STUDY

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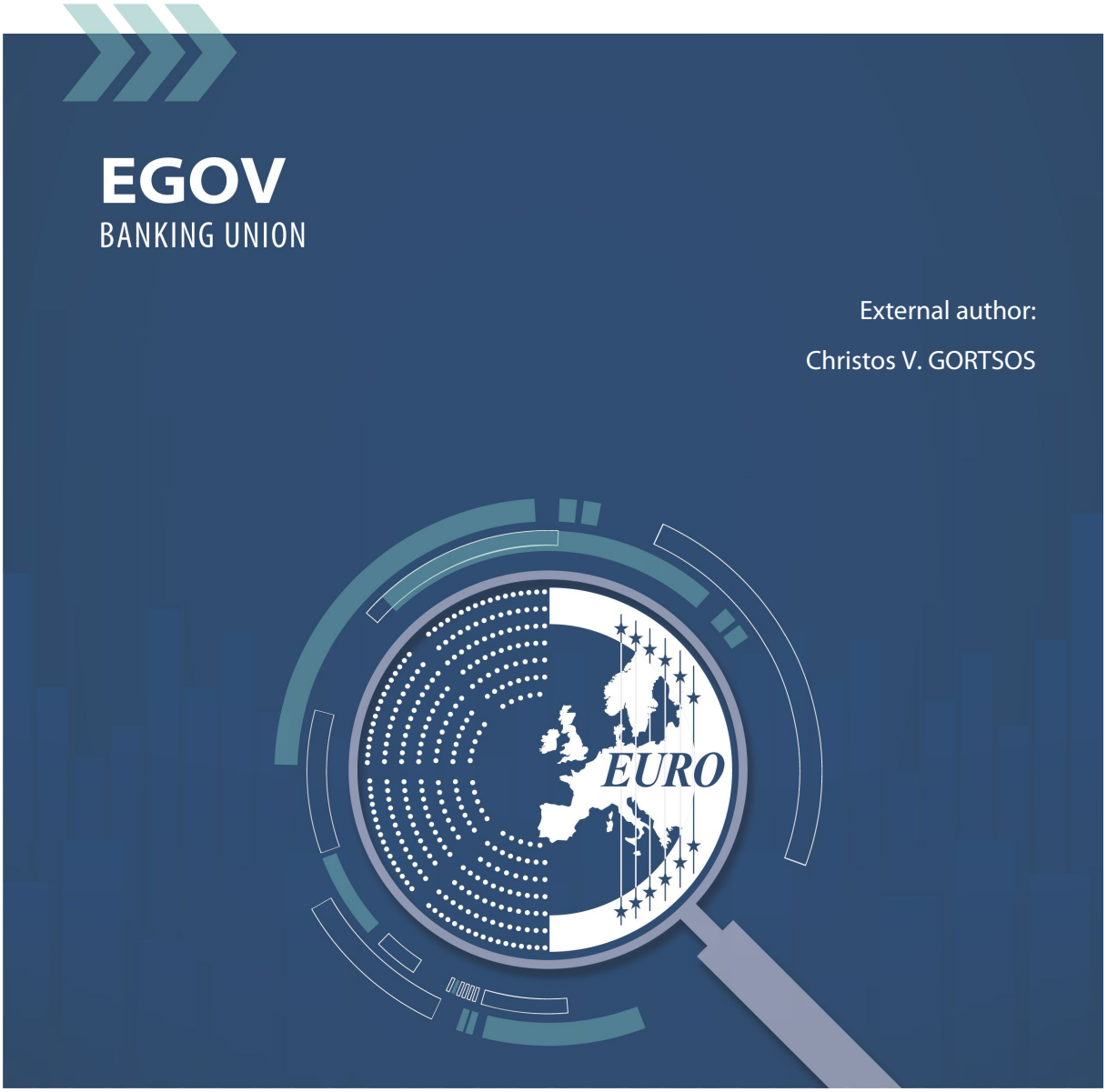
European Parliament

10 years of Banking Union case-law:

How did CJEU judgments shape supervision and resolution practice in the Banking Union?



Economic Governance and EMU Scrutiny Unit (EGOV)
Directorate-General for Internal Policies
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10 years of Banking Union case-law:

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Abstract

This study discusses and analyses on a targeted basis and in a systematic way the evolution and key aspects of the case-law of the Court of Justice of the European Union (CJEU) in relation to the two key pillars of the Banking Union in force, namely, the Single Supervisory and the Single Resolution Mechanisms, from their full operationalisation in November 2014 and in January 2016, respectively, up to the beginning of September 2024.

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LIST OF ABBREVIATIONS

ABoR	Administrative Board of Review (ECB – SSM)
ACPR	Autorité de Contrôle Prudentiel et de Résolution (France)
AEUV	Vertrag über die Arbeitsweise der Europäischen Union
AMLA	Anti-Money Laundering Authority
BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht (Germany)
BCBS	Basel Committee on Banking Supervision
BoA	Board of Appeal (ESAs)
BPdB	Banca Popolare di Bari
BRRD	Bank Recovery and Resolution Directive (2014/59/EU)
BU	Banking Union
BVerfG	Bundesverfassungsgericht (Germany)
CEO	Chief Executive Officer
CFR	Charter of Fundamental Rights (of the EU)
CIWUD	Credit Institutions Winding-Up Directive (2001/24/EC)
CJEU	Court of Justice of the European Union
CMF	Code monétaire et financier français
CMDI	Crisis Management and Deposit Insurance
CRD IV	Capital Requirements Directive No IV (2013/36/EU)
CRD VI	Capital Requirements Directive No VI (2024/1619)
CRR	Capital Requirements Regulation (575/2013)
CRR III	Capital Requirements Regulation No III (2024/1623)
DGS	Deposit Guarantee Scheme
DGSD	Deposit Guarantee Schemes Directive (2014/49/EU)
EBA	European Banking Authority
EBAR	European Banking Authority Regulation (1093/2010)
EBI	European Banking Institute
ECA	European Court of Auditors
ECB	European Central Bank
ECJ	European Court of Justice
ECLI	European Case-Law Identifier
ECON	Economic and Monetary Affairs Committee (European Parliament)

EDIF	European Deposit Insurance Fund
EDIS	European Deposit Insurance Scheme
EDPS	European Data Protection Supervisor
EEA	European Economic Area
EIOPA	European Insurance and Occupational Pensions Authority
ELA	Emergency Liquidity Assistance
EMU	Economic and Monetary Union
EP	European Parliament
ESAs	European Supervisory Authorities
ESCB	European System of Central Banks
ESFS	European System of Financial Supervision
ESM	European Stability Mechanism
ESMA	European Securities and Markets Authority
ESMAR	European Securities and Markets Authority Regulation (1095/2010)
ESRB	European Systemic Risk Board
ESRBR	European Systemic Risk Board Regulation (1092/2010)
EU	European Union
FBF	Fédération Bancaire Française
FITD	Fondo Interbancario di Tutela dei Depositi (Italy)
FOLTF	Failing Or Likely To Fail
FROB	Fondo de Restructuración Ordenada Bancaria (Spain)
FSB	Financial Stability Board
GFC	Global Financial Crisis
GRC	Charta der Grundrechte der Europäischen Union
IPCs	Irrevocable Payment Commitments
ITSs	Implementing Technical Standards
IVASS	Istituto per la Vigilanza Sulle Assicurazioni (Italy)
L-Bank	Landeskreditbank Baden-Württemberg – Förderbank
LLR	Lending of Last Resort
LSI	Less Significant Institution
MiFID II	Markets in Financial Instruments Directive No II (2014/65/EU)
MoU	Memorandum of Understanding

N&Ds	National Options and Discretions
NCWO	No Creditor Worse Off (principle)
NCA	National Competent Authority
NCB	National Central Bank
NDA	National Designated Authority
NJA	National Judicial Authority
NRA	National Resolution Authority
OJ	Official Journal (of the European Union)
PIA	Public Interest Assessment
PSI	Private Sector Involvement
Q&As	Questions and Answers
SFL	Stiftung für Forschung und Lehre
RTSs	Regulatory Technical Standards
SREP	Supervisory Review and Evaluation Process
SRB	Single Resolution Board
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SRMR	Single Resolution Mechanism Regulation (806/2014)
SRMR II	Single Resolution Mechanism Regulation no. II (2019/877)
SSM	Single Supervisory Mechanism
SSMR	Single Supervisory Mechanism Regulation (1024/2013)
SSM-FR	SSM Framework Regulation (468/2014)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom

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EXECUTIVE SUMMARY

The key objective of the present study is to discuss and analyse in a systematic way some of the most important judgments of EU Courts (in more than 300 actions brought before them) relating to decisions taken by the European Central Bank (ECB) as a banking supervisory authority within the Single Supervisory Mechanism (SSM) and by Single Resolution (SRB) as a resolution authority within the Single Resolution Mechanism (SRM) (except for those relating to the Single Resolution Fund (SRF)).[1] Accountability issues of the ECB and the SRB and aspects of the alleged violations of Articles of the Charter of Fundamental Rights of the EU are outside the perimeter of the analysis.

In relation to the **"SSMR-related"** case-law (discussed in Section 2) of significant importance is firstly the seminal judgment of the General Court of 2017 in the so-called "*L-Bank* case". By examining the relationship between Articles 4(1) and 6 of the Council's SSM Regulation (SSMR), the General Court came to the conclusion that the exclusive competences conferred upon the ECB in the performance of its specific (supervisory) tasks in accordance with Article 4(1) are implemented within the "decentralised framework" consisting of the ECB and the national competent authorities (NCAs); thus, there is no distribution of competences between them. Furthermore, in its rulings in actions brought before them on the classification of credit institutions as significant in accordance with Article 6(4) SSMR, and on the withdrawal of banking licenses by virtue of Article 4(1), the General Court did not challenge the Decisions taken by the ECB (ruling also that its withdrawal Decisions do not directly affect the legal situation of credit institutions' shareholders).

On the other hand, when it comes to cases relating to the rather unusual occurrence in EU law set out in Article 4(3) SSMR, according to which the ECB is required to implement the national rules that incorporate EU banking law (to the extent that national options and discretions are set out therein) when carrying out the specific tasks conferred upon it by the SSMR, the outcome is mixed. By some of its judgments the General Court has dismissed the actions for annulment; however, by its most recent (19 September 2024) judgement, the Court set aside the General Court's judgment in one of these cases and annulled the related ECB Decision. In other judgments, the interpretation of national law by the ECB has been directly challenged by the General Court. A key common significant feature of all these judgments is that, by applying national law pursuant to Article 4(3) SSMR, the ECB must assure its conformity and compliance with the general principles of EU law, as well as with the legislative acts which constitute the sources of these legislative acts.

The discussion and analysis of the **"SRMR-related"** case-law (in Section 3) reveals that the General Court has, in principle, not challenged the Decisions taken by the SRB within the SRM in accordance with the SRM Regulation of the European Parliament and the Council (SRMR) in the resolution case for *Banco Popular Español*, the "no-resolution" cases for *ABLV Bank*, *ABLV Bank Luxembourg* and *AS PNB Banka*, and the "mixed" case for *Sberbank*; thus, it has dismissed the actions brought before it. In assessing the scope of the judicial review, the General Court emphasised that resolution decisions are made on the basis of discretionary, highly "complex

[1] Furthermore, the study briefly deals (in Sections 1 and 4) with the case-law of EU Courts relating to the principle of proportionality, the powers of EU agencies in accordance with the "*Meroni* doctrine" (as further elaborated and refined), the validity of soft law instruments (Guidelines) adopted by the European Banking Authority (EBA), the liability of supervisory and resolution authorities within the SSM and the SRM, State aid (in the meaning of Article 107(1) TFEU) in the context of resolution funding, reorganisation measures and deposit guarantee, and the judicial review of Decisions of the European Banking Authority (EBA) and of the ESAs' Board of Appeal (BoA).

economic and technical assessments". Accordingly, the review is confined to examining whether in exercising its discretionary powers, the SRB has committed any manifest error of assessment or misuse of powers, or even manifestly exceeded the limits of its discretion. It was, thus, confirmed that the outcome of any proportionality review is mostly marginal and rarely leads to the annulment of EU measures in cases involving such assessments, unless a manifest error of assessment is proven.

Another important aspect in this context is the interpretation by the General Court of key provisions of the SRMR on a variety of aspects, such as:

- the nature of the "supervisory" assessments made by the ECB that a credit institution is failing or likely to fail (FOLTF), which it considers not to be binding on the SRB;
- the "public interest assessment" (PIA) made by the SRB;
- the resolution scheme adopted by the SRB, which in order to enter into force, must be endorsed by the Commission or the Council with regard to its discretionary aspects;
- the role of the national resolution authorities (NRAs) to which SRB Decisions are addressed; and
- the *ex-post* definitive valuation conducted for the purposes of resolution and the limitations on the compensation (provided in Article 20(12)) by application of the "no creditor worse off principle" (NCWO).

INTRODUCTION[2]

Background

The Banking Union (BU) was established amidst the fiscal crisis in the euro area in the wake of the 2007-2009 global financial crisis (GFC). It was designed to apply, in principle, to credit institutions operating in the euro area Member States and consist of three main pillars: the Single Supervisory Mechanism (SSM); the Single Resolution Mechanism (SRM) and the European Single Resolution Fund (SRF, the first industry-funded safety net); and the European Deposit Insurance Scheme (EDIS, coupled by the European Deposit Insurance Fund (EDIF)). The SSM and the SRM are fully operational by virtue of (respectively) the SSM Regulation of the Council (SSMR) and the SRM Regulation of the European Parliament and the Council (SRMR), while the EDIS/EDIF are not yet in place. The BU should be (and is, indeed) supported by the underlying single rulebook, which applies to all Member States and consists, at the level of legislative acts of the European Parliament and the Council, of the Capital Requirements Regulation and Directive (CRR and CRD IV), the Bank Recovery and Resolution Directive (BRRD), and the Deposit Guarantee Schemes Directive (DGSD, which governs the national DGSs, i.e., the second industry-funded safety net). With the exception of the SSMR and the DGSD, all other these legislative acts have been (repeatedly) amended.

By virtue of the SSMR, the SSM consists of the European Central Bank (ECB) as a hub and the national competent authorities (NCAs) of the participating Member States as spokes. The ECB assumed its specific (supervisory) tasks therein on 4 November 2014. By virtue of the SRMR, on the other hand, the SRM consists of the Single Resolution Board (SRB) as a hub and the national resolution authorities (NRAs) of the participating Member States as spokes. Even though the SRB became fully operational on 1 January 2015, the majority of the SRMR provisions are applicable from 1 January 2016.

Aim and structure

Decisions taken by the ECB within the SSM and the SRB within the SRM (including in relation to the SRF) can be and have, indeed, been challenged before the EU Courts. The aim of this study is to discuss in a systematic way the evolution of the related case-law of the EU Courts. Taking into account that, up to the beginning of September 2024, more than 300 cases were brought before the EU Courts, some of which have been closed while others are still pending, the author has followed a targeted approach, focusing his analysis on those rulings which, in his view, are the most important. Furthermore, due to limitations as regards the length of this (in any case, quite extensive) exercise, the judgments relating to the SRF are not discussed. It is finally noted that this study does not deal with the subject area of the ECB's and SRB's accountability *vis-à-vis* the European Parliament. However, their liability under EU law is briefly discussed.

The study is structured in five Sections as follows:

Section 1 presents in some detail the above-mentioned two key pillars of the BU and of the underlying single rulebook and the further tasks of the ECB beyond those in the SSM (under 1.1.). It then discusses the further evolution and the missing elements of the BU framework, notably, the centralisation of the Emergency Liquidity Assistance (ELA) Mechanism (under 1.2.), as well as

[2] The cut-off date for information included herein is 4 September 2024. However, one significant Court judgment adopted later on is also referred to without further discussion (see **Section 2 below, under 2.2.2.1 (B)**, *in finem*).

earmarked rulings of the Court relating to the principle of proportionality, the powers of EU agencies in accordance with the **"*Meroni* doctrine"**, as further elaborated and refined by more recent Court rulings, and the validity of specific soft law instruments (e.g., Guidelines) adopted by the European Banking Authority (EBA) (under 1.3.). Finally, Section 1.4. overviews the provisions of the SSMR and the SRMR that have been challenged before the EU Courts and frames the expectations of the reader as to the aspects discussed in the following Sections.

Section 2 focuses on the "SSMR-related" case-law. The analysis is based on three thematic issues (under 2.1.-2.3., respectively):

first, the relationship between Article 4(1) and 6 SSMR and interpretation of Article 6(4) on the classification of a credit institution as significant, discussing the seminal rulings in the so-called "*L-Bank* case";

second, the interpretation of (the first sentence of the first sub-paragraph of) Article 4(3) SSMR on the application of national law by the ECB through the lens of the case-law in the "*Crédit Agricole* cases", the "*Berlusconi* cases", two aspects relating to the "*Crédit Mutuel Arkéa* case", the "*Corneli* case", and two further cases in which the judgments were adopted in 2024; and

third, some aspects relating to the withdrawal of banking licenses by the ECB within the SSM.

The focus of the following **Section 3** turns to the "SRMR-related" case-law. The analysis is based on three thematic issues as well (under 3.1.-3.3., respectively):

first, the nature of the assessment by the ECB that a credit institution is failing or likely to fail (FOLTF), namely the first condition for resolution in accordance with Article 18 SRMR;

second, the actions taken within the SRM in relation to *Banco Popular Español* (the resolution case), to *ABLV Bank, AS* and *ABLV Bank Luxembourg, SA* and then to *AS PNB Banka* (the "no-resolution" cases), and finally *Sberbank* (a mixed case); and

third, specific aspects relating to the valuations for the purposes of resolution.

Finally, for the sake of completeness of the analysis, **Section 4** briefly discusses the EU courts' case-law on some related aspects and namely: the liability of supervisory authorities within the SSM and of resolution authorities within the SRM (under 4.1.); State aid in the context of resolution funding and beyond that (under 4.2.); and the judicial review of Decisions of the European Banking Authority (EBA) and of the ESAs' Board of Appeal (BoA) (under 4.3.).

Section 5 contains the concluding remarks and an assessment.

1. THE TWO KEY PILLARS OF THE BANKING UNION (BU) AND THE RELATED SINGLE RULEBOOK

1.1. A brief overview of the institutional and regulatory framework as in force

1.1.1. Introductory remarks

(1) According to the political decisions taken in 2012 amidst the sovereign/fiscal crisis in the euro area,[3] the creation of the Banking Union ('**BU**') within the European Union ('**EU**') and as inherent part of the Economic and Monetary Union ('**EMU**') should lead to a "Europeanised bank safety net" consisting of three pillars: a Single Supervisory Mechanism for the banking sector (i.e., not for the other two sectors of the financial system) for the prudential supervision of credit institutions (mainly) incorporated in euro area Member States (the **'first pillar'**); a Single Resolution Mechanism for unviable credit institutions (for the same group of Member States) and a Single Resolution Fund to cover any resulting funding gaps in resolution (the **'second pillar'**); and a single deposit guarantee scheme ('**DGS**') (the **'third pillar'**). The key institutional and regulatory developments towards the establishment of the BU, which is a "highly integrated system" like the European System of Central Banks ('**ESCB**'),[4] took place during the period 2013-2014. Except for the European Deposit Insurance Scheme ('**EDIS**'), the other components, namely the Single Supervisory Mechanism ('**SSM**') and the Single Resolution Mechanism ('**SRM**'), are in place, coupled by a single rulebook.

1.1.2. The SSM

(1) The SSM was established by the Single Supervisory Mechanism Regulation[5] ('**SSMR**'), which was adopted by the Council on the basis of the enabling clause of **Article 127(6)** of the Treaty on the Functioning of the European Union[6] ('**TFEU**'),[7] which is one of the rare cases where the special legislative procedure is applicable[8] and on the basis of which the Council may confer **"specific tasks"** upon the ECB concerning policies relating to the prudential supervision of credit institutions and other financial firms, with the exception of insurance undertakings. This legislative act entered into force on 3 November 2013 (and is in force without any amendments), is binding in its entirety and directly applicable in all Member States,[9] even though its main addressees are the Member States participating in the BU.[10]

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3 See by means of mere indication **Hadjiemmanuil (2020)** and **James (2024)** (on the IMF's role).

4 See **Lehmann (2021)**, pp. 77-78, with reference to the judgment of the Court (Grand Chamber) of 26 February 2019 in joined **Cases C-202/18**, *Ilmārs Rimšēvičs v Republic of Latvia* and **C-238/18**, *European Central Bank v Republic of Latvia* (ECLI:EU:C:2019:139), pp. 69-70. On these cases, see details in **Smits (2020a)**.

5 **Council Regulation (EU) No 1024/2013** of 15 October 2013 "conferring specific tasks on the European Central Bank [**'ECB'**] concerning policies relating to the prudential supervision of credit institutions", OJ L 287, 29.10.2013, pp. 63-89.

6 Consolidated version, OJ C 202, 7.6.2016, pp. 47-200.

7 For an analysis of this TFEU Article, see **Gortsos (2023a)**, pp. 328-330.

8 **TFEU**, Article 289(2).

9 **SSMR**, Article 34 and last sentence.

10 The term 'participating Member State' is defined (*ibid.*, Article 2, point (1)) to mean: *first*, (on a mandatory basis) a Member State whose currency is the euro; and *second*, a Member State whose currency is not the euro which has established a close cooperation in accordance with Article 7 thereof (currently, Bulgaria).

The hub within the SSM is the ECB (a Treaty-based EU and independent institution[11]), which fully assumed the specific supervisory tasks conferred upon it under the SSMR on 4 November 2014[12] and the spokes are the national competent authorities ('**NCAs**') of these Member States.[13] Thus, the SSM is an EU "system of financial supervision" composed of the ECB and these NCAs, the former being responsible for its effective and consistent functioning.[14]

(2) The institutional framework governing the SSM is further specified in several ECB legal acts, containing provisions on the operational arrangements for the implementation of its supervisory tasks, such as (predominantly) the **SSM Framework Regulation** ('**SSM-FR**').[15] Furthermore, in 2013, the ECB signed an **Interinstitutional Agreement** with the European Parliament,[16] which entered into force on 7 November 2013, and a **Memorandum of Understanding** ('**MoU**') with the Council,[17] which entered into force on 12 December 2013.[18]

1.1.3. The SRM

(1) The SRM was established by the Single Resolution Mechanism Regulation[19] ('**SRMR**'), which was adopted by the European Parliament and of the Council (hereinafter the "**co-legislators**"), thus, under the ordinary legislative procedure,[20] on the basis of **Article 114 TFEU**,[21] entered into force on 19 August 2014, is in principle applicable from 1 January 2016 and is binding in its entirety and directly applicable to all Member States[22] even though its main addressees are, in this case as well, the Member States participating in the BU. Unlike the SSMR, this legislative act (in the meaning of **Article 289(3) TFEU**) has been repeatedly amended and, *inter alia*, most notably on 20 May 2019 by **Regulation (EU) 2019/877** of the co-legislators "amending the SRMR as regards loss-absorbing and recapitalisation capacity for credit institutions and investment firms" ('**SRMR II**').[23]

The hub within the SRM is the Single Resolution Board ('**SRB**'), established by the SRMR. This EU agency has legal personality, became fully operational on 1 January 2015 and, unlike the ECB, belongs to the EU decentralised agencies with a specific structure corresponding to its tasks

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11 Treaty on European Union ('**TEU**', Consolidated version, OJ C 202, 7.6.2016, pp. 13-45), Article 13(1), second sub-paragraph, sixth indent and **TFEU**, Article 130, respectively. According to Judgment of the Court of 10 July 2003 in **Case C-11/00**, *Commission of the European Communities v European Central Bank* (ECLI:EU:C:2003:395), the ECB independence does neither separate it from the EU, nor does it exempt it from the application of EU law.

12 **SSMR**, Article 33(2), first sub-paragraph.

13 These are defined in Article 2, point (2).

14 *Ibid*., Article 2, point (9), and Article 6(1).

15 **Regulation (EU) No 468/2014** of the ECB of 16 April 2014 "establishing the framework for cooperation within the SSM between the [ECB] and [NCAs] and with national designated authorities ['**NDAs**'] **(ECB/2014/17)**", OJ L 141, 14.5.2014, pp. 1-50 (in force).

16 OJ L 320, 30.11.2013, pp. 1-6. The two institutions must carry out periodically an assessment of the practical implementation of this Agreement, (*ibid*., Section VI).

17 At: https://op.europa.eu/en/publication-detail/-/publication/021e8fcb-96ac-11ea-aac4-01aa75ed71a1/language-en.

18 On the SSM and the SSMR, see **Wymeersch (2014)** and the individual contributions in **Banca D'Italia (2024)**; for further references see also below.

19 **Regulation (EU) No 806/2014** of the co-legislators of 15 July "establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund (...)", OJ L 225, 30.7.2014, pp. 1-90.

20 **TFEU**, Article 289(1).

21 On this TFEU Article, which refers to the legislative acts necessary to complete the internal market in the EU, see **Herrnfeld (2019)**.

22 **SRMR**, Articles 34, 99(2), 99(1), and last sentence, respectively.

23 OJ 150, 7.6.2019, pp. 2256-252.

serving the public interest.[24] The spokes are the participating Member States' national resolution authorities ('**NRAs**').[25]

(2) Furthermore, appropriate funding for the purposes of resolution in the BU is available to the SRB by the establishment (by the SRMR as well) and full (by now) operationalisation of the Single Resolution Fund ('**SRF**'); this is solely owned by it.[26] From 1 January 2016 onwards, the SRF is considered to be the participating Member States' resolution financing arrangement pursuant to Articles 99-109 of the Bank Recovery and Resolution Directive (see just below).[27]

1.1.4. The single rulebook

The key pillars of the BU should be coupled by a "single rulebook" containing substantive rules on all the previous aspects, including on DGSs, even though the EDIS has not yet been established. This single rulebook is part of the broader single rulebook of legislation that underpins the single market for financial services.[28] It is a child of the (2007-2009) global financial crisis ('**GFC**') shaped, to a higher or lesser degree, under the influence of international financial standards adopted in its wake by international financial fora, such as the Basel Committee on Banking Supervision ('**BCBS**') and the Financial Stability Board ('**FSB**').[29] Regarding banking in particular, its harmonised rules are contained in four legislative acts:

(a) in relation to prudential banking regulation and supervision, in the Capital Requirements Regulation ('**CRR**') and the Capital Requirements Directive No IV" ('**CRD IV**') of the co-legislators of 27 June 2013,[30] which apply to credit institutions and some categories of holding companies;

(b) in relation to the resolution of credit institutions (and investment firms), the Bank Recovery and Resolution Directive ('**BRRD**') of the co-legislators of 15 May 2014;[31] and

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24 **SRMR**, Articles 42(1) and 98(1).

25 These authorities are defined in Article 3(1), point (3).

26 *Ibid*., Article 67(1), first sentence and 67(3), respectively. The SRF is also governed by the **Intergovernmental [SRF] Agreement (8457/14)** of 14 May 2014 "on the transfer and mutualisation of contributions to a single resolution fund" (available at: https://register.consilium.europa.eu/content/out?lang=EN&typ=ENTRY&i=SMPL&DOC_ID=ST%208457%202014%20COR%201).

27 **SRMR**, Article 96. For a detailed analysis of the SSMR and SRMR Articles, see by means of indication the Commentary by **Binder, Gortsos, Lackhoff, K. and Ohler (2022**, editors**)**, pp. 1-451 and 453-1229, respectively. See also the individual contributions in **Busch and Ferrarini (2020**, editors**)**. On the evolution of the BU as part of the EU banking law, see **Gortsos (2023a)**, pp. 241-253.

28 On the link between the BU and the single market, see **Lastra (2013)**, **Alexander (2016)**, pp. 258-260, **Binder (2016)**, pp. 13-15, and **Ohler (2022)**, pp. 3-4.

29 On these standards, and those international financial fora, see **Gortsos (2023a)**, pp. 131-140, 161-181 and 116-122, respectively.

30 **Regulation (EU) No 575/2013** "on prudential requirements for credit institutions firms (…)" and **Directive 2013/36/EU** "on access to the activity of credit institutions and the prudential supervision of credit institutions (...)", OJ L 176, 27.6.2013, pp. 1-337 and 338-436, respectively (both as in force). These have been recently amended by two legislative acts of 31 May 2024, namely: **Regulation (EU) 2024/1623** "(…) as regards requirements for credit risk, credit valuation adjustment risk, operational risk, market risk and the output floor" (OJ L, 2024/1623, 19.6.2024, '**CRR III**'); and **Directive (EU) 2024/1619** "(…) as regards supervisory powers, sanctions, third-country branches, and [ESG] risks" OJ L, 2024/1619, 19.6.2024. '**CRD VI**'). In principle, the provisions of the CRR III will apply from 1 January 2025, except for those which apply from 9 July 2024; in relation to the provisions of the CRD VI, Member States are required to adopt and publish the laws, regulations and administrative provisions necessary to comply with that legislative act by 10 January 2026 and apply those measures from 11 January 2026.

31 **Directive 2014/59/EU** "establishing a framework for the recovery and resolution of credit institutions and investment firms (...)", OJ L 173, 12.6.2014, pp. 190-348, as in force.

(c) in relation to national DGSs in which all credit institutions established in the EU must participate, the Deposit Guarantee Schemes Directive of 16 April 2014[32] ('**DGSD**').[33]

The single rulebook also consists of: *first*, Commission's (and in some limited cases Council's) delegated and implementing acts (in the meaning of **Articles 290** and **291 TFEU**, respectively), which are based on regulatory and implementing technical standards ('**RTSs**' and '**ITSs**', respectively) developed by the European Banking Authority ('**EBA**')[34] (an agency ("Union body") with legal personality which is part of the **"European System of Financial Supervision"** ('**ESFS**')[35]) in the course of "level 2" of the so-called "Lamfalussy procedure";[36] and *second*, EBA Guidelines and Recommendations (which constitute EU soft law[37]) in the course of "level 3" of that procedure.[38]

1.1.5. Further tasks of the ECB – beyond those in the SSM

(1) It is worth noting that, beyond its basic tasks as a monetary authority within the Eurosystem in accordance with **Article 127(2) TFEU**[39] and its specific supervisory tasks within the SSM, the ECB is also part of the ESFS, which applies to all EU Member States. This consists of the European Systemic Risk Board ('**ESRB**'),[40] the three "European Supervisory Authorities" ('**ESAs**'),[41] the Joint Committee of the ESAs for the purposes of carrying out the tasks specified in Articles 54-57 of the ESAs' Regulations, and the competent supervisory authorities in the Member States as specified in the legislative acts referred to in Article 1(2) of these Regulations (including the ECB in relation to the EBA).[42]

In relation to the operation of the ESRB and on the basis of the (above-mentioned) **Article 127(6) TFEU** (which was activated for the first time in that case), and taking into account the close links between monetary and macroprudential policies, specific tasks have been conferred upon the

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32 **Directive 2014/49/EU** "on deposit guarantee schemes", OJ L 173, 12.6.2014, pp. 149-178 (in force).

33 The term 'credit institution' is defined (**CRR**, Article 4(1), point (1), (a) and (b), respectively) to mean both: **(a)** an undertaking the business of which consists of taking deposits or other repayable funds from the public and granting credits for its own account (according to the traditional definition), *and* **(b)** an undertaking the business of which consists of carrying out any of the activities referred to in points (3) and (6) of Section A of Annex I to the '**MiFID II**' (**Directive 2014/65/EU** of the co-legislators of 15 May 2014 "on markets in financial instruments (…)", OJ L 173, 12.6.2014, pp. 349-496) subject to specific conditions. Of interest in relation to this study is the definition under point (a).

34 This was established by **Regulation (EU) No 1093/2010** of the co-legislators of 24 November 2010 ('**EBAR**', OJ L 331, 15.12.2010, pp. 12-47, as in force).

35 *Ibid*., Articles 5(1) and 2(1), respectively.

36 On the EBA's RTS and ITSs, see its interactive rulebook (at: https://www.eba.europa.eu/regulation-and-policy/single-rulebook/interactive-single-rulebook/12860).

37 On this aspect, see further **below, under 1.3.3**.

38 The EBA's power to adopt RTSs and ITSs is based on Article 10-15 EBAR and its power to adopt Guidelines and Recommendations on Article 16. See on this **Gortsos (2023a)**, pp. 413-422 (with further reference to relevant case-law of the Court of Justice of the EU (hereinafter '**CJEU**' or '**Court**'). The EBA Guidelines are also available (by legislative act) in the (just above-mentioned) interactive rulebook.

39 See by means of mere indication **Gortsos (2024a)**, pp. 47-50 (with extensive further references).

40 Its founding legislative act is **Regulation (EU) No 1092/2010** of the co-legislators of 24 November 2010, OJ L 331, 15.12.2010, pp. 1-11, as in force ('**ESRBR**').

41 These include, apart from the above-mentioned EBA, the European Insurance and Occupational Pensions Authority ('**EIOPA**'), established by virtue of **Regulation (EU) No 1094/2010**, and the European Securities and Markets Authority ('**ESMA**'), established by virtue of **Regulation (EU) 1095/2010**, ('**ESMAR**') (OJ L 331, 15.12.2010, pp. 48-83 and 84-119, respectively). All these Regulations are in force as amended.

42 **ESAs Regulations**, Article 2(2) and Article 1(3) **ESRBR**. Their main objective is set out in Article 2(1), second sentence of their founding legislative acts. On the ESFS and its components, see **Gortsos (2023a)**, pp. 227-233 (with extensive further references).

ECB by a Council Regulation[43] in the field of financial macroprudential oversight.[44] The ECB participates through a representative appointed by its Supervisory Board in the EBA's Board of Supervisors as non-voting member.[45]

(2) Furthermore, earmarked tasks have been allocated to the ECB within the European Stability Mechanism ('**ESM**') by virtue of the intergovernmental Treaty of 2 February 2012 (adopted outside the EU framework).[46] In this respect (and in relation to the 2013 Cypriot banking crisis[47]), of relevance is (*inter alia*) the Judgment of the Court (Grand Chamber) of 20 September 2016 in **Joined Cases C-8/15 P, C-10/15 P**, *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*.[48] In this, the Court clarified the responsibilities of the Commission and the ECB regarding the MoU, which outlined the economic policy conditions imposed on Cyprus as part of the stability support program it was granted, and should be consistent with EU law.

(3) Thus, as of 4 November 2014, the admittedly wide scope of its tasks (mainly) consists of the following: *first*, its basic tasks within the Eurosystem, as set out in **Article 127(2) TFEU**, and its other tasks laid down in the TFEU and the Statute of the European System of Central Banks ('**ESCB**') and of the ECB[49] (the "**ESCB/ECB Statute**"), such as those relating to the issuance of euro-denominated banknotes and coins;[50] *second*, the specific tasks conferred upon it by virtue of Article 2 of **Council Regulation (EU) No 1096/2010** on the macroprudential oversight of the EU financial system in the context of the functioning of the ESRB; *third*, the tasks assigned to it by the ESM Treaty; *fourth*, the specific banking supervisory tasks conferred on it by the SSMR; and *finally*, its supervisory power to make an assessment (determination) that a credit institution is failing or likely to fail ('**FOLTF**') pursuant to **Article 18 SRMR**.[51]

1.2. On the further evolution and certain missing elements of the BU framework

(1) The SRMR, the BBRD, and the DGSD, as in force, constitute the so-called EU crisis management and deposit insurance ('**CMDI**') framework. This is currently under review by virtue of the Commission's legislative package of 18 April 2023,[52] on the basis of its previous (2019) review of

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43 **Council Regulation (EU) No 1096/2010** of 24 November 2010 (as well), OJ L 331, 15.12.2010, pp. 162-164.

44 On this aspect, see Chapter 3 in **Gortsos (2024a)** (with extensive further references).

45 **EBAR**, Article 40(1), point (d). On this Board, see **Gortsos (2023a)**, pp. 391-394.

46 The consolidated version of the ESM Treaty, which is currently under revision, is available at: https://www.esm.europa.eu/legal-documents/esm-treaty. These tasks include assessing the urgency of requests for stability support, and, in liaison with the Commission, assessing requests for stability support, negotiating an MoU and monitoring compliance with the conditionality attached to the financial assistance (**ESM Treaty**, Articles 4(4), 13(1), 13(3) and 13(7), respectively).

47 See on this **Gortsos (2022b)** (with extensive further references).

48 ECLI:EU:C:2016:701.

49 **Protocol (No 4)** attached to the EU Treaties "on the Statute of the European System of Central Banks and of the European Central Bank", Consolidated version, OJ C 202, 7.6.2016, pp. 230-250

50 It is noted that the ECB does not have any banking supervisory powers within the Eurosystem; see Order of the General Court (Fourth Chamber) of 25 September 2019 in **Case T-451-18**, *Triantafyllopoulos and Others v ECB*, ECLI:EU:T:2019:715, para. 40.

51 On this aspect, see **Section 3 below, under 3.1.1**. On the (still limited) role of the ECB within the "ELA mechanism", see just **below, under 1.2 (2)**.

52 Amendment of the BBRD and the SRMR "as regards [EIMs], conditions for resolution and funding of resolution action", as well as of the DGSD "as regards the scope of deposit protection, use of deposit guarantee schemes funds, cross-border cooperation, and transparency" (COM/2023/227 final, COM/2023/226 final and COM/2023/228, respectively). It is noted, however, that the proposed amendments cover a wider field of aspects that those referred to in the title of the legislative proposals, namely on crisis prevention.

the BRRD and the SRMR in accordance with its mandate under these two legislative acts;[53] the input gathered from its related 2021 consultative exercise;[54] and the priorities set out by the Eurogroup in its "Statement on the future of the banking union" of 16 June 2022.[55] This aspect will not be further discussed herein, since it falls outside the direct scope of this study.

(2) The completion of the BU also requires, apart from the completion of the EDIS and the European Deposit Insurance Fund ('**EDIF**'),[56] the harmonisation at EU level of the rules governing bank insolvency, as well as the provision of last resort lending directly by the ECB to (at least) the credit institutions which are directly supervised by it by virtue of the SSMR, under the Emergency Liquidity Assistance ('**ELA**') Mechanism. The rules and procedural arrangements of this mechanism are set out in the Eurosystem's "Agreement on emergency liquidity assistance" of **9 November 2020**.[57] In the author's view, this should be the BU's fourth pillar, since it is a paradox that, while the definition and implementation of the single monetary policy is one of the basic tasks of the Eurosystem, the ECB is not acting therein (and actually not at all) as an LLR to credit institutions established in the euro area but only has the power to prohibit the provision of ELA by national central banks ('**NCBs**') pursuant to **Article 14.4 ESCB/ECB Statute**.[58] The further discussion of this important aspect (except for the State aid dimension[59]) is beyond the scope of this study as well.[60]

1.3. Specific related issues through the lens of Court's earmarked rulings

1.3.1. On the principles of subsidiarity and proportionality

All the above-mentioned legislative acts were adopted with full respect to the principles of subsidiarity and proportionality, as enshrined in **Article 5(3)-(4) TEU**. In accordance with **Article 5, last sentence of Protocol (No 2)** on the application of these principles,[61] any draft legislative act should take account of the need for any burden, financial or administrative, that it is likely to create, in particular for the Member States, to be minimised and be commensurate with the objective to be achieved. Moreover, according to **Article 1** of this Protocol, each institution is

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53 COM/2019/213 final.

54 At: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2021-crisis-management-deposit-insurance-review-targeted-consultation-document_en.pdf.

55 At: https://www.consilium.europa.eu/en/press/press-releases/2022/06/16/eurogroup-statement-on-the-future-of-the-banking-union-of-16-june-2022. For an overview and assessment of these proposed amendments, see by means of mere indication **Gortsos (2023a)**, **Ramos-Muñoz *et al.* (2023)** and **Asimakopoulos and Tröger (2024)**. The Parliament adopted its first reading reports on the proposals in April 2024 (see at: https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-amending-the-bank-crisis-and-deposit-insurance-framework). On the Council's position of June 2024 (at: https://www.consilium.europa.eu/en/press/press-releases/2024/06/19/bank-crisis-management-and-deposit-insurance-framework-council-agrees-on-its-position), see **Spitzer and Magnus (2024)**.

56 On these aspects, see **Gortsos (2023b)** (with extensive further references).

57 At: https://www.ecb.europa.eu/pub/pdf/other/ecb.agreementemergencyliquidityassistance202012~ba7c45c170.en.pdf-?dca797da3212289956ac24df607eb168.

58 See **Gortsos (2015)** and **Lastra and Goodhart (2015)**, p. 16.

59 See **Section 4 below, under 4.2.1 (2)**.

60 Here, it is merely noted that, in relation to actions for access to ECB documents on the granting of ELA, the General Court has delivered three judgments in applications brought pursuant to **Article 263 TFEU** for (mainly) violation of **Article 4 of ECB Decision 2004/258/EC** of 4 March 2004 "on public access to [ECB] documents **(ECB/2004/3)**" (OJ L 80, 18.3.2004, pp. 42-44, as in force), which were appealed before the Court. These are separately included at the end of the list of EU judgments and orders and are discussed in **Gortsos (2024a)**, pp. 52-53.

61 Consolidated version, OJ C 202, 7.6.2016, pp. 206-209.

duty-bound to ensure "*constant respect*" for both these principles. In this respect, the Court has clarified two issues: *first*, the EU legislature must take into consideration "*all relevant factors and circumstances of the situation which its act was intended to regulate*";[62] and *second*, the principle of proportionality requires that "*acts of the EU institutions should be suitable for attaining the legitimate objectives pursued by the legislation at issue and should not go beyond what is necessary to achieve those objectives*",[63] necessity essentially meaning that there is no alternative and less onerous measure which allows the objective of the measure to be achieved equally effectively.[64]

1.3.2. On the powers of EU agencies

(1) The powers of EU agencies, such as, in the financial system, the SRB and the ESAs, are delimited, shaped and amenable to judicial review in light of the **"*Meroni* doctrine"**. It was the European Court of Justice ('**ECJ**') that laid down the core principles governing the relations between EU institutions and EU agencies in its seminal 1958 **"*Meroni* judgment"**,[65] which made a distinction between *a delegation*, involving clearly defined executive powers whose exercise can, thus, be subject to strict review in the light of objective criteria determined by the delegating authority and, *a discretionary power*, implying a wide margin of discretion which may, according to the use made of it, make possible the execution of actual economic policy.[66] Under the *Meroni* doctrine, aiming at the protection of EU balance of powers, a fundamental guarantee granted by the Treaties:

> "*a delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility*" (the "non-delegation principle").[67]

(2) The *Meroni* doctrine was further elaborated by a subsequent ECJ ruling in 1981 in **Case 98/90**[68] (the **"*Romano* case"**), which specified that an institution may not empower an agency to adopt normative acts, i.e., acts of general application having the force of law (the "*Romano* doctrine"). This was later on further refined by the Court (Grand Chamber) in its judgment of 22 January 2014 in **Case 270/12**, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*[69] (the **"*short selling* case"**). By this judgment the Court, which dismissed the action in its entirety, applied the *Meroni* jurisprudence to the specificities of the

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62 Judgment of the Court (Grand Chamber) of 8 December 2020 in **Case C-620/18**, *Hungary v European Parliament*, ECLI:EU:C:2020:1001, para. 116.

63 Judgment of the Court (Grand Chamber) of 11 December 2018 in the so-called **"*Weiss* case"** (**Case C-493/17**, *Weiss and Others*, ECLI:EU:C:2018:1000, para. 72), with reference to its judgment of 16 June 2015 in the so-called **"*Gauweiler* case"** (**Case C-62/14**, *Peter Gauweiler and others v Deutscher Bundestag*, ECLI:EU:C:2015:400, para. 67 and the case-law cited therein).

64 Judgment of the Court (Grand Chamber) of 14 December 2004, in **Case C-210/03**, *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health*, ECLI:EU:C:2004:802, para. 56. On the three steps in the proportionality test (suitability/appropriateness, necessity, and proportionality *stricto sensu*), see **Alexy (2014)**, **Joosen and Lehmann (2019)**, pp. 73-74 and **Craig and de Búrca (2020)**, pp. 583-591.

65 Judgment of the Court of 13 June 1958 in joint **Cases C-9/56** and **C-10/56**, *Meroni & Co., Industrie Metallurgische, SpA v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1958:7.

66 *Ibid.*, para. 41. Thus, an institution may only delegate clearly defined executive powers subject to strict control in light of objective criteria determined by the delegating authority. For a thorough analysis of the *Meroni* doctrine and the legal limits to "agencification", see by means of mere indication **Chamon (2021)** and **(2016)**, p. 134 *et seq*.

67 *Ibid.*, para. 152.

68 Judgment of the Court of 14 May 1981 in **Case 98/90**, *Giuseppe Romano v Institut National d'assurance Maladie*, ECLI:EU:C:1981:104.

69 ECLI:EU:C:2014:18.

direct intervention powers of the ESMA in capital markets in exceptional circumstances in accordance with **Article 28** of the so-called **"Short Selling Regulation"**.[70] This allows the ESMA to adopt measures (pursuant to Article 28(1)) addressing a threat to the orderly functioning and integrity of financial markets or to the stability of the EU financial system. Such measures, however, may be adopted if the following condition are met: there are cross-border implications; the factors set out in Article 28(2)-(3) have been duly examined; and either no NCA has taken measures to address the threat, or the measures taken by one or more of them have proven not to adequately address it.[71]

1.3.3. On the soft law instruments adopted by the EBA

As noted,[72] the EBA has the power to adopt Guidelines and Recommendations in the course of "level 3" of the Lamfalussy procedure. These acts constitute EU soft law. On this matter, of importance is the Judgment of the Court (Second Chamber) of 13 December 1989 in **Case C-322/88**, *Salvatore Grimaldi v Fonds des maladies professionnelles*[73] (the ***"Grimaldi* case"**), discussing the effects of Recommendations of EU agencies, and in particular whether those are binding for national courts, which can apply by analogy to all acts of EU soft law. Furthermore, even though they are non-legally binding, their addressees "*shall make every effort to comply with those*" pursuant to the "comply or explain" principle set out in **Article 16(3) EBAR**.[74] However, Member States may not fully comply with specific Guidelines, claiming in certain cases that the EBA does not have the competence to adopt them. In this respect, of significance is the judgment of the Court (Grand Chamber) of 15 July 2021 in **Case C-911/19**, *Fédération Bancaire Française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)*,[75] relating to the EBA **Guidelines** of 22 March 2016 (**EBA/GL/2015/18**) on product governance for retail banking products, which ruled that the Guidelines are valid, despite the opposite Opinion of the Advocate General.[76]

1.4. Provisions of the SSMR and the SRMR that have been challenged before the EU Courts

(1) The provisions of the SSMR and the SRMR that have been challenged before the General Court and the Court and have been interpreted by them, as discussed in Sections 2 and 3 below, are as follows:[77]

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70 **Regulation (EU) No 236/2012** of the co-legislators 14 March 2012, OJ L 86, 24.3.2012, pp. 1-24. On this legislative act, see **Walla (2022)**. On the intervention powers of the ESMA in accordance with **Article 9(5) ESMAR**, see by means of indication **D'Ambrosio (2018)**.

71 **Court judgment**, paras. 46-48. On the short selling case and this judgment, see, by means of mere indication, **Repasi (2014)**, **Chamon (2014)**, pp. 1058-1059, **Bergström (2015)** and **Gortsos and Lagaria (2020)**.

72 See **above, under 1.1.4**.

73 ECLI:EU:C:1989:646.

74 See **Wymeersch (2012)**, pp. 276-277 and **Gortsos (2023a)**, pp. 419-423.

75 ECLI:EU:C:2021:599.

76 ECLI:EU:C:2021:294. On this case and judgment, see by means of indication, **Annunziata (2021)**, **Kyriazis (2021)** and **Gortsos (2023a)**, pp. 421-422 (with further references).

77 For a comprehensive, regularly updated inventory of, *inter alia*, the actions brought against ECB and SRB Decisions and the related judgments of the Court, see **Della Negra and Smits (2024)**, published at the website of the European Banking Institute ('**EBI**') (at: https://ebi-europa.eu/publications/eu-cases-or-jurisprudence).

First, in relation to the SSMR, in which all actions for annulment of ECB Decisions were based on **Article 263 TFEU**,[78] of predominant importance are **Article 4(1)** on the specific tasks conferred upon the ECB within the SSM and its relationship with Article 6, **Article 6(4)** on the classification of a credit institution as significant, **Article 4(3)** on the application of national law by the ECB (and within that the provisions of the CRD IV, the CRR and the BRRD as implemented by participating Member States), as well as various points of Article 4(1), including **point (a)** on the ECB power to withdraw authorisations of credit institutions.[79] In the author's view, the judgments concerning these actions are the most representative out of a vast number.[80]

Second, in relation to the SRMR, relevant are (mainly) **Articles 18** on the resolution procedure, **20** on valuation for the purposes of valuation, and **23** on the resolution scheme.[81] In this respect, it is noted that one aspect on the liability of supervisory and resolution authorities is further discussed in Section 4.[82]

Furthermore, there are also numerous (over 100) closed and pending actions for annulment of SRB Decisions relating to the calculation of *ex-ante* contributions to the SRB for the SRF.[83] This aspect is not further discussed in Section 3.[84] It is merely noted that some of the most recent judgments of the General Court (Eighth Chamber, Extended Composition) in this respect are those of 10 April 2024 in **Case T-441/22**, *Dexia v Single Resolution Board (SRB)*,[85] and of 4 September in **Case T-599/22**, *Hypo Vorarlberg Bank AG v Single Resolution Board (SRB)*.[86]

(2) It is also noted that in most of the actions brought before the General Court, several pleas related to the infringement of various Articles of the Charter of Fundamental Rights of the EU ('**CFR**').[87] Due to its significant importance, this aspect would require an analysis *per se*; thus, is not discussed in this study.

(3) Finally, even though this study does not deal with the subject area of the ECB's and SRB's accountability *vis-à-vis* the European Parliament, their liability under EU law is (as also mentioned just above) briefly discussed in **Section 4**.[88]

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78 On this TFEU Article, pursuant to which the Court is competent to review, *inter alia*, the legality of ECB acts, other than Recommendations and Opinions (which are soft law instruments), see **Craig and de Búrca (2020)**, Chapters 15 and 16, as well as **Lenaerts *et al.* (2014)**, pp. 253-417.

79 See **Section 2 below, under 2.1-2.3**, respectively.

80 For a detailed list, as of 21 December 2023, see **Della Negra and Smits (2024)**, Section 1.

81 See **Section 3 below, under 3.1-3.3**.

82 See **Section 4 below, under 4.1.2 (2)**.

83 This aspect is governed by Articles 69-70 **SRMR**; for an analysis, see **Gortsos (2022a)**, pp. 1097-1109. Key issues at stake are the legal standards in evaluating the use by the SRB of **Article 70(7) SRMR** relating to these contributions (and of **Council Implementing Regulation (EU) 2015/81** of 19 December 2014 "specifying uniform conditions (...) with regard to *ex-ante* contributions to the [SRF]" adopted on its basis, OJ L 15, 22.1.2015, pp. 1-7), as well as the interpretation of **Article 69 SRMR** on the SRF's target level.

84 On some of these actions and the related judgments, see **Brescia Morra and Della Negra (2021)** and **Thijssen (2021)**, pp. 453-457; on a complete list of the related judgments of the General Court (as of 21 December 2023), see **Della Negra and Smits (2024)**, Section 3.1.

85 ECLI:EU:T:2024:216. Against this judgment the SRB filed an appeal on 26 June (**Case C-454/24 P**, *Single Resolution Board (SRB) v Dexia*, OJ C, C/2024/4958, 19.8.2024).

86 ECLI:EU:T:2024:587 (not available in English).

87 Consolidated version, OJ C 303, 14.12.2007, pp. 1-17). Shortly after 2009, when the Charter became binding, in order to demonstrate the broad scope of application of this source of primary law, the Court declared that "*[t]he applicability of [EU] law entails applicability of the fundamental rights guaranteed by the Charter*". See the judgment of the Court (Grand Chamber) of 26 February 2013 in **Case C-617/10**, *Åklagaren v Hans Åkerberg Fransson*, ECLI: EU:C:2013:105.

88 See **Section 4 below, under 4.1**.

2. SSMR-RELATED CASE-LAW

2.1. Relationship between Articles 4(1) and 6 SSMR – interpretation of Article 6(4) on the classification of a credit institution as significant

2.1.1. The regulatory framework

Pursuant to **Article 6(4) SSMR** (further specified in **Article 70 SSM-FR**), one of the criteria for the classification of a credit institution (and in general a supervised entity) by the ECB as significant is the **"size criterion"**, namely that the value of its assets exceeds 30 billion euro. In this case, it becomes subject to direct supervision by the ECB. Its classification as significant may be avoided only if there are **"particular circumstances"** (pursuant to **Article 6(4), second sub-paragraph**) entailing that the direct prudential supervision by the NCA is *better able* to attain the objective of financial stability protection and to ensure the consistent application of high supervisory standards.[89]

2.1.2. Case-law: the "*L-Bank* case"

(1) The German credit institution *Landeskreditbank Baden-Württemberg – Förderbank* (an investment and development bank and a legal person governed by public law and wholly owned by the German State (Land) of Baden-Württemberg, hereinafter "***L-Bank***") was classified by the ECB, on 1 September 2014, as significant on the basis of the above-mentioned size criterion and became subject to its direct supervision.[90] The *L-Bank* brought before the General Court an action for the annulment of the contested ECB Decision, putting forward five pleas in law: *first*, infringement of **Articles 6(4) SSMR** and **70 SSM-FR** in the choice of criteria applied by the ECB; *second*, manifest errors of assessment of the facts; *third*, infringement of the obligation to state reasons; *fourth*, misuse of powers arising from the ECB's failure to exercise its discretion; and *fifth*, an infringement by the ECB of its obligation to take into consideration all the relevant circumstances of the case.

(2) In its seminal judgment of 16 May 2017 in **Case T-122/15** *Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank (ECB)*[91] (hereinafter the "***L-Bank* case**"), the General Court rejected all five pleas (the fifth as unfounded) and, accordingly, dismissed the action brought by the *L-Bank* in its entirety.[92] In relation to the first two pleas, the following is briefly noted:

First, the first plea was rejected on the basis that, under the relevant provisions of the SSMR and the SSM-FR, a credit institution must be classified as a "significant entity" and, thus, become subject to the direct supervision of the ECB, *inter alia*, where the value of its assets exceeds 30

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89 On these provisions, see **Gortsos (2022a)**, pp. 110-116.

90 In its Opinion of 20 November 2014, the Administrative Board of Appeal ('**ABOR**') found this Decision lawful and on 5 January 2015 the ECB adopted **Decision ECB/SSM/15/1** (which was then "the contested decision"), which repealed and replaced the decision of 1 September 2014, whilst maintaining the applicant's classification as a significant entity. The Opinions of the ABoR (which, in general, are not binding on the Supervisory Board and the Governing Council) in the other cases presented in this Section below, albeit of importance, will not be further discussed in this study; on this body and a stocktaking of its work, see **Brescia Morra (2019)**, **Pizzolla (2021)**, pp. 362-365 and **Smits (2022)**.

91 ECLI:EU:T:2017:337.

92 **General Court judgment**, paras. 100, 112, 136, 142 and 150, respectively.

billion euro, unless there are "particular circumstances". In this context, the Court highlighted that the exercise by NCAs of direct prudential supervision of less significant institutions ('**LSIs**')

> "*is overseen by the ECB, which, under Article 6(5)(a) and (b) [SSMR], has the competence to communicate to those authorities 'regulations, guidelines or general instructions to national competent authorities, according to which the tasks defined in Article 4 (…) … are performed' and, moreover, to remove authority from a national authority and to 'decide to exercise directly itself all the relevant powers for one or more credit institutions'.*"[93]

Most importantly, the General Court pointed out that, from the examination of the interaction between **Articles 4(1)**[94] and **6 SSMR**, it is apparent that "*the logic of the relationship between them consists in allowing the exclusive competences delegated to the ECB to be implemented within a* ***"decentralised framework"***,[95] *rather than having a distribution of competences between the ECB and the NCAs in the performance of the tasks referred to in Article 4(1)*". According to the General Court, the ECB has exclusive competence for determining the "particular circumstances" in which direct supervision of a supervised entity that should fall under its direct supervision might instead be under the supervision of an NCA. This finding is supported by a textual interpretation of recitals (15), (28) and (38)-(40), noting in particular that the arrangement of the latter suggests that direct supervision by the NCAs under the SSM was envisaged by the Council "*as a mechanism of assistance to the ECB rather than the exercise of autonomous competence*".[96]

Furthermore, the General Court considered the following: *first*, the ECB retains important prerogatives even when NCAs perform the supervisory tasks set out in **Article 4(1), points (b) and (d)-(i) SSMR**, the existence of which is indicative of the subordinate nature of the intervention by the NCAs in the performance of those tasks (with further analysis of **Article 6(5)**[97]); and *second*, the competences conferred upon the ECB are also evident from the comparison of the provisions allowing for adjustments to the criterion for distribution of the roles between the ECB and the NCAs relating to the size of the supervised entity.

On the basis of the above, the Court concluded that the Council has delegated to the ECB exclusive competence in respect of the tasks laid down in Article 4(1) SSMR and that:

> "*the sole purpose of Article 6 (…) is to enable decentralised implementation under the SSM of that competence by the [NCAs], under the control of the ECB, in respect of the less significant entities and in respect of the tasks listed in Article 4(1)(b) and (d) to (i) (…), whilst conferring on the ECB exclusive competence for determining the content of the concept of "particular circumstances" within the meaning of Article 6(4), second subparagraph, which was implemented through the adoption of Articles 70 and 71 of the SSM-FR*".[98]

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93 *Ibid*., para. 24.

94 This SSMR Article is analysed in **Lackhoff and Witte (2022)**.

95 Bolded characters added for emphasis.

96 **General Court Decision**, paras. 54 and 55-58. In this respect it is noted that, according to settled case-law, "*the interpretation of a provision of EU law requires that account be taken not only of its wording, but also of its context and the objectives and purpose pursued by the act of which it forms part*" (see judgment of the Court of 29 July 2024 in **Case C-174/23**, *HJ, IK and LM v. Twenty First Capital SAS* (EU:C:2024:654), para. 46 and the case-law cited therein).

97 On this Article, see **Gortsos (2022a)**, pp. 127-131.

98 **General Court Decision**, paras. 59-61, 62 and 63, respectively.

(b) The General Court also rejected the second plea, in which the *L-Bank* claimed that it should, *inter alia*, have been classified as an LSI, because the objectives of the SSMR would be *sufficiently* achieved by being supervised by the German NCA (Bundesanstalt für Finanzdienstleistungsaufsicht ('**BaFin**', Federal Financial Supervisory Authority), given its low-risk profile by virtue of the practical impossibility of its finding itself in a situation of insolvency. In this respect, the General Court considered that the applicant failed to argue that the German authorities would be better able to attain these objectives than the ECB.[99]

(3) The appeal on this judgment was dismissed by that of the Court (First Chamber) of 8 May 2019 in **Case C-450/17**, *Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank (ECB)*.[100]

2.2. Interpretation of Article 4(3) SSMR on the application of national law by the ECB

2.2.1. The regulatory framework

Of significant importance in the system of the SSMR is (the first sentence of the first sub-paragraph of) **Article 4(3)**, which reads as follows: "*For the purposes of carrying out the tasks conferred on it by this Regulation (…), the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options*".[101]

By virtue of this provision (hereinafter **"Article 4(3) CRD IV"**), since certain CRD IV (and fewer CRR) Articles contain minimum harmonisation provisions, meaning that national law can set (or maintain) additional requirements,[102] the obligation has been imposed upon the ECB to implement national rules that incorporate EU banking law (namely, the CRD IV and the BRRD, as well as the CRR as to limited national options and discretions therein) in participating Member States. Accordingly:

First, this SSMR Article implies that, when the ECB takes related supervisory Decisions, it is required to apply as many different national laws as there are participating Member States, including applying different rules to (and treating differently) credit institutions belonging to the same group but located in different participating Member States.[103]

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99 *Ibid.*, paras. 101-111. On this judgment, see **Tröger (2017)**, **Annunziata (2018)** and **(2019)**, pp. 3-13, **Chiti (2019)**, p. 129, **Montemaggi (2020)**, **Riso (2021)**, pp. 494-503 and **Gortsos (2022a)**, pp. 116-118. On its interpretation by the German Constitutional Court (Bundesverfassungsgericht), see BVerfGE 151, 202.

100 ECLI:EU:C:2019:372.

101 In relation to the CRR, of importance is the second sentence of this first sub-paragraph, according to which, where the relevant EU law is composed of Regulations and currently those Regulations (such as the CRR) explicitly grant options for Member States, the ECB must also apply the national legislation exercising those options. It is noteworthy that this provision only refers to options and not to discretions. On **Article 4(3) SSMR**, see by means of indication **Kornezov (2017)**, **Annunziata (2019)**, pp. 16-28, **D'Ambrosio (2020)**, pp. 131-138, **Gagliardi and Wissink (2020)** and **Lackhoff and Witte (2022)**, pp. 71-79.

It is also noted that similar obligations are imposed on the newly-established so-called Anti-Money Laundering Authority ('**AMLA**') by virtue of **Regulation (EU) 2024/1620** of the co-legislators of 31 May 2024 "establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism (…)" (OJ L, 2024/1620, 19.6.2024).

102 This leads to the co-called **"gold plating"**.

103 See **Zilioli and Wojcik (2021)**, p. 10, para. 1.26.

Second, as a consequence, it brings national law to be applied by the ECB at a supranational level.[104] This is a rather unusual occurrence in EU law.

Third, if an option or discretion is given to participating Member States pursuant to the CRD IV, the ECB must apply the requirements set out in the national law transposing the CRD IV, including any specific national requirements, whereas, if it is given to NCAs or NDAs, the ECB assumes the role of these authorities in accordance with **Article 9(1) SSMR**[105] with regard to significant credit institutions established in the BU (and all credit institutions therein in relation to the so-called "common procedures"[106]).[107]

2.2.2. Case-law

A key aspect in this respect is the interpretation by the EU Courts of national law in conformity with EU law. Reference to the national legislation transposing provisions of the CRD IV and/or the BRRD is confined to the minimum necessary for the purposes of this study.

2.2.2.1 Cases in which the actions for annulment of ECB Decisions were dismissed by the General Court

(A) The *"Crédit Agricole* cases"

(1) Article 13(1) CRD IV (based on the considerations set out in **recitals (53)-(54)**) refers to a specific aspect of the corporate governance requirements for credit institutions under that legislative act, namely the effective direction of their business and place of the head office.[108] The interpretation of this Article by the ECB, which, on 29 January 2016, adopted four Decisions in its banking supervisory capacity within the SSM by virtue of the SSMR, and its obligation to apply French law pursuant to **Article 4(3) SSMR**, was at the epicentre of (another seminal) judgment of the General Court (Second Chamber in its Extended Composition) of 24 April 2018 in **Joined Cases T-133/16 to T-136/16**, *Crédit Agricole v ECB*.[109] The credit institutions affected by the supervisory decisions, namely four regional banks of the French non-centralised *Crédit Agricole* group, contested them filling an action for annulment pursuant to **Article 263 TFEU**.

(2) The key issues at stake was the interpretation by the General Court of the prohibition introduced by **Article 13(1) CRD IV** to combine within the same credit institution the role of

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104 See **Annunziata and De Arruda (2023)**, p. 12.

105 In accordance with this SSMR Article, the ECB is considered in the participating Member States the competent authority for carrying out its tasks in accordance with **Articles 4(1)-(2) SSMR** and as the designated authority for carrying out its tasks in accordance with **Article 5(2)**. For a detailed analysis, see **Gruber (2022)**.

106 These refer to the authorisations to take up the business of credit institutions, withdrawals of such authorisations, as well as the assessment of acquisitions and disposals of qualifying holdings (**SSMR**, Articles 4(1), points (a) and (c) and 14-15, and Articles 73-88 **SSM-FR**).

107 See **Witte (2021)**, p. 245, para. 15.21. On national options and discretions ('**N&Ds**') under the CRD IV, see in detail **Gortsos (2023c)**, with reference to the related acts adopted by the ECB and in particular its "Guide on options and discretions available in Union law" (at https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisory_guides2022_ond.en.pdf?29bf94d2acc9953ed8df6dcb0fe77bfb).

108 These address weaknesses in corporate governance, which have contributed to excessive and imprudent risk-taking in the banking sector with systemic ramifications and the need to introduce principles and standards to ensure effective oversight by the management body. For an analysis of the substantial impact of the CRD IV on credit institutions' corporate governance, including a discussion of Article 88 and the above-mentioned recitals, see by means of mere indication **Zetzsche and Enriques (2014)**, **Busch and Teubner (2019)**, **Busch, Ferrarini and van Solinge (2019)**, **Mülbert and Wilhelm (2020)**, **Binder (2019)** and **Hopt (2020)**.

109 ECLI:EU:T:2018:219.

chairman of the "management body in its supervisory function"[110] with the role of an executive member of the management body according to the rule of separation of supervisory and executive functions, as well as whether this provision was appropriately transposed into French law. Based on the ECB's interpretation of **Article 13(1)**, the General Court dismissed the actions and concluded that *first*, **Article 4(3) SSMR** requires it to assess the legality of the contested ECB decisions in the light of both **Article 13(1) CRD IV** *and* the second paragraph of Article L. 511-13 of the *Code monétaire et financier français* ('**CMF**', French monetary and financial code);[111] and *second*, for the purpose of determining whether the ECB committed errors of law, as alleged by the applicants, it was necessary to establish their meaning.[112] This was based on the following key considerations:

First, pursuant to **recital (57)**, the role of a credit institution's non-executive directors is, *inter alia*, to constructively challenge its strategy and scrutinise the performance of its management in achieving agreed objectives.[113]

Second, pursuant to the first sub-paragraph of **Article 88(1)**, the management body must define and oversee, and is also accountable for, the implementation of governance arrangements, which ensure the effective and prudent management of each credit institution, including the segregation of duties in the organisation and the prevention of conflicts of interest. The management body must furthermore comply with the five principles laid down in the second sub-paragraph (points (a)-(e)). According to the principle set out in point (d), the management body is responsible for providing effective oversight of senior management. Point (e) provides then that the chairman of a credit institution's management body in its supervisory function should not exercise simultaneously the functions of a Chief Executive Officer ('**CEO**') within the same institution unless justified by the institution and authorised by competent authorities.[114]

Third, the General Court assessed that, in the general scheme of the CRD IV, the objective relating to credit institutions' good (corporate) governance requires effective oversight of the senior management by the non-executive members of the management body, which necessitates checks and balances within that body. The effectiveness of such an oversight may, hence, be jeopardised if the chairman of the management body in its supervisory function, even if not formally acting as CEO, is also responsible for the effective direction of its business. Thus, while the predecessors to it may be understood as authorising the joint appointment of the CEO and the chairman of the management body in its supervisory function as "effective directors", such an interpretation cannot be followed under the CRD IV. This is due to the fact that, pursuant to the (above-mentioned, new) rules relating to credit institutions' "good governance" under **Article 88(1)** and in accordance with the separation of supervisory and executive functions rule set out therein, *in principle*, the chairman of the management body in its supervisory function is precluded

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110 Pursuant to Article 3(1), point (8) **CRD IV**, **'management body in its supervisory function'** means the management body acting in its role of overseeing and monitoring management decision-making.

111 It is noted that, according to settled EU case-law, where the interpretation of a national law provision is at issue, the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts; see by means of mere indication, the judgments of the Court (Fifth Chamber) of 27 June 1996 in **Case C-240-95**, *Rémy Schmit* (EU:C:1996:259), para. 14, and of 16 September 2015 (First Chamber) in **Case C-433/13**, *European Commission v Slovak Republic* (ECLI:EU:C:2015:602), para. 81.

112 **General Court judgment**, paras. 47-50.

113 *Ibid*., paras. 69-76.

114 *Ibid*., paras. 77-78. On the reluctance of competent authorities to provide such an authorisation, see **Enriques and Zetzsche (2014)**.

from also being responsible for the effective direction of a credit institution's business (i.e., exercising executive powers).[115]

Fourth, on the basis of a textual, historical, teleological and contextual interpretation of **Article 13(1)** concerning the meaning of the expression "*two persons who effectively direct the business of the institution*", deemed necessary in view of the changes in credit institutions' corporate governance established by the CRD IV, which put emphasis on the monitoring role of non-executive members of the management body, the General Court elaborated the definition of 'good governance', reading this Article in conjunction with the prohibition established by **Article 88(1)**.[116]

(3) Overall, the judgment reaffirmed that, in accordance with **Article 4(3) SSMR**, for the purpose of carrying out the specific tasks conferred upon it under this legislative act, the ECB must apply EU law, and to the extent that this is composed of Directives, the national legislation transposing them. In the cases discussed in this article that was French law, namely, the CMF.[117]

(B) The *"Berlusconi* cases"

(1) Of significance in respect of the interpretation by EU courts of national (in this case, Italian) law which the ECB must apply in accordance with Article 4(3) is also the judgment of the General Court (Second Chamber, Extended Composition) of 11 May 2022 in **Case T-913/16**, *Finanziaria d'investimento Fininvest SpA (Fininvest) and Berlusconi v European Central Bank (ECB)*.[118] This case concerns an application by Fininvest and by Mr Silvio Berlusconi for annulment of the ECB Decision (ECB/SSM/2016) of 25 October 2016, whereby the ECB refused to authorise the acquisition by them of a qualified holding in the Italian credit institution *Banca Mediolanum SpA* pursuant to **Article 22 CRD IV**. The ECB third specific task "*to assess notifications of the acquisition and disposal of qualifying holdings in credit institutions, except in the case of a bank resolution, and subject to Article 15*"[119] is one of the common procedures established by that Article.[120]

(2) In the meantime, on 19 December 2018, the Court (Grand Chamber) had issued its judgment in **Case C-219/17**, *Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*.[121] The case concerned a request for a preliminary ruling under **Article 267 TFEU** from the Italian Council of State (*Consiglio di Stato*), made by decision of 23 February 2017, asking whether challenges for judicial review of an NCA's draft proposal to the ECB in a qualifying holding procedure are within the competence of national or EU courts, and whether the Court is competent when the applicant claims that the force of *res judicata* attaching to a national decision has been disregarded.[122]

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115 *Ibid*., paras. 79-80. According to the General Court, the different governance structures used across Member States, with a unitary or a dual board structure, do not undermine this conclusion (*ibid*., paras. 81-82).

116 Pursuant to **Mülbert and Wilhelm (2020)**, at p. 223, "*[t]he (…) CRD IV has fundamentally transformed the legal framework for European banks' corporate governance*".

117 On these cases and this judgment, see **Smits (2018a)**, **Chiti (2019)**, pp. 107 and 131, **D'Ambrosio (2020)** and in detail **Gortsos (2021a)**.

118 ECLI:EU:T:2022:279.

119 **SSMR**, Article 4(1), point (c).

120 See **Bastos (2019)**, discussing, on the occasion of this Case, the judicial review of "composite" administrative procedures in the SSM; see also **Eckes and D'Ambrosio (2020)**, pp. 17-47, **Della Negra and Lo Schiavo (2022)**, as well as **Budinská and Tegelaar (2022)** on the duty of care as a judicial review tool in SSM composite procedures.

121 ECLI:EU:C:2018:1023.

122 Thus in this case there are both a national and an EU judicial path.

The Court ruled as follows: *first*, **Article 263 TFEU** must be interpreted as precluding national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by NCAs in the procedure provided for in Articles 22-23 CRD IV, in Articles 4(1) point (c) and 15 SSMR and in Articles 85-87 SSM-FR; and *second*, in that regard, it is immaterial that a specific action for a declaration of invalidity on the ground of alleged disregard of the force of *res judicata* attaching to a national judicial decision has been brought before a national court.

(3) Reverting to the General Court's judgment in **Case T-913/16**, the key issue at stake was the interpretation of the concept 'acquisition of a qualifying holding' in the meaning of Article 15 SSMR and Article 22(1) CRD IV. By its judgment of 11 May 2022, which dismissed the action, the General Court made the following considerations, primarily based on the Court's settled case-law that, according to the need for uniform application of EU law and from the principle of equality, "*the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union*".[123]

First, **Article 15 SSMR** (on the assessment by the ECB (within the SSM) of acquisitions of qualifying holdings) and **Article 22 CRD IV** (on the notification of such acquisitions)[124] make no express reference to the laws of the Member States for the purpose of determining the meaning and scope of the concept of acquisition of a qualifying holding. However, if the applicability of the assessment of acquisitions of qualifying holdings depended on the interpretation of that concept in the national laws, that assessment's mandatory nature would be undermined; thus, that concept must be regarded, for the purposes of the issue at hand, as "*an autonomous concept of EU law which must be interpreted in a uniform manner throughout the Member States*".[125]

Second, consequently, and according to settled case-law, that (and any) concept must be determined by reference to the general context in which it is used and its usual meaning in everyday language, while, in construing a provision of EU law, it is necessary to consider the objectives pursued by the legislation in question and its effectiveness. In the context of applying the authorisation procedure for acquisitions of a qualifying holding and the objectives pursued, the General Court refers to the considerations in **recitals (22)-(23) SSMR** and to **Article 23(1) CRD IV** (on the objective of this procedure) to conclude that this concept cannot be interpreted restrictively as applying only to situations in which acquisitions arise exclusively from the purchase of shares on the market since:

> "*in fact, such a restrictive interpretation would have the effect of allowing the assessment procedure to be circumvented, thus removing certain methods of acquiring qualifying holdings from the supervision of the ECB and thus undermining those objectives*".[126]

Third, having regard to the wording of Articles 15 SSMR and 22(1) and 23(1) CRD IV, their context and their objectives, the applicability of the authorisation procedure for the acquisition of a qualifying holding to a given transaction cannot be dependent on a change in the likely influence that may be exercised by the acquirers of a qualifying holding on the credit institution to which that transaction relates. In fact, pursuant to Article 23(1) CRD IV, "*the likely influence of a proposed*

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123 **General Court judgment**, para. 44 (and the case-law cited therein).

124 For a detailed analysis of these Articles, see **Gurlit (2022)**, pp. 215-234.

125 **General Court judgment**, paras. 45-49 (and the case-law cited therein).

126 *Ibid*., para. 50 (and the case-law cited therein) and paras. 51-57.

acquirer on the credit institution in question is among the factors to be taken into account for the sole purposes of assessing the suitability of the proposed acquirer and the financial soundness of the proposed acquisition".

Conversely, since that factor is not mentioned in Article 22(1), it is not relevant for the purposes of the classification of a transaction as the acquisition of a qualifying holding, leading to the conclusion that, in essence, "*the applicability of the procedure for the authorisation of the acquisition of a qualifying holding is not dependent on a change in the likely influence that may be exercised by the proposed acquirer on the credit institution*".[127]

Finally, pursuant to the objectives of the procedure for the assessment of acquisitions of qualifying holdings, the provisions governing that procedure must not be interpreted restrictively either. Even though Articles 15 SSMR and 22 CRD IV provide for an *ex-ante* review of acquisitions of qualifying holdings in credit institutions, their provisions cannot be interpreted as not applying to transactions that might be classified as acquisition of a qualifying holding solely because such a transaction has already been implemented, without the acquirers having informed the competent authorities and having awaited their authorisation, since "*such an interpretation would render them wholly ineffective and undermine their objective*".[128]

(C) The "*Crédit Mutuel Arkéa* case" on two aspects

(I) Exercise of supervisory powers by the ECB within the SSM

(1) In accordance with **Article 16(2) SSMR**, supervisory powers can be exercised by the ECB if the governance arrangements, strategies, processes and mechanisms implemented by a supervised entity and the own funds and liquidity held by it do not ensure sound management and coverage of risks.[129] This must be assessed on the basis of a determination made in the framework of a "supervisory review" pursuant to **Article 4(1), point (f) SSMR**, which confers upon the ECB this (sixth) specific task within the SSM. Such a review is carried out in accordance with the supervisory review and evaluation process ('**SREP**').[130]

(2) This condition has been discussed (*inter alia*) in the judgment of the General Court (Second Chamber, Extended Composition) of 13 December 2017 in **Case T-712/15**, *Crédit Mutuel Arkéa v European Central Bank (ECB)*,[131] another one in which it had to interpret French banking law concepts. The applicant, a non-centralised banking group consisting of a network of local branches with the status cooperative companies, requested the annulment of the ECB Decision (ECB/SSM/2015) of 5 October 2015 setting out the prudential requirements for the French *Crédit Mutuel* group. Pursuant to the judgment, which dismissed the action, it follows from a joint reading of **Article 16(1), point (c)** and **16(2), point (a) SSMR** that, if prudential examinations

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127 *Ibid*., paras. 58-60.

128 *Ibid*., paras. 61-64. On this case, see (by means of mere indication) **Di Bucci (2021)**, pp. 119-123, **Bassani, G. (2021)** and **Annunziata (2022)**. By the closing of this study, pending were two appeals against this General Court's judgment. It is merely noted that after the cut-off date, by its judgment of 19 September 2024 in **Joined Cases C-512/22 P and C-513/22 P**, *Finanziaria d'investimento Fininvest SpA (Fininvest) v European Central Bank (ECB) and European Commission* and *Marina Elvira Berlusconi and Others v European Central Bank (ECB) and European Commission* (ECLI:EU:C:2024:774), the Court (Fourth Chamber) set aside the General Court's judgment, finding that this distorted the facts of the dispute, and annulled the ECB Decision of 25 October 2016.

129 On this SSMR Article, see **Gortsos (2022a)**, pp. 235-251.

130 Investigations and on-site inspections pursuant to **Articles 11-12** are also of relevance.

131 ECLI:EU:T:2017:900.

carried out by the ECB show that the own funds and liquidity held by a credit institution do not ensure sound management and risk coverage, the ECB is entitled to require it to go beyond these minimum requirements.[132]

(II) Supervision of banking groups on a consolidated basis

(1) As regards micro-prudential supervision of banking groups on a consolidated basis, the seventh ECB specific task within the SSM[133] consists in carrying out such supervision (as provided for by **Article 111 CRD IV** on the determination of the consolidating supervisor) in respect of significant supervised entities if the parent undertaking is either a "parent institution" or an "EU parent institution" established in a participating Member State;[134] and in participating in consolidated supervision, including in colleges of supervisors (pursuant to **Article 116**), without prejudice to the participation of participating Member States' NCAs therein as observers for parent companies not established therein.[135]

(2) This aspect has also been discussed in detail in the above judgment of 13 December 2017 in **Case T-712/15**, *Crédit Mutuel Arkéa v European Central Bank (ECB)*, where the General Court undertook a teleological and contextual interpretation of **Article 2, point (21)(c) SSM-FR** on the definition of the term **'supervised group'**.[136] In this respect, the General Court considered as follows:

First, since, according to **recital (9) of the SSM-FR**, the aim is to develop and specify the cooperation procedures established in the SSMR between the ECB and NRAs within the SSM, as well as with NDAs, the application of a teleological interpretation of Article 2, point (21)(c) requires the taking into account of the objectives of the SSMR set out in Article 1.[137]

Second, in order to comply with the objectives of the SSMR, Article 2, point (21)(c) and the conditions laid down in **Article 10(1) CRR** (to which it refers) "*must be interpreted in the light of the legislature's intention to enable the ECB to have an overall picture of the risks likely to affect a credit institution and to avoid the fragmentation of prudential supervision between the ECB and national authorities*".[138] This conclusion was based on an analysis of the two aims to of the consolidated prudential supervision of groups of credit institutions, namely, enable the ECB to identify the risks likely to affect a credit institution which derive from the group of which it forms part (taking into

132 **General Court judgment**, para. 168. The appeal in **Joined Cases C-152/18 P and C-153/18 P**, *Crédit mutuel Arkéa v European Central Bank (ECB)*, was dismissed by the Court (First Chamber) by its judgment of 2 October 2019 (ECLI:EU:C:2019:810).

133 **SSMR**, Article 4(1), point (g).

134 The relevant NCA must perform the task of the consolidated supervisor in respect of LSIs (**SSM-FR**, Article 8(2)).

135 **CRD IV**, Articles 111-118.

136 Point (c) covers supervised entities each having their head office in the same participating Member State provided that they are permanently affiliated to a central body which supervises them under the conditions laid down in **Article 10(1) CRR** and is established in the same participating Member State.

137 For a detailed analysis of this Article, see **Ohler (2022)**.

138 **General Court judgment**, paras. 57 and 64.

account the considerations in **recital (26) SSMR**), and avoid the prudential supervision of the entities making up groups being fragmented between different supervisory authorities[139]).[140]

2.2.2.2 Cases in which the interpretation of national law by the ECB has been challenged by the General Court

(A) The "*Corneli* case"

(1) Five months after its judgment in the *Fininvest and Berlusconi v ECB case*, namely on 12 October 2022, the General Court delivered its judgment in **Case T-502/19**, *Francesca Corneli v ECB*,[141] (the **"*Corneli* case"**). The applicant, a minority shareholder in the Italian credit institution *Banca Carige Spa*, submitted a request for annulment of the ECB Decision (ECB-SSM-2019-ITCAR-11) of 1 January 2019 to place the credit institution under temporary extraordinary administration pursuant to **Article 70(1)** of the Consolidated Law on Banking (hereinafter the **"Italian Banking Law"**), which implemented **Articles 28-29 BRRD**,[142] by dissolving its administrative and supervisory bodies and replacing them with three special administrators and with a supervisory committee formed of three members, respectively. The applicant submitted that the ECB erred in law in basing the contested Decisions on that Article of the Italian Law, whereas that provision does not refer to the situation relied on to justify the temporary placement under administration, namely a 'significant deterioration' of the bank's situation, a plea disputed by the ECB, supported by the Commission.

(2) By its judgment, the General Court did not endorse the ECB's claim to declare the action brought by the applicant inadmissible, and found an error in the interpretation of Italian law; accordingly, it annulled the (above) ECB Decision placing *Banca Carige* under temporary administration (as well as the ECB Decision ECB-SSM-2019-ITCAR of 29 March 2019 extending the duration of the period of temporary administration) and dismissed the action as to the remainder.[143] In relation to the applicants' plea alleging that the ECB erred in law in determining the legal basis used to adopt the contested decisions this respect, the following is briefly noted:

First, on the basis of a textual analysis of the wording of the conditions for the application of two provisions of that law, namely, Article 69*octiesdecies*(1)(b) (hereinafter **"Article 69"**), which transposed, respectively, Article 28 and Article 29 BRRD, the General Court concluded that the two provisions govern two different situations (the first the 'removal' of the managing or supervisory bodies of credit institutions and the second the 'dissolution' of their managing or supervisory bodies, which results in the suspension of the functions of the assemblies and other bodies and in

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139 *Ibid*., paras. 58-61 and paras. 62-63, where it is stated, respectively, that the second aim is apparent: *first*, from the fact that according to **recital (38)** and **Article 6(4) SSMR**, the assessment of the significance of a credit institution, which determines whether certain prudential supervision tasks will be carried out by the ECB alone or decentralised under the SSM (with reference to para. 63 of the (above-mentioned) judgment in the *L-Bank* Case T-122/15); and *second*, from **Article 40(2) SSM-FR**, which provides that if an entity that is part of a group comes under the prudential supervision of the ECB, either because it fulfils the direct public financial assistance criterion or is one of the three most significant credit institutions in a participating Member State, that supervision will be extended to the entire group; see on this also **Ohler (2020)**, p. 1129 at para. 37.67.

140 On this case and that judgment, see **Smits (2018b)**, **Chiti (2019)**, p. 130, and **Martucci (2021)**, pp. 504-509.

141 ECLI:EU:T:2022:627.

142 The carrying out of early intervention where a credit institution or group in relation to which the ECB is the consolidating supervisor, does not meet or is likely to breach the applicable prudential requirements, and, only in the cases explicitly stipulated by relevant Union law for competent authorities, structural changes required from credit institutions to prevent financial stress or failure, excluding any resolution powers is the second leg of the last ECB specific task within the SSM (**SSMR**, Article 4(1), point (i)).

143 On this case, see **Sarmiento (2022)** and **Annunziata and De Arruda (2023)**. Against this judgment the ECB filed an appeal (**Case C-777/22 P**, *ECB v Corneli*) and the Commission as well (**Case C-789/22 P**, *Commission v Corneli*); both are pending.

the setting up of extraordinary administration), while the conditions for their application also differ and, in particular, they are exhaustive and are alternatives.[144]

Second, by its Decision to place *Banca Carige* under temporary administration, the ECB decided to dissolve its administration and supervisory bodies and to replace them by three extraordinary commissioners and by a supervisory committee. According to the General Court, the power exercised by the ECB to place *Banca Carige* under temporary administration was, apparently, that referred to in Article 70. The reference to Article 69 does not invalidate that finding, and the ECB infringed Article 70 by relying, even though that condition was not provided for in that provision, on the **"significant deterioration"** in its situation in order to dissolve its management and supervisory bodies, set up a temporary administration and maintain that during the period covered by the extension decision.[145]

Third, the ECB (supported by the Commission) contested that conclusion by submitting, *inter alia*, that it was required to apply, in addition to national law, when acting as banking supervisor, all the standards laid down in EU law; on that basis, it was required to apply the provision which, in the BRRD, provides for placement under temporary administration in the event of a significant deterioration in the situation of the establishment in question. That obligation stems from the principle of legality, which requires the institutions to observe, subject to review by the EU Courts, the rules to which they are subject, and in the case at hand **Article 4(3) SSRM**.[146] However, the General Court noted that, pursuant to this provision, where the EU law involves Directives, it is the national law transposing them that should be applied:

> "*The provision cannot be read as having two distinct sources of obligations, namely EU law in its entirety, including directives, to which the national law transposing them should be added. Such an interpretation would imply that the national provisions differ from directives and that, in such a case, the two types of documents are binding on the ECB as separate legislative sources. [It] cannot be accepted, since it would be contrary to* ***Article 288 TFEU****, which provides that 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. Furthermore, according to settled case-law, a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual*".

On the basis of the above-mentioned, the General Court concluded that the error made by the ECB in the application of Article 70 of the Italian Banking Law: "*cannot be remedied by a* ***free interpretation***[147] *of the texts which would allow the conditions for the application of provisions conceived separately in [the BRRD] and national law to be reconstructed.*"[148]

(B) Two recent (2024) judgments on related cases

(1) On 28 February 2024, the General Court (Third Chamber) submitted its most recent judgments in the context of the application of **Article 4(3) SSMR** in relation to two Austrian significant credit institutions under the direct supervision of the ECB: the *first* in **Case T-667/21**, *BAWAG PSK Bank*

144 **General Court judgment**, paras. 88-95.

145 *Ibid*., paras. 96-98 and 100.

146 *Ibid*., paras. 101-111.

147 Bolded characters added for emphasis.

148 **General Court judgment**, paras. 112 (and the case-law cited therein) and 113.

für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v European Central Bank;[149] and the *second* in **Cases T-647/21 and T-99/22**, *Sber Vermögensverwaltungs AG, formerly Sberbank Europe AG v European Central Bank (ECB)*.[150] In all cases, the applicants sought the annulment of the ECB Decisions (namely, ECB-SSM-2021-ATBAW-7-ESA-2018-0000126 of 2 August 2021 in Case T-667/21, and ECB-SSM-2021-ATSBE-7 of 2 August 2021 and ECB-SSM-2021-ATSBE-12 of 21 December 2021, respectively, in the other two) taken pursuant to **Article 4(1), point (d)**[151] and **4(3) SSMR**, read in conjunction with **Article 395(1) CRR** on "limits to large exposures" and several provisions of Austrian financial law. The key issue at stake was whether the ECB can apply absorption interest pursuant to Austrian law where Article 395 CRR has been infringed and following a decision imposing an administrative pecuniary penalty under **Article 18 SSMR**.

In the context of the Russian Federation's invasion of Ukraine and the restrictive measures taken by the EU against it, which is closely linked to the *Sberbank* cases, a most recent action was brought on 29 June 2024 in **Case T-324/24**, *UniCredit SpA v European Central Bank (ECB)*.[152] By this action, the applicant submitted the request for annulment of the ECB Decision of 22 April 2024 (Decision No ECB-SSM-2024-ITUNI-17) establishing prudential requirements to further reduce the risks connected with the business of *UniCredit SpA* in the Russian Federation, in particular in relation to the provision of loans, the taking of deposits and the provision of payment services.

(2) By its judgment in the first case, the General Court annulled the ECB Decision of 2 August 2021. By its second judgment, the General Court after having joined, for its purposes, Cases T-647/21 and T-99/22, declared that there is no longer any need to adjudicate on the action in the first (for the reasons set out in paras. 82-87) and as regards the second case, annulled the ECB Decision of 21 December 2021.[153]

2.3. Aspects relating to the withdrawal of banking licenses

(1) Article 4(1), point (a) SSMR confers upon the ECB its first specific task which is another case of a common procedure, namely, to (grant and) withdraw authorisations (licenses) of credit institutions subject to **Article 14**.[154] The ECB has made use of this specific task on several occasions, which have been the subject of judicial review.

(2) The seminal Court case in that respect is that relating to the Latvian credit institution *Trasta Komercbanka* (the **"*Trasta* case"**).[155] At a proposal of the Latvian NCA (*Finanšu un kapitāla tirgus*

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149 At: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202402609.

150 ECLI:EU:T:2024:127. On the case of *Sberbank Europe AG*, see also **Section 3 below, under 3.2.2.4**.

151 This point sets out the fourth specific task of the ECB within the SSM, namely, to ensure compliance with the acts referred to in Article 4(3), which impose prudential requirements on credit institutions in the areas of, *inter alia*, large exposure limits, and the related reporting and public disclosure of information.

152 OJ C, C/2024/4869, 12.8.2024.

153 For an assessment of these judgment, see **Section 5 below**.

154 For a detailed analysis of this Article, see **Gurlit (2022)**, pp. 189-215.

155 Other related judgments of the General Court (Ninth Chamber, Extended Composition) are those on the withdrawal by the ECB of the banking licenses of the following credit institutions:

(a) the Estonian *Versobank AS* by its Decision of 26 March 2018 (see judgment of 6 October 2021 in **Cases T-351/18 and T-584/18**, *Ukrselhosprom PCF LLC and Versobank AS v European Central Bank (ECB)* (ECLI:EU:T:2021:669, in which the General Court declared that there is no longer any need to adjudicate on the action in the first case and dismissed the action in the second on the annulment of the ECB Decision); and

(b) the Maltese LSI (thus, under direct supervision of the Maltese NCA) *Pilatus Bank plc* by its Decision of 2 November 2018 (see judgment of 2 February 2022 in **Case T-27/19**, *Pilatus Bank plc and Pilatus Holding Ltd v European Central Bank (ECB)* (ECLI:EU:T:2022:46).

komisija), the ECB (by its Decision of 11 July 2016) decided to withdraw the banking license of *Trasta* (hereinafter the **"withdrawal Decision"**). Upon that withdrawal, *Trasta* had been liquidated, in accordance with Latvian law, by a Latvian court, which, in order to successfully complete the liquidation, appointed a liquidator. The credit institution and some of its shareholders requested initially the General Court to annul the ECB Decision of 3 March 2016 withdrawing the banking license of *Trasta* on the basis of six grounds.

By its Order of 12 September 2017 in **Case T-247/16**, *Fursin and others v European Central Bank (ECB)*,[156] the General Court (Ninth Chamber) rejected the claim of *Trasta Komercbanka* (which after the initiation of the liquidation proceedings was renamed to *Fursin)* as inadmissible and upheld the shareholders' claim as admissible. Following three appeal cases by the ECB, the Commission and *Trasta* itself, the Court (Grand Chamber) submitted its judgment of 5 November 2019 in **Joined Cases C-663/17 P, C-665/17 P and C-669/17 P**, *European Central Bank (ECB) and European Commission v Trasta Komercbanka AS and Others*.[157] The Court did not address the shareholders' individual concerns but discussed the conditions under which the shareholders could be held to be directly concerned by a Decision adopted in respect of banking supervision in relation to the credit institution in which they held shares. In that respect, the Court ruled as follows:

On the one hand, the withdrawal Decision directly affected the legal situation of the credit institution concerned itself, since, once the Decision had been taken, this was no longer authorised to continue its banking activities.[158] *On the other hand*, that Decision did not have such an effect on the credit institution's shareholders, since (despite its economic impact on the value of their shares or the proportion of distributable dividends following its adoption) it did not prevent them from continuing to exercise their participation rights at the credit institution's general meeting. The Court considered that it was *only* the liquidation decision which affected their legal situation, which entrusted the management of the credit institution to the liquidator, by depriving them of the possibility to exert influence on its management. Since, however, that decision had not been adopted by the ECB, but by a Latvian court pursuant to Latvian law (in a field which, as already noted,[159] has not been harmonised at EU level), the withdrawal of *Trasta Komercbanka's* authorisation by the ECB did not actually, in itself, directly affect the shareholders' legal situation. Accordingly, since the act contested by the shareholders was the withdrawal Decision, the action was declared inadmissible.[160]

156 ECLI:EU:C:2017:623 (unpublished).

157 ECLI:EU:C:2019:923.

158 **Court judgment**, para. 104.

159 See **Section 1 above, under 1.2 (2)**.

160 **Court judgment**, paras. 105-115. On a detailed background of this case and a discussion of the Court's decisions, see **Smits (2020b)** and **Marafioti (2021)**.

3. SRMR-RELATED CASE-LAW

3.1. Assessment by the ECB that a credit institution is failing or likely to fail (FOLTF)

3.1.1. The regulatory framework

If a significant credit institution's financial position has deteriorated to such an extent that the ECB makes an assessment that it is "failing or likely to fail" (**FOLTF**, the first resolution condition[161]), the ECB must communicate its assessment to the Commission and the SRB. This is a "supervisory assessment" about an individual credit institution addressed to the SRB in order for the latter to conduct its own resolution assessment.[162]

The resolution regime under **Article 18 SRMR** is not activated if any of the three forms of provision of extraordinary public financial support[163] to remedy a "*serious disruption*" in the national economy and preserve financial stability applies (including an injection of own funds or purchase of capital instruments "*at prices and on terms that do not confer an advantage upon the credit institution*", the so-called **"precautionary recapitalisation"**).[164] Applicable in this case is the **2013 Banking Communication** adopted to support measures in favour of credit institutions amidst the GFC.[165]

3.1.2. Case-law

The above consideration on the nature of the FOLTF assessment was confirmed by the General Court (Eighth Chamber) in its Order of 6 May 2019 in **Case T-281/18**, *ABLV Bank AS vs European Central Bank (ECB)*.[166] Pursuant to this Order, it was necessary to determine, by looking at their substance, "*whether those [ECB] contested acts constitute a communication to the SRB which forms the basis for the adoption by the SRB of a resolution scheme or of a decision establishing that resolution*

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161 **SRMR**, Article 18(1), first sub-paragraph, point (a); under conditions, the SRB may also make such an assessment (*ibid*., Article 18(1), second sub-paragraph). **Article 18(4)** defines four situations in which an entity is deemed as FOLTF. The second condition for resolution consists in that, having regard to timing and other relevant circumstances there is no reasonable prospect that the failure of the credit institution could be prevented within a reasonable timeframe by taking in respect of it any 'alternative private sector measures' (*ibid*., Article 18(1), first sub-paragraph, point (b)). This assessment is made by the SRB but may also be made by the ECB duly informing the SRB (*ibid*., Article 18(1), fourth sub-paragraph). On the resolution conditions, see **Binder (2016)**, **Freudenthaler and Lintner (2017)**, **Haentjens (2017)**, pp. 221-226, **Ventoruzzo and Sandrelli (2019)**, and **Tornese (2022)**.

162 **SRMR**, Article 18(1), third and second sub-paragraphs, respectively.

163 This term is defined (*ibid*., Article 3(1), point (29)) as State aid within the meaning of **Article 107(1) TFEU**, or any other public financial support at supra-national level, which, if provided at national level, would constitute State aid, and which is provided in order to preserve or restore the viability, liquidity or solvency of a designated entity or of a group of which such an entity is part.

164 *Ibid*., Article 18(4), first sub-paragraph, point d(i)-(iii), respectively, and second sub-paragraph (on the additional conditions for precautionary recapitalisation). See **Micossi, Bruzzone and Cassella (2016)**, **Binder (2017)**, pp. 69-70 and **Tornese (2022)**, pp. 678-684.

On the precautionary recapitalisation on the Italian credit institution *Banca Monte dei Paschi di Siena S.p.A.* ('**MPS**') on the basis of the Agreement of 1 June 2017 between the Commission and the Italian Ministry of Finance in full compliance with the above-mentioned SRMR Article (at: https://europa.eu/rapid/press-release_STATEMENT-171502_en.htm), see (critically) **De Groen (2016)** and **Hadjiemmanuil (2017)**. It is also noted that specific bondholders of MPS submitted an action for annulment (pursuant to **Article 263 TFEU**) of Commission Decision C(2017) 4690 final of 4 July 2017 on State Aid for precautionary recapitalisation, declaring the aid compatible with the internal market. The Commission challenged this as inadmissible. At the preliminary examination stage, by its judgment of 24 February 2021 in **Case T-161/18**, *Anthony Braesch and Others v European Commission* (ECLI:EU:T:2021:102), the General Court (Third Chamber, Extended Composition) found that the approval of the aid measures in the light of the restructuring plan in the contested decision is of direct and individual concern to the applicants and rejected the Commission's plea of inadmissibility.

165 Communication from the Commission "on the application, from August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis" ('Banking Communication') (OJ C 216, 30.7.2013, pp. 1-15, as in force), para. 19. On this Communication, see further **Section 4 below, under 4.2**.

166 ECLI:EU:T:2019:296; see further in **this Section below, under 3.2.2.2 (A) (1)**.

is not in the public interest, but which does not, as such, change the applicant's legal situation". In this respect, the General Court *first* considered that the contested acts contain a mere FOLTF assessment issued by the ECB. This has no decision-making power within the framework for the adoption of a resolution scheme, since, while the ECB and the SRB must be able to assess whether a credit institution is FOLTF, the assessment of the conditions required for a resolution and to adopt a resolution scheme is an exclusive SRB power. Thus, the FOLTF assessment "*does not in any way bind the SRB*".

Furthermore, the General Court concluded that ECB assessments on FOLTF are a mere factual assessment, with no legal effect, and constitute "*preparatory measures*" which do not change the applicant's legal status:[167] "*They set out a factual assessment carried out by the ECB as to whether the applicant and its subsidiary are failing or are likely to fail which is in no way binding, but which constitutes the basis for the adoption by the SRB of resolution schemes or decisions establishing that resolution is not in the public interest.*"[168]

3.2. Resolution action

3.2.1. The regulatory framework

(1) The third condition that must be met (cumulatively with the other two) for the resolution of credit institutions under the SRMR (and the BRRD) is the public interest criterion. A resolution action is deemed to be in the public interest if two parameters are cumulatively met in the course of the public interest assessment ('**PIA**'):[169] *first*, such an action is necessary for the achievement of, and is proportionate to, at least one of the resolution objectives set out in **Article 14(2) SRMR**; and *second*, the winding-up of the credit institution under normal insolvency proceedings ('**NIPs**')[170] would not meet these resolution objectives "*to the same extent*".[171] If the two above-mentioned parameters are not met (thus, there is a **"negative PIA"**), the credit institution is wound up under NIPs.

(2) In the course of the resolution procedure under **Article 18 SRMR**, the SRB must adopt a resolution scheme containing specifically set elements. The legal and political responsibility for determining the resolution policy is conferred upon the Commission or the Council, which must endorse it with regard to its discretionary aspects.[172] All SRB Decisions are addressed to the respective NRAs, which are required to take all necessary measures to implement them in accordance with **Article 29 SRMR**, by exercising resolution powers.[173]

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167 **Order of the General Court**, para. 34.

168 *Ibid.*, paras. 48-49, on the basis also of the considerations in para. 36.

169 **SRMR**, Article 18(1), first sub-paragraph, point (c), and (5) (see **Tornese (2022)**, pp. 684-687). According to **Spitzer, Grigaitè and Magnus (2023)** (at p. 2) these two conditions constitute, respectively, the "absolute" and the "relative" test (since it entails a number of judgements). Furthermore, according to **Lastra, Russo and Bodellini (2019)** (at p. 11-15), on the interpretation of the term "public interest" and the criteria to define it, the second condition leads to a "dichotomy" between resolution and liquidation. See in this respect also the SRB's 2019 document entitled "Public interest assessment: SRB Approach" (available at: https://srb.europa.eu/sites/srbsite/files/2019-06-28_draft_pia_paper_v12.pdf), which has been updated twice.

170 This term is defined (in Article 2(1), point (47) **BRRD**) broadly to cover a variety of proceedings under Member States' national laws.

171 The SRMR (and the BRRD) highlight the exceptional nature that resolution actions should have irrespective of a credit institution's size and/or interconnectedness; recital (59) **SRMR** (and recitals (45)-(46) **BRRD**) are bold on this. See also **Hadjiemmanuil (2015)**, p. 23.

172 **SRMR**, Article 18(7).

173 *Ibid.*, Article 18(9), second sentence.

(3) When deciding on and adopting the resolution scheme, the SRB, the Council and the Commission must, to the extent possible, respectively opt for the scheme that is the least costly for the SRF, and *in principle* take into account and follow the measures provided for in the resolution plan. Since, however, the optimal course of resolution action should be chosen depending on the circumstances of the case, all resolution tools should be available.[174]

3.2.2. Case-law[175]

Actions before the Court against the SRB pursuant to **Articles 263-264 TFEU** (the first on the review of the legality of acts adopted by EU institutions, bodies, offices, and agencies, and the second on their annulment,[176] including on infringement of CRF Articles) and/or **265 TFEU** (on failure to act)[177] are governed by **Article 86 SRMR**. **Article 86(4)** provides that the SRB must take the necessary measures to comply with the Courts' judgments.[178]

3.2.2.1 Actions related to Banco Popular Español: the resolution case

(A) Background of the case

On 6 June 2017, the ECB assessed that the Spanish credit institution *Banco Popular Español* (hereinafter "***Banco Popular***") was FOLTF based on **Article 18(4), first sub-paragraph, point (c) SRMR**. This assessment was made on the basis that, taking into account its rapidly deteriorating liquidity situation, there were sufficient grounds supporting the determination that it would, in the near future, be unable to pay its debts as they fall due.[179] The SRB (in its executive Session[180]) determined that there was no reasonable prospect that any alternative private sector measures or supervisory action would prevent *Banco Popular's* failure within a reasonable timeframe on the basis of **Article 18(1), first sub-paragraph, point (b)** and, on the following day, has taken resolution action in respect of it after having assessed that all the conditions for resolution were met due to a positive PIA.

Accordingly, the SRB adopted a resolution scheme pursuant to **Article 18(6) SRMR** (SRB Decision SRB/EES/2017/08), Article 5.1 of which provided for the write down and conversion of capital instruments of *Banco Popular's* shareholders and creditors and, afterwards, the application of the sale of business resolution tool. The Commission endorsed that resolution scheme pursuant to **Article 18(7)** (Commission Decision (EU) 2017/1246).[181]

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174 In that respect, the SRB is given the discretion to assess, taking into account these circumstances, that the resolution objectives will be achieved more effectively by taking actions not provided for therein (*ibid*., Article 23, third sub-paragraph). In the course of the resolution process, the SRB may amend and update the resolution scheme as appropriate considering the circumstances of the case. Such amendments and updates are governed by **Article 18** (*ibid*., Article 23, fourth sub-paragraph). On the contrary, NCAs and the ECB have no decision-making power within the framework for the adoption of a resolution scheme (*ibid*., recital (26), second and third sentences); in relation to the ECB, see also para. 34 (second sentence) of the Order of the General Court of 6 May 2019 in **Case T-281/18**, *ABLV Bank AS vs European Central Bank (ECB)*, discussed **below, under 3.2.2.2**.

175 For a brief, precise stocktaking of these resolution cases, see **Spitzer *et al*. (2023)**, pp. 4-5.

176 On Article 264 TFEU, see **Craig and de Búrca (2020)**, Chapters 15-16, and **Lenaerts *et al.* (2014)**, pp. 253-417.

177 On Article 265 TFEU, see **Lenaerts *et al.* (2014)**, pp. 419-440.

178 On this SRMR Article, see **Kaufhold (2022)**.

179 The ECB Press Release on deeming *Banco Popular* as FOLTF is available at: https://www.bankingsupervision.europa.eu/press/pr/date/2017/html/ssm.pr170607.en.html.

180 All related decisions are adopted by the SRB in its Executive Session (**SRMR**, Article 54(1), point (d)).

181 OJ L 178, 11.7.2017, p. 15. On the same date, the Spanish Fund for Orderly Bank Restructuring (*Fondo de restructuración ordenada bancaria*, '**FROB**'), in its capacity as NRA, adopted the necessary measures to implement the resolution scheme adopted by the SRB

(B) Judgments of the Court

(I) A systematic general overview

The closed and pending cases on the resolution of *Banco Popular* are numerous.[182] In particular:

(1) In October 2019, the General Court (Eighth Chamber) delivered its first three Orders. The first two, of 10 October, mainly dealt with issues relating to the valuation for purposes of resolution; they are separately discussed below.[183] The third, of **24 October**, was in **Case T-557/17**, *Carmen Liaño Reig v Single Resolution Board*, by which the General Court dismissed as inadmissible the request for annulment of the resolution measure consisting in the conversion of the capital instrument relating to the subordinated bonds into newly issued *Banco Popular* shares as unfounded and contrary to the SRMR and the CFR.[184] The appeal in **Case C-947/19 P**, *Carmen Liaño Reig v Single Resolution Board (SRB)*, was also dismissed by the Court (Eighth Chamber) as inadmissible by its judgment of 4 March 2021.[185]

(2) The first key bulk of 5 judgments of the General Court (Third Chamber, Extended Composition) appeared (with a remarkable delay) on **1 June 2022**:

(a) The first dismissed the claims in **Case T-481/17**, *Fundación Tatiana Pérez de Guzmán el Bueno and SFL v Single Resolution Board (SRB)*,[186] which related to a request for annulment of the SRB Decision of 7 June 2017. This judgment and the Court's 2024 judgment in appeal are further discussed below (**under II** and **III**, respectively).

(b) The second judgment related to a request for annulment of the Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme in **Case T-570/17**, *Algebris (UK) Ltd, Anchorage Capital Group LLC v Commission*. This case was dismissed as well.[187]

(c) A group of three cases related mainly to the annulment of both the SRB and the Commission Decisions. The General Court dismissed the claims raised therein by its judgments in **Case T-510/17**, *Del Valle Ruiz and Others v European Commission and Single Resolution Board (SRB)*;[188] in **Case T-523/17**, *Eleveté Invest Group, SL v European Commission and Single Resolution Board*

and the effective execution of the transfer in accordance with **Article 29 SRMR**. On this resolution case as the first for the SRB, see **Binder (2017)**.

182 On the content of the requests in these cases, and a due classification based thereon, see **Della Negra and Smits (2024)**, Section 3.2. On the judicial review in relation to the resolution actions taken by the SRB in relation to *Banco Popular*, see also **Binder (2021)**, pp. 379-384. It is also noted that several aspects relating to these cases have also been brought before the SRB Appeal Panel; however, the perimeter of its powers is confined by **Article 85(3)**, which does not cover issues relating to the adoption of resolution schemes. A comprehensive list of all (over 100) cases brought before it is available at: https://www.srb.europa.eu/en/cases/search. On this appeal body, established by **Article 85(1) SRMR**, see **Lamandini and Ramos Muñoz (2020)**, pp. 124-126 and 134-160 and **(2021)**, as well as **Kaufhold (2022)**, pp. 1163-1173.

183 See **this Section below, under 3.3.2.1**.

184 ECLI:EU:T:2019:771 (not available in English as most of the case-law cited below, unless otherwise indicated).

185 ECLI:EU:C:2021:172 (available in English).

186 ECLI:EU:T:2022:311.

187 ECLI:EU:T:2022:314 (available in English).

188 ECLI:EU:T:2022:312 (available in English). In this case, the applicants also requested to declare illegal Articles 18 and 22 SRMR. In relation to this judgment an appeal is pending before the Court in **Case C-539/22 P** (among the same parties). *Furthermore*, arbitral proceedings have been underway between the applicants and Spain since 2018. See on this **Della Negra and Smits (2024)**, Section 3.2, case no. 16.

(SRB);[189] and in **Case T-628/17**, *Aeris Invest Sàrl v European Commission and Single Resolution Board (SRB)*.[190]

(3) Finally, on **22 November 2023**, four further judgments were tabled by the General Court in **Case T-340/20**, *Galván Fernández-Guillén v Single Resolution Board (SRB)*;[191] in **Case T-330/20**, *ACMO Sàrl v Single Resolution Board (SRB)*;[192] in **Case T-304/20**, *Molina Fernández v Single Resolution Board (SRB)*;[193] and in **Joined Cases T-302/20**, *Del Valle Ruíz and Others v Single Resolution Board (SRB)*, **T-303/20**, *Arias Mosquera and Others v Single Resolution Board (SRB)* and **T-307/20**, *Calatrava Real State 2015 v Single Resolution Board (SRB)*.[194] The actions (relying on several pleas in law) related *mainly* to the annulment of the SRB Decision of 7 June 2017 and the claims therein were all dismissed.

(4) Two further cases referred to the annulment of ECB Decisions, which had dismissed applicants' application for access to ECB documents and for an order to disclosure documents requested on the basis of the so-called **"ECB Public Access Decision"**.[195] Of related interest is also the judgment of the General Court (Eighth Chamber, Extended Composition) of 26 April 2023 in **Case T-557/20**, *Single Resolution Board v European Data Protection Supervisor*.[196]

(II) On the General Court's 2022 judgment in Case T-481/17

As noted, with its (quite lengthy, 719 paras.) judgment of 1 June 2022 (which shares several common elements with the other judgments of that date[197]) in **Case T-481/17**, *Fundación Tatiana Pérez de Guzmán el Bueno and SFL v Single Resolution Board (SRB)*, the General Court dismissed the applicants' claims. Its key elements can be summarised as follows:

First, in relation to the alleged breach of principles relating to the delegation of powers, the General Court held, by reading and interpreting **Article 18(7)**, that in order for the resolution scheme to produce legal effects, the Commission must endorse it with regard to its discretionary aspects to avoid an **"actual transfer of responsibility"** in the meaning of the *Meroni* doctrine.[198] However, the division of responsibilities between the SRB and the Commission within the SRM

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189 ECLI:EU:T:2022:313. Two aspects of this judgment relating to valuation and the non-contractual liability of the SRB are separately discussed below in **this Section, under 3.3.2.2** and in **Section, under 4.1.2 (2)**, respectively. An appeal is pending as well before the Court in **Case C-541/22 P**, *García Fernández and Others v European Commission and Single Resolution Board (SRB)*.

190 ECLI:EU:T:2022:315. In this case, the applicants also requested to declare inapplicable Articles 15, 18, 20-22 and/or 24 SRMR. In relation to this judgment an appeal is pending before the Court in **Case C-535/22 P**.

191 ECLI:EU:T:2023:732.

192 ECLI:EU:T:2023:733 (available in English).

193 ECLI:EU:T:2023:734.

194 ECLI:EU:T:2023:735.

195 **Decision 2004/258/EC** of the ECB of 4 March 2004 "on public access to European Central Bank documents (ECB/2004/3)", *OJ L 80, 18.3.2004, pp. 42-44, as in force*. See in this respect the judgments of the Court of 6 October 2021 (both not available in English) in **Case T-827/17**, *Aeris Invest v ECB* (ECLI:EU:T:2021:660), which dismissed the appeal except for the annulment of one ECB Decision; and in **Case T-15/18**, *OCU v ECB* (ECLI:EU:T:2021:661), which dismissed the appeal.

196 ECLI:EU:T:2023:219. The case concerned the processing of data collected by the SRB in the context of the resolution scheme in respect of *Banco Popular* (by virtue of Article 15(1), point (d) of **Regulation (EU) 2018/1725** of the co-legislators of 23 October 2018 "on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (…)" (OJ L 295, 21.11.2018, pp. 39-98) and mainly the annulment of the revised decision of the European Data Protection Supervisor ('**EDPS**') of 24 November 2020 following the SRB's request for review of the decision of the EDPS of 24 June 2020 concerning five complaints submitted by several complainants. By its judgment, the Court annulled that revised decision of the EDPS. An appeal by the EDPS in **Case C-413/23 P**, *EDPS v SRB*, is pending.

197 For an overview of all these cases, see **Petit (2022)** and **Raschner (2022)**, who (*inter alia*, at p. 1) refers to the identity of the applicants.

198 See **Section 1 above, under 1.3.2**.

cannot support the argument that the endorsement of the resolution scheme by the Commission implies that it appropriates it. In exercising its own competence to carry out an assessment of its discretionary aspects, it may either accept it or object to its discretionary aspects but does not have the power *either* to exercise the powers conferred upon the SRB *or* modify the resolution scheme or its legal effects.[199]

Second, based (mainly) on a textual interpretation of **Article 86(2) SRMR**,[200] the General Court considered that, since a resolution scheme adopted by the SRB is – in view of its substance – producing legal effects, it is subject to appeal on its own, without there being any need to appeal against the Commission's decision to accept it.[201]

Third, the General Court rejected the argument that it is not possible to annul the resolution scheme if the Commission decision remains in force noting that, if it were to annul a resolution scheme, the Commission decision endorsing it would be deprived of its purpose. Thus, taking the view that, once endorsed by the Commission, a resolution scheme adopted by the SRB produces legal effects and constitutes an act against which an independent action for annulment may be brought, the General Court declared the action for annulment brought before it admissible.[202]

Fourth, in assessing the scope of the judicial review, the General Court noted that resolution decisions are made on the basis of discretionary, highly **"complex economic and technical assessments"**. Accordingly, the review is confined to examining whether in exercising their discretionary powers resolution authorities have committed any manifest error of assessment or misuse of powers, or even manifestly exceeded the limits of their discretion.[203] Thus, the proportionality review is marginal (and not as rigorous).

Finally, the General Court fully dismissed the applicants' claim for alleged violation of the three resolution conditions (as set out in **Article 18(1)**). In particular as regards the third, "public interest" criterion,[204] the applicants claimed that the public interest did not require the approval of the resolution scheme, since there were more proportionate measures that would have made it possible to address *Banco Popular's* liquidity crisis by preventing the intervention into shareholders' rights. On top of stating that the applicants did not put forward any argument capable of establishing that the resolution objectives would have been achieved to the same extent if *Banco Popular* had been wound up under NIPs, the General Court considered that the proportionality of resolution measures in relation to alternative measures or other resolution tools provided for in the SRMR is irrelevant for the purposes of applying the public interest condition. It

199 **General Court judgment**, paras. 130 and 132.

200 *Ibid.*, para. 122, with reference to para. 66 of the Court's (previously adopted) judgment of 6 May 2021 in **Cases C-551/19 P** and **C-552/19 P**, *ABLV Bank and Others* v *ECB* (see **this Section below, under 3.2.2.2 (A) (2)**).

201 *Ibid.*, paras. 116-120, 127, 137, 140-143 and 149. Furthermore, pursuant to para. 147, an interpretation to the contrary would be incompatible with the principles of legal certainty and effective judicial protection, since any person affected by a resolution decision adopted by the SRB would be subject to a condition of admissibility of his or her action which has not been expressly provided for.

On whether the resolution scheme at hand is a challengeable act producing binding legal effects, see further **below, under (III)**. In this context, the author wishes to note that the reference made in para. 116 to **Article 16(1) SRMR** is not precise, since this does not *stricto sensu* apply to credit institutions but refers to resolution action in group scenarios (on this Article, see **Binder (2022)**).

202 **General Court judgment**, paras. 148-150.

203 *Ibid.*, paras. 123 and 167 and the case-law cited therein. This aspect is further discussed in **this Section below, under 3.2.2.2 (B) (II) (3)** dealing with the General Court's judgment in **Case T-280/18**, *ABLV Bank v Single Resolution Board (SRB)*.

204 On the Court's argumentation on the first and second resolution conditions, see paras. 365-391 and 392-426, respectively.

came, thus, to the conclusion that by making a positive PIA for *Banco Popular* the SRB did not commit a manifest error of assessment in finding that this condition was met.[205]

(III) On the Court's 2024 judgment in appeal

(1) The Commission, supported (in essence) by the European Parliament,[206] has brought an appeal against this General Court's judgment, submitting that it erred in its interpretation of **Article 263**, fourth sub-paragraph **TFEU** and **Article 18(7) SRMR** when it held, in (the just above-mentioned) paras. 116-120, 127 and 137 of its judgment, that "*the resolution scheme at issue is a challengeable act producing binding legal effects*".[207] By its (most recent) judgment of 18 June 2024 in **Case C-551/22 P**, *European Commission v Fundación Tatiana Pérez de Guzmán el Bueno, Stiftung für Forschung und Lehre (SFL), Single Resolution Board (SRB)*,[208] the Court (Grand Chamber), on the basis of its analytical considerations in paras. 65-96, including on the application of the *Meroni* doctrine (paras. 69-72), concluded in para. 97 that "*the resolution scheme at issue does not constitute a challengeable act for the purposes of Article 263, fourth sub-paragraph TFEU*".[209] Thus: *first*, it set aside the General Courts's judgment, in so far as it found that the action brought by *Fundación Tatiana Pérez de Guzmán el Bueno* and (Swiss-based) *Stiftung für Forschung und Lehre* ('**SFL**') seeking annulment of the SRB Decision of 7 June 2017, concerning the adoption of a resolution scheme in respect of *Banco Popular*, is admissible; and *second*, it dismissed the action brought by *Fundación Tatiana Pérez de Guzmán el Bueno* and the SFL seeking annulment of the SRB Decision as inadmissible.[210]

(2) The key considerations of this judgment can be summarised as follows:

First, even though **Article 18(1)** and **(6) SRMR** confers on the SRB a wide margin of discretion on whether and how the credit institution concerned is to be resolved, **Article 18(7)** "*makes the entry into force of the resolution scheme subject to the Commission's endorsement, in the absence of objections on the part of the Commission or the Council*". Once having endorsed it, the Commission must then fully assume the responsibilities conferred on it by the Treaties.[211] Furthermore, this latter Article not only allows the Commission to endorse the scheme but also "*allows the Commission and the Council to substitute their own assessment for that of the SRB as regards those discretionary aspects by objecting thereto*".[212]

Second, the Court challenges paras. 121-124 of the General Court's judgment, stating that:

(a) It cannot be inferred from **Article 86(1)-(2)** that the resolution scheme at issue was capable of forming the subject matter of an action for annulment since, pursuant to the Commission,

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205 *Ibid.*, paras. 427 and 440-441.

206 **Court judgment**, para. 45.

207 *Ibid.*, paras. 53-63.

208 ECLI:EU:C:2024:520 (available in English).

209 See in this respect the case-law cited in para. 66.

210 This Court judgment was based on the Opinion of Advocate General Ćapeta of 9 November 2023 in **Case C-551/22 P** (ECLI:EU:C:2023:846, available in English), which concluded as follows (para. 133): "*The resolution scheme has no independent legal existence, and thus cannot be challenged independently of the Commission's endorsement. A direct action should challenge the Commission's endorsement of the SRB's resolution scheme. Therefore, there is a single challengeable act with the Commission as its author*".

211 **Court judgment**, paras. 77, 80 and 85-86.

212 In addition, pursuant to **Article 18(8) SRMR**, a Council's objection on the ground that the public interest criterion is not fulfilled has the effect of ultimately preventing the resolution of the credit institution concerned, that entity then having then to be wound up under NIPs in accordance with the applicable national law (*ibid.*, paras. 85-86).

the provisions of a regulation cannot alter the system of remedies laid down by the TFEU. In addition, in accordance with a textual interpretation of these SRMR provisions, the actions they concern must be brought before the Court in accordance with **Article 263 TFEU**, which presupposes that they satisfy the condition, set out therein, relating to the challengeable nature of the contested act.

(b) It also cannot be inferred from Article 86 (and from the Court's judgment of 6 May 2021 in **Joint Cases C-551/19 P** and **C-552/19 P**, *ABLV Bank and Bernis and Others*[213]) that the resolution scheme at issue is an act against which an action for annulment may be brought before the General Court, when it did not constitute the outcome of the resolution procedure at issue. That outcome has only materialised through the endorsement of the resolution scheme by the Commission, and, on the basis of the Court's analysis, it did not produce independent legal effects.[214]

Finally, pursuant to the Court, it is a Commission endorsement decision (such as Decision 2017/1246) which displays, for its part, the features of an act against which an action for annulment may be brought under **Article 263, fourth sub-paragraph TFEU**. In such an action brought against such a Decision, "*it is open to the natural or legal persons concerned to plead the illegality of the resolution scheme approved by that institution, thereby giving it binding legal effect, which is capable of guaranteeing them sufficient judicial protection*".

In that regard, the Court also states that "*the Commission is, by that approval, deemed to endorse the information and grounds contained in that scheme, with the result that it must, if necessary, answer to the EU judicature*".[215]

3.2.2.2 Actions related to ABLV Bank, AS and ABLV Bank Luxembourg, SA: the "no-resolution" case

On 23 February 2018, the ECB made the determination that *ABLV Bank, AS*, Latvia's then third largest credit institution, and its subsidiary *ABLV Bank Luxembourg, SA*, companies constituted under Latvian and Luxembourg law respectively, were FOLTF in accordance with **Article 18(1) and (4) SRMR**.[216] On the same date, the SRB decided not to adopt a resolution scheme in respect of these credit institutions due to a negative PIA (adopting thus **"no-Resolution Decisions"** (**SRB/EES/2018/09** and **SRB/EES/2018/10**).[217]

Several actions were brought before the Court in this case as well relating to the annulment of these ECB Decisions *or* those of the SRB based on **Article 263 TFEU**.[218] In particular:

(A) Actions for the annulment of the ECB Decisions

(1) On 3 May 2018, *ABLV Bank* brought an action in **Case 281/18**, *ABLV Bank v European Central Bank (ECB)*, requesting for annulment of the above-mentioned ECB Decisions of 23 February 2018,

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213 See **just below, under 3.2.2.2 (A) (2)**.

214 **Court judgment**, paras. 91 and 94.

215 *Ibid.*, para. 96 (and the case-law cited therein), with reference to paras. 87-88.

216 The ECB Press Release on deeming these credit institutions as FOLTF is available at: https://www.bankingsupervision.europa.eu/press/pr/date/2018/html/ssm.pr180224. en.html.

217 The banking license of *ABLV Bank AS* was withdrawn by the ECB on 1 July 2018.

218 Exceptionally, in the pending **Case T-71/23**, *ABLV Bank v ECB and SRB*, action was brought before the Court on 12 February 2023 requesting the declaration that both the ECB and the SRB are jointly and severally liable for the damage caused to the credit institution due to the withdrawal of its license and of that of its subsidiary in Luxembourg.

relying on 10 pleas in law, *inter alia*, that the ECB's assessment of the FOLTF criterion in respect of it and its subsidiary was erroneous and deficient, as well as violation of the right to be heard, the principle of proportionality and (on the basis of related CFR Articles) the rights to equal treatment and to property. By its Order of 6 May 2019, which was discussed in detail in this Section above in relation to its assessment on the nature of the FOLTF assessment,[219] the General Court dismissed the action as inadmissible.[220]

Similar was the **Case 283/18**, *Bernis and Others v European Central Bank (ECB)*, of the same date, where the applicants (namely shareholders of *ABLV Bank*) relied on the same 10 pleas in law. This action was also dismissed by the General Court as inadmissible by its Order of 6 May 2019 as well.[221]

(2) Two appeals brought before the Court (Third Chamber), challenging both these orders of the General Court in (the already mentioned above[222]) **Joint Cases C-551/19 P** and **C-552/19 P**, *ABLV Bank and Bernis and Others*, were dismissed, as partly inadmissible and in part unfounded, by its judgment of 6 May 2021.[223]

(B) Actions for the annulment of the SRB Decisions

(I) General overview

(1) With its action brought before the General Court on 3 May 2018 (as well) in **Case T-280/18**, *ABLV Bank v Single Resolution Board (SRB)*, the credit institution requested the annulment of the above-mentioned SRB Decisions that resolution was not in the public interest. It relied on 13 pleas in law, *inter alia*, lack of competence of the SRB for the decision as to liquidation, error of assessment and violation of the principle of proportionality and of the rights to equal treatment and to property. By its judgment of 6 July 2022,[224] the General Court (Tenth Chamber, Extended Composition) dismissed the action in its entirety.[225] This judgment is discussed in detail **under (II) below**.

(2) On the same date, a similar action was brought before the General Court by the same shareholders as in the (above-mentioned[226]) *ABLV Bank v European Central Bank (ECB)* case, in **Case T-282/18**, *Bernis and Others v Single Resolution Board (SRB)*, which relied on the same 13 pleas in law as in (the just above-mentioned) **Case T-280/18**. By its Order of 14 May 2020,[227] the General Court (Tenth Chamber) declared this action inadmissible considering that the contested decisions: *first*, do not directly affect the legal position of shareholders such as the applicants; *second*, give the NRAs discretion as regards the adoption of measures likely to affect the rights of the

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219 See **this Section above, under 3.1.2**.

220 Noteworthy in this respect are also paras. 37-38 and 41 of the Order, according to which, since the applicant has also brought an action against the decisions adopted by the SRB further to the ECB's communication of the contested acts in accordance with Article 18(1) SSMR, which has been registered as **Case T-280/18** (see just **below, under (B) (I) (1)**), "(…) *contrary to what is claimed by the applicant, the contested acts are not capable of being challenged under Article 263 TFEU*." Thus, the argument that formal negative assessments must be open to judicial review is ineffective.

221 ECLI:EU:T:2019:295.

222 See **this Section above, under 3.2.2.1 (B)**.

223 ECLI:EU:C:2021:369.

224 ECLI:EU:T:2022:429.

225 An appeal brought before the Court in **Case C-602/22 P** is pending.

226 See just **above, under (A) (1)**.

227 ECLI:EU:T:2020:209.

shareholders of *ABLV Bank* and *ABLV Luxembourg*; and *third*, unlike the situation in the case which gave rise to the ***Trasta* case**,[228] they "*have neither the object nor the effect of withdrawing from those banks their licences authorising them to carry on the business of credit institutions*."[229]

The Court (Seventh Chamber) dismissed the appeal brought before it, challenging the General Court's Order in **Case C-364/20 P**, *Bernis and Others*, by its judgment of 24 February 2022.[230]

(II) On the General Courts's judgment of 6 July 2022

The (just above-mentioned) General Court's judgment of 6 July 2022 is of significant importance in terms of interpretation of the provisions of **Article 18 SRMR** on the SRB no-resolution Decisions and the application of **Article 29**. The key considerations and conclusions are summarised as follows:

(1) On the applicant's *first* plea, alleging that the SRB exceeded the powers conferred on it by the SRMR by ordering that *ABLV* should be liquidated, the General Court considered that it is not the SRB which decides on liquidation; it is the NRAs which must implement SRB Decisions and ensure that any action they take complies with these Decisions pursuant to **Article 29(1) SRMR**, which does not specify the nature of the measures to be taken. *Furthermore*, such Decisions, in general, do not directly and immediately require NRAs to liquidate the applicant, while an applicant's liquidation may arise from a decision taken by its shareholders following the SRB's Decision on a negative PIA.[231]

(2) On the applicant's *second* plea in law, alleging that the SRB did not have the power to take a formal decision not to adopt a resolution scheme within the meaning of **Article 18(1) SRMR**, the General Court considers (*inter alia*) the following:

First, if the ECB concludes that the entity concerned is FOLTF, its assessment is sent to the SRB and the resolution procedure is initiated. At that time, it is for the SRB to verify whether the conditions referred to in Article 18(1) SRMR are met in order to decide whether to adopt a resolution scheme.[232]

Second, the General Court also found that this ECB assessment, being an intermediate measure and not an act open to challenge, is amenable to judicial review in the context of an action before the EU Courts against the adoption by the SRB of a resolution scheme or against the decision not to adopt such a scheme. Thus, the SRB is required to make a positive or a negative PIA once it has

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228 See **Section 2 above, under 2.3**.

229 **General Court Order**, paras. 40-43. Furthermore, para. 44 considers that ABLV Bank was voluntarily wound up by decision of its general meeting of shareholders and, as regards ABLV Luxembourg, the District Court of Luxembourg initially rejected the Luxembourg NRA's application for dissolution.

230 ECLI:EU:C:2022:115. Pending before the Court is **Case T-430/23**, *ABLV Bank v SRB* (OJ C, C/2023/24, 9.10.2023), by which the credit institution requests the annulment of, *inter alia*, the SRB's decision of 30 September 2022 with respect to its request for access to documents pursuant to **Regulation (EC) No 1049/2001** of the co-legislators of 30 May 2001 "regarding public access to European Parliament, Council and Commission documents" (OJ L 145, 31/05/2001, pp. 43-48, as in force).

231 **General Court judgment**, paras. 75-76 with reference, respectively, to its (previous, above-mentioned) Order of 14 May 2020 in **Case T-282/18**, *Bernis and Others v SRB*, and para. 49 of the Court's (also previously adopted) judgment of 6 May 2021 in **Cases C-551/19 P** and **C-552/19 P**, *ABLV Bank and Others* v *ECB* (see **this Section above, under 3.2.2.2 (A) (2)**). The Court further notes that any SRB press release, as that in the present case of 24 February 2018, "*is merely an informative measure which announces and summarises the contested decisions, does not replace them and cannot create obligations which do not flow from those*" (*ibid*., para. 77).

232 This consideration is based on para. 70 of the Court's judgment of 6 May 2021 in Cases *ABLV Bank and Others* v *ECB*.

examined the three conditions laid down in Article 18(1) "*if only to prevent a lacuna in the judicial protection of an entity, especially with regard to the ECB's FOLTF assessment*".[233]

Third, once the ECB has assessed that a credit institution is FOLTF, it is for the SRB to decide whether that assessment is correct and, if so, whether or not this will be the subject of a resolution. Moreover, "*the alleged lack of power on the part of the SRB to adopt a Decision not to put in place a resolution scheme could jeopardise the stability of the establishment concerned and potentially of the financial markets, by giving rise to doubts as to the follow-up action to be taken in respect of that establishment in the light of the ECB's assessment*". Thus, upon the initiation of the procedure by the ECB, the SRB is required to examine the criteria set out in Article 18(1) and based thereon, take a decision.[234]

(3) On the applicant's *third and fourth* pleas in law, alleging, respectively, that the SRB erred in failing to carry out its own examination of the condition laid down in Article 18(1), point (a) (FOLTF assessment), and that it did not sufficiently examine whether there was a reasonable prospect that other measures would prevent its failure pursuant to Article 18(1), point (b), the General Court considers as follows:

First, in examining the scope of its judicial review of the SRB's FOLTF assessment, it notes that, according to case-law, the review by the EU judicature of the **"complex economic assessments"** made by EU institutions, bodies, offices and agencies is limited in that it is necessarily confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers. When conducting such a review, EU Courts must not substitute their own economic assessment for that of the competent EU authority: "*Since the SRB's FOLTF assessments are based on "complex economic assessments", that case-law can be applied to that type of assessment*".

Furthermore, although the SRB does have a margin of discretion in that regard, judicial review must not refrain from reviewing its interpretation of the economic data on which its Decision is based. As the Court has previously held, "*even in the case of complex assessments, the EU Courts must establish not only whether the evidence relied on was factually accurate, reliable and consistent, but also whether that evidence contained all the relevant information which must be taken into account in order to assess a complex situation and whether it was capable of substantiating the conclusions drawn from it*".

In that regard, to establish that the SRB made a manifest error in assessing the facts such as to justify the annulment of the contested decision, "*the evidence adduced by the applicant must be sufficient to make the factual assessments used in the decision in question implausible*".[235] Furthermore, the ECB's FOLTF assessment in respect of the specific applicant, is not based on the definition of the concept of liquidity set out in the CRR and the related Commission delegated act,[236] "*which form part of prudential supervision*". It concerns whether an entity will, in the near

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233 **General Court judgment**, para. 56.

234 *Ibid.*, paras. 79-82 and 84-85.

235 *Ibid.*, paras. 91 and the case-law cited therein, 92, and 93-94 and the case-law cited therein, by analogy.

236 **Commission Delegated Regulation (EU) 2015/61** of 10 October 2014 "to supplement [the CRR] with regard to liquidity coverage requirement for Credit Institutions", OJ L 11, 17.1.2015, pp. 1-36, as in force.

future, be unable to pay its debts or other liabilities as they fall due in the meaning of **Article 18(4), point (c) SRMR**.[237]

Second, the General Court considered that, according to settled case-law, in an action for annulment the legality of the contested act must be assessed on the basis of the facts and the law as they stood at the time when the act was adopted and that the assessments made by the SRB must be examined solely on the basis of the information available to it at the time when those assessments were made. Hence, subsequent events relied on by an applicant cannot invalidate the ECB's FOLTF assessment, which may be adopted by the SRB, or the view that there were no alternative measures capable of preventing the failure. It also noted that the causes of an applicant's FOLTF are not a factor to be taken into account when carrying out the examination provided for in **Article 18(4) SRMR**.[238]

Third, in examining whether the SRB is entitled to base its Decisions solely on the ECB's FOLTF assessment, the General Court considered, yet again, that the SRB is not bound by this assessment and, in particular, does not put it in a position where its powers in respect of that assessment are circumscribed: "*There is nothing in the wording of that provision to indicate that the SRB would have no power to assess whether the entity in question is FOLTF*".[239]

However, under the second sub-paragraph of **Article 18(1) SRMR**, while the SRB may also carry out a FOLTF assessment, it may do so only after informing the ECB of its intention to do so and only if the ECB does not make such an assessment. Thus, and most importantly:

> "*The ECB is (…) recognised as having **primary power**[240] to carry out such an assessment, based on its expertise as supervisory authority, since, having access in that capacity to all supervisory information regarding the entity concerned, it is best placed to determine, in light of the definition of FOLTF in Article 18(4), which refers, in particular, to matters related to the prudential situation (…), whether that condition is satisfied*".[241]

Thus, having regard to the broad discretion enjoyed by the SRB in accordance with the case-law referred to in paras. 91-94 in the context of the complex economic assessment represented by the FOLTF assessment in respect of the applicant, the SRB, while not bound by the ECB's examination and view, did not err in law by taking the latter as its basis, since the ECB is the institution best placed to carry out the FOLTF assessment.[242]

Fourth, even though the conditions referred to in **Article 18(1)**, first sub-paragraph, points (a)-(b) **SRMR** are separate, the examination of the various measures and actions referred to in point (b) can be integrated into the ECB's FOLTF assessment in respect of an applicant if related to the condition laid down in point (a). In addition, under Article 18(1), fourth sub-paragraph, the assessment of the condition referred to in point (b) shall be made by SRB in close cooperation with

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237 **General Court judgment**, paras. 95-96.

238 *Ibid*., paras. 98 and the case-law cited therein, 99 and 101.

239 *Ibid*., para. 102 with reference to para. 67 of the Court's judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*.

240 Bolded characters added for emphasis.

241 **General Court judgment**, para. 106 with reference to para. 62 of the above Court's judgment of 6 May 2021.

242 *Ibid*., para. 108. Paras. 110-115 develop on the claim that the FOLTF assessment in respect of the applicant is based, in essence, on its liquidity crisis. In this context, para. 114 develops on the primary importance of credit institutions' liquidity in view of intermediation function in the financial system and the risk for massive fund withdrawals not only for stressed credit institutions, "*but also healthy ones following a loss of public confidence in the soundness of that system*" (with reference to the judgment of the Court (Fifth Chamber) of 4 October 2018 in **Case C-571/16**, *Nikalay Kantarev v Balgarska Narodna Banka*, ECLI:EU:C:2018:807 (the "***Kantarev* case**"), ECLI:EU:C:2018:807, para. 56 and the case-law cited).

the ECB and this may also inform the SRB that it considers the condition set out in that point to be met. Thus, the SRB can rely on the examination carried out by the ECB.[243]

(4) Finally, in relation to *sixth plea in law*, alleging that the statement of reasons set out by the SRB in the contested Decision was inadequate (merely citing the text of the relevant provisions without setting out the factual elements on which the Decision was based), the General Court concluded that the Decision has disclosed in a clear and unequivocal fashion the reasoning followed by the SRB as to enable the applicant to ascertain the reasons for the measure and the Court to exercise its power of review.[244]

3.2.2.3 Action related to AS PNB Banka: another "no-resolution" case

By its judgment of 15 November 2023 in **Case T-732/19**, *PNB Banka and Others v Single Resolution Board (SRB)*,[245] the General Court (Seventh Chamber) dismissed in its entirety the applicants' action to annul, based on **Article 263 TFEU**, the SRB "no-resolution" **Decision SRB/EES/2019/131** of 15 August 2019 in respect of another Latvian credit institution, *PNB Banka AS*.[246]

3.2.2.4 Sberbank: a mixed case

(1) In view of the Russian Federation's invasion of Ukraine on 24 February 2022, on 27 February (i.e., one day before the first set of sanctions was imposed on its Central Bank), the ECB assessed that *Sberbank Europe (Austria)*, a 100% subsidiary of *Sberbank of Russia* (that country's largest bank), and its subsidiaries in Croatia and Slovenia (which were all significant and, hence, under its direct supervision pursuant to **Article 6(4) SSMR**) were FOLTF. On that basis, on **1 March**, the SRB took resolution action. Unlike in the previous case involving a group (*ABLV*), this time its decisions were not the same for all group members: *on the one hand*, as regards Sberbank Europe (Austria), the SRB adopted a "no-resolution Decision", after having assessed that the third condition for resolution set out in Article 18(1) was not met (due to a negative PIA) and, thus, decided not to take resolution action in respect of this credit institution (as initially envisaged in its resolution plan of 3 May 2021);[247] and *on the other hand*, for the two subsidiaries in Croatia and Slovenia, it adopted, due a positive PIA and pursuant to **Article 18(6)**, resolution Decisions SRB/EES/2022/20 and SRB/EES/2022/21 coupled by a resolution scheme.[248]

(2) The resolution cases relating to *Sberbank Europe (Austria)* and its subsidiaries in Croatia and Slovenia gave rise to judicial review by the Court of the resolution actions undertaken by the SRB, the Council and/or the Commission on the basis of actions brought by the (former) *Sberbank*

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243 In addition, the General Court considered that applicants should have set out the reasons why the alternative measures taken into consideration by the SRB and by the ECB are, indeed, such as to prevent their failure within a reasonable timeframe and identify other measures which the SRB should have taken into account in its examination. It concluded, thus, that "*the mere unsubstantiated assertion that the SRB disregarded the existence of alternative measures is insufficient to render implausible its assessment and not capable of demonstrating that there has been a manifest error of assessment*" (*ibid*., paras. 151-152).

244 *Ibid*., para. 177, with reference to the case-law cited in paras. 174-175. On this judgment, see further **Steiblytė (2021)**.

245 ECLI:EU:T:2023:721.

246 The General Court's argumentation is broadly similar to that in its judgment on the *ABLV* cases. On this case, see further at: https://www.srb.europa.eu/en/content/pnb-1.

247 This was in line with the above-mentioned consideration that even credit institutions of a significant size and highly interconnected should not be resolved if is credible and feasible to wind them up.

248 On the Sberbank case, see details in **Gortsos (2024b)**.

Europe (Austria) (which was renamed to *MeSoFa Vermögensverwaltungs AG*) and by *Sberbank of Russia*. In this respect, the following is briefly noted:[249]

First, upon an action brought by *Sberbank Europe (Austria)* on 18 July 2022 in **Case T-450/22**, *Sberbank Europe v SRB*,[250] in its actions of 18 and 19 August, respectively, in **Cases T-523/22** and **T-524/22**, (both) *Sberbank Europe v Council of the European Union, European Commission and Single Resolution Board (SRB)*,[251] it claims that the General Court should declare void (pursuant to **Article 264 TFEU** and based on nine pleas in law) the SRB Decisions of 1 March 2022 adopting a resolution scheme with respect to its Slovenian and its Croatian subsidiaries, respectively, together with Valuation Reports 1 and 2[252] of 27 February, and, if applicable, the approval of the resolution scheme by the Commission and/or the Council. By its Orders of 8 September 2023,[253] the General Court (Seventh Chamber) dismissed as inadmissible the latter two actions to the extent they were directed against the Council, since this was not involved in the resolution process (and, thus, the condition set out in the third sub-paragraph of **Article 18(7) SRMR** was not met).[254]

Second, *Sberbank of Russia* also challenged before the General Court the SRB's assessments and the Commission's Decisions endorsing the resolution schemes for the Croatian and Slovenian subsidiaries of *Sberbank Europe (Austria)*. In particular, in the actions brought on 20 August in **Cases T-525/22** and **T-526/22**, *Sberbank of Russia v Commission and SRB*,[255] it claims, based on three pleas in law, that the Court should annul both the SRB Decisions of 1 March 2022 on the adoption of a resolution scheme in respect of the two subsidiaries of *Sberbank Europe (Austria)*, together with its Valuation Reports 1 and 2, and the **Commission Decisions (EU) 2022/948** and **(EU) 2022/947** of the same date endorsing them. *Furthermore*, by its action brought on 22 August in **Case T-527/22**, *Sberbank of Russia v SRB*,[256] it claims, also based on three pleas in law, that the General Court should annul SRB Decision SRB/EES/2022/19 of 1 March 2022 on the assessment of the conditions for resolution in respect of Sberbank Europe (Austria), together with its Valuation Report 1 of 27 February. By Orders of the General Court (Seventh Chamber) of 10 October 2023, the actions in all these three cases have been dismissed as inadmissible.[257]

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249 For a detailed discussion of these actions, see *idem*., pp. 17-20.

250 OJ C 389, 10.10.2022, pp. 12-13.

251 OJ C 432, 14.11.2022, pp. 30-31 and 31-32, respectively.

252 On these valuations, see briefly **just below, under 3.3**.

253 At: https://curia.europa.eu/juris/document/document.jsf?docid=277473&doclang=en (on Case T-523/22), and https://curia.europa.eu/juris/document/document.jsf?docid=277474&doclang=en (on Case T-524/22).

254 **General Court Orders**, paras. 16-20.

255 OJ C 441, 21.11.2022, p. 20 and 21, respectively.

256 OJ C 441, 21.11.2022, p. 22.

257 ECLI:EU:T:2023:633, ECLI:EU:T:2023:628 and ECLI:EU:T:2023:629, respectively. Against these Orders, three appeals were lodged on 20 December 2023, respectively, which are all pending in **Cases C-791/23 P** and **C-792/23 P**, both *Sberbank v Commission and SRB*, and **Case C-793/23 P**, *Sberbank v SRB*.

3.3. On specific aspects relating to the valuations for the purposes of resolution

3.3.1. The regulatory framework (Article 20 SRMR)

Article 20 SRMR, governing the sensitive issue relating to the valuations of credit institutions' assets and liabilities for the purposes of resolution, provides for various categories of *ex-ante* and *ex-post* ones. In particular:

(1) *Ex-ante* valuations are required for the early recognition of losses upon a credit institution' failure; the benchmark case are the **"definitive"** valuations, i.e., those cumulatively meeting the requirements set out in **Article 20(1)** and **(4)-(9)**.[258] Thereunder, the SRB must ensure a "*fair, prudent and realistic*" valuation of the credit institution's assets and liabilities, which must be carried out by an independent valuer[259] before deciding (*inter alia*) on a resolution action in order to assess their value[260] and be supplemented by specific information. It must also indicate the subdivision of creditors in classes pursuant to the priority of claims referred to in **Article 17**, as well as an estimate of the treatment that each class of shareholders and creditors would have been expected to receive if the institution concerned were wound up under NIPs by application of the "no creditor worse off ('**NCWO**') principle.[261]

(2) If an independent valuation is not possible, "*due to urgency in the circumstances of the case*", the SRB may decide to carry out an *ex-ante* **"provisional"** one.[262] This applies until an ***"ex-post* definitive"** valuation has been carried out by an independent person, which *must* also be compliant with the requirements set out in Article 20(1) and (4)-(9), *may* be carried out separately from the (other *ex-post*) **"Valuation 3"** (governed by **Article 20(16)-(18)**) or simultaneously with it and by the same independent person (but must be distinct). The purposes of this valuation are to ensure that any losses on the institution's assets are fully recognised in its books of accounts and to inform the decision to write back creditors' claims or to increase the value of the consideration paid.[263] If its estimate of the institution's net asset value is higher than the provisional valuation's estimate, the SRB may request the NRA to undertake specific courses of action.

In this respect, it is also noted that the discretion given to the SRB under Article 20(12) has a twofold purpose: to avoid an unwarranted disproportionate effect on creditors' rights in line with **Article 52 CFR** and to contribute to the prevention of possible breaches of the NCWO principle,

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258 **SRMR**, Article 20(2); this is subject to **Article 20(15)**.

259 A valuer is deemed to be independent from any public authority and the credit institution concerned when the conditions set out in **Article 38 of Delegated Regulation (EU) 2016/1075** of 23 March 2016 (OJ L 184, 8.7.2016, pp. 1-71, as in force) are met.

260 To support and inform SRB's decisions regarding resolution actions, *ex-ante* valuations are carried out for several purposes (**Article 20(5)**) and namely to inform the determination of whether the conditions for (*inter alia*) resolution are met (**"Valuation 1"**) and, if this is the case, to inform the decision on the appropriate resolution action to be taken in respect of the institution concerned if the conditions for resolution are met and, if resolution tools are be applied, take specific decisions in relation to them (**"Valuation 2"**).

261 According to this principle (safeguard), no creditor and shareholder of a credit institution in resolution should incur greater losses than it would have been incurred if this would have been wound up under NIPs at the time that the resolution decision is taken. Hence, the resolution framework should provide that creditors and shareholders receiving less due the resolution action than they would have received in liquidation should have a right to compensation and specify its exercise. See **Wojcik (2015)** and **Gortsos (2021b)**.

262 **SRMR**, Article 20(3) and (10).

263 *Ibid*., Article 20(11), first sub-paragraph and second sub-paragraph, points (a) and (b), respectively.

as early as possible. Thus, the ultimate obligation is the provision of compensation by application of the NCWO principle, by the SRF, on the basis of the results of the *ex-post* valuation. If the *ex-post* definitive valuation shows a lower net asset value than the provisional one, the SRB may ask for additional write down or conversion, as necessary. It is for the purpose of minimising the probability of this occurring that the provisional valuation should include the buffer for possible additional losses.[264]

(3) It is finally noted that a valuation itself may not be subject to a separate right of appeal but may be subject to an appeal together with an SRB resolution decision.[265] This has been the case in several actions relating to the resolution of *Banco Popular*.

3.3.2. Selected case-law relating to Banco Popular

The *ex-ante* valuation of *Banco Popular* comprised two reports annexed to the resolution scheme: Valuation 1 of 5 June 2017, drawn up by the SRB under **Article 20(5), point (a) SRMR**, and a provisional Valuation 2 of the following date, drawn up by an independent valuer (Deloitte) under **Article 20(10)**. In this respect, the following three Orders of the General Court are of particular interest.

3.3.2.1 On the General Court's judgments of 2019 in Cases T-599/18 and T-2/19

(1) By its Orders of 10 October 2019, the General Court (eighth Chamber) dismissed as inadmissible the (similar but not identical) requests in **Case T-599/18**, *Aeris Invest v SRB* and in **Case T-2/19**, *Algebris (UK) and Anchorage Capital Group v SRB*,[266] respectively. While in the *first case* the claimants submitted a request for annulment of the SRB's Decision of 14 September 2018 not to carry out an *ex-post* definitive valuation in the context of Decision SRB/EES/2017/08 of 7 June 2017 concerning the resolution scheme in respect of *Banco Popular*, on the basis, *inter alia*, of the plea in law for infringement of **Article 20(11) SRMR**, their request in the *second* was for annulment of the SRB Decision to the effect that *ex-post* definitive valuations of *Banco Popular* were not required pursuant to Article 20(11), relying (mainly) on the plea in law relating to error of law for breach of **Article 20(11)** and/or **20(12)**.

(2) In both these cases, the argumentation of the General Court on the interpretation of **Article 20(11)-(12) SRMR** can be summarised as follows:

First, the objective of Article 20(11), point (b) must be read in the light of Article 20(12).[267]

Second, the compensation provided in Article 20(12) only applies when the resolution tool applied to a credit institution is the bail-in tool, the bridge institution tool or the asset separation tool. The sale of business tool (applied to *Banco Popular*) is not included in the situations in which compensation may be paid following an *ex-post* definitive valuation under that Article.[268]

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264 See the relevant EBA Q&As at: https://eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/ 2015_2351 and at: https://eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/ 2015_2187.

265 **SRMR**, Article 20(15), second sentence and recital (63), fourth sentence. On a detailed analysis of Article 20, see **Gortsos (2022a)**, pp. 619-718 (with extensive further references).

266 ECLI:EU:T:2019:740 and ECLI:EU:T:2019:741, respectively. An appeal with regard to the first order, in **Case C-874/19 P**, *Aeris Invest Sàrl v Single Resolution Board*, was dismissed by the Court (Third Chamber) by its judgment of 21 December 2021 (ECLI:EU:C:2021:1040). An appeal with regard to the second one, in **Case C-934/19** P, *Algebris (UK) Ltd and Anchorage Capital Group LLC v Single Resolution Board*, was also dismissed by the Court (Third Chamber) by its judgment of 21 December 2021 (ECLI:EU:C:2021:1042).

267 Order in Case T-599/18, para. 43 and Order in Case T-2/19, para. 45.

268 Order in Case T-599/18, paras. 46-47 and Order in Case T-2/19, paras. 47-49.

Furthermore, Article 20(12) does not allow compensation for a credit institution's former shareholders and creditors whose capital instruments have been fully converted, written down and transferred to a third party.[269]

Finally, the *ex-post* definitive valuation must be distinguished from the (also) *ex-post* Valuation 3; in the circumstances of the two cases, the applicants would potentially be entitled to compensation as a result of the latter valuation but not of the former.[270]

3.3.2.2 On the General Court's judgment of 1 June 2022 in Case T-523/17

By its judgment in the above-mentioned **Case T-523/17**, *Eleveté Invest Group and Others v Commission and SRB*,[271] the General Court dismissed in its entirety the second plea in law, alleging infringement of **Article 20** and in particular infringement of Articles 20(1) on the ground that Valuation 2 was not "*fair, prudent and realistic*", 20(11) and 20(5), points (a)-(c) and (f), lack of independence on the part of the independent valuer, and infringement of Article 20(7) and (9). In its quite detailed analysis in this respect,[272] the General Court made the following considerations and came to the following conclusions:

First, in accordance with the case-law cited in paras. 110-115, the review carried out by the Court is limited and confined to verifying that there was no manifest error of assessment by the SRB when it considered that Valuation 2 complied with the requirements set out in Article 20(10), given the urgency of the circumstances.[273]

Second, on the occasion of the applicants' claim on an alleged infringement of Article 20(11) in so far as the SRB refused to provide the definitive versions of Valuations 1 and 2, the General Court observed that the *ex-post* definitive valuation under that Article is by definition subsequent to the adoption of the resolution scheme and the Commission's Decision and that, according to settled case-law, the legality of an EU measure is assessed on the basis of the facts and the law as they stood at the time when the measure was adopted. Thus, the issue of whether or not an *ex-post* definitive valuation was carried out after the adoption of the resolution scheme cannot affect the validity of the contested decisions (rendering thus the applicants' argument ineffective).[274]

Third, on the alleged infringement of Article 20(5) it concluded that in cases (like the one at hand) where the valuation must be carried out as a matter of urgency, a provisional valuation under Article 20(11) does not have to meet all the objectives set out in Article 20(5).[275]

Finally, on the occasion of the applicants' claim on an alleged infringement of Article 20(1) on the ground that Valuation 2 was not a "*fair, prudent and realistic*" of *Banco Popular's* assets and liabilities, the General Court considered that, in accordance with the second sub-paragraph of Article 20(10), the provisional valuation should include a buffer for additional losses, recognising thus the existence of uncertainties inherent therein, to conclude that:

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269 Order in Case T-599/18, para. 48 and Order in Case T-2/19, para. 50.

270 Order in Case T-599/18, paras. 57-61 and Order in Case T-2/19, paras. 57-62.

271 See **Section 3 above, under 3.2.2.1 (B) (I) (2)**.

272 **General Court judgment**, paras. 263-425.

273 *Ibid*., paras. 268 and 275.

274 *Ibid*., paras. 279, 281 and the case-law cited therein, and 282.

275 *Ibid*., para. 303.

"given the time constraints and the information available, some uncertainties and approximations are inherent in any provisional valuation carried out under Article 20(10) (…) and that the reservations expressed by [an independent valuer] cannot mean that Valuation 2 was not 'fair, prudent and realistic' within the meaning of Article 20(1) (…)".[276]

4. CASE-LAW ON OTHER RELATED ASPECTS: LIABILITY OF SUPERVISORY AND RESOLUTION AUTHORITIES – STATE AID IN THE BANKING SECTOR – JUDICIAL REVIEW OF EBA DECISIONS

4.1. Liability of supervisory and resolution authorities within the SSM and the SRM

4.1.1. The regulatory framework

(1) The SSMR does not contain any provisions on the contractual and/or non-contractual liability of the ECB within the SSM. However, **recital (61)** considers that, in accordance with the **third sub-paragraph of Article 340 TFEU** which specifically applies to it, the ECB should, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties, without prejudice to the liability of NCAs to make good any damage caused by them or by their servants in the performance of their duties in accordance with national legislation.[277]

In this respect and in relation to Greek government bond exchange programme under the Private Sector Involvement ('**PSI**') program amidst the euro area sovereign/fiscal crisis, of significance is the judgment of the General Court (Third Chamber) of 9 February 2022 in **Case T-868/16**, *QI and Others v European Commission and European Central Bank (ECB)*.[278] The application, brought under **Article 268 TFEU**[279] and dismissed in its entirety, sought compensation for the damage allegedly suffered by the applicants (holders of Greek government bonds) following the PSI implementation due to the conduct and actions of, *inter alia*, the ECB.

(2) On the other hand, the SRB's liability is explicitly governed by **Article 87 SRMR** (a provision, however, of declaratory nature[280]), which sets up a liability regime replicating **Article 340 TFEU** (and, in one case, **Article 272**), and **Article 41(3) CFR**.[281] In this respect, the SRB must, in accordance with the general principles governing the liability of Member States' public

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276 *Ibid*., paras. 350 and 357.

277 For details see **D'Ambrosio (2015)** and **Almhofer (2021)**, pp. 230-232. It is noted that the ECB is not to be held responsible for the damages committed by third parties.

278 ECLI:EU:T:2022:28.

279 Under this Article, the Court has jurisdiction in disputes relating to compensation under Article 340 (second and third sub-paragraphs) TFEU concerning the non-contractual liability of the EU and of the ECB, respectively; see **Lenaerts *et al.* (2014)**, pp. 480-549 and **Craig and de Búrca (2020)**, pp. 616-640.

280 See **Kaufhold (2022)**, at p. 1179, with reference to Article 21 of **Council Regulation (EC) No 58/2003** of 19 December 2002 "laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes" (*OJ L 11, 16.1.2003, pp. 1-8).*

281 The latter lays down the right to compensation as one of the principles of good administration Since the SRB has legal personality, it can itself be the party against whom claims may be asserted. On Article 41(3) CFR, see **Arons (2015)**, para. 84 and in details **Voet van Vormizeele (2019)**, p. 3507.

authorities, restore any damage caused by it or by its staff in the performance of their duties, in particular their resolution functions including acts and omissions in support of foreign resolution proceedings.[282] An exception constitutes **Article 87(4) SRMR**, pursuant to which the SRB is obliged to compensate an NRA for damages which the latter has been ordered to pay by a national court, or which it has undertaken, in agreement with the SRB, to pay under an amicable settlement, resulting from an act or omission committed by that NRA in the course of any banking resolution.[283] The Court has jurisdiction: *first*, to determine the non-contractual liability of the SRB, the Council and the Commission, as well as in any dispute relating to SRB's obligation to compensate NRAs;[284] and *second*, in accordance with **Article 267 TFEU**, to give preliminary rulings, when national judicial authorities ('**NJAs**') exercise their own competence, in accordance with their national law, to determine the non-contractual liability of NRAs of the participating Member States in the exercise of the powers conferred on them by the SRMR.[285]

4.1.2. Case-law

(1) Key judgments of the Court in this respect are the following: *first*, its judgment of 19 November 1991 in joint **Cases C-6/90** and **C-9/90**, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*[286] (the **"*Francovich* case"**), which developed the *Francovich* liability doctrine that may require disregarding a national statutory limitation of supervisory liability to cases of intentional relevant harm; *second*, the judgment of the Court (sitting as a full Court) of 12 October 2004 in **Case C-222/02**, *Peter Paul, Cornelia Sonnen-Lütte, Christel Mörkens v Bundesrepublik Deutschland*[287] (the **"*Peter Paul* case"**), which refused to apply a *Francovich*-type Member State liability to the obligations incumbent on competent authorities to exercise prudential supervision over credit institutions pursuant to the EU legal acts in force at that time; and *third*, the (more recent) judgment of the Court (Fifth Chamber) of 4 October 2018 in the above-mentioned[288] **"*Kantarev* case"**, which is relevant for the liability of NCBs and NCAs for incorrect application of EU law and focuses on the scope of the *Francovich* liability doctrine.

On the basis of the above, the ECB and the SRB can only be successfully held liable in relation to acts or omissions in the performance of their duties if 4 conditions are met on a cumulative basis: *first*, there is a sufficiently serious breach of a rule of EU law; *second*, the rule of EU law infringed must be intended to confer rights on individuals; *third*, there exists actual and certain damage; and *fourth*, a direct causal link is established between the breach of the obligation and the damage

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282 *Ibid.*, Article 87(3) and recital (120), second sentence; see **Kaufhold (2022)**, pp. 1181-1184.

283 Thus, all measures taken during the resolution of a credit institution under the SRB's remit ultimately go back to its resolution Decision, even if the NRA may have had discretion when deciding upon the mode of application and the SRB would thus not be liable pursuant to **Article 87(3) SRMR**. To disincentivise NRA to disregard SRB decisions, this obligation does not apply if the act or omission constituted an infringement (committed intentionally or with manifest and serious error of judgement) of the SRMR, another provision of EU law or a Decision of the SRB, the Council or the Commission. This paragraph of Article 87 expresses and further develops the division of responsibilities within the SRM; see details in **Busch, McMeel and Gortsos (2022)**, pp. 508-509 and **Kaufhold (2022)**, pp. 1189-1190. On the liability of NRAs within the SRM, see **Almhofer (2021)**, pp. 230-232.

284 Proceedings in matters arising from such a liability are barred after a period of 5 years from the occurrence of the event giving rise thereto (**SRMR**, Article 87(5) and recital (120), second sentence).

285 *Ibid.*, recital (120), third and fourth sentences. On Article 267 TFEU, see **Craig and de Búrca (2020)**, pp. 497-502, and more analytically **Lenaerts *et al.* (2014)**, pp. 456-479, and **Schwarze und Voet van Vormizeele (2019)**, pp. 2908-2939.

286 ECLI:EU:C:1991:428.

287 ECLI:EU:C:2004:606.

288 See **Section 3 above, under 3.2.2.2 (B) (II) (3)**.

sustained by claimant.[289] However, an important issue relating to supervisory liability within the SSM and the SRM is that the judicial review of acts adopted by the ECB and by NCAs, or by the SRB and by NRAs, is likely to be governed by different procedural rules (EU law in the case of the ECB and the SRB and national laws for NCAs and NRAs), giving rise to undesirable differences in outcomes across jurisdictions.[290]

(2) In the above-mentioned, *Banco Popular*-related **Case T-523/17**, *Eleveté Invest Group and Others v Commission and SRB*,[291] the applicants raised a claim for compensation in respect of the non-contractual liability of the SRB (and the Commission). In its judgment, the General Court concluded that, *on the one hand*, they have not (demonstrated the existence of unlawful conduct and, thus, not) established the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals, and, *on the other hand*, they have not established a causal link between the alleged unlawful conduct by the SRB and the Commission and the liquidity crisis of *Banco Popular*,[292] dismissing this claim as well.

4.2. State aid

4.2.1. State aid in the context of resolution funding

(1) State aid and aid by the SRF are governed by **Article 19 SRMR**.[293] In this respect, the following deserves attention:

First, even though, in principle, any State aid is perceived as incompatible with the internal market and is thus prohibited if the conditions set out in **Article 107(1) TFEU** are met,[294] by way of exception and in accordance with **Article 107(3), point (b) TFEU**, State aid may be considered as compatible with the internal market "*to remedy a serious disturbance in the economy of a Member State*". On the basis of this provision, since the onset of the GFC, the Commission has issued a number of "crisis communications", including its (above-mentioned[295]) **2013 Banking Communication**, which provided guidance as to how it intended to apply the State aid rules to the financial sector as long as that crisis persisted.

Despite its announcement that these Communications would apply on an exceptional basis, they still do so. However, a review of the banking State aid framework is envisaged in accordance with the Commission Communication of 18 April 2023.[296] Taking as given the close linkages between the CMDI and the State aid frameworks: *first,* this aims at ensuring the necessary consistency; and *second*, could lead to a solid assessment as to whether a more progressive approach should be adopted with different criteria for

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289 The same applies to the EBA. On this aspect, see **Almhofer (2021)**, pp. 242-244 (discussed under the perspective of the ECB within the SSM and the SRB within the SRM) and **Busch and Gortsos (2022)**, pp. 32-51 (in relation to EBA as well), both with extensive further references to the relevant jurisprudence of the Court and to secondary sources.

290 On this aspect, see also **Busch and Gortsos (2022)**, pp. 506-508.

291 See **Section 3 above, under 3.2.2.1 (B) (I) (2)**.

292 **General Court judgment**, paras. 651 and 665, respectively.

293 For a detailed analysis of this Article, see **Grünewald and Gortsos (2022)**.

294 Pursuant to that TFEU Article, State aid constitutes any intervention by a State or through State resources, which distorts or threatens to distort competition by favouring certain undertakings or sectors on a selective basis and likely affects trade between the Member States. See also the Commission Notice on the notion of State aid as referred to in this TFEU Article (OJ C 262, 19.7.2016, pp. 1-50).

295 See **Section 3 above, under 3.1.1**.

296 COM/2023/225 final. In the Commission's legislative proposal amending the DGSD, the term **'Union State aid framework'** is defined (**Article 2(1), new point (21)**) to mean the framework established by **Articles 107-109 TFEU**, Regulations and all EU acts, including Guidelines, Communications and Notices made, or adopted pursuant to **Articles 108(4) or 109 TFEU**.

assessing the compatibility of State aid in the form of preventive measures, resolution measures or liquidation aid in insolvency.[297]

Second, in relation to resolution financing, the situation is not clear-cut in all cases. While the SRF and the national resolution financing arrangements set out under the BRRD are "industry-funded", national DGSs and resolution financing arrangements have been treated by the Commission, in principle, as being under the control of the State and the decision as to their application as being imputable to it. In particular, according to the Banking Communication:[298]

(a) Interventions by national DGS in relation to their "payout function" (namely reimbursement of covered depositors) in accordance with the DGSD do not constitute State aid in accordance with **Article 107(1) TFEU**.

(b) On the other hand, the use of their funds to assist in the restructuring of credit institutions may constitute such State aid: "*Whilst the funds in question may derive from the private sector, they may constitute aid to the extent that they come within the control of the State and the decision as to the funds' application is imputable to the State. The Commission will assess the compatibility of State aid in the form of such interventions under this Communication*". This approach has been challenged with the General Court's judgment in the so-called ***"Tercas case"***, discussed just below (**under 4.2.2.2**). *Furthermore*, State aid in the form of interventions by a resolution fund (in accordance with **Article 109 BRRD** and **Article 19 SRMR**) should also be assessed by the Commission under the Banking Communication as to its compatibility with the internal market.

(2) On the other hand, the provision of ELA (which, as already noted,[299] is governed by the relevant Eurosystem's Agreement of 9 November 2020) if the specific, typical conditions for LLR are met, and monetary policy operations (such as open market operations and standing facilities) do not fall within the scope of State aid rules pursuant to **Article 107(1) TFEU**.[300]

4.2.2. State aid beyond resolution funding

4.2.2.1 State aid and reorganisation measures – interpretation of the Banking Communication

In this context and in relation to specific Slovenian reorganisation measures (adopted under the national law which transposed **Directive 2001/24/EC** of the co-legislators of 4 April 2001 "on the reorganisation and winding-up of credit institutions"[301] ('**CIWUD**') and their implementation), two judgments of the Court (Grand Chamber) relating to the request for a preliminary ruling under **Article 267 TFEU** from the Slovenian Constitutional Court are noteworthy: the first, of 19 July 2016 in **Case C-526/14**, *Tadej Kotnik and Others v Državni zbor Republike Slovenije*[302] (the ***"Kotnik***

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297 **Commission Communication (April 2023)**, p. 5, last para. On this, see also the position of the European Parliament, which is favour of revisiting State aid rules (**European Parliament (2022)**, point 32).

298 **Banking Communication**, paras. 63 and 64.

299 See **Section 1 above, under 1.2 (1)**.

300 **Banking Communication**, para. 62.

301 OJ L 125, 5.5.2001, pp. 15-23, as in force. This Directive is analysed in **Peters (2011)** and **Wessels (2017)**.

302 ECLI:EU:C:2016:570. On this judgment, see by means of mere indication **Blanck (2021)**, pp. 487-489. This judgment also discusses soft law aspects, and in particular the limits of institutions' discretion due to the general principles of predictability, transparency and protection of legitimate expectations

case"); and the second (and most recent) of 13 September 2022 in **Case C-45/21**, *Banka Slovenije* (Central Bank of Slovenia).[303]

The Court's judgment in the *Kotnik* case, in particular, deals with (1) the validity and interpretation of points 40-46 of the Banking Communication, (2) the application of the principle of proportionality in relation to the conversion or the write-down of subordinated rights in accordance with that Communication as a condition for granting to credit institutions State aid under Article 107(3), point (b) TFEU, (3) the interpretation of specific provisions of the CIWUD, and (4) the principle of the protection of legitimate expectations and the right to property. According to the Court, the Banking Communication must be interpreted as meaning that (as an instrument of EU soft law) it is not binding on the Member States, and its points (40)-(46), laying down a condition of "burden-sharing" by shareholders and holders of subordinated rights as a prerequisite to the authorisation of State aid, as compatible with Articles 107-109 TFEU.[304]

4.2.2.2 State aid to DGSs: the "Tercas case"

(1) *Banca Tercas*, an Italian credit institution, was placed under special administration in 2012 due to irregularities identified by its NCA, Banca d'Italia. In 2013, another Italian credit institution, *Banca Popolare di Bari* ('**BPdB**'), expressed an interest in the subscription of additional capital in *Banca Tercas* on the condition that the latter should be audited and its deficit be covered by Fondo Interbancario di Tutela dei Depositi ('**FITD**'), one of the Italian DGSs.[305] The FITD intervened in 2014 for the benefit of *Banca Tercas* and decided to cover its negative equity and grant it certain guarantees (approved by Banca d'Italia).

(2) By its decision of 23 December 2015, the Commission found that this intervention constituted unlawful State aid under **Article 107(1) TFEU** granted by Italy to *Banca Tercas* and ordered its recovery.[306] By its judgment of 19 March 2019 in **Joined Cases T-98/16**, *Italian Republic v Commission*, **T-196/16**, *[BPdB] v Commission* and **T-198/16**, *[FITD] v Commission*[307]), the General Court annulled the Commission's decision based the following:

First, it argued that the Commission had wrongly classified as State aid the measures adopted for the benefit of *Banca Tercas* by the FITD, recalling that State aid must cumulatively meet two conditions: being attributable to the State *and* being granted "through State resources" pursuant to **Article 107(1) TFEU**, as well as considering that these conditions were not met, since the FITD autonomously decided to intervene for the benefit of *Banca Tercas*[308] and that the public mandate

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303 ECLI:EU:C:2022:670. In this case, the request has been made in proceedings for review of the constitutionality of national legislative provisions defining the conditions for the liability of the Central Bank of Slovenia (Banka Slovenije) for damage caused by the cancellation of certain financial instruments, and for access to certain information relating to that cancellation held by Banka Slovenije.

304 **Court judgment**, paras. 35-45 and 46-60, respectively.

305 This consortium of credit institutions operating in Italy is governed by private law and acts as a mutual benefit body, having the power to adopt measures for the benefit of its members: *first*, in the form of a statutory guarantee of deposits if one of those has been placed under compulsory liquidation (**"mandatory intervention"**); and *second*, on a voluntary basis, in accordance with its statute, if it is possible by means of such intervention to reduce the burden that its members may have to bear as a result of guaranteeing deposits (**"voluntary intervention"**, including by way of support or preventive intervention).

306 **Commission Decision (EU) 2016/1208** of 23 December 2015 "on State aid granted by Italy to the bank Tercas" (Case SA.39451 (2015/C) (ex 2015/NN)), OJ 2016 L 203, pp. 1-34. For a detailed perusal of the case's background, including the specificities of Italian law, see **Boccuzzi (2022)**, pp. 39-51.

307 ECLI:EU:T:2019:167.

308 See **Nicolaides (2020)**, p. 29 *et seq*.

given to it under Italian law only applies if a member credit institution is subject to compulsory liquidation, which was not the case.

Furthermore, the General Court stated that the FITD, as a private entity, is acting "*on behalf of and in the interests of the members of the consortium*" subject to its statutes and concluded that the Commission did not prove that the funds granted to *Banca Tercas* were controlled by Italian public authorities. Even though the latter claimed that the contributions used by the FITD to finance the intervention were mandatory, the Court found that (*inter alia*) the intervention for the benefit of *Banca Tercas* was in accordance with the FITD statutes.[309]

(3) The Court (Grand Chamber) confirmed the General Court's ruling by dismissing the appeal brought by the Commission on 29 May 2019 against it by its judgment of 2 March 2021 in **Case C-425/19 P**, *European Commission v Italian Republic, [BPdB], Banca d'Italia and [FITD]*.[310]

4.3. On the judicial review of Decisions of the EBA and of the ESAs' Board of Appeal (BoA)

(1) Pursuant to **Article 61(1)-(2) EBAR**, proceedings may be brought before the Court by Member States, EU institutions and any natural or legal person may institute proceedings contesting Decisions of the EBA in accordance with **Article 263 TFEU**. A condition for this is that there is no right of appeal against such EBA Decisions before the Board of Appeal ('**BoA**'). *Furthermore*, pursuant to **Article 61(3) EBAR**, proceedings for failure to act also may be brought before the Court pursuant to **Article 265 TFEU** if the EBA is under an obligation to act but fails to take a Decision.[311]

(2) Decisions of the BoA may also be contested before the Court in accordance with **Article 263 TFEU**.[312] This is a joint body of the ESAs established by **Article 58(1) of the ESAs' Regulations**, is governed by **Articles 58-60** and its Rules of Procedure,[313] constitutes a form of administrative pre-litigation review mechanism (like the Appeal Panel in the SRM), is fully independent and is composed of six members and six alternates, which must (personally and collectively) meet specific qualification criteria[314] and are personally independent.[315]

(3) Appeals before the BoA can be lodged by any natural or legal person, including competent authorities, against a Decision of the EBA (or any other ESA) as referred to in **Articles 17-19** or taken by it in accordance with the sectoral legislative acts set out (as *numerus clausus*) in **Article 1(2)**, which is either addressed to that person or is of direct and individual concern to it.[316]

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309 On this judgment, see further **Bodellini (2021)**, pp. 366-369, **Blanck (2021)**, pp. 489-490, and **Quigley (2022)**, p. 42.

310 ECLI:EU:C:2021:154.

311 **EBAR**, Article 61(3). In both cases, the EBA is required to take the necessary measures to comply with the Court's judgment (*ibid*., Article 61(3)).

312 *Ibid*., Article 61(1).

313 *Ibid*., Article 60(6). The Rules of Procedure of 25.02.2020 (BoA 2020 01), which are currently into force, are available at: https://www.esma.europa.eu/sites/default/files/library/boa_rules_of_procedure_2020.pdf.

314 **EBAR**, Article 58(2)-(4). Article 58(6)-(8) contains procedural and administrative rules.

315 *Ibid*., Articles 58(5) and 59(1), first and second sentences and (6), first sentence.

316 *Ibid*., Articles 60(1). Article 60(2) contains administrative provisions, while Article 60(3) sets out that appeals lodged do not have suspensive effect, unless the BoA considers that circumstances so require.

The power has thus been conferred upon the BoA to decide on appeals only against *specific* Decisions of the ESAs; otherwise, appeals are inadmissible.[317]

(4) The CJEU has made several rulings on the admissibility of appeals submitted by virtue of **Article 17 of the ESAs Regulations** (on "breach of Union law"), which sets out a **"three-step mechanism"** involving (*inter alia*) the EBA, NCAs and (under conditions) the Commission,[318] and in particular in relation to the EBA's "own-initiative jurisdiction" under **Article 17(2)** to initiate an investigation; this is currently in force as amended by Article 2 of **Regulation (EU) 2019/2175** of the co-legislators of 18 December 2019.[319] Relevant in this respect of admissibility are: *first*, before the amendment of Article 17(2), the judgments of the General Court (Third Chamber) of 9 September 2015 in **Case T-660/14**, *SV Capital OÜ v [EBA]*[320] *and* of the Court (First Chamber) of 14 December 2016 in **Case C-577/15 P**, *SV Capital OÜ v [EBA]*[321] (the ***"SV Capital* case"**); and *second*, after that amendment, the Order of the General Court of 10 August 2021 in **Case T-760/20**, *Stasys Jakeliūnas v. ESMA* (the "***Jakeliūnas* case"**).[322]

5. CONCLUDING REMARKS AND ASSESSMENT

In the previous Sections, the author has discussed and analysed key decisions of EU Courts relating, mainly, to cases brought before them challenging decisions taken by the ECB within the SSM and the SRB within the SRM. As already noted, up to the beginning of September 2024, more than 300 related cases were brought before the EU Courts, some of which have been closed while others are still pending. Thus, the author has followed a targeted approach, focusing his analysis on those rulings which, in his view, are the most relevant.

As discussed,[323] the actions and judgments relating to the calculation of *ex-ante* contributions to the SRB for the SRF have not been discussed. The same applies to pleas in most of the actions brought before EU Courts related to the infringement of various Articles of the Charter of Fundamental Rights (CFR).

On Section 1

(1) Section 1 sets the scene on the SSM and the SRM, i.e., the key pillars of the BU, and the underlying single rulebook.[324] This allows some initial considerations:

First, with exception of the SSMR and the DGSD, the other legislative acts governing the BU framework (namely, the SRMR, the CRD IV, the CRR and the BRRD) have been repeatedly amended

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317 If this not the case, it examines whether the appeal is well-founded and may confirm the Decision of the competent body of the ESA, or remit the case to it, in which case the BoA's Decision, which must be reasoned and be made public by the relevant ESA, is binding and an amended Decision regarding the case concerned must be adopted (*ibid*., Articles 60(4)-(5) and (7)). An inventory of the decisions taken by the BoA (its most recent of July 2024) is available at: https://www.eba.europa.eu/about-us/organisation/joint-board-of-appeal/decisions. On the BoA's work, see **Blair (2012)**, **Wymeersch (2012)**, pp. 292-297, **Van Rijn (2022)**, pp. 313-317 and in detail **Lamandini and Ramos Muñoz (2020)**, pp. 122-134 and 145-160, who highlight the importance of this EU body along with the inherent weaknesses in this form of *quasi*-judicial protection and compare the features of the BoA with those of the ABoR and the SRB's Appeal Panel.

318 **EBAR**, Article 17(3)-(7) and recitals (26)-(28). See on this **Wymeersch (2012)**, pp. 255-263 (published though before the amendment of Article 17(2) discussed just below).

319 OJ L 334, 27.12.2019, pp. 1-145. This Regulation (EU) has applied from 1 January 2020 (Article 7).

320 ECLI:EU:T:2015:608.

321 ECLI:EU:C:2016:947.

322 ECLI:EU:T:2021:512.

323 See Section 1 above, under 1.3.

324 See Section 1 above, under 1.1.

since their adoption during the period 2013-2014, while a new review of the CMDI framework is pending. Notwithstanding the fact that this development is based on legitimate considerations relating to the policy objective of safeguarding financial stability and (at least in some cases) the new rules adopted (or to be adopted) follow international financial standards, concerns in terms of legal certainty are reasonably raised.

Second, even though the SSM and the SRM are already (and almost for a decade by now) fully operational, the EDIS/EDIF have not yet been established. Other major missing elements in the BU architecture are the harmonisation at EU level of the rules governing bank insolvency and, in the author's view, the centralisation of the ELA Mechanism by the provision of last resort lending directly by the ECB to (at least) the credit institutions which are directly supervised by it by virtue of the SSMR; in his view, this should become the BU's fourth key pillar.[325]

(2) In the same Section, the author briefly discusses EU case-law relating to some specific related issues pertaining to three aspects. *Firstly*, by its judgment of 11 December 2018 in the **"*Weiss* case"**, the Court has clarified (*inter alia*) that the principle of proportionality, as enshrined in the TEU and further detailed in Protocol (No 2) attached to the Treaties on its application, requires that EU institutions' acts should not go beyond what is necessary to achieve their objectives taking into account alternative and less onerous measures which would allow these objectives to be achieved equally effectively. *Furthermore*, through its **"*Meroni* doctrine"**, which was further elaborated and refined by its rulings in 1981 in the **"*Romano* case"** and in 2014 in the **"*short selling* case"**, the Court has set the limitations of the powers of EU agencies (such as in the financial system the SRB and the ESAs). *Finally*, by its judgment of 15 July 2021 in **Case C-911/19**, the Court ruled on the validity of specific Guidelines adopted by the EBA in the course of "level 3" of the Lamfalussy procedure.[326]

On Section 2 ("SSMR-related" case-law)

The focus of Section 2 is on the "SSMR-related" case-law and in particular on three thematic issues: the relationship between Articles 4(1) and 6 SSMR; the interpretation of Articles 6(4) and 4(3); and the withdrawal of banking licenses by the ECB.

Relationship between Articles 4(1) and 6 SSMR and interpretation of Article 6(4) on the classification of a credit institution as significant

The *first* thematic issue refers to the interpretation of Article 6(4) SSMR on the classification of a credit institution as significant. In its judgment of 16 May 2017 in the **"*L-Bank* case"**, the General Court assessed the German credit institution's plea in law on infringement of Article 6(4) (and of Article 70 SSM-FR) in the choice of the criteria applied by the ECB to classify it as significant. *L-Bank* claimed that it should have been classified as an LSI since the SSMR objectives would have been *sufficiently* achieved if directly supervised by the German NCA (BaFin), given its low-risk profile. This plea was rejected on the basis that *L-Bank* did not prove how the German authorities would have been better able to attain these objectives.

This judgment is even more important in view of the discussion on the relationship between Articles 4(1) and 6 SSMR. In that respect, the General Court highlighted that the exercise by NCAs

[325] See Section 1 above, under 1.2, with reference to EU case-law relating to some aspects of the ELA mechanism.

[326] See Section 1 above, under 1.3.

of direct supervision of LSIs is overseen by the ECB pursuant to Article 6(5), points (a)-(b), and, by examining the interaction between Articles 4(1) and 6 SSMR, ruled that "*the logic of [their] relationship consists in allowing the exclusive competences delegated to the ECB to be implemented within a decentralised framework, rather than having a distribution of competences between the ECB and the NCAs in the performance of the tasks referred to in Article 4(1)*".[327]

Interpretation of Article 4(3) SSMR

The interpretation of the first sentence of the first sub-paragraph of Article 4(3) SSMR on the application of national law by the ECB[328] has been discussed through the lens of earmarked judgments of the EU Courts. These are classified in two groups: those in which the actions for annulment of ECB Decisions were dismissed (namely, in the "*Crédit Agricole* cases", the "*Berlusconi* cases", and the "*Crédit Mutuel Arkéa* case") and those in which the interpretation of national law by the ECB has been challenged by the General Court (namely, in the "*Corneli* case" and in two cases in which the judgments were adopted in 2024) (see below, under (1) and (2), respectively).

(1) *First*, in the ***"Crédit Agricole* cases"** the key issues at stake was the interpretation by the General Court of the prohibition introduced by Article 13(1) CRD IV to combine within the same credit institution the role of chairman of the management body in its supervisory function with that of an executive member of the management body and the appropriate transposition of this provision into French law. By its judgment of 24 April 2018 in **Joined Cases T-133/16 to T-136/16** the General Court dismissed the actions brought before it by concluding, *inter alia*, that Article 4(3) SSMR requires it to assess the legality of the contested ECB decisions in the light of both Article 13(1) CRD IV and the related French law (CMF). On the basis of a textual, historical, teleological and contextual interpretation of Article 13(1) CRD IV concerning the meaning of the expression "*two persons who effectively direct the business of the institution*", it elaborated on the definition of 'good governance', reading this Article in conjunction with the prohibition established by Article 88(1). Its judgment reaffirmed that, in accordance with Article 4(3) SSMR, the ECB must apply EU law for the purpose of carrying out the specific tasks conferred upon it within the SSM, and, to the extent that this is composed of Directives, the national legislation transposing them (such as, in the case at hand French law, namely the CMF).[329]

Second, another significant judgment in respect of the interpretation by EU courts of national (in this case, Italian) law which the ECB must apply in accordance with Article 4(3) is the General Court's judgment of 11 May 2022 in **Case T-913/16** (the **"*Berlusconi* case"**). The key issue at stake was the interpretation of the concept "acquisition of a qualifying holding" in the meaning of Articles 15 SSMR and 22(1) CRD IV. By its judgment, which dismissed the action, the General Court considered (primarily based on settled case-law) that, according to the need for uniform application of EU law and from the principle of equality, "*the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union*". Considering that Articles 15 SSMR and 22 CRD IV make no express reference to the laws of the Member States for the purpose of determining the meaning and scope of the concept of such an acquisition, the General Court concluded that, according to settled case-law, this concept must be

327 See Section 2 above, under 2.1.

328 On this Article, see Section 2 above, under 2.2.1.

329 See Section 2 above, under 2.2.2.1 (A).

determined by reference to the general context in which it is used and by its usual meaning. Thus, taking also into account the objectives of the procedure for assessing acquisitions of qualifying holdings, the General Court ruled that a restrictive interpretation of the provisions governing this procedure would render them wholly ineffective and undermine their objective.[330]

Third, a related judgment of the General Court of 13 December is that in **Case T-712/15** (the **"*Crédit Mutuel Arkéa* case"**). The issues at stake related to two specific tasks conferred upon the ECB within the SSM under Article 4(1), points (f) and (g), respectively. The *first* referred to its supervisory powers in accordance with Article 16(2) SSMR. The General Court dismissed the action and ruled that, from a joint reading of Article 16(1), point (c) and 16(2), point (a) SSMR, if in accordance with prudential examinations carried out by the ECB the own funds and liquidity held by a credit institution do not ensure sound management and risk coverage, the ECB is entitled to require the credit institution to go beyond the minimum requirements. The *second* issue referred to micro-prudential supervision of banking groups on a consolidated basis. In this case, the General Court undertook a teleological and contextual interpretation of Article 2, point (21)(c) SSM-FR on the definition of the term 'supervised group'. Based on an analysis of the two objectives of consolidated prudential supervision of banking groups, it concluded that, in order to comply with the objectives of the SSMR, this Article and the conditions laid down in Article 10(1) CRR (to which it refers) must be interpreted in the light of the intention to enable the ECB to have an overall picture of the risks likely to affect a credit institution and to avoid the fragmentation of prudential supervision between the ECB and NCAs.[331]

(2) *First*, on 12 October 2022, the General Court delivered its judgment in **Case T-502/19** (the **"*Corneli* case"**). The applicant, a minority shareholder in the Italian credit institution *Banca Carige*, submitted a request for annulment of the ECB Decision placing *Banca Carige* under temporary administration pursuant to the Italian Banking Law. By its judgment, the General Court found an error in the interpretation of that law by the ECB and annulled its Decision. Following a textual interpretation of the conditions for the application of Articles 69-70 of the Italian Banking Law (which had transposed Articles 29-30 BRRD, respectively), it concluded that these provisions govern two different situations and that the power exercised by the ECB to place *Banca Carige* under temporary administration was, apparently, that referred to in Article 70. In addition, since pursuant to Article 4(3) SSRM, where the EU law involves Directives, it is the national law transposing them that must be applied, it also concluded that the ECB's error in the application of Article 70 of the Italian Banking Law cannot be remedied by a "free interpretation" of the texts which would allow the conditions for the application of provisions separately conceived in the BRRD and national law to be reconstructed. [332]

Second, in the context of the application of Article 4(3) SSMR in relation to two Austrian significant credit institutions (*BAWAG PSK Bank* and *Sberbank Europe AG*), the General Court submitted its judgments on 28 February 2024 in **Case T-667/21** in relation to the first and **Cases T-647/21 and T-99/22** in relation to the second. The applicants sought the annulment of the ECB Decisions taken pursuant to Article 4(1), point (d) and 4(3) SSMR, read in conjunction with Article 395(1) CRR

330 See Section 2 above, under 2.2.2.1 (B). However, as noted in the last footnote of that Sub-section, by its judgment of 19 September 2024 the Court (Fourth Chamber) set aside the General Court's judgment and annulled the ECB Decision of 25 October 2016.

331 See Section 2 above, under 2.2.2.1 (C) (I) and (II), respectively.

332 See Section 2 above, under 2.2.2.2 (A).

on "limits to large exposures" and several provisions of Austrian financial law. By its judgments in Case T-667/21 and in Case T-99/22, the General Court annulled the ECB Decisions.[333]

All these judgments share a common key significant feature. They conclude that, by applying national law pursuant to Article 4(3) SSMR, the ECB must assure its conformity and compliance with the general principles of EU law, as well as with the BRRD and the CCR (to the extent that it contains options for Member States), as in the cases at hand (as well as also the CRD IV). The question apparently arises, however, how the ECB should deal with a situation in which the transposition into national law is not appropriate until that law is disapplied or amended.

Withdrawal of banking licenses by the ECB

The last aspect discussed in Section 2 relates to case-law on the withdrawal of banking licenses by the ECB within the SSM by virtue of Article 4(1), point (a) SSMR. *Inter alia*, this aspect has been the subject matter of (ultimately) the Court judgment of 5 November 2019 in the **"*Trasta* case"**. The Court ruled that an ECB withdrawal Decision directly affects the legal situation of the credit institution concerned (namely, in the case at hand the Latvian *Trasta Komercbanka*), which, once the Decision had been taken, is no longer authorised to continue its banking activities. *On the other hand*, it concluded that an ECB withdrawal Decision does not have such an effect on the shareholders, since these are not prevented from continuing to exercise their participation rights at the credit institution's general meeting and, thus, their legal situation is not directly affected. It is *only* the liquidation decision which actually affects their legal situation, which, however, is adopted by a national court pursuant to national law and not by the ECB.[334]

On Section 3 ("SRMR-related" case-law)

The focus of Section 3 turns to the "SRMR-related" case-law. The analysis is based on three thematic issues as well: the nature of the assessment by the ECB that a credit institution is failing or likely to fail (FOLTF); the resolution action taken within the SRM in relation to *Banco Popular Español*, *ABLV Bank* and *ABLV Bank Luxembourg*, *AS PNB Banka*, and *Sberbank*; and aspects relating to the valuations conducted for the purposes of resolution.

The nature of the ECB's FOLTF assessment

On the nature of the assessment made by the ECB that a credit institution is FOLTF, the General Court considered by (*inter alia*) its Order of 6 May 2019 in **Case T-281/18** that the ECB has no decision-making power for the adoption of a resolution scheme, since the assessment of the conditions required for resolution and, thus, the adoption of a resolution scheme are exclusive powers of the SRB. Accordingly, the FOLTF "supervisory" assessment is not binding upon the SRB. Most importantly, the General Court concluded such ECB assessments are a mere factual assessment, with no legal effect, constituting "preparatory measures", which do not change the applicant's legal status.[335]

333 See Section 2 above, under 2.2.2.2 (B).

334 See Section 2 above, under 2.3.

335 See Section 3 above, under 3.1.

Resolution action

The resolution actions taken within the SRM in relation to several credit institutions can be divided in three groups: the resolution case for *Banco Popular Español* (see under (1) below), the "no-resolution" cases for *ABLV Bank* and *ABLV Bank Luxembourg* (under (2)) and then also for *AS PNB Banka*,[336] and the "mixed" case for *Sberbank* (in the sense that the parent company was not resolved while its two subsidiaries were (under (3)). Of key importance in terms of interpretation of the related SRMR Articles were (again) the ECB FOLTF assessment; the public interest assessment (PIA) made by the SRB; the resolution scheme adopted by the SRB and then endorsed by the Commission or the Council with regard to its discretionary aspects; and the role of the NRAs to which SRB Decisions are addressed.[337]

(1) The closed and pending cases on the resolution of *Banco Popular* are numerous.[338] In relation to those on which the General Court and the Court (in appeal) have already issued judgments, the actions brought before were, in principle, dismissed.

First, in its detailed judgment of 1 June 2022 in **Case T-481/17** the General Court made the following considerations and came to some important conclusions:

(a) By reading and interpreting Article 18(7), it ruled that the resolution scheme produces legal effects after the Commission has endorsed it with regard to its discretionary aspects, to avoid an "actual transfer of responsibility" in the meaning of the *Meroni* doctrine. Furthermore, the division of responsibilities between the SRB and the Commission within the SRM should be read as meaning that, in exercising its own competence to carry out an assessment of its discretionary aspects, the Commission may either accept the resolution scheme or object to its discretionary aspects but does not have the power *either* to exercise the powers conferred upon the SRB *or* to modify the resolution scheme or its legal effects. Furthermore, based on a textual interpretation of Article 86(2) SRMR, it ruled that a resolution scheme adopted by the SRB is in view of its substance producing legal effects and, thus, is subject to appeal on its own.

(b) In assessing the scope of the judicial review, the General Court emphasised that resolution decisions are made on the basis of discretionary, highly "complex economic and technical assessments". Thus, the review is confined to examining whether in exercising their discretionary powers, resolution authorities have committed any manifest error of assessment or misuse of powers, or even manifestly exceeded the limits of their discretion.

(c) In relation to an alleged violation of the three resolution conditions and, in particular, as regards the third, "public interest" criterion, the General Court concluded that the SRB did not commit a manifest error of assessment in finding that this condition was met by making a positive PIA for *Banco Popular*. This was based on the consideration that the proportionality of resolution measures in relation to alternative measures or other resolution tools provided for in the SRMR is irrelevant for the purposes of applying the public interest condition.[339]

[336] See Section 3 above, under 3.2.2.3.

[337] See Section 3 above, under 3.2.1.

[338] For a systematic general overview, see Section 3 above, under 3.2.2.1 (B) (I).

[339] See Section 3 above, under 3.2.2.1 (B) (II).

Thus, as a general assessment point, the outcome of any proportionality review is mostly marginal and rarely leads to the annulment of EU measures in cases involving complex economic assessments, unless a manifest error of assessment is proven.

Second, by its judgment of 18 June 2024 in **Case C-551/22 P** the Court concluded that the resolution scheme at issue did not constitute a challengeable act for the purposes of Article 263, fourth sub-paragraph TFEU. Thus, it set aside the General Courts's judgment, in so far as it found that the action brought by the appellants seeking annulment of the SRB Decision of 7 June 2017, concerning the adoption of a resolution scheme in respect of *Banco Popular*, is admissible. This was based on the consideration that, even though Article 18(1) and (6) SRMR confer on the SRB a wide margin of discretion on whether and how to resolve a credit institution, Article 18(7) makes the entry into force of the resolution scheme subject to the Commission's endorsement (subject to objections on the part of the Commission or the Council), which can substitute their own assessment for that of the SRB as regards those discretionary aspects. Once that scheme has been endorsed, the Commission must fully assume the responsibilities conferred on it by the Treaties.[340]

(2) Several actions were also brought before the General Court relating to the annulment of ECB Decisions (on the assessment of the FOLTF criterion, as discussed above) *or* those of the SRB in the "no-resolution" *ABLV Bank* and *ABLV Bank Luxembourg* cases.[341] In particular:

First, with its action brought before the General Court on 3 May 2018 in **Case T-280/18**, the credit institution requested the annulment of the SRB Decisions that resolution was not in the public interest. By its judgment of 6 July 2022, the General Court dismissed the action in its entirety. This judgment is of significant importance in terms of interpretation of the provisions of Article 18 SRMR on the SRB no-resolution Decisions and the application of Article 29. In this respect, the following considerations and conclusions of the General Court are highlighted:

(a) On whether the SRB exceeded its powers by ordering *ABLV's* liquidation, the General Court considered that the decision on liquidation is not taken by it, but it is the NRAs which must implement the SRB Decision and ensure that any action they take complies with that Decision pursuant to Article 29(1) SRMR. Furthermore, such Decisions do not, in general, directly and immediately require the NRA to liquidate the credit institution concerned. Its liquidation may, however, arise from a decision taken by its shareholders following the SRB Decision on a negative PIA.

(b) On the SRB's power to take a formal decision not to adopt a resolution scheme within the meaning of Article 18(1) SRMR, the General Court considered that the resolution procedure is initiated once the ECB FOLTF assessment is sent to the SRB. Thus, upon the initiation of the procedure by the ECB, the SRB is required to examine the criteria set out in Article 18(1) and based thereon, take a decision on whether to adopt a resolution scheme.

(c) On whether the SRB erred in failing to carry out its own examination of the condition laid down in Article 18(1), point (a) (on the FOLTF assessment), and sufficiently examined whether there was a reasonable prospect that other measures would prevent its failure pursuant to Article 18(1), point (b), the General Court considered that, since the assessments made by the SRB must be examined solely on the basis of the information available to it at the time when those assessments were made, subsequent events cannot invalidate the ECB's FOLTF assessment, which may be adopted by the SRB, or the view that there were no alternative measures capable of preventing

340 See Section 3 above, under 3.2.2.1 (B) (III).

341 See Section 3 above, under 3.2.2.2 (B) (I).

the failure. The General Court also noted that the causes of an applicant's FOLTF are not a factor to be taken into account when carrying out the examination provided for in Article 18(4) SRMR.

Furthermore, in examining whether the SRB is entitled to base its Decisions solely on the ECB's FOLTF assessment, and upon its consideration that the ECB is recognised as having "primary power" to carry out such an assessment due to its expertise as supervisory authority, the General Court considered, yet again, that the SRB is not bound by this assessment. Furthermore, in accordance with Article 18(1) SRMR, second sub-paragraph, the SRB may also carry out such an assessment, however, only after informing the ECB of its intention to do so and if the ECB does not make such an assessment.

In addition, even though the conditions referred to in Article 18(1), first sub-paragraph, points (a)-(b) SRMR are separate, the General Court considered that the examination of the various measures and actions referred to in point (b) can be integrated into the ECB's FOLTF assessment in respect of an applicant if related to the condition set out in point (a). Finally, in accordance with Article 18(1), fourth sub-paragraph, the assessment of the condition referred to in point (b) shall be made by the SRB in close cooperation with the ECB. Thus, the SRB can rely on the examination carried out by the ECB.

Second, by its Order of 14 May 2020 in **Case T-282/18**, the General Court declared the action brought before it by *ABLV Bank* shareholders inadmissible considering that the contested SRB decisions did not directly affect the legal position of shareholders such as the applicants; give the NRAs discretion as regards the adoption of measures likely to affect the rights of the shareholders; and, unlike the situation in the case which gave rise to the ***Trasta* case**, they have neither the object nor the effect of withdrawing from credit institutions their operating licences.

(3) Finally, in relation to the resolution cases relating to *Sberbank Europe (Austria)* and its subsidiaries in Croatia and in Slovenia, actions were brought by both *Sberbank Europe (Austria)* and its Russian parent company *Sberbank of Russia*, which are actually still pending. However, by its Orders of 8 September 2023, the General Court dismissed as inadmissible two of the actions brought by *Sberbank Europe (Austria)* to the extent they were directed against the Council, since this was not involved in the resolution process (and, thus, the condition set out in the third sub-paragraph of Article 18(7) SRMR was not met).[342]

Valuations for the purposes of resolution

The valuation of credit institutions' assets and liabilities for the purposes of resolution is governed by Article 20 SRMR, which provides for various categories of *ex-ante* and *ex-post* valuations.[343] This has been the subject of various actions brought before the General Court on the occasion of the *Banco Popular* resolution case. The rulings discussed were the General Court's Orders of 10 October 2019 in Cases **T-599/18** and **T-2/19**, and its judgment of 1 June 2022 in **Case T-523/17**. Key conclusions in that respect are the following:[344]

First, in relation to Article 20(10) on Valuation 2, the General Court ruled (once again) that the review carried out by EU Courts is limited, confined to verifying the lack of manifest error of assessment by the SRB when it considers that this valuation complies with the requirements set

342 See Section 3 above, under 3.2.2.4.

343 See Section 3 above, under 3.3.1.

344 See Section 3 above, under 3.3.2.1 and 3.3.2.2.

out in that Article. Furthermore, on the applicants' claim of alleged infringement of Article 20(1) on the ground that Valuation 2 was not a "*fair, prudent and realistic*" of *Banco Popular's* assets and liabilities, the General Court considered that, pursuant to the second sub-paragraph of Article 20(10), the provisional valuation should include a buffer for additional losses, recognising thus the existence of uncertainties inherent therein.

Second, in relation to Article 20(11) on the *ex-post* definitive valuation the General Court observed that, by definition, this valuation is subsequent to the adoption of the resolution scheme and the Commission's Decision and that, according to settled case-law, the legality of an EU measure is assessed on the basis of the facts and the law as they stood at the time when the measure was adopted. In addition, as concerns the alleged infringement of Article 20(5), the General Court concluded, *inter alia*, that in cases like the one at hand, where the valuation must be carried out as a matter of urgency, the provisional valuation pursuant to Article 20(11) does not have to meet all the objectives set out in Article 20(5).

Finally, on the relation between Article 20(11) and 20(12) on the compensation provided following the *ex-post* definitive valuation, the General Court ruled that the objective of Article 20(11), point (b) must be read in the light of Article 20(12). It furthermore ruled that the compensation provided under the latter Article does not apply when the sale of business tool is applied (as in the case of *Banco Popular*) and that this Article does not allow compensation for a credit institution's former shareholders and creditors whose capital instruments have been fully converted, written down and transferred to a third party.

On Section 4 (other related case-law)

For the sake of completeness, Section 4 briefly also develops on the case-law of EU Courts relating to three aspects which are of importance as well in the context of EU banking law:

(1) In relation to the liability of supervisory authorities within the SSM and of resolution authorities within the SRM, the author presented the related regulatory framework pursuant to the TFEU, the SSMR and the SRMR and then briefly discussed the key judgments of the Court in the "*Francovich* case", the "*Peter Paul* case", and the "*Kantarev* case", which set out the conditions under which the ECB and the SRB can be successfully held liable in relation to acts or omissions in the performance of their duties. Furthermore, he briefly also deals with the General Court's judgment in the *Banco Popular*-related **Case T-523/17**, which, *inter alia*, raises that one of the above-mentioned conditions, namely, the establishment of a causal link in that specific case between the alleged unlawful conduct by the SRB and the Commission and the liquidity crisis of *Banco Popular*, was not met.[345]

(2) Another aspect discussed is that relating to State aid, in accordance with Article 107(1) TFEU, in the context of resolution funding but also beyond that funding arrangement (namely, in the context of reorganisation measures and deposit guarantee). In particular: *on the one hand*, in relation to State aid in resolution, governed by Article 19 SRMR, the author briefly discusses some key provisions of the Commission's 2013 Banking Communication, which establish, *inter alia*, that, even though interventions by national DGS in relation to their "payout function" pursuant to the DGSD do not constitute State aid, the use of their funds to assist in credit institutions' restructuring may constitute such aid. *On the other hand*, the seminal Court judgment in the ***"Kotnik* case"** and another ruling relating to the adoption of reorganisation measures as a condition for granting

[345] See Section 4 above, under 4.1.

State aid are briefly presented before developing on the General Court's judgment of 19 March 2019 in the **"*Tercas* case"**. By this judgment, confirmed by the Court, the General Court annulled the Commission's decision, according to which the intervention by one of the Italian DGSs (FITD) in favour of the Italian credit institution *Banca Tercas* constituted unlawful State aid in accordance with Article 107(1) TFEU.[346]

(3) The final aspect discussed refers to the judicial review of Decisions of the European Banking Authority (EBA) and of the ESAs' Board of Appeal (BoA). In this respect, of relevance are the rulings (in the **"*SV Capital* case"** and the **"*Jakeliūnas* case"**) on the admissibility of appeals submitted by virtue of Article 17 of the ESAs Regulations (on the "three-step mechanism" established in relation to "breach of Union law"), and in particular on the EBA's "own-initiative jurisdiction" in accordance with Article 17(2) of those legislative acts to initiate an investigation.[347]

[346] See Section 4 above, under 4.2.1 and 4.2.2, respectively.

[347] See Section 4 above, under 4.3.

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This study discusses and analyses on a targeted basis and in a systematic way the evolution and key aspects of the case-law of the Court of Justice of the European Union (CJEU) in relation to the two key pillars of the Banking Union in force, namely the Single Supervisory and the Single Resolution Mechanisms, from their full operationalisation in November 2014 and in January 2016, respectively, up to up to the beginning of September 2024.

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