic of Argentina* [2007] Final Award.

[226] *Waste Management, Inc. v. The United Mexican States* [2004] ICSID Case No. ARB(AF)/00/3, 6 ICSID Rep. 538.

[227] *International Thunderbird Gaming Corporation v. United Mexican States* [2006] Arbitral Award, 200.

[228] *Del Valle and Others v Kingdom of Spain* (2023) Case No 2019-17.

the point of making an award of costs to the respondent. It did so by engaging with the facts in an analysis as detailed and comprehensive as the one in the pilot cases decided by the General Court.

Thus, neither the arbitral tribunal nor the European courts condoned the governmental actions in the name of financial stability. They rather evaluated the measures in terms of substance and procedure.

It is worth noting that the arbitral tribunal discussed at length the standard of proof, which relates to the degree of certainty required for a tribunal to find that a fact alleged by the claimant is proven. It considered that the tribunal enjoys wide discretion in the weighing of the evidence and applied the standard of reasonable certainty. It also noted that the claimants had requested the tribunal to apply a standard of proof lower that the preponderance of evidence and shift the burden of proof to the respondent which had, in the case, exclusive control over evidence and had taken steps to deny access to relevant evidence to the claimants. The tribunal considered in principle that, depending on the circumstances, in its discretion it may determine that the burden of proof should be shifted or the standard lowered "and ultimately whether an alleged fact can be deemed established under the circumstances".[229] However, the tribunal concluded that in the case at hand all crucial facts, including those concerning the alleged ELA suspension on 6 June 2017[230], were in the end established with reasonable certainty grounded on documental evidence submitted by both parties.

4. EUROPEAN COURT'S SCRUTINY OVER SANCTIONS AND ENFORCEMENT MEASURES IN THE BANKING UNION.

Although supervision and resolution both entail the exercise of intrusive powers, sanctions and enforcement measures carry a special meaning, for both substantive and symbolic reasons, and that is why they merit special consideration. The exercise of sanctioning powers by EU financial authorities is beginning to grow now, but the framework for such powers rests on a rich body of case law from both the ECtHR and the CJEU, on the exercise of such powers by authorities in Member States, of which we offer a brief summary, focused on three main challenges: the classification of sanctioning measures as 'criminal' or 'punitive' (4.1.); the courts' standard of review, including the role of general principles such as legality, 'seriousness' or proportionality (4.2.) and the specific safeguards, both procedural (the privilege against self-incrimination) or substantive, such as the presumption of innocence and the (substantive) *ne bis in idem* (4.3.)[231]

4.1. 'Criminal' measures.

In the EU, classifying a measure as 'criminal' triggers certain fundamental safeguards e.g., the right to silence, or *ne bis in idem*, and enhances others, e.g., proportionality. Both the ECtHR and the CJEU interpret

[229] *Del Valle and Others v Kingdom of Spain* (2023) Case No 2019-17 *Del Valle and Others v Kingdom of Spain* (2023) Case No 2019-17, paras 495-497

[230] *Del Valle and Others v Kingdom of Spain* (2023) Case No 2019-17, paras 592-659 (and at 635 the finding that "upon a review of the entirety of the record, the Tribunal comes to the conclusion that there was nothing unreasonable or arbitrary in the conclusion of the Bank of Spain that Banco Popular had not managed to provide sufficient collateral and to pledge it in accordance with the applicable requirements to justify disbursements in excess of the sum of 3.8 billion that Bank of Spain had released to Banco Popular".

[231] For a detailed analysis of the background on these issues, see Marco Lamandini, David Ramos, and Javier Solana, 'The European Central Bank (ECB) as a Catalyst for Change in EU Law. Part 2: SSM, SRM and Fundamental Rights' [2016] CJEU 207-09 .

the term 'criminal' autonomously under the *Engel* test and have considered administrative fines as 'criminal' despite statutory language to the contrary.[232]

Starting with the *Grande Stevens* judgment of the ECtHR and the Court of Justice findings in *Spector Photo Group,*[233] or *DB v CONSOB,* some of the administrative sanctions imposed by supervisor appear to pursue a punitive purpose and to present a high degree of severity such that they are liable to be regarded as being criminal in nature.[234]

In the Banking Union, there are many administrative measures that could in theory be characterized as having a punitive purpose, which requires further elaboration by the courts. In *Pilatus Bank* the General Court held that the decision to withdraw a bank's license due to the criminal indictment of its shareholder in the US was not 'criminal' in nature, and could not benefit of the presumption of innocence, because the withdrawal decision was taken once the indictment had led to a massive withdrawal of deposits and the request of early termination of the practical totality of the bank's loans. In other cases, the appellants did not even seek to classify the measures as 'penalties', such in *Berlusconi II*, where the ECB refused to authorize the acquisition of a qualified holding in a significant bank, due to the appellant's previous criminal conviction (there, the appellant alleged violation of other principles like non-retroactivity, legal certainty, proportionality and rights of defence) and in *Anglo Austrian (AAB)* or *Versobank*.

What explains this cautious approach? To be effective, financial supervision needs swiftness to correct a breach or deterioration or address a crisis. If measures like the refusal to authorise an acquisition, a request to replace directors, the withdrawal of a license, or the deployment of resolution tools, instead of being seen as almost automatic reactions to correct imbalances are seen as 'sanctions', the system cannot function properly. Thus, in *Pilatus, Berlusconi II, AAB* or *Versobank* the Courts simply followed the approach of cases like *Banco Popular* or *ABLV,* i.e., reject the appellants' 'narrative of blame' (or lack thereof), which would inevitably raise the burden for the authorities, and accept the 'narrative of fact' of the authorities, focused strictly on matters such as the financial position of the entity, or the trust placed in a person or institution. A classification of measures as non-punitive, in turn, grants the Courts more flexibility to calibrate their substantive scrutiny or the procedural safeguards.

Consider *VTB,*[235] where the Austrian VTB Bank sought the annulment of a supervisory decision to levy 'absorption' interests for exceeding the large exposure limit (Article 395 CRR) before national courts. National courts made a preliminary reference to the Court of Justice to ask about the compatibility with EU law of the *automatic* application of such measure under national law. The Court concluded, contrary to the national supervisor, that such measure was not a non-punitive 'economic control' measure to recover the advantage obtained by breaching the limit of Article 395 CRR, but an administrative measure within the meaning of Article 65.

Taking the issue a step forward, more recently in *Sber*[236] the General Court held that similar decisions levying absorption interests under the SSM regulation and pursuant to Austrian national law are **a *non-punitive* prudential measure, and thus an administrative measure rather than an administrative penalty**; in *Sber* this took the Court to conclude that, although the Bank had already been the subject of an administrative pecuniary penalty under the SSM regulation at the time of application of the absorption

[232] Art 23(5) of the Council Regulation 1/2003/EC on the implementation of the Rules on Competition laid down in arts 81 and 82 of the Treaty [2003] OJ L 1.

[233] Case C-45/08 *Spector Photo Group* [2009] ECLI:EU:C:2009:806 (hereafter *Spector*).

[234] Case C-481/19 *DB v. CONSOB* [2021] ECLI:EU:C:2021:84.

[235] Case C-52/17 *VTB Bank (Austria) v Finanzmarktaufsichtsbehörde* [2018] ECLI:EU:C:2018:648.

[236] Joined Cases T-647/21 and T-99/22, *Sber v ECB* [2024] ECLI:EU:2024:T.127

interests and the amounts of both administrative measures were significant, there was no violation of the *ne bis in idem*.

4.2. Courts' standard of review, and the role of legality or proportionality

As explained above in point no. 2.2.2. there are relevant reasons why Courts define in advance the **standard of review** that they will apply to decisions by administrative authorities. This enhances legal certainty, and balances accountability and respect for the authorities' discretion. However, sometimes the concepts used by the Courts to define their review standard are very general, and do not provide very specific guidance in concrete cases, nor capture fully what the Courts actually do when revising administrative decisions (in their decisions involving 'complex' assessments European courts define their approach as reviewing for 'manifest errors' of assessment).

In decisions involving sanctions and penalties the standard of review is even more relevant. Such decisions carry a special (graver) significance, and a 'deep' review by independent bodies is a precondition to ensure that the decision complies with fundamental rights. The **ECtHR's case law has expressed this idea by requiring a 'full review' (as opposed to a 'legality review', or 'marginal' review) as a condition to find that a state complied with Convention rights.**[237] In *Grande Stevens* the Court held that the review by the Turin Court of Appeal of insider dealing penalties imposed by the Italian Securities Commission 'CONSOB' fell short of standards:[238] the court was impartial, independent, and had full jurisdiction, it reviewed the reasons for the decision and reduced some penalties for being disproportionate, but it was unclear whether its hearings were 'public,' or whether there was an effective equality of arms between the parties, and the Supreme Court's public hearings were insufficient to restore compliance, as it was not a court with 'full jurisdiction'.[239]

The discussion about the standard of review of penalties arose in the early stages of the Banking Union due to uncertainties about how to apply Article 261 TFEU to the division of sanctions made by Article 18 SSM, and what this implied for the courts' full review. These issues have been dealt with by case law.

In *VQ v ECB* the General Court held that it exercised full review only for the penalty amount;[240] the Court otherwise made a legality review. However, as seen earlier, a 'legality' review where Courts insist in claiming authority over the finalistic interpretation of legal provisions, combined with process-based review where courts insist in a thorough revision of the factual elements used by the administrative authority to adopt its decision can be quite exacting. In the context of sanctions, too, the role of general principles of Union law such as *legality* or *legal certainty* is particularly relevant.

Appellants have relied on these general principles of EU law to allege that the legal framework was not clear enough. The General Court rejected these arguments in *Versobank,* in *VQ v. ECB*[241] and in *Crédit Agricole*[242].

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[237] *Menarini Diagnostics v. Italy,* app. no. 43509/08, 27 September 2011, 63–67 (hereafter *Menarini*). The ECtHR emphasized that *Consiglio* had gone beyond an 'external' review of the consistency of the decision on penalties, and examined the elements resulting in the final determination.

[238] *Grande Stevens v Italy,* App no 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (4 March 2014).

[239] Ibid, paras 153–55. Public hearings before the *Corte di Cassazione* were not enough, as the court did not have full jurisdiction.

[240] *VQ v. ECB* [2020] ECLI:EU:T:2020:313 (hereafter *VQ*) at 94.

[241] VQ. See also Case T-203/18 *VQ v. ECB* [2018] ECLI:EU:T:2018:261 (hereafter *VQ v. ECB Order*). Compare Laura Wissink, 'The VQ Case T-203/18: Administrative penalties by the ECB under judicial scrutiny' in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing Limited 2021), 542-550.

[242] See *Crédit Agricole*.

Occasionally, the parties have attempted to argue that the rules were too complex, and/or the bank's interpretation was not 'negligent'. In *Crédit Agricole,* the Court dismissed this allegation by the bank. In the *Nordic Banks* "shadow ratings" case, the Joint Board of Appeal of the ESAs accepted the argument.[243] However, it rejected it, on the face of different factual circumstances, in *Scope Ratings v ESMA*[244].

A related argument, straddling between legality and proportionality, in proceedings with a national and a European 'leg', or where EU authorities apply national law, is to argue that the breach of national provisions was neither 'serious' enough, nor established with enough certainty, to justify the enforcement measures. This point, raised in *Anglo Austrian Bank (AAB[245]) by* the appellant, was however unsuccessful.

Perhaps the most common allegation is that supervisory measures, enforcement measures and penalties are not *proportionate*. It was raised in *Berlusconi II* about the fit and proper assessment of a qualified holder, and the General Court dismissed it. It was also raised in *AAB*, where the General Court held that the withdrawal of the license was suitable to end rule violations.[246] However, it was only in *Versobank* that the General Court provided a detailed proportionality assessment, or, rather, discussed the structured and comprehensive proportionality analysis made by the ECB, considered and rejected other alternatives, and dismissed the appeal.

The General Court assessed the proportionality of penalties in *VQ v ECB,* dismissing the applicant's plea. The Court also dismissed the applicant's argument that the publication of the decision had caused 'disproportionate damage' to the bank.

However, more recently, in *BAWAG PSK Bank* (Austria)[247] the Court concluded that the proportionality assessment of the ECB in the application of absorption interest was crucial and mandatorily required under Article 70 CRD. Therefore, national courts had to interpret national law setting out the power to apply absorption interests in conformity with the directive to the point of changing established case-law, where necessary so to grant to the competent authority (ECB) the power to determine the type of administrative measure, taking into account all the circumstances and using their discretion. This would preclude the authority from being in a position of non-discretionary competence as regards the application of absorption interest pursuant to paragraph 97 of the applicable Austrian national law.

4.3. Specific safeguards.

Sanctions and penalties not only result in common principles (judicial protection, proportionality) being applied with more intensity; they also **warrant specific safeguards**. Among properly 'criminal' procedural safeguards, the **'right to silence'**, or privilege against self-incrimination is conceptually the more cumbersome. In *DB v. CONSOB*, the Court of Justice clarified that the privilege applies in market abuse cases, [248] *and* is a fundamental right. The Italian Securities Commission (CONSOB) fined DB for insider dealing and for *failure to cooperate* due to his refusal to answer questions during a hearing. The

[243] BoA D 2019 02, BoA D 2019 03, BoA D 2019 04, Svenska Handelsbanken, BoA D 2019 01, Skandinaviska Enskilda Banken v ESMA, BoA D 2019 05; Swedbank v ESMA, BoA D 2019 06, Nordea Bank v ESMA, BoA D 2019 07 www.esma.europa.eu/it/page/board-appeal.

[244] BoA D 2020/03 *Scope Ratings GmbH v ESMA* (28 December 2020).

[245] Case T-797/19 *Anglo Austrian AAB v ECB* [2022] ECLI:EU:T:2022:389.

[246] Ibid, paras 194-197.

[247] Case T-667/21, *BAWAG PSK Bank v ECB* ECLI:EU:T:2024:131

[248] Case C-481/19 *DB v. CONSOB* [2021] ECLI:EU:C:2021:84 (hereafter *DB v. CONSOB*).

Italian Constitutional Court adhered to this *dictum*[249] and declared the national law unconstitutional *vis-à-vis* the right to silence, but only to the benefit of natural persons.

The **presumption of innocence and rights of defence** were already considered by (a?) European Court in *Spector Photo Group*, an insider dealing case. There the Court of Justice held that presuming that a subject who possessed inside information and had done a trade had 'used' the inside information with 'full knowledge' was compatible with Article 6 ECHR's rights of defence, because *"that presumption is open to rebuttal and the rights of the defense are guaranteed"*,[250] in *Pilatus Bank* the General Court rejected the existence of a breach of the presumption of innocence in a case where the ECB withdrew a bank's licence partly as a consequence of the bank shareholder's criminal indictment in the United States, and the resulting loss of confidence by depositors and investors: the measure (withdrawal of license) was not criminal in nature, and the ECB had based its assessment of the shareholder's 'good repute' on 'allegations', without accepting them as true, and thus the fact that it failed to examine the allegations was not a breach of the safeguards.[251]

An equally important criminal safeguard is the ***ne bis in idem* principle**.[252] Market abuse cases, like *Menci*,[253] *Di Puma*[254] and *Zecca* as well as *Garlsson*[255] considered the compatibility of duplicate proceedings and penalties with the *ne bis in idem* principle. In *Garlsson* the Court held that the objective of guaranteeing the integrity of the financial markets of the EU and public confidence in financial instruments could justify a duplication of proceedings,[256] to the extent that there was coordination of proceedings, but the duplication seemed to go beyond what was strictly necessary (i.e., lack of proportionality[257]). As already noted, more recently, in *Sber*[258] the General Court held that the levying of absorption interests on the basis of the SSM regulation and pursuant to Austrian national law is a *non-punitive* administrative measure, and not an administrative penalty. Thus, although the Bank had already been subjected to an administrative pecuniary penalty under the SSM regulation *and* of the absorption interests, both with significant amounts, there was no violation of the *ne bis in idem*.

5. ALL'S WELL THAT ENDS WELL WITH THREE RECOMMENDATIONS.

Can we then conclude, as in Shakespeare's comedy, "all's well that ends well"? Quite so, yet with *caveats* which point to three main areas, which could benefit from reflection to: increase the role of (maximum harmonisation) regulations over (minimum harmonisation) directives (5.1) adjust courts' standard of review to decision-making under uncertainty, and other challenges observed in the Banking Union (5.2.), and improving the role of financial appeal bodies as a suitable complement of the European courts (5.3.)

[249] Italian Constitutional Court, Judgement no 84/21 (30 April 2021).
[250] *Spector*, para 44. See also paras 39-42.
[251] *Pilatus*.
[252] Lamandini, Ramos, and Solana, 'The ECB as a Catalyst for Change in EU Law. Part 2'.
[253] Case C-524/15 *Luca Menci v Procura della Repubblica* [2018] ECLI:EU:C:2018:197.
[254] Case C-596/16 and C-597/16 *Enzo di Puma v. Consob* [2018] ECLI:EU:C:2018:192.
[255] Case C-537/16 *Garlsson Real Estate v. Consob* [2018] ECLI.EU:C:2018:193) (hereafter: *Garlsson*)
[256] Ibid, paras 44-47.
[257] Ibid, paras 53-59.
[258] Joined Cases T-647/21 and T-99/22, *Sber v ECB* [2024] ECLI:EU:2024:T.127

5.1. EU authorities applying national laws: the case for greater harmonisation.

Ten years-experience with Banking Union case law shows that Article 4(3) SSMR, and the application of national laws by the ECB, has been a breeding ground of complexities and a source of uncertainty for a truly functioning system. It also shows that, whereas some differences between national laws transposing the CRD may be exceptionally justified, many others (the vast majority) are not, and lead to a balkanisation of the Single Rulebook, and to confusion, as shown in *Corneli*. This invites a reconsideration of the respective roles of the CRD and CRR, with a much greater role for the latter, and its directly applicable provisions. This also requires reconsidering the 'constitutional' basis of those rules, in Articles 53 and 59 TFEU, which should be limited to a narrower core of rules, and Article 114 TFEU, which role should be expanded.

Article 53 TFEU allows the harmonisation of the rules relating to the taking up and pursuit of activities as self-employed persons (same as Article 59 TFUE does for services) to facilitate freedom of establishment, by enabling the EU legislature to lay down minimum standards and then "passport", i.e., mutually recognize formal qualifications, licenses. However, this is possible *only* by means of directives, not regulations. CRD is grounded on this legal basis alone.

Article 114 for its part applies "save where otherwise provided in the Treaties", setting out a "general harmonisation competence" which operates as a residual legal basis, to be used (only) where the Treaty does not provide for a more specific legal basis. Unlike Article 53 TFEU, Article 114 TFEU allows for the use of directives and regulations.

In banking the European courts held in the past that Article 53 TFEU should be used for legislative measures aiming "to promote the harmonious development of the activities of credit institutions throughout the Union by eliminating any restrictions on the freedom of establishment and freedom to provide services, while increasing the stability of the banking system and the protection of savers".[259] However, they also acknowledged in *Tobacco advertising*[260] that Article 114 TFUE can be used where the measure genuinely intends to improve the conditions for the establishment and functioning of the internal market, and actually has that effect by contributing to the elimination of likely obstacles to the exercise of fundamental freedom or remove appreciable distortions of competition which are likely to arise from the diverse national rules. The Court also held that Article 114 TFEU may be the legal basis for measures that are legally binding on individuals[261] and even for the establishment of a Union agency, where harmonization measures depend on specific professional and technical expertise.[262] The General Court built on these principles to reiterate the compatibility of the SRMR with Article 114 TFUE.[263] Thus, ideally, the co-legislators could, under Article 296 TFEU decide on a case-by-case the most suitable legal instrument to be adopted, while Courts tend to be deferential when it comes to the selection of the suitable method of approximation for achieving the desired result.[264]

[259] C-233/94 *Germany v Parliament and Council* [1997] ECLI:EU:C:1997:231, para 13 ; Opinion AG Jääskinen in C-507/13 *United Kingdom of Great Britain and Notrthern Ireland v. European Parliament and Council* [2014] ECLI:EU:C:2014:2481 para 109.

[260] C-376/98

[261] C- 270/ 12 *UK v EP and Council (ESMA Shortselling)*, paras 97– 117

[262] *ESMA Shortselling*, para 105

[263] T-405/21, *Dexia Crédit Local v SRB*,[2024] ECLI :EU :T :2024 :33 para 49-87.

[264] C- 58/ 08, Vodafone and Others, para 51.-52.

This view finds growing support in the literature.[265] It also inspires a recent shift in policy. First, it explains the recent trend of EU legislative acts with prudential rules for financial entities and use Article 114 TFUE as legal basis. This is the case, e.g. of Directive (EU) 2019/2162 (covered bonds)[266]; Directive (EU) 2015/2366 (PSD2); Regulation (EU) 2017/2402; Regulation (EU) 2022/2554 (DORA); Regulation (EU) 2023/1114 (MiCAR); Regulation (EU) 2020/1503 (Crowdfunding).[267] **The premise is that a truly integrated financial market for those players needs a consistent and uniform set of rules.**[268]

Second, **the subject-matter of the rules covered by regulations based on Article 114 TFUE has also considerably widened up, encompassing uniform rules on the taking up and pursuit of financial activities and governance arrangements**, traditionally a field for Articles 53 or 59 TFUE. This is the case of the rules for the authorisation, supervision (and governance) of CCPs and trade repositories in Regulation (EU) No 648/2012 (EMIR), or Central Securities Depositories (CSD) under Regulation (EU) No 909/2014 (CSDR), crowdfunding under Regulation (EU) 2020/1503, as well as the entities under Regulation (EU) 2022/2554 (DORAR) and Regulation (EU) 2023/1114 (MiCAR).

Third, experience has shown that the Banking Union's functioning is served well when the institutions are conferred a harmonised set of powers, as it happens with supervisory 'Pillar 2' powers, under Article 16 SSMR, and, conversely, that some of the shortcomings are due to an insufficient level of harmonization in, e.g., the lack by the ECB of the full set of powers enjoyed by NCAs,[269] the variability of background rules on fit and proper assessment, sanctioning powers and anti-money laundering,[270] or the ECB's lack of harmonised powers for early intervention.[271]

Thus, there is compelling evidence to base many of the provisions on the taking up and pursuit of financial activities not on a directive based on Articles 53 or 59 TFUE, but on a regulation based on Article 114, since the prevailing objective is to overcome market fragmentation and improve the functioning of the internal market. The co-legislators should strive to reduce as much as possible the "irreducible core of rules", if any, which *needs* to remain in CRD and based on Article 53 TFEU, which may only include the existing CRD provisions on freedom to establishment and the freedom to provide services, and to widen up the scope of the CRR (under Article 114 TFEU) to include a wide array of provisions currently in the CRD or BRRD or other minimum harmonization directives to create a level playing field for banks in the Banking Union, **including governance, capital buffers and supervisory powers**.

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[265] Chiara Zilioli and Karl-Philipp Wojcik, 'European banking union: a giant step towards european integration and a challenge for judicial review', in C Zilioli and K-P Wojcik (eds), *Judicial Review in the European Banking Union*' (Edward Elgar 2021). Anna-Lena Högenauer, David Howarth & Lucia Quaglia, 'Introduction to the special issue: the persistent challenges to European Banking Union', *Journal of European Integration*, 2023, 45, 1. Giovanni Bassani, 'The Centralisation of Prudential Supervision in the Euro area: The Emergence of a New 'Conventional Wisdom' and the Establishment of the SSM', *European Business Law Review* 31, no. 6 (2020). According to the last Author, "*In the end, transposition of Directives, "national powers" and "options and discretions" for Member States in a directly applicable Regulation deliver a variable geometry "patchwork" of applicable legal requirements that prevent a true centralisation of prudential powers and impede the establishment of a single prudential supervisory jurisdiction within the Euroarea*".

[266] In its Opinion on the legal basis, the Committee on Legal Affairs of the EP suggests to delete Article 53 TFUE, noting that Article 53's basic principle of "*access to a profession*", would be *"accessory to the preponderant aim of the proposal, which is the harmonization of the regulatory treatment of covered bonds"*.

[267] This recent trend is not entirely new: less recently, see Regulation (EC) No 1060/2009 (Credit rating agencies).

[268] See Regulation (EU) 2017/2402, Regulation (EU) 2020/1503, Regulation (EU) 2023/1114, Regulation (EU) 2022/2554.

[269] Commission Report to the European Parliament and the Council on the Single Supervisory Mechanism (COM(2017) 591 final), 11.10.2017 p. 8.

[270] Commission Report to the European Parliament and the Council on the Single Supervisory Mechanism (COM(2023) 212 final), 18.4.2023, p. 20.

[271] Commission Report to the European Parliament and the Council on the BRRD and the SRMR (COM(2019) 213 final), 30.4.2019 p. 6. The recent proposal to reform the Crisis Management and Deposit Insurance (CMDI) framework (COM(2023) 226 final) 18.4.2023 suggests replacing Article 13 SRMR with a new set of provisions (Articles 13 to 13c).

5.2. Courts' and quasi-courts' standard of review in the Banking Union: uncertainty and plausibility assessment.

Banking Union case law shows that the analysis of future scenarios pervades both supervision and resolution. The idea of system-wide 'events' captures this logic in the extreme cases. Thus, **to ensure financial stability, authorities engage in supervisory, preparatory and preventative public actions largely based on forward looking, speculative assumptions**. Although the General Court in *Tatiana Pérez de Guzmán* raised doubts about the applicability of the 'precautionary' principle in the banking sector, noting that Article 191(2) TFEU and existing case-law confine so far that principle to environmental policy and public health,[272] the logic seems to be the same: **upon a context filled with uncertainty and known unknowns, authorities should act when the risk of a 'false negative' clearly outweighs the risk of a 'false positive'; or, to put it simply, where it is better safe than sorry**.[273]

Therefore, whether it is stated explicitly or not, bank supervision and resolution require combining more 'familiar' assessments, e.g., the conclusion that a certain event will occur in the future, in a binary probabilistic assessment, as in the likely failure of a FOLTF assessment based on the bank's deteriorating liquidity position,[274] with assessments that require making assumptions beyond a single probability distribution, to minimize the harmful consequences in each scenario e.g., "maximin with multiple priors",[275] or **assessments that require weighing probabilities, but factoring in black swans and fat tail events**.

Given the uncertainty and the economic stakes, these assessments become policy and legal battlegrounds. Any solution by the courts will shape their standard of review, the scope for the authority's discretion and the evidentiary standard to be discharged by the parties.

Just to give a few recent examples, first, a FOLTF assessment, as shown in the *Banco Popular, ABLV* and *Sberbank* cases is not a balance-sheet insolvency test; instead, typically, there will be a liquidity crisis, with deposit outflows, which will require a forecast of short-term liquidity outflows, and a parallel assessment of present and future conditions for access to emergency liquidity assistance from the relevant Central Bank. Second, a credible resolution plan must forecast the business profile of the resolved entity at the time of resolution and after: generally, a smaller balance sheet (so called 'balance sheet depletion at resolution') may justify lower post-resolution capital levels to operate; conversely, increased capital levels may be needed to sustain market confidence for an entity that was just subjected to resolution measures. This requires robust, yet hypothetical assumptions about the expected balance sheet depletion (i.e., how the reduction in the balance sheet size will impact the diminished credit risk), and the potential divestitures made before or at the point of resolution, which may be envisaged in the recovery plan, agreed with the supervisory authority, as well as the capital levels needed to sustain market confidence. These matters were discussed e.g. in case 1/22 before the Appeal Panel. Finally, to subject an entity to resolution planning and MREL levels the resolution authority must conclude that resolution objectives will be better served by deploying resolution tools, under a Public Interest Assessment (PIA), which simultaneously consider two hypothetical failure scenarios: one idiosyncratic and the other in the context

[272] Case T-481/17, *Tatiana Perez*, paras 446-448.

[273] D. Ramos Muñoz, A. Cabrales, A. Sanchez, 'Central Banks and Climate Change (Part 1): Does Climate Change Fit in Central Banks' Mandates?', 6 *Bus. & Fin. L. Rev* 213 (2023) and D. Ramos Muñoz, A. Cabrales, A. Sanchez, 'Central Banks and Climate Change (Part 2): Can Central Banks Intervene Now? And How?', 6 *Bus. & Fin. L. Rev* 213 (2023).

[274] EBA Guidelines on FOLTF assessments EBA/GL/2015/07; on its implication for the Banco Popular FOLTF see *Eleveté Invest*, paras 140-144, in particular at 143.

[275] D. Ramos Muñoz, A. Cabrales, A. Sanchez, 'Central Banks and Climate Change (Part 2), p. 269; Itzhak Gilboa, David Schmeidler, 'Maxmin Expected Utility Theory with a Nonunique Prior' 18 Journal of Mathematical Economics, (1989), p. 141.

of a system-wide crisis. Ultimately, also the choice of the resolution tool is *per se* a dynamic multi-scenario decision-making in uncertainty.

Thus, in the real world, weighing the costs and benefits of action ("false positives") and inaction or insufficient preparation ("false negatives") is not an easy task. European courts have acknowledged the degree of technical discretion needed by supervisory and resolution authorities, most notably in the *Credit Lyonnais* and *Banco Popular* pilot cases, while providing a thorough and demanding review, and the same happens with the review by the SRB Appeal Panel and the ECB ABoR.

The General Court's intensity of review is exacting, comprising the scrutiny that the evidence relied on by the SRB is factually accurate, reliable and consistent, and also whether it constitutes *all* the relevant information which must be taken into account in order to asses a complex situation *and* whether that information is capable of supporting the conclusions drawn from it.[276] The administrative review is exacting in law and facts, but (i) cannot lead to a de novo evaluation and (ii) needs to respect the margin of appreciation conferred by the applicable rules.[277] The thorough review of law *and* of facts can be better appraised if the composition of administrative bodies ensures technical expertise beyond legal knowledge. However, their review is limited by the type of discretion conferred on the authority by the legal framework, be it full "discretion" e.g., if a provision expressly states that the agency "may" (or may not) grant a certain derogation from a requirement, or a margin of "technical" appreciation. Although the discretionary choices cannot be subject to a de novo assessment, any time an appealed decision rests on a discretionary choice, the statement of reasons is key, and the requisite standard to be met by the decision is exacting.[278]

To give an example, in the cases concerning iMREL waivers the SRB applied Article 12h SRMR, as amended by Regulation 877/2019, which provides that (emphasis added):

> The Board *may* waive the application of Article 12g in respect of a subsidiary of a resolution entity established in a participating Member State where: […] *(c) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary in respect of which a determination has been made* in accordance with Article 21(3), in particular where resolution action is taken in respect of the resolution entity.

The provision combines (1) the granting of *discretion* to the SRB "even when the conditions set out in that provision are met",[279] with (2) the condition that "there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities", which must be complied with before a waiver is considered by the Board, and, given its open-textured formulation, confers to the agency not full discretion, but a 'legally bounded' margin of appreciation to verify that the factual and

[276] EGC 1 June 2022, *Fundación Tatiana Pérez v SRB*, T-481/17, ECLI:EU:T:2022:311, EGC 1 June 2022, *Del Valle Ruiz v SRB*, T-510/17, ECLI:EU:T:2022:312, EGC 1 June 2022, , *Eleveté Invest Group v SRB*, T-523/17, ECLI:EU:T:2022:313, EGC 1 June 2022, *Algebris v Commission*, T-570/17 ECLI:EU:T:2022:314 and EGC 1 June 2022, *Aeris Invest v Commission and SRB*, T-628/17 ECLI:EU:T:2022:315

[277] AP, X v SRB, 19 June 2019, Case 21/2019, para 39; see also AP decision in Case 1/21.

[278] Case T-411/17, *Landesbank Baden Württenberg v SRB* [2020] ECLI:EU:T:2020:435 and on appeal C-584/20 and 621/20, *European Commission v Landesbank Baden Württenberg*, [2021] ECLI:EU:C:2021:601; Joined Cases T-351/18 and T-584/18, *Ukrselhosprom Versobank v European Central Bank*, [2021] ECLI:EU:T:2021:669, paras 385-387. This is also consistent with the ABoR practice, which recently published a statement that disclosed that a recurring element in ABoR opinions has been the need for the ECB to provide adequate reasoning of its decisions, and with the AP practice, as recently recalled by the AP, *Appellant v SRB*, 13 February 2023, Case 3/22.

[279] See to this effect *La Banque Postale v European Central Bank*, T-733/16 ECLI:EU:T:2018:477, at para 58; *BPCE v European Central Bank*, T-745/16 ECLI:EU:T:2018:476 and *Crédit Agricole v European Central Bank* T-758/16 ECLI:EU:T:2018: 472; compare also Case *Crédit Lyonnais v European Central Bank*, T-504/19 ECLI:EU:T:2021:185.

legal elements of the condition are fulfilled, which, in turn, entails a complex, factual and legal assessment. The review of *both* assessments must ensure appropriate deference to the technical evaluation of the agency and a fine-tuned, yet close scrutiny of its legality, to ensure that the assessment is adequately substantiated, *and* that the exercise of discretion is sound, in light of general principles like proportionality and equal treatment. The Appeal Panel closely analyzed the SRB's statement of reasons, to assess whether all the elements had been considered. In its judgment of 10 July 2024 in *France v. SRB*[280] the General Court upheld this view, and conducted a careful examination of the SRB's statement of reasons, considering it, as well as the review by the Appeal Panel, satisfactory.

Therefore, in our view the discussion on the standard of review, and the often-elusive distinction between marginal and full review, is probably not necessary in this context, as **here the standard of review of European courts has evolved from a traditional "hands off" understanding of 'manifest error' to an exacting "hands on" approach.**

Indeed, although in the early days of the Banking Union the literature focused on the binary distinction between marginal v full review[281], we have shown that the standard of review of the European courts in cases involving the ECB and SRB has developed over time to ensure the effectiveness of judicial protection,[282] with European courts becoming bolder and more willing to elaborate on the elements of 'manifest error', duty to state reasons and excess of power, and control of the substantive legality of the decision. This, in our view, blurs the lines between error and manifest error; rather, the review of discretion has moved from 'soft' to 'hard(er) look'.[283] European courts attach importance to process-based review, focusing on the factors considered in the decision and its justification,[284] as also supported by Article 41 of the EU Charter, and respect the authority's discretion. However, by rejecting a view of 'discretion' that compartmentalizes the roles of administrative authorities and courts, and by claiming the ultimate authority to interpret legal provisions, **European courts reserve themselves a scope of review with an intensity that can be better calibrated depending on the needs of the case, the finality of the legislation, and the relevance of higher considerations of fundamental values. This helps shape a finer, more accurate review than the coarse distinction between marginal and full review**.

Thus, in our view, in the Banking Union the question is not about changing the standards of review as they stand; *it is about ensuring that the standard of legality review is meaningfully applied. What kind of error of assessment counts as 'manifest' cannot be determined independently of the Court's understanding of what falls within the acceptable range, which, in turn, cannot be established without reference to the court's willingness to take a closer look at all factual and legal elements of the reasoning.* If this is done, judicial

[280] Case T-540/22 *France v SRB* [2024] ECLI:EU:T:2024:459

[281] Compare e.g. Eddie Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in Eddie Wymeersch, Klaus Hopt and Guido Ferrarini (eds), *Financial Regulation and Supervision. A Post-Crisis Analysis* (OUP 2012) 294; Paolo Chirulli and Luca De Lucia, 'Specialised Adjudication in EU Administrative Law: the Boards of Appeal of EU agencies' [2015] ELR 832-857; for a review limited to questions of law Andreas Witte, 'Standing and judicial review in the new EU financial markets architecture' [2015] JFR, 245; Joana Mendes, 'Discretion, care and public interests in the EU Administration: Probing the limits of law' [2016] CMLR 53, 419-452; Marco Lamandini, 'Il diritto bancario dell'Unione' [2015] *Banca, borsa e tit. cred.*, I, 423 and Marco Lamandini, 'Il diritto bancario dell'Unione' in Raffaele D'Ambrosio (ed), *Quaderni di Ricerca Giuridica della Consulenza Legale* (Bank of Italy 2016), 81, 441.

[282] Compare René Smits and Federico Della Negra, 'The Banking Union and Union Courts: Overview of cases', <https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/>.

[283] Michael Ioannidis, 'The judicial review of discretion in the Banking Union: from "soft" to "hard(er)" look', in *Judicial Review in the European Banking Union*, eds. Chiara Zilioli & Karl-Philipp Wojcik (Elgar Edward, 2021), 130.

[284] Koen Lenaerts 'The European Court of Justice and Process-Based Review' *Yearbook of European Law* Yearbook of European Law, Vol. 31, No. 1 (2012), pp. 3-16.

protection is effectively guaranteed, and the marginal v full review debate is, in the Banking Union, more academic than practical.

Thus, instead of on distinctions that may be elusive, or futile, more efforts should be placed on a different issue: **what is the evidentiary burden to be discharged by the supervisory and resolution authority to support complex technical assessments based on alternative options on future, hypothetical scenarios.** In some cases, e.g., antitrust, there has traditionally been a call to treat 'false positives' (e.g. erroneous antitrust convictions and over-deterrence) as costlier than 'false negatives' (i.e. erroneous acquittals and under-deterrence), and ask for a higher evidentiary burden for those alleging an antitrust violation,[285] through a 'preponderance of evidence' (in American terms) or 'balance of probability' in European terms (see, for a very good discussion of European Court's practice in the Opinions of AG Kokott in *Bertelsmann*[286] and in *CK Telecoms*[287]).

This cannot be extrapolated to supervision or resolution cases, where the financial stability implication of false negative are potentially catastrophic. Economic science cannot (at least cannot always) offer conclusive answers or full evidence of the shape and implications of potential future financial stability shocks, which may be used as input for resolution decisions. **Thus, the 'plausibility' standard used by European courts to review supervisory and resolution measures based on alternative future scenarios is warranted and would deserve a clear-cut codification in the Single Rule Book.** This would clarify that the precautionary principle considerations, as stated by the Court in, e.g., *Blaise*[288] fit well in this context: if the existence or extent of the alleged risk cannot be determined with certainty, but there is a likelihood of real harm should the risk materialize, the precautionary principle justifies the adoption of corrective actions also in supervision and resolution.

One area where the debate about costs and benefits on the face of uncertainty is particularly confused is the calculation of TLAC/MREL levels. These levels of capital and debt are set according to the authorities' calculations of the needs for an eventual write down and conversion of instruments to absorb losses, i.e., bail-in. Critics can point out that TLAC/MREL results in additional financing costs for banks, which constrains lending, that the SRB has departed from the resolution plans it prepared in advance, sometimes reversing the finding that resolution would be in the public interest, to opt for insolvency-based liquidation, and that the SRB has never deployed the bail-in tool as such, and instead it has twice used the sale of business tool, and that even in the crisis of a G-SII, like Crédit Suisse, a transfer of business was used. However, such criticism would leave out that TLAC/MREL levels help make crisis management more manageable, regardless of the tool used, **and that the TLAC/MREL ammunition has reached its targets only this year. Therefore, what matters to assess the credibility of the bail-in tool in Europe will be its practice from now on**. And the differences between the Swiss and the European context are more than the parallels.

Acknowledging resolution as an area of decision-making under uncertainty means that the judicial scrutiny of decisions based on assumptions of hypothetical future events cannot be reasonably expected to be much stricter than the one in the *Banco Popular* saga, with any adjustments resulting from the pending *Sberbank* and *ABLV* cases (once they are final after the judgments by the Court of Justice on

[285] Robert Bork, *The Antitrust Paradox* (1978; reprinted as Bork Publ., 2021), 134-160; for a recent reconsideration, Al Gavil, Stephen Salop, *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 *Penn. Law Review* 2107 (2019-2020) (Symposium: The Post-Chicago Antitrust Revolution).

[286] Case C-413/06 *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P ECLI:EU:C:2008:392, paras 207-208.

[287] Case C-376/20, *European Commission v CK Telecoms UK Investments Ltd.*, C-376/20, ECLI:EU:C:2022:817, paras 56-58. Consider in the literature, Andriani Kalintiri, *Evidence Standards in EU Competition Enforcement – The EU Approach* (Hart Publishing, 2019), 78 and Joana Mendes (ed), *EU Executive Discretion and the Limits of Law* (OUP 2019).

[288] C-616/17, *Procureur de la République v Blaise* [2019] ECLI:EU:C:2019:190, para 43.

appeal). In other words, we acknowledge that the *plausibility test* used to scrutinize future and hypothetic scenarios is generally warranted, with two *caveats*.

First, although the 'plausibility' standard should be the general rule for scrutinizing future scenarios, the 'balance of probability' test may still apply as an exception, in cases where a specific concept or statutory provision requires it, e.g., the "likely to fail" in the FOLTF assessment, where there must be "objective evidence to support the conclusion that failing will occur in the future" (as required by the EBA guidelines), i.e., the competent authority (and the valuer, in valuation 1) must be persuaded, and justify that failing is more likely than not.

Second, to balance the needs of decision-making in uncertainty with fundamental values, the scrutiny must be, in our view, more exacting on two aspects.

On one hand, **on the consistency between supervisory and resolution authorities' assessments when these overlap on a specific issue**, e.g., both supervisory and resolution authorities must express an opinion on the feasibility of intra-group support and asset transfers, and the implications for capital, liquidity, waivers of internal MREL requirements, or recovery and resolution planning. In case of discrepancies, a European court can (and should) carefully and closely cross-examine the authorities' assessments to see if the divergence responds to differences in the assumptions that the law requires the authorities to make, in which case the differences would be justified, or simply to methodological limitations on one side, or inconsistencies not based on the legal framework, which should be cured to ensure better consistency in the supervision-resolution continuum.

On the other hand, , on the scenarios that are measurable. The clearest example is valuation 3 and the *ex post* assessment of compensation claims of affected shareholders and creditors. True, this valuation needs to compare the actual scenario of resolution with the liquidation counter-factual (with an interesting interplay between Article 76 SRMR, Level 2 regulation 2018/344 and national law)[289] with un-harmonized bank liquidation rules. However, courts should not shy away from pointing out that, while crisis measures may have been justified in a situation of urgency, a comparative harm deserves compensation. **This would convey an important message: while they may be deferential to the guardians of financial stability, courts are the ultimate guardian of the fundamental rights of parties economically affected by resolution in the interest of financial stability**. This balance is important to ensure the legitimacy of the system.

5.3. Making quasi-judicial bodies more useful: simple reforms in light of experience.

Ten years of Banking Union also evidenced, in our view, that specialized administrative review bodies can be a useful tool to ensure a filter for the European courts, and a prompt response to the parties, thus complementing European courts' role.

Administrative appeal bodies (including the ESAs Joint Board of Appeal, SSM ABoR and SRB Appeal Panel) are an institutional experiment that looks set to stay. They help balance potentially intrusive action with expert knowledge, and regard for fundamental EU values. Initial experience suggests that the appellants have got a timely, non-expensive, expert review which meets the requirements of Charter Article 41, and Article 47 (should the latter be applicable) within few months, considerably shorter than proceedings before the courts (a few years).

[289] Joined Cases T-302/20, T-303/20 and T-307/20 *Del Valle Ruiz v SRB* ECLI:EU:T:2023 :735 paras 71-85.

Quasi-courts have also tried to find their place in financial markets' institutional architecture, by balancing their role *vis-à-vis* (i) the regulatory/supervisory bodies, combining independence with institutional loyalty to offer precise reasons to guide future action, (ii) the appellants, balancing accessibility with clarity about what they can, and cannot, review, and (iii) European courts, where quasi-courts have tried to play a relevant role, without interfering with the courts' own 'de-cluttering' their table, without becoming 'institutional clutter' themselves, filtering the more technically abstruse issues, and helping to flesh out those that are of pivotal importance in terms of policy or values, where courts may undertake a second review,[290] i.e., helping to see the forest for the trees.

Ten years of experience also show, however, some weaknesses. Reforms could enhance the appeal bodies' supporting role to European courts. Since a full overhaul to transform these administrative bodies into specialised courts attached to the Court of Justice under Article 257 TFEU is unlikely, a more viable alternative may be a regulation that simultaneously amends (at a minimum) the ESAs Regulations and the SRM Regulation under their same legal basis (Article 114 TFEU), and **consolidates the ESAs' Board of Appeal and the SRB Appeal Panel (and possibly any appeal body for the new anti-money laundering agency) into a single administrative tribunal**, a sort of newly established 'European Joint Board of Appeal for public-law financial disputes', *without transforming it into a specialised court attached to the Court of Justice*. This administrative tribunal could review all agencies' decisions, removing most bottlenecks, given that the currently limited remits of different boards of appeal lacks a clear rationale.

Although it would be desirable, on efficiency grounds, to extend this reform to the decisions adopted by the SSM ABoR, this is constitutionally problematic, in light of the ECB's independence, according to Article 130 TFEU, Article 19 and recitals (30) and (79) of SSM Regulation and Article 263 TFEU. In principle, the SSM Regulation could be amended to merge the ABoR with the structure of the new administrative tribunal, while keeping its decisions in the SSM context as non-binding opinions. It would remain open to consider granting binding force to the ABoR decisions, since, in our view, the ECB independence is not endangered by the judicial review of the CJEU, and this need not change with an administrative tribunal. Moreover, the ECB independence can be calibrated differently according to its different mandates, and be subject to legal accountability, is one of the sources of its ECB legitimacy.

This reform should take quasi-judicial review out of the internal governance of each single agency or institution, with organizational and efficiency gains and more institutional independence.

Finally, in our view, an administrative tribunal is preferable to specialized courts under Article 257 TFEU for several reasons. (a) It can be composed also by experts in supervisory and financial matters, who do not 'possess the ability required for appointment to judicial office' required by Article 257 TFEU and the appointment of the members (unlike the appointment of judges to the CJEU) does not require any political consensus. (b) Its Rules of Procedure can be designed to deliver a prompt review (shorter than GCEU proceedings). However, the current 1-3 month deadlines are not compatible with the right to be heard: either the period starts from the date the evidence is complete, as it happens with ESAs' Board of Appeal and SRB Appeal Panel Rules of Procedure or, if it runs from the appeal filing, proceedings that leave time for being heard, examining and drafting should run from four to six months, unless otherwise agreed with the parties.(c) It may usefully participate in the administrative process by confirming

[290] This, in our view, happened, e.g., in *France v SRB,* case T-540/22, of 10 July 2024, EU:T:2024:459.

(contributing additional reasoning) or remitting to the agency, thus fostering prompt self-correcting action on relevant matters, where erroneous decisions entail serious consequences.

Appointment rules should reflect this change, by strengthening the role of the European Commission,[291] which currently only shortlists candidates for the ESAs' Board of Appeal and has no role for SRB Appeal Panel candidates and could select and appoint the members after a statement before the European Parliament. This would enhance their institutional independence, which could be accompanied by full EU official status, better-designed remuneration, immunity, budget autonomy and adequate secretarial and law-clerical support. Would such a body outside Article 267 TFEU be admissible to judicial dialogue with the CJEU? In our view it could and, in the Court's words at *Paul Miles'* paragraph 45, why not to 'envisage a development of the system of judicial protection' by expressly granting the power to make preliminary references in this context? Conversely (and not less importantly), if administrative review is taken outside the agencies, the agencies should have *locus standi* to challenge appeal bodies' decisions before the GCEU. Finally, this reform would fully justify, to our minds, (i) the existing inclusion in Article 58a in Protocol No 3 of the Statute of the Court of Justice, according to which 'an appeal brought against a decision of the General Court concerning a decision of an independent board of appeal (…)shall not proceed unless the Court of Justice first decides that it should be allowed to do so' and (ii) the express conferral to the specialized administrative tribunal of unlimited jurisdiction (*ad instar* of Article 261 TFEU for the CJEU) in respect to penalties, sanctions and administrative measures adopted by the relevant authorities whose decisions fall within its remit.

[291] This introduced a role for the European Parliament. New art 59(3) as amended of the ESAs founding regulations.

The Banking Union makes ten years. It is a story of success. Courts have been crucial for this success. This study explains why, and what should be done to preserve (and improve) their role.

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