STUDY

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The Judicial Scrutiny of the SSM and the SRB

A missed chance or a success story?

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A missed chance or a success story?

Abstract

This study examines key rulings on the supervision and resolution of credit institutions in the EU and their impact on the Banking Union framework. It explores how case law has refined the European Central Bank's practices, shareholders' and boards' rights, and the interaction between ECB and Single Resolution Board powers during 'failing or likely to fail' assessments. While highlighting how litigation has clarified processes, rights, and the criteria for resolution, the study's findings underscore the need for heightened scrutiny of agencies to prevent political interference and ensure effective oversight.

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LIST OF ABBREVIATIONS

ABoR	Administrative Board of Review
ACPR	Autorité de Contrôle Prudential et de Resolution
ALM	Asset Liability Management
AML/CFT	Anti-Money Laundering/Combating the Financing of Terrorism
BRRD	Bank Recovery and Resolution Directive
CDC	Caisse des dépôts et consignations
CEO	Chief Executive Officer
CET	Common Equity Tier
CJEU	Court of Justice of the European Union
CMF	Code Monétaire et Financier
CNCM	Confédération nationale du Crédit mutuel
CRD	Capital Requirements Directive
CRR	Capital Requirements Regulation
ECB	European Central Bank
ECJ	European Court of Justice
FCMC	the Finanšu un Kapitāla Tirgus Komisija
FOLTF	Failing or Likely to Fail
IPC	Irrevocable Payment Commitment
LDD	Livret de Développement Durable et solidaire)
LDP	Livret D'épargne Populaire
LSI	Less Significant Institution
NCA	National Competent Authorities
SI	Significant Institution
SRB	Single Resolution Board
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism
TFEU	Treaty on the Functioning of the Europen Union
V1	Valuation Report 1
V2	Valuation Report 2
V3	Valuation Report 3

EXECUTIVE SUMMARY

Background

In November 2024, the Single Supervisory Mechanism (SSM), integrated in the European Central Bank (ECB), will celebrate its 10th anniversary. The setting up of this new mechanism provided the ECB with a toolbox for the prudential supervision of credit institutions, consisting of investigative measures, administrative measures and administrative penalties. The SSM marked a major advance in the EU integration process by shifting from highly fragmented national banking supervision to a unified European approach. Ten years later, the EU banking sector is sounder, with stronger capital and liquidity positions, whilst supervision is more uniform and applied in a consistent way. One of the main innovative elements of the SSM is that in order to ensure compliance with prudential requirements, the ECB need not only to apply EU law, but also national legislation adopted in transposition of EU Directives or exercising options granted by EU legislation.

The Single Resolution Board (SRB) is the resolution authority for credit institutions within the Banking Union, working in cooperation with the National Resolution Authorities of participating Member states. The Board has a relatively broad remit, ranging from ex ante planning to resolution action for insolvent banks. As such, the SRB plays a pivotal role in the implementation of the rules and procedure established in the EU to deal with the financial crisis of a credit institution. The decisions to resolve Banco Popular in 2017 and Sberbank in 2022, using resolution tools rather than national insolvency laws, have tested both the efficiency of these rules and the overall effectiveness of the mechanism in addressing crises while meeting resolution objectives and criteria.

Although the resolution actions were effective and did not require public funds or disrupt the financial system, they sparked widespread discontent among shareholders and other investors. Many turned to national and EU courts seeking legal redress, claiming violations of rules under the Bank Recovery and Resolution Directive, the Single Resolution Mechanism Regulation, and fundamental rights such as the right to property and the right to good administration.

In this respect, the litigation that ensued from SRB resolution decisions provided the Court of Justice of the European Union (CJEU) with the opportunity to assess the conformity to law of SRB actions.

Aim

The CJEU has the exclusive jurisdiction to decide on the validity of ECB decisions. Since its inception, approximately 80 cases have challenged ECB supervisory decisions before the CJEU, underscoring the complexity of ECB oversight. These cases encompass a variety of issues, including the ECB's powers over significant and less significant institutions, consolidated supervision, governance, license withdrawal, and the application of national legislation.

The resolution cases discussed in this paper are those related to the insolvency of Banco Popular, which have either reached a final judgement or are under appeal. Claimants seek to annul the SRB and European Commission decisions to resolve the bank, while the SRB, the European Commission and other intervening parties abject these requests. In ruling upon the validity of these claims, the Court has, for the first time, defined how EU fundamental legal principles and rights apply within a bank resolution process. It has also clarified the role of the independent valuer, the scope of various valuation reports, and addressed matters related to the delegation of powers within the EU, as well as other procedural aspects.

The aim of this paper is to assess how the judicial scrutiny of the ECJ has influenced ECB supervisory and SRB resolution activities and practices. Where possible, we will also evaluate whether this has broader implications for the behaviour of authorities and the further development of the Banking Union.

Key takeaways

Several key conclusions can be drawn from judicial cases related to supervisory decisions:

- **The CJEU's jurisprudence has been instrumental in clarifying supervisory practices within the Banking Union**. By closely examining the ECB's actions and annulling decisions where specific, detailed analyses were insufficient, the CJEU has set important precedents. These rulings have not only refined the ECB's supervisory approach but also established clearer standards for the application of prudential measures.
- Ad-hoc legal amendments influenced by political agreements have the potential to undermine the supervisory and judicial framework. Such amendments can override established EU legislation, creating perceptions of arbitrariness and weakening the credibility of both the supervisory framework and judicial process.
- **The requirement for the ECB to apply national legislation in accordance with interpretations from national courts – but only when compatible with EU law – underscores the need for caution and proportionality**. This dual requirement places the ECB in a delicate position, as it must balance national legal interpretations with EU-wide standards, further complicating the application of administrative measures.

With regard to resolution, the Court has:

- contributed to **better define a resolution procedure** by specifying actual processes, timing, responsibilities and reasoning. This enhances the **transparency and predictability** of the process.
- clarified the **division of powers** among EU entities responsible for resolution, including the **objectives** of different valuations, the **conditions** for resolution and the **scope** of judicial review.
- Incorporated the **resolution perspective** in the debate on the evaluation and hierarchy of EU fundamental rights and principles.

However, there is a risk that the Court's strict adherence to the letter of the law risks **limiting external scrutiny** of the agencies and affect the **effectiveness of legal redress**, particularly when judicial protection is the primary safeguard for stakeholders. While the Court's approach is lawful and legitimate, it necessitates that other EU institutions **enhance their scrutiny on the SRB** through robust accountability mechanisms.

1. INTRODUCTION

The Single Supervisory Mechanism (SSM) represents a landmark development in the EU's financial regulatory framework, centralising the prudential supervision of credit institutions across the Banking Union. Empowering the European Central Bank (ECB) with a robust toolbox for oversight – including investigative measures, administrative actions, and penalties – the SSM integrates closely with National Competent Authorities (NCAs) to supervise both significant and less significant institutions. This collaborative approach blends EU directives with national laws, creating a complex regulatory landscape.

Complementing the SSM, the Single Resolution Mechanism (SRM) addresses the limitations of Article 127(6) TFEU by centralising the resolution of credit institutions and investment firms, thereby standardising procedures and consolidating resolution powers within the Single Resolution Board (SRB). The SRM aims to harmonise and centralise resolution processes, a necessary evolution given the fragmented nature of financial oversight prior to its establishment.

Since its inception, approximately 80 cases have challenged ECB supervisory decisions before the Court of Justice of the European Union (CJEU), highlighting the complexity of ECB oversight. These cases address a range of issues, including the ECB's powers over significant and less significant institutions, consolidated supervision, governance, license withdrawal, and the application of national legislation.

With regard to resolution, when a bank reaches a point of failure or is deemed 'failing or likely to fail' (FOLTF), the SRB must choose between national insolvency proceedings or resolution tools to address the situation, with the former being the default. The SRB has only resolved two institutions, Banco Popular in 2017 and Sberbank in 2022, with the former been litigated extensively, including disputes over the valuation reports, claims of procedural violations, and alleged breaches of fundamental rights.

This in-depth analysis seeks to achieve two primary objectives: first, to review pivotal rulings on the supervision and resolution of EU credit institutions; and second, to assess their impact on the operational framework of the Banking Union. Additionally, it explores how these rulings contribute to broader discussions on the distribution of decision-making powers within the EU and the interpretation of fundamental rights in resolution contexts.

Specifically, the analysis focuses on how case law has refined supervisory practices related to the ECB's competencies, including asset-liability management (ALM) and anti-money laundering/combating the financing of terrorism (AML/CFT) procedures, and the application of national laws. It also addresses the rights of shareholders and boards to challenge ECB decisions, the interaction between ECB and SRB powers in cases of FOLTF assessments, and how resolution-related litigation has clarified processes, rights, and criteria for evaluating public interest objectives and resolution conditions, as well as the scope of judicial review and the division of responsibilities among EU institutions.

2. THE REGULATORY FRAMEWORK OF THE SINGLE SUPERVISORY MECHANISM

The Single Supervisory Mechanism (SSM) is shaped by Council Regulation (EU) no 1024/2013 of 15 October 2013, providing the European Central Bank (ECB) with a toolbox for the prudential supervision of credit institutions. This toolbox consists of investigative measures, administrative measures and administrative penalties. Since the SSM is a mechanism, the ECB cooperates closely together with National Competent Authorities (NCAs) to ensure the single supervision of the banking sector of Banking Union participating Member States. Indeed, while the ECB is also involved in the supervision of less significant institutions (LSIs) and under certain conditions can even take over their supervision,

the NCAs also need to be closely involved and cooperate with the ECB in the supervision of significant institutions (SIs).

One of the main innovative elements of the SSM is that in order to ensure compliance with prudential requirements, the ECB need not only to apply EU law, but also national legislation adopted in transposition of EU Directives or exercising options granted by EU legislation. This means that the powers of the SSM are to be found in both EU and national legislation, which complicates the legal set-up.

The CJEU can only adjudicate on the basis of applicable EU law, with the interpretation of national legislation being for national judges. Still, since the ECB needs to apply both EU and national legislation and the CJEU has exclusive jurisdiction to decide on the validity of ECB decisions, the CJEU could ultimately need to adjudicate on the basis of national legislation (Allegrezza S., Voordeckers O, 2015), as has been the case in a few instances. The requirement for the ECB to apply national legislation according to the interpretation provided by national courts – but only when it is compatible with EU law – highlights the need for increased caution and proportionality in the ECB's application of administrative measures, as will be explained later.

In November 2024, European banking supervision will have been operational for 10 years. The SSM has evolved from a start-up to a mature, well-established, and respected supervisor, though challenges remain in the horizon (Thomadakis and Arnal, 2024). In shaping the operational framework of the SSM, the CJEU has played a crucial role. In the following section, the milestone rulings of the CJEU with regards to the SSM will be summarised and analysed.

3. ACTIONS FOR ANNULMENT AGAINST ECB SUPERVISORY DECISIONS

Since inception, there have been around 80 cases substantiated before the CJEU requesting the annulment against ECB supervisory decisions. For the purposes of this analysis, instead of presenting them by chronological order, the rulings deemed more relevant are explained and analysed by subject. This contributes to a better understanding and presentation of the role of the CJEU in shaping the features and functioning of the ECB in their supervisory functions.

More specifically, the following subjects will be presented below: (1) supervisory powers of the ECB over significant and less significant institutions; (2) consolidated supervision and lawfulness of the imposition of additional own funds requirements; (3) governance; (4) withdrawal of license; (5) calculation of leverage ratio; (6) deduction of irrevocable payment commitments from Common Equity Tier 1 (CET 1) capital; (7) rights in on-site inspections; and (8) application of national legislation by the ECB.

3.1. Supervisory powers of the ECB over significant and less significant institutions

3.1.1. Landeskreditbank Baden-Württemberg v ECB

The Landeskreditbank Baden-Württemberg is the investment and development bank of the Baden-Württemberg region in Germany, with the value of its assets at the time exceeding EUR 30 billion and thus meeting the requirements to be classified as an SI, being brought under the direct supervision of the ECB. However, the Landeskreditbank brought an action before the General Court against the decision of the ECB classifying it as SI, under the reasoning that financial stability would be sufficiently achieved by the German authorities exercising their supervision in light of its low risk profile. On 16

May 2017, the General Court dismissed the action brought by Landeskreditbank Baden-Württemberg,[1] indicating that the bank met the conditions to be considered an SI and had not argued that the German authorities would be better able to achieve the objectives of the relevant rules, but that the supervision by German authorities would simply be *sufficient*. The ruling by the General Court was appealed, with the CJEU confirming on 8 May 2019 the judgement of the General Court.[2]

Regardless of these two cases, the Landeskreditbank Baden-Württemberg achieved to be exempt from prudential supervision by the ECB through a legislative amendment to Article 2(5) of the Capital Requirements Directive IV (CRD IV), which provided for an exemption from the application of the Capital Requirements Directive for all promotional banks in Germany. Moreover, as per Article 1, 2nd para, of the SSM Regulation, '*institutions referred to in Article 2(5) of [CRD IV] are excluded from the supervisory tasks conferred on ECB in accordance with Article 4 of this Regulation.*' Still, pursuant to the German Banking Act (*Kreditwesengegesetz*), the exempted promotional banks would nonetheless continue to be governed by CRR rules, though under the supervision of national authorities.

In conclusion, what Landeskreditbank Baden-Württemberg could not achieve through the ECB and the CJEU was finally achieved by an ad-hoc political agreement to amend legislation and bring an institution that fulfilled the criteria to be an SI and thus supervised by the ECB under national supervision.

3.1.2. Pilatus Bank v ECB

Another milestone case regarding the supervisory powers of the ECB is one of the Pilatus Banks cases. After its authorisation as a credit institution had been revoked, Pilatus Bank, a Maltese LSI under supervision of the Maltese Financial Services Authority until the withdrawal of its banking license, requested the ECB via two e-mails to take over direct prudential supervision. In an e-mail of 21 December 2018, the ECB replied that its supervisory tasks are limited to credit institutions and that given that the authorisation of Pilatus Bank as a credit institution had been withdrawn, the ECB was no longer competent to take any measures. On 4 March 2019, the applicant brought an action for annulment of the contested ECB's email and on 24 September 2021,[3] the Court found that *'the ECB's competence to carry out prudential supervision tasks is defined, rationae personae, as referring to credit institutions and, rationae materiae, as referring to the activity of an undertaking taking deposits or other repayable funds from the public and granting credits for its own account'*. The Court concluded that the ECB was *'manifestly lacking in competence to ensure direct prudential supervision of the applicant when the latter asked it to do so'*. In conclusion, the Court confirmed that prudential supervisory tasks by the ECB are confined to credit institutions.

[1] General Court of the European Union (2017). Judgment of the General Court (Fourth Chamber, Extended Composition) in Case T-122/15, Landeskreditbank Baden-Württemberg v European Central Bank. *ECLI:EU:T:2017:337*. Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=190725&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1216721.

[2] Court of Justice of the European Union (2019). Judgment of the Court (First Chamber) of 8 May 2019, Landeskreditbank Baden-Württemberg v European Central Bank, Case C-450/17 P. *ECLI:EU:C:2019:372*. Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=213858&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4776440.

[3] General Court of the European Union. (2021). Order of the General Court (Ninth Chamber) of 24 September 2021, Pilatus Bank plc v. European Central Bank, Case T-139/19, *ECLI:EU:T:2021:623*. Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=246524&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1164648.

3.2. Consolidated supervision and lawfulness of the imposition of additional own funds requirements

The Crédit mutuel is a non-centralised French banking group, made up of a network of local credit unions having the status of cooperatives. Each local mutual credit union must be affiliated with a regional federation and each federation must be affiliated with the *Confédération nationale du Crédit mutuel* (CNCM), the central body of the network.

The Crédit mutuel Arkéa is a variable-capital cooperative finance company, certified as a credit institution. By decisions of 5 October 2015 and 4 December 2015, the ECB organised its prudential supervision of the entities in the Groupe Crédit mutuel – including the Crédit mutuel Arkéa – on a consolidated basis through the CNCM. It also considered that the Crédit mutuel Arkéa had to possess additional tier 1 equity capital, given the possibility that it could leave the group. Subsequently, the Crédit mutuel Arkéa brought an action before the General Court seeking annulment of those decisions. In essence, it challenged the exercise of consolidated prudential supervision of the Groupe Crédit mutuel through the CNCM on the ground that it was not a credit institution, that there is no 'Groupe Crédit mutuel' and that the ECB could not require it to have additional equity capital.

On 13 December 2017, the General Court dismissed Crédit Mutuel Arkéa's arguments.[4] The court ruled that consolidated supervision is permitted to allow the ECB to understand risks that may affect a credit institution, even if those risks originate from the group to which it belongs rather than from the institution itself. This also helps to prevent the fragmentation of prudential supervision.

Additionally, the court held that the ECB does not need to have sanctioning powers over a central body under the SSM Regulation to conduct prudential supervision on a consolidated basis. It is not necessary for the ECB to have the complete arsenal of supervisory or sanctioning powers over the parent entity of a group.

The court further clarified that there is nothing in the EU rules on prudential supervision requiring that a 'central body' must be classified as a credit institution to be considered a 'group subject to prudential supervision.' It also determined that Crédit Mutuel, through the CNCM, meets all the conditions to be categorized as a 'group,' including solidarity between affiliated institutions, consolidated accounts, and the CNCM's power to issue instructions to the management of affiliated institutions.

Finally, the court acknowledged that the ECB has wide-ranging powers. If prudential examinations by the ECB reveal that a credit institution's own funds and liquidity do not ensure sound management and risk coverage, the ECB is entitled to require the institution to exceed these minimum requirements. The ruling by the General Court was appealed, with the CJEU dismissing it on 2 October 2019[5] on the same grounds as the General Court.

In conclusion, these rulings confirm several key aspects of the ECB's authority. First, they affirm that the ECB can perform consolidated supervision without requiring the central body to be a credit institution. Second, the ECB does not need full sanctioning powers to effectively conduct prudential supervision. Lastly, the ECB's supervisory powers are extensive, allowing it to require a credit institution to exceed

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[4] General Court of the European Union (2017). Judgment of the General Court (Second Chamber, Extended Composition) of 13 December 2017, Crédit mutuel Arkéa v European Central Bank, Case T-712/15. *ECLI:EU:T:2017:900*. Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=197786&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=302426.

[5] Court of Justice of the European Union (2019). Judgment of the Court (First Chamber) of 2 October 2019, Crédit mutuel Arkéa v European Central Bank, Joined Cases C-152/18 P and C-153/18 P. *ECLI:EU:C:2019:810*. Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=218485&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=1817188.

minimum prudential requirements if the entity's own funds and liquidity do not adequately cover its risks.

3.3. Governance: separation of the exercise of executive and non-executive functions within a bank's management body

Four regional banks of the Crédit Agricole group in France took to the General Court ECB's decisions concerning the combination of the positions of chair of the board and effective director. On 7 October 2015, the ECB approved the four presented candidates as chairmen of the boards of the four regional banks but opposed their appointment as 'effective director', relying on Article 88(1)(e) CRDIV as prohibiting the chair of the supervisory board simultaneously functioning as chief executive officer (CEO). The regional banks argued that the ECB was wrong to rely on a position of the French NCA, the *Autorité de contrôle prudential et de resolution* (ACPR), on the interpretation of the *Code Monétaire et Financier* articles which implement the CRDIV's provisions on the governance of credit institutions.

The General Court joined all four cases in one single ruling and confirmed on 24 April 2018 that the ECB was right in its reading that an 'effective director' has an executive mandate (e.g. a CEO), while the chairman of the board of directors is a non-executive director.[6] Thus, only members of the management body who are also part of the senior management may be appointed as 'persons [who] effectively direct the business of the institution' in the meaning of Article 13 CRD IV or the second paragraph of Article L. 511-13 CMF. The ruling also confirms that even if the French legal provision was slightly broader in scope than its EU counterpart, the ECB could apply it, since the provision was not incompatible with EU law.

In conclusion, this ruling confirms that the chair of the board is a non-executive member and hence cannot be considered an 'effective director' for the purposes of Article 13 CRD. It also indicates that the ECB can apply broader national legislation to the extent it is not in contradiction with EU law.

3.4. Withdrawal of license

There are several landmark cases regarding the withdrawal of license by the ECB, namely, the so-called Trasta Komercbanka (then renamed as Fursin), Nemea, Pilatus, Versobank and PNB Banka cases.

3.4.1. Legal standing

a. Trasta Komercbanka v ECB

The Trasta Komercbanka case provided light on whether a bank can itself challenge the withdrawal of license decision by the ECB even when the powers of the board of the bank have been taken over by a liquidator or whether the shareholders have the right to do so. In March 2016, the ECB withdrew the banking license of Trasta Comercbanka, a Latvian bank at a proposal of the *Finanšu un kapitāla tirgus komisija* (FCMC), the Latvian NCA. Following the recommendation by the Administrative Board of Review, the governing body of the ECB clarified certain elements, adopting new decision of withdrawal of the banking license on 11 July 2016. The decision was taken to the General Court by both Trasta Komercbanka and its shareholders.

[6] General Court of the European Union (2018). Judgment of the General Court of 24 April 2018, Caisse régionale de crédit agricole mutuel Alpes Provence and Others v European Central Bank, Joined Cases T-133/16 to T-136/16. *ECLI:EU:T:2018:219*. Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=202822&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=12737336.

On 12 September 2017, the General Court issued an Order rejecting the claim of Trasta Komercbanka as inadmissible and upholding the shareholders' claim as admissible. This Order was contested by the ECB, the European Commission, Trasta Komercbanka and its shareholders.

On 5 November 2019, the CJEU dictated a ruling, indicating that effective judicial protection would be undermined if the legal person depended on a liquidator, appointed by the authority initiating the withdrawal of the license, to contest the revocation of the authorisation.[7] In this case, the Court highlighted a conflict of interest between the liquidator and the FCMC. It noted the close ties between them and concluded that the General Court had made a legal error. The Court found that the liquidator's revocation of the authority to act, which had been granted by the former decision-making bodies of Trasta Komercbanka to the lawyer challenging the decision, violated the bank's right to effective judicial protection.

Still, while the CJEU considered that Trasta Komercbanka had legal standing to contest the withdrawal of the bank license, it did not acknowledge the same right to its shareholders, due to the fact that the banking license had been issued to Trasta Komercbanka itself and not to the shareholders *ad personam*. While the liquidation following the withdrawal of the license directly affected the right of the shareholders, the liquidation following the withdrawal of the license was a consequence of Latvian law. On this basis, the case was referred back to the General Court for deciding on the merits.

In a judgement of 30 November 2022, the General Court dismissed the action to annul the ECB decision of July 2016 withdrawing the license to Trasta Komercbanka. At the time of writing this analysis, the case is under appeal.

b. Pilatus Bank v ECB

Another landmark case in terms of legal standing is the Pilatus Bank case. On 2 November 2018, following a recommendation by the Malta Financial Services Authority (MFSA), the ECB revoked Pilatus Bank's authorisation to conduct banking operations.

On 15 January 2019, Pilatus Bank and Pilatus Holding[8] filed an application at the Registry of the General Court. The action for annulment of the decision in question was brought through a lawyer who had been granted authority to act by the Board of Directors of Pilatus Bank and the director of Pilatus Holding. However, the General Court dismissed the case, ruling that the action brought by Pilatus Holding was inadmissible because, as a shareholder, it was not directly affected by the decision in question. Additionally, the court rejected all 11 legal arguments raised by the appellant.

On 12 April 2022, the appellant, represented by the same lawyer as in the initial proceedings, filed an appeal before the CJEU. On 8 February 2024, the CJEU ruled that the General Court had erred in law.[9] Specifically, the General Court failed to determine, on its own initiative, whether the authority given by the appellant's Board of Directors to its lawyer was lawful. This significant error led to the judgment under appeal being overturned, and there was no need to address the appellant's grounds of appeal.

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[7] Court of Justice of the European Union. (2019). Judgment of the Court (Grand Chamber) of 5 November 2019, European Central Bank and European Commission v Trasta Komercbanka AS and Others, Joined Cases C-663/17 P, C-665/17 P, and C-669/17 P. *ECLI:EU:C:2019:923*. Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=219724&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=485133.

[8] Pilatus Holding is the majority shareholder of Pilatus Bank.

[9] Court of Justice of the European Union (2024). Judgment of the Court (Second Chamber) of 8 February 2024, Pilatus Bank plc v. European Central Bank, Case C-256/22 P, *ECLI:EU:C:2024:125*. Retrieved from https://curia.europa.eu/juris/document/document.jsf;jsessionid=6B7ABCF4EF4F03041ABB154E95007236?text=&docid=282585&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=131773.

The CJEU clarified that the appellant's Board of Directors no longer had the authority to represent the appellant or to authorise a lawyer to act on its behalf.[10]

The CJEU also underlined an important point. The fact that the competent person was appointed by the national competent authority, which submitted the proposal to withdraw authorisation to the ECB, was not sufficient on its own to establish a conflict of interest. Legal representation related to challenging a withdrawal of authorization may indeed fall within the remit of the competent person. This is because such matters necessarily concern the assets of the bank.

Furthermore, the CJEU clarified that the Pilatus case was not comparable to the Trasta Komercbanka case. In the latter, the Court observed that the liquidator, appointed based on a proposal from the NCA, was tasked with carrying out the final liquidation of the institution. This authority could relieve the liquidator of their duties at any time. The competent person's role in the Trasta Komercbanka case was to liquidate the bank by collecting debts, selling assets, and satisfying creditors' claims until the bank's activities ceased entirely. Consequently, there was a risk that the liquidator might be dissuaded from challenging the decision to withdraw the institution's authorisation in court.

c. Nemea Bank and Versobank v ECB

The Nemea Bank and the Versobank cases involved a legal challenge against the ECB's decision to withdraw the banking license of the two financial institutions. The ECB's decision stemmed from significant concerns regarding the banks' financial stability and adherence to regulatory requirements related to governance, financial management and with anti-money laundering (AML). The banks contested the decision, arguing that the ECB had not provided sufficiently detailed justification for the withdrawal and that the process lacked procedural fairness.

In both cases, the Court upheld the ECB's decision to withdraw the banks' authorisation, confirming that the ECB had acted within its powers and adhered to the required procedural standards.[11,12] The Court concluded that the ECB's action was not disproportionate, and that the decision was valid under the applicable legal framework. This outcome reinforced the ECB's authority in regulating and supervising financial institutions within the Eurozone, emphasising the importance of regulatory compliance and the legitimacy of regulatory actions taken in response to significant breaches. In addition, and although Member States remain competent to implement the AML/CFT provisions, the ECB has exclusive competence to withdraw authorisation, for all credit institutions, irrespective of their size, even where such competence is based on the grounds of infringement of AML/CFT procedures.

d. PNB Banka v ECB

In 2017, PNB Banka (or Norvik Banka as it was then called), a bank incorporated under Latvian law, but controlled by British interests, submitted a request for arbitration against Latvia. The two separate

[10] The competent person appointed by the MFSA was granted the competencies to 'assume all the powers, functions and duties of the Bank in respect of all assets, whether exercisable by the Bank in general meeting or by the Board of Directors or by any other person, including the legal and judicial representation of the Bank to the exclusion of the Bank and any other person'.

[11] General Court of the European Union (2021). Judgment of the General Court (Ninth Chamber, Extended Composition) of 6 October 2021, Ukrselhosprom PCF LLC and Versobank AS v. European Central Bank, Cases T-351/18 and T-584/18, *ECLI:EU:T:2021:674*. Retrieved from https://curia.europa.eu/juris/document/document_print.jsf?docid=247115&text=&dir=&doclang=EN&part=1&occ=first&mode=lst&pageIndex=0&cid=1297073.

[12] General Court of the European Union (2021). Order of the General Court (Ninth Chamber, Extended Composition) of 20 December 2021, Niemelä and Others v. European Central Bank, Case T-321/17, *ECLI:EU:T:2021:942*. Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=251864&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=394690.

claimants, the bank itself and the majority shareholders, argued that contrary to Latvia's obligations under international law, the bank was subject to 'unfair, arbitrary, improperly motivated and unreasonable regulatory treatment' by the Latvian authorities.

In April 2019, the ECB took over the supervision of PNB Banka at the request of the Latvian Financial and Capital Market Commission (FCMC), as that the bank has been in breach of capital requirements since the end of 2017. Few months later, in August 2019, the ECB concluded an on-site inspection, which identified a substantial provisioning shortfall and found objective elements indicating that the assets of the bank were less than its liabilities, thus declaring the bank as 'failing or likely to fail' (FOLTF). On 12 September 2019, the competent court declared PNB Banka insolvent and appointed an insolvency administrator. However, the administrator revoked the power of attorney of the previous representative of the bank, upon which the bank's directors appointed someone new as their representative in the proceedings.

In spite of the appointment of an insolvency administrator to deal with the insolvency proceedings and the transfer to him of all the powers of the applicant and its board of directors, the General Court[13] stated that the lawyer appointed by the Board of Directors had legal standing, as it was not apparent from the documents in the file that the insolvency administrator revoked the authority given by the Chairman of the applicant's board of directors. That letter did not mention such a revocation, even though it stated that the lawyer appointed by the Chairman of the board of directors had to refrain from any activities on behalf of the applicant without prior consultation with the insolvency administrator.

In conclusion, what derives from these five cases, is that the shareholders of a credit institution do not have the legal standing to appeal against an ECB's decision withdrawing a banking license. As for the right of the Board of Directors to appoint a lawyer to substantiate the appeal, it all depends on the specificities of the case. For example, it was possible in the Trasta Komercbanka case because the competent person had the mission of liquidating the bank and as such was exposed to a potential conflict of interest – which was not the case in Pilatus. The PNB Banka case also clarifies that the revocation of legal representation powers by the new administrator needs to be explicit.

3.4.2. The Administrative Board of Review Opinions and the legal effects of the replacement of ECB's decisions by amended or identical decisions

Stakeholders have several avenues to challenge a decision made by the ECB. They can: i) request an internal review by the Administrative Board of Review (ABoR) of the European Central Bank; ii) pursue legal action in court following an administrative review; or iii) simultaneously seek recourse through both the court and the ABoR.

a. Nemea Bank v ECB

On 23 March 2017, the ECB adopted a decision withdrawing the banking license from the Maltese Nemea bank. On 22 April 2017, the ABoR received a request from the applicants for a review of the contested decision.[14] While the internal administrative review by the ABoR was still being carried out,

[13] General Court of the European Union (2021). Judgment of the General Court (Sixth Chamber, Extended Composition) of 21 April 2021, Republic of Poland v. European Parliament and Council of the European Union, Case T-275/19, *ECLI:EU:T:2021:203*. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62019TJ0275.

[14] The ABoR's advisory rather than quasi-judiciary role does not incentivise its use, and banks often prefer to directly challenge an ECB decision before the CJEU (Lamandini and Thomadakis, 2024).

the applicants brought an action against the contested decision on 22 May 2017 in front of the General Court (i.e. option iii) as explained above).

On 19 June 2017, the ABoR adopted an opinion in which it proposed that the contested decision be replaced by a decision of identical content, which the ECB adopted on 30 June 2017. On 20 December 2021, the General Court held that there was no longer any need to adjudicate on the application for annulment of the contested decision because the second decision not challenged by the applicants had replaced the contested decision, with such replacement having a retroactive effect to the time at which the latter decision took effect.[15]

On 7 April 2022, Nemea Bank filed an appeal with the CJEU, requesting that the Court set aside the order under appeal, while asking for the case to be referred back to the General Court, with a new judgment to be delivered by a chamber composed of entirely different judges. Additionally, Nemea Bank sought an order for the ECB to pay the associated costs. As of the time of writing this analysis, the judgement is still pending, with the Advocate General's Opinion having been made public in November 2023.

b. Versobank v ECB

Another relevant case relating to ABoR's Opinions is the Estonian Versobank case. By decision of 26 March 2018, the ECB withdrew Versobank's authorisation as a credit institution. On 22 June 2018, the ABoR adopted and communicated its Opinion to the ECB's Supervisory Board, by which it proposed to the Supervisory Board to adopt a decision identical in content to the decision of 26 March 2018. The ECB's Governing Council followed that opinion and adopted the decision of 17 July 2018.

In its ruling of 6 October 2021, the General Court confirmed that the replacement of the reviewed decision by an amended decision must be made with retroactive effect to the time at which the reviewed decision took effect.[16] The Court clarified that when the initial decision is replaced by an identical or amended decision at the end of the review procedure, the original decision disappears definitively from the legal order. The Court also indicated that the interests of the affected parties are fully protected. This protection is provided through the possibility of seeking annulment of the act adopted following the review in question and by seeking compensation for any damage caused by the adoption of that review.

3.4.3. Possibility to withdraw a banking license after the adoption of a FOLTF decision

In the Versobank case, on 10 April 2017, the Estonian NCA (i.e. FSA) declared that Versobank was FOLTF. However, on 7 February 2018, acting as the national resolution authority, the FSA determined that a resolution was not in the public interest. As a result, these decisions did not lead the FSA to adopt a resolution scheme since the necessary conditions were not cumulatively met.

On 8 February 2018, the ECB received a proposal from the FSA to withdraw Versobank's authorisation. On 26 March 2018, the ECB adopted a withdrawal decision, which was later replaced by an identical

[15] General Court of the European Union. (2021). Order of the General Court (Ninth Chamber, Extended Composition) of 20 December 2021, Heikki Niemelä, Mika Lehto, Nemea plc, Nevestor SA, and Nemea Bank plc v European Central Bank, Case T-321/17. *ECLI:EU:T:2021:942*. Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=251864&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=321227.

[16] General Court of the European Union (2021). Judgment of the General Court (Ninth Chamber, Extended Composition) of 6 October 2021, Ukrselhosprom PCF LLC and Versobank AS v. European Central Bank, Cases T-351/18 and T-584/18, *ECLI:EU:T:2021:674*. Retrieved from https://curia.europa.eu/juris/document/document_print.jsf?docid=247115&text=&dir=&doclang=EN&part=1&occ=first&mode=lst&pageIndex=0&cid=1297073.

decision on 17 July 2018. The General Court dismissed the applicants' arguments, stating that the coexistence of the SSM and the SRM does not prevent the ECB from withdrawing authorisation if the conditions for a resolution measure are not met. The Court explained that measures under the SSM and SRM could only be mutually exclusive if an entity no longer meets the conditions for continuing authorisation and is also insolvent. In such a case, the ECB would prioritise a resolution measure adopted by the SRB or a national resolution authority, depending on the size of the credit institution, within the coordination and cooperation framework with these authorities.

In conclusion, if an entity is declared FOLTF but does not meet the other conditions required for a resolution, nothing prevents the ECB from deciding to withdraw its authorisation.

3.5. Calculation of leverage ratio

3.5.1. French banks v ECB

In 2016, six French credit institutions,[17] challenged the ECB's decision in the calculation of the leverage ratio, considering that the ECB should have authorised to exclude exposures consisting of sums in a number of savings accounts taken out with them (i.e. *Livret A*, *Livret de Développement Durable et solidaire* (LDD) and *Livret D'épargne Populaire* (LDP), since these amounts need to be held at the *Caisse des dépôts et consignations* (CDC – Deposit and Loans Fund), a French public financial institution. During the proceedings, the ECB confirmed that the sole situation in which the CDC would not be able to pay back the relevant sums was the default by the French State, the plausibility of which the ECB had not even analysed.

Against this background, on 13 July 2018, the General Court considered that the ECB had rendered practically inapplicable in practice the possibility offered by Article 429(14) of the Capital Requirements Regulation (CRR) to exclude from the exposure measure exposures to a public sector entity.[18] The General Court subsequently analysed the liquidity risk which would lead a bank to fire sales of its assets and got the ECB to acknowledge that the period separating cash inflows and outflows would not be at the origin of a liquidity risk. This led the General Court to consider that the ECB had committed a manifest error and had failed as good administrator, indicating that *'the ECB, in the contested decision, did not carry out a detailed examination of the characteristics of regulated savings products, but merely indicated in an abstract manner the risks involved in the period for adjusting the positions of the applicant and of the CDC.'* As a consequence, the General Court annulled ECB's decisions.

In conclusion, this was the first ruling where the General Court annulled an ECB's decision. It established that by way of practice, the ECB cannot deprive legal provisions of content (in this particular case, the exclusion of exposures from the exposure measure of the leverage ratio) and underlined the need for the ECB to conduct a detailed examination of risks, not relying exclusively on abstract descriptions.

3.5.2. Crédit Lyonnais v ECB

In 2015, Crédit Lyonnais – a subsidiary of Crédit Agricole S.A. and subject to the direct prudential supervision of the ECB – applied to the ECB for authorisation to exclude certain exposures to the CDC. Although in 2016 the ECB refused to grant Crédit Agricole the authorisation, the General Court

[17] BNP Paribas, BPCE, Confédération nationale du Crédit mutuel, Crédit Agricole SA, La Banque Postale and Société Générale.

[18] For instance, General Court of the European Union (2018). Judgment of the General Court (Second Chamber, Extended Composition) of 13 July 2018, La Banque postale v European Central Bank, Case T-733/16. *ECLI:EU:T:2018:477*. Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=204008&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=4336087.

annulled the refusal decision.[19] As a result, in 2018, Crédit Agricole[20] again applied to the ECB for authorisation to exclude the exposures to the CDC. By decision of 3 May 2019, the ECB authorised Crédit Agricole and the entities forming part of the Crédit Agricole group, but with the exception of Crédit Lyonnais, to exclude from the calculation of the leverage ratio all of their exposures to the CDC. By contrast, Crédit Lyonnais was allowed to exclude only 66%.

Regarding the remaining 34%, Crédit Lyonnais brought an action for annulment of the ECB's decision. In particular, the bank alleged three pleas: i) infringement of Article 266 TFEU and of the force of res judicata of the General Court's judgment (footnote 19); ii) infringement of Article 429(14) and of Article 400(1)(a) of CRR; and iii) manifest error of assessment on the part of the ECB in refusing Crédit Lyonnais' request to exclude the 100% of its exposure to CDC from the calculation of its leverage ratio.

In its 14 April 2021 judgement,[21] the General court annuls the ECB decision in respect of its refusal to authorise Crédit Lyonnais to exclude from the calculation of its leverage ratio 34% of its exposure to the CDC. This ruling marked a significant development in litigation related to prudential supervision, as it was the first time the General Court explicitly outlined the condition under which methodologies that limit discretion can be considered lawful.

However, the ECB appealed the General Court's decision, bringing the case before the ECJ. Upon review, the ECJ upheld the ECB's initial refusal to exclude the 34% exposure to the CDC from Crédit Lyonnais' leverage ratio calculation.[22] The ECJ found that the General Court had overstepped its judicial authority by substituting its own assessment of the risk of fire sales of assets to which Crédit Lyonnais was exposed for that of the ECB. By doing so, the General Court had exceeded the limits of its power of judicial review, effectively encroaching on the ECB's regulatory discretion.

The ECJ's ruling emphasized that the ECB, as the competent supervisory authority, has the expertise and discretion to assess the risks and make decisions regarding the application of prudential measures. The judgment clarified that while judicial review is essential for ensuring the legality of supervisory decisions, courts should not replace the assessments of regulatory authorities with their own unless there is a clear legal error or overreach.

In conclusion, this case underscores the delicate balance between judicial oversight and regulatory discretion in the context of prudential supervision. The ECJ's decision reaffirms the importance of respecting the specialised judgment of supervisory authorities like the ECB, while also ensuring that such decisions are subject to legal scrutiny. The case serves as a precedent for how courts should approach disputes involving complex financial regulations and the methodologies used to enforce them, ensuring that both legal principles and practical expertise are appropriately balanced.

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[19] For instance, General Court of the European Union (2018). Judgment of the General Court (Second Chamber, Extended Composition) of 13 July 2018, Crédit agricole SA v European Central Bank, Case T-758/16. *ECLI:EU:T:2018:472*. Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=204013&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2425906.

[20] On its own behalf and on behalf of the entities forming part of the Crédit agricole group, including Crédit lyonnais.

[21] General Court of the European Union. (2021). Judgment of the General Court (Second Chamber) of 14 April 2021, Crédit lyonnais v ECB, T-504/19. *ECLI:EU:T:2021:185*. Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=239865&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=2430872.

[22] General Court of the European Union. (2023). Judgment of the Court (First Chamber) of 4 May 2023, ECB v Crédit lyonnais, C-389/21P. *ECLI:EU:T:2023:368*. Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=273285&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2430451.

3.6. Deduction of irrevocable payment commitments from CET 1 capital

3.6.1. French banks v ECB

The contributions which credit institutions are required to pay to the Single Resolution Fund and the deposit guarantee scheme may be paid by either an immediate payment or by means of an irrevocable payment commitment (IPC), payable at first request. IPCs must be fully backed by collateral of low-risk assets unencumbered by any third-party rights and liquidated within a short period of time. On 19 December 2017, the ECB adopted a decision requiring that the cumulative amounts of IPCs subscribed to the deposit guarantee schemes or the resolution funds be deducted from the CET 1 capital. On 1 March 2018, six French banks [23] brought a coordinated legal action for annulment of that decision.

The General Court's decision was that the ECB acted within the scope of its supervisory powers under the second pillar, and thus, the measure adopted had a valid legal basis. [24] However, the Court also found that the ECB failed to conduct an individual supervisory review of the applicant, neglecting to consider its specific risk profile, level of liquidity, and factors that could mitigate potential risks. Moreover, the ECB did not pursue its examination beyond merely identifying the IPC as a potential risk due to its treatment as an off-balance-sheet item.

3.6.2. French and German banks v ECB

A second wave of judicial challenges arose in 2022 in response to an ECB decision concerning IPCs. This time, a German bank (i.e. Deutsche Bank) joined forces with a group of six French banks, [25] presenting almost identical pleas. The issue stemmed from a decision adopted by the ECB on 2 February 2022, in which the ECB determined that the arrangements, strategies, processes, and mechanisms implemented by the applicants, along with their own funds and liquidity, were insufficient to ensure sound risk management. The ECB found that the banks had overstated their CET1 capital. To address this risk, the ECB imposed a deduction measure[26] on the IPCs and introduced a reporting requirement.[27]

On 12 April 2022, the applicants brought an action against the ECB's decisions. The case was judged by the General Court on 5 June 2024. [28] Unlike in the previous case, the Court found that the ECB had conducted specific analyses of each bank's individual situation, which led to different conclusions regarding the deduction of IPCs. The Court also determined that the ECB had not issued a general or stereotyped statement of reasons, thereby adhering to the principle of sound administration.

Furthermore, the General Court ruled that the contested decisions did not render the IPCs ineffective in practice. The argument that the likelihood of an IPC call was highly hypothetical was deemed

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[23] Arkéa Direct Bank, BNP Paribas, BPCE, Confédération nationale du crédit mutuel, Crédit Agricole and Société Générale.

[24] General Court of the European Union. (2020). Judgment of the General Court (Second Chamber, Extended Composition) of 9 September 2020, BNP Paribas v European Central Bank, Joined Cases T-150/18 and T-345/18. *ECLI:EU:T:2020:394*. Retrieved from https://curia.europa.eu/juris/document/document.jsf?mode=DOC&pageIndex=0&docid=230790&part=1&doclang=EN&text=&dir=&occ=first&cid=11233278.

[25] BNP Paribas, BPCE, Crédit Agricole, Confédération nationale du crédit mutuel, Banque postale and Société Générale.

[26] The deduction measure is equivalent to the value of the sums put up as collateral and recorded as assets on the applicant's balance sheet, minus the items capable of reducing the risk.

[27] The reporting requirement is intended to enable the ECB to ensure that the deduction imposed on the applicant is correctly reflected.

[28] General Court of the European Union. (2024). Judgment of the General Court (Third Chamber, Extended Composition) of 5 June 2024, Deutsche Bank and Others v ECB Case T-182/22. *ECLI:EU:T:2024:352*. Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=286806&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2391894.

irrelevant, given the risk identified by the ECB. The Court concluded that the measures imposed by the ECB, including the deduction of IPCs from CET1 capital, were neither disproportionate nor inappropriate. This decision underscored the ECB's thorough approach in addressing the specific circumstances of each bank while maintaining its supervisory standards.

In conclusion, whereas in the first batch of cases the General Court annulled the ECB's decisions considering that a general analysis and not a specific one had taken place, in the second batch the ECB already applied the General Court's indications on the need to perform a specific analysis and measurement of risks, which led to the rejection by the Court of all the pleas brought forward.

3.7. Rights and obligations in on-site inspections

Regarding PNB Bank, as described above, and the ECB's on-site inspection, the General Court determined that such inspection decisions cannot be considered provisional measures against which no judicial remedy lies. Specifically, an on-site inspection decision adopted on the basis of Article 12 of Regulation (EU) 1024/2013, which grants the European Central Bank specific tasks related to the prudential supervision of credit institutions (such as the contested decision), can indeed affect the legal interests of the entity notified of that decision. This impact brings about a distinct change in the bank's legal position, meaning that the decision is subject to challenge and can be brought before the General Court for annulment.

The General Court also confirmed that the ECB is competent to exercise – in relation to an LSI – the investigatory powers provided for in Articles 10 to 13 of Regulation (EU) 1024/2013, and in particular the power to conduct an on-site inspection (either a full-scope, targeted or thematic one).

As for the exchange of information between the PNB Banka and the ECB, the General Court ruled that if inspection staff request the disclosure of information that exceeds the scope of the inspection, the entity being inspected has the right to refuse to provide that information. This right stands unless the ECB decides to enforce the request through coercive measures. If the ECB does enforce the request, the enforcement decision itself can be challenged before the General Court.

Additionally, the entity being inspected has the option to comply with the request for information while still raising objections. The entity can ask the ECB not to use the information on the grounds that it falls outside the scope of the inspection. If the ECB refuses to honor such legitimate requests, this refusal could potentially make the ECB liable for any consequences. Moreover, such refusal might undermine the validity of any subsequent actions taken by the ECB that are based on the disputed information.

In conclusion, this ruling highlights the rights of entities under inspection to challenge the scope and use of information during regulatory inspections, ensuring that the ECB's actions remain within legal bounds.

3.8. Application of national legislation by the ECB

In 2016, the Austrian bank BAWAG acquired a securitized portfolio of French real estate loans worth EUR 1.4 billion. This transaction involved transferring the portfolio to a fund, with BAWAG subsequently acquiring shares in that fund. Due to concerns over data protection, BAWAG received details of the underlying borrowers only in encrypted form. As a result, the ECB concluded that BAWAG could not apply a 'look-through' approach to assess the risk of the underlying assets. The ECB determined that this led to a violation of the 25% limit on large exposures, as BAWAG's exposure to the fund was not properly accounted for. Consequently, based on a provision of the Austrian Banking Act, the ECB imposed an absorption interest penalty of over EUR 19 million on BAWAG. In response, BAWAG

challenged the ECB's decision, arguing that the ECB lacked the competence to impose such a penalty and that the decision breached the principle of proportionality.

On 28 February 2024, the General Court delivered its ruling on the case. The Court confirmed that the ECB has the authority to apply both EU and national legislation in its supervisory activities. This includes applying national law measures that are not explicitly listed in CRD IV, as the directive's list of measures is considered non-exhaustive. When applying national legislation, the Court held that the ECB is entitled to follow the interpretation given by national courts. Importantly, the Court noted that CJEU would not review the substance of such national interpretations. However, the interpretation of national law as interpreted by national courts would only be shielded from review insofar as that interpretation ensured the compatibility of national law with EU law. If a national court's interpretation conflicts with EU law, the General Court has the authority to provide an alternative interpretation.

In this case, the General Court found that the Austrian courts' interpretation of the absorption interest as a non-discretionary measure contradicted the requirements of CRD IV. According to CRD IV, national competent authorities must have a margin of discretion when applying administrative measures. By treating the absorption interest measure as non-discretionary, the ECB failed to recognise this margin of discretion and did not properly consider the proportionality of its decision. As a result, the General Court ruled that the ECB had based its decision on a legally flawed premise, leading to the annulment of the ECB's decision.

In conclusion, the General Court's ruling underscores the importance of the ECB's responsibility to apply both EU and national law in a manner consistent with the principles of EU law. The case highlights the necessity for the ECB to exercise its discretion appropriately and consider all relevant factors when making decisions that have significant financial implications for institutions under its supervision. The decision also reinforces the principle that national court interpretations of national law must align with EU law, ensuring a coherent and legally sound regulatory framework across the European Union.

4. MAIN CONCLUSIONS OF JUDICIAL CASES PERTAINING TO SUPERVISORY DECISIONS

Based on the analysis presented above, several key conclusions can be drawn from judicial cases related to supervisory decisions. First, it is evident that **ad-hoc legal amendments** influenced by political agreements can be introduced to circumvent EU legislation and its interpretation by the ECB and the CJEU. This demonstrates the potential for political interventions to override established EU legislation, undermining the work of both the supervisor and the judiciary, fostering the perception of arbitrariness and weakening the credibility of the supervisory framework.

Another important conclusion is that the ECB's prudential supervisory tasks are **confined to credit institutions**. Once a banking license is withdrawn, the ECB loses its competence in this field. However, the ECB retains the ability to carry out consolidated supervision even when the central body is not a credit institution, and it does not require full sanctioning powers to conduct this supervision effectively. Additionally, the ECB’s supervisory powers are broad, particularly under **Pillar 2**, which is distinct from **Pillar 1 regulatory requirements**. The ECB has the authority to require a credit institution to exceed minimum prudential requirements if the entity's own funds and liquidity do not sufficiently cover its risks. However, while these supervisory powers are extensive, the ECB cannot strip legal provisions of their substance – such as excluding exposures from the leverage ratio measure – and must conduct detailed risk assessments instead of relying solely on abstract descriptions.

The rights of **shareholders and boards** in challenging ECB decisions are also clarified. Shareholders of a credit institution lack the legal standing to appeal an ECB decision withdrawing a banking license.

The right of the Board of Directors to appoint a lawyer for an appeal depends on the specific circumstances, particularly if the competent person may face a conflict of interest, which could undermine the entity's right to effective judicial protection. Furthermore, any revocation of legal representation powers by a new administrator must be explicitly stated.

In the context of **FOLTF declarations**, if an entity does not meet the criteria for resolution, the ECB is still able to withdraw authorisation. However, if a resolution is necessary, the ECB must prioritise any resolution measures adopted by the SRB or a national resolution authority, depending on the size of the credit institution, and coordinate accordingly with these authorities.

The ECB also has **exclusive authority** to withdraw authorisations from credit institutions, regardless of their size, including when the grounds are related to breaches of **AML/CFT** procedures. While Member States remain responsible for implementing AML/CFT provisions, the ECB's exclusive competence in authorisation withdrawal is firmly established.

In terms of **governance**, the chair of the board, being a non-executive member, cannot be considered an 'effective director' under Article 13 of the CRD. This also indicates that the ECB may apply broader national legislation, provided it does not conflict with EU law. The ECB's decisions, including those regarding on-site inspections, can be judicially challenged. The ECB is authorized to conduct on-site inspections even in LSIs. However, if the ECB requires additional information beyond the scope of the inspection, the supervised entity has the right to initiate legal action.

Finally, the ECB is obligated to apply both **EU and national legislation**, including national law measures not explicitly outlined in the CRD IV, as its list of measures is non-exhaustive. When applying national legislation, the ECB may follow the interpretation provided by national courts. However, this interpretation is shielded from review only if it aligns with EU law. If national courts' interpretation conflicts with EU law, the General Court may adopt a differing interpretation to ensure compatibility with EU regulations.

4.1. Three takeaways

Building on these cases, three main takeaways emerge that highlight the evolving dynamics of supervisory practices and legal oversight within the Banking Union.

First, the jurisprudence of the CJEU has played a crucial role in **clarifying supervisory practices** within the Banking Union. By closely examining the ECB's actions and annulling decisions where specific, detailed analyses were lacking, the CJEU has set important precedents. These rulings not only help refine the ECB's approach to supervision but also establish clearer standards for how prudential measures should be applied. This legal guidance enhances the consistency and transparency of supervisory practices, ensuring that the ECB's decisions are both legally sound and aligned with broader EU principles.

Second, certain cases underscore the **risks associated with discretionary political decision-making** in the realm of financial supervision. When political agreements lead to *ad-hoc* legal amendments that override established EU legislation, it risks undermining the work of both the supervisor and the judiciary. Such situations create a perception of arbitrariness and weaken the credibility of the supervisory framework. To maintain the integrity of the Banking Union, efforts should be made to avoid these scenarios and to reinforce the independence and objectivity of supervisory and judicial bodies.

Finally, the requirement for the ECB to apply national legislation according to the interpretation provided by national courts – but only when it is compatible with EU law – highlights the **need for increased caution and proportionality** in the ECB's application of administrative measures. This dual

requirement places the ECB in a delicate position, where it must balance national legal interpretations with EU-wide standards. As a result, the ECB will need to exercise greater diligence in ensuring that its actions are proportionate, particularly when they involve applying national measures that might not have a direct equivalent in EU legislation. This added layer of scrutiny is likely to influence how the ECB approaches its supervisory role, encouraging a more nuanced and balanced application of both national and EU laws.

5. THE REGULATORY FRAMEWORK OF THE SINGLE RESOLUTION MECHANISM

It can be argued that the SRM has been set up to remedy the subject matter limitations of Article 127 (6) TFEU, which confines ECB tasks to prudential supervision of credit institutions. It aims to create a single set of rules and a uniform procedure for the resolution of credit institutions and certain investment firms participating in the SSM. Additionally, it seeks to centralise resolution powers and decision-making activities at EU level.

The specific legal framework within which the SRM operates is included in Directive 2014/59 (BRRD)[29] and Regulation 806/2014 (SRM Regulation).[30] The former established a harmonised toolkit for the recovery and resolution of credit institutions, with provisions related to resolution conditions, tools, process, objective and principles, and powers and safeguards. The latter establishes the SRM and allocates resolution responsibilities and tasks included in the BRRD primarily to the Single Resolution Board (SRB). The SRB can be seen as yet another piece in the 'agencification' process of the EU, and as such it is part and parcel of the debate on the delegation of powers among EU institutions, which is at the core of a few cases covered below.[31]

The cases discussed in this paper highlight how judge-made doctrines, fundamental principles of EU law included in the Treaty, and the fundamental rights of the Charter[32] have not only informed the design of that legal framework but are currently playing a prominent role in the application and interpretation of the provisions therein, or can be resorted to in filling a normative gap.

This in turn gives the Court the chance to define for the first time how EU fundamental legal principles and rights should be applied within a bank resolution procedure and to contribute to the interpretation of those principles in cases where a balance needs to be struck between the protection of both private and public interests.

[29] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance OJ L 173, 12.6.2014, p. 190–348, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0059. The Directive has been amended repeatedly by the EU legislator and has also been supplemented by regulatory technical standards (RTS) related to the criteria to be used to determine a possible difference in the treatment of shareholders under resolution and normal insolvency proceedings (to comply with the "no creditor worse off" principle); and the methodology to assess the value of assets and liabilities of institutions, just to name those immediately relevant to the cases under investigation.

[30] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 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 and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 1–90, https://eur-lex.europa.eu/eli/reg/2014/806/oj/eng. The SRM regulation too has been amended, most recently by Regulation 2019/877.

[31] As it will be clarified in some of the cases below, decision making powers in the field of resolution are shared among several EU institutions, to comply with what is commonly known as the Meroni doctrine.

[32] Charter of Fundamental Rights of the European Union, (2000/C 364/01), at https://www.europarl.europa.eu/charter/pdf/text_en.pdf.

Within the above framework, the provisions that are more often claimed to be infringed are Article 18 (resolution procedure), Article 20 (valuation for the purposes of resolution), and 24 (sale of business tool) of the SRM Regulation; Article 17 (right to property), Article 41 (right to good administration), Article 47 (right to an effective remedy and to a fair trial), Article 52 (scope of guaranteed rights)[33] of the Charter; Article 339 (confidentiality and professional secrecy) (TFEU); Article 32 (conditions for resolution); Article 39 (sale of business tool: procedural requirements), par 2 a) b) d) f), BRRD.

6. THE RESOLUTION CASES UNDER ANALYSIS

When a FOLTF declaration has been made, the SRB needs to decide whether the bank will be liquidated under national insolvency proceedings or resolved making use of resolution tools. Whilst the default option should be the former, the litmus test that would determine the SRB choice is the existence of a public interest in resolution in light of the systemic relevance of the institution and the ability of the chosen procedure to ensure the continuity of critical functions.

Since its inception, the SRB adopted a resolution scheme only for two ailing institutions: Banco Popular in June 2017 and Sberbank in March 2022.

In what follows, we will focus solely on the litigation related to the resolution of Banco Popular for two primary reasons. First, the legal proceedings in this case are more advanced. Second, the claims related to Sberbank either closely mirror those of Banco Popular, meaning the latter will set a precedent, or they have not yet reached the stage of final judgment.

6.1. Background to the disputes: The failure of Banco Popular and applicants' requests

Banco Popular,[34] a Spanish credit institution, was the first bank to be resolved by the SRB, which applied the sale of business tool[35] to place the entity in resolution. No public funds were employed in the operation, and at the time this was hailed as a success and as a proof of the efficiency of the tools and mechanisms introduced in the EU after the financial crisis.

When the events unfolded, Banco Popular was the sixth largest banking group in Spain[36] focusing on SME lending, with presence in third countries and participations in a number of joint ventures.[37] Following the endorsement[38] of the SRB resolution scheme[39] by the EU Commission[40] on 7 June 2017

[33] Better known as the proportionality principle.

[34] Banco Popular was the parent undertaking of Banco Popular Group and was listed in the Spanish Stock exchange. See SRB resolution scheme Article 2.1 (5).

[35] In the bank's 2016 resolution plan the bail-in tool was originally envisaged to be used. The SRB decided not to apply that tool because 'given the specific circumstances of the case the sale of business tool would meet the resolution objectives more effectively than the resolution strategy provided in the plan'. SRB decision, 5 (46) and Judgement of the General Court (Third Chamber, Extended composition) of 1 June 2022 in case T-510/17 Antonio Del Valle Ruiz v European Commission and SRB, at (27). Retrieved from https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=T-510/17.

[36] T-510/17, (fn 34) at (25). Retrieved from https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=T-510/17.

[37] SRB resolution scheme, 2.1 (3) to (8), available here: https://www.srb.europa.eu/system/files/media/document/srb_decision_srb_ees_2017_08_non-confidential_scanned.pdf..

[38] As required by Article 18 (7), SRM Regulation.

[39] SRB resolution scheme, (fn 36).

[40] COMMISSION DECISION (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español S.A. (notified under document C(2017) 4038), in OJ L 178/15 11.7.17, available here https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:178:FULL&from=EN.

at 6.30am, the SRB resolution scheme entered into force and Banco Santander purchased Banco Popular for a price of EUR 1. Immediately before the application of the measure, the write down and conversion of capital instruments was applied. In a nutshell, the latter covered 100% of Banco Popular share capital; additional Tier 1 instruments; and Tier 2 capital instruments.[41]

The SRB based its assessment of the bank's assets, liabilities, and overall financial position, as well as whether resolution conditions were met, on two valuation reports (V1 and V2) prepared by Deloitte, which was appointed through a public tender process. A third report (V3), also by Deloitte, followed to assess any differences in treatment between affected investors (creditors and shareholders) and what would have happened under normal insolvency proceedings.

The independence of the valuer, the content of the valuations, and the SRB's alleged unquestioning reliance on these reports are central issues in many disputes raised by affected stakeholders. These matters will be explored in detail in the following sections.

The applicants in several cases have closely examined the factors leading to Banco Popular's insolvency, which can be summarised as follows: liquidity issues in 2016 prompted a EUR 2.5 billion capital increase; a change in senior management after a brief tenure; consolidated losses in 2017 and adjustments to 2016 results; unsuccessful attempts at a private sale; downgrades by rating agencies in early 2017; negative media attention, including an interview with the Chair of the SRB and a leak by a senior EU official; and significant liquidity outflows that dropped the bank's coverage ratio below 80%, resulting in two requests for Emergency Liquidity Assistance.

The above led the ECB, on 6 June 2017, to issue a FOLTF declaration for Banco Popular:[42] The excessive outflows, the speed at which liquidity was deteriorating, and the inability of the bank to generate further liquidity were seen as objective elements to indicate Banco Popular inability to pay its debts or other liabilities at maturity.[43] Incidentally, on June 6 the Board of the bank had also alerted the ECB that it had reached the conclusion that the bank was failing or likely to fail.[44]

As it is well known, the insolvency of Banco Popular ignited a litigation frenzy in front of national authorities, the SRB appeal panel, and EU institutions. The applicants represented various types of stakeholders, including shareholders, fund managers, and holders of T1 and T2 instruments. They sought to annul several key decisions: the SRB's decision on the resolution scheme, the European Commission's endorsement of that scheme, and the SRB's decision of 17 March 2020,[45] which assessed whether compensation should be granted to shareholders and creditors under the 'no creditor worse off' principle.

In one case, applicants sought the annulment of V2, separate from the contested decisions.[46] In another, they requested compensation for damages based on non-contractual liability, both as a result of the SRB and Commission decisions' annulment and independently of it. This claim was grounded in

[41] SRB resolution scheme, (fn 36), Article 6.

[42] See press release here https://www.bankingsupervision.europa.eu/press/pr/date/2017/html/ssm.pr170607.en.html.

[43] Judgement of the General Court (Third Chamber, Extended Composition), of 1 June 2022 in case T-481/17 Fundacion Tatiana Perez de Guzman el Bueno and SFL v SRB, at (61) retrieved from https://curia.europa.eu/juris/liste.jsf?num=T-481/17.

[44] SRB resolution scheme, (fn 36), at 3 (36), and J T-510/17, (fn 34), at (25).

[45] DECISION OF THE SINGLE RESOLUTION BOARD of 17 March 2020 determining whether compensation needs to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular Español S.A. have been effected (SRB/EES/2020/52) available here https://www.srb.europa.eu/en/content/banco-popular.

[46] Judgement of the General Court (Third Chamber, Extended Composition) of 1 June 2022 in case T-523/17 Elevete Invest Group v European Commission and SRB, retrieved from here https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017TJ0523&from=IT.

allegation of unlawful conduct by the SRB and the Commission,[47] including breaches of confidentiality due to leaked information, institutional indifference towards Banco Popular's collapse,[48] failure in sound administration and early intervention, and the unlawfulness of the resolution procedure.

Defendants are the SRB, and/or the EU Commission, supported by the Kingdom of Spain, Banco Santander, the European Parliament and the EU Council, depending on the specific case. The defendants normally request that the action be dismissed and that the applicants be ordered to pay costs.

To date, the court has never ruled in favor of the bank's stakeholders. However, in one instance, the Court did reject an SRB argument that certain applicants lacked the standing to bring proceedings, and thus, the action should have been declared inadmissible.[49] The Court referred to established case law, which holds that if at least one applicant in a joint action has standing, there is no need to assess the standing of the other applicants.[50] As the action was deemed admissible for other applicants, the SRB's plea of inadmissibility was not examined further. Ultimately, however, the Court dismissed the entire action, ruling that the pleas brought forward by the applicants were inadmissible.

In another case,[51] the Grand Chamber, in its appeal judgment, found that the Court of first instance had erred in determining that the SRB decision, which included the resolution scheme, was a challengeable act under Article 263 TFEU and could therefore be subject to an annulment action. As a result, the Grand Chamber set aside the initial judgment to the extent that it had declared the action for annulment of the scheme admissible.[52] While this ruling holds significant importance for the balance of powers within the EU, particularly concerning competence and decision-making authority, it has no practical effect for the original applicants, as their request for annulment of the SRB decision had already been rejected.

The cases covered in the remainder of this paper are those for which a judgement has been issued.[53] Conclusions will be drawn to highlight the impact that the dispute may have had on the behavior of the authorities involved, and how these are likely to influence the development of the Banking Union.

6.2. Scope of the review carried out by the Court

As mentioned above, the Court has consistently declared the actions inadmissible in their entirety. This is expected because the type of review needed involves decisions that require discretion, as well as economic and technical expertise. According to national and EU law, supervisors can only be held liable in extreme cases of gross negligence, which is hard to prove. As long as supervisors have followed procedures, provided clear reasons, and applied good administrative practices, liability is unlikely.

Likewise, as duly noted in the cases requesting the annulment of the SRB decision on shareholders' compensation, 'with regard to situations in which the EU authorities have a broad discretion, in

[47] T-523/17, (fn 45), at 587.

[48] *Ibid* at 593.

[49] Judgement of the General Court (Third Chamber, Extended Composition) of 22 November 2023 in case T-330/20 ACMO Sarl v SRB retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62020TJ0330.

[50] *Ibid* at 35.

[51] Judgement of the Court (Grand Chamber) of 18 June 2024 in case C-551/22 P Appeal under art 56 of the Statute of the Court of Justice of the European Union brought on 17 August 2022, European Commission v Fundacion Tatiana Perez de Guzman el Bueno and Stiftung für Forschung und Lehre (SFL) and SRB retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62022CJ0551.

[52] *Ibid* at 97.

[53] There have been two main rounds of judgements: one in June 2022 (the June cases) and one in November 2023 (the November Cases).

particular as to the assessment of highly complex scientific and technical facts, (…), review by the EU judicature is limited to verifying whether there has been a manifest error of assessment or a misuse of powers, or whether those authorities have manifestly exceeded the limits of their discretion. In such a context, the EU judicature cannot substitute its assessment of scientific and technical facts for that of the EU authorities on which alone the FEU Treaty has placed that task'.[54] Moreover, 'as regards the review by the Courts of the European Union of the complex economic assessments made by the EU authorities, that review is necessarily limited and 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, the EU judicature must not substitute its own economic assessment for that of the competent EU authority'.[55]

While this does not mean that the Court must 'refrain from reviewing the SRB interpretation of economic data on which its decision is based',[56] it does put a heavy burden of proof upon applicants. Applicants must prove that the assessments included in the Valuations reports, or the SRB actions, were inaccurate or based on a manifest error of assessment, implausible evidence / assumptions / estimates / reasoning, or abuse of power. The Court has found that applicants often fail because their arguments are too vague, speculative, incorrect, or lack solid evidence to challenge the defendants effectively.

Therefore, the Court won't replace the SRB's judgment on technical or discretionary issues if the SRB's processes and reasoning are sound. Instead, it is up to the EU Parliament to closely examine the SRB's actions and accountability. However, the Court's scrutiny might lead to changes in SRB behavior. When the Court has demanded procedural measures, it has forced the SRB to provide more detailed or less redacted documents. This suggests that the SRB may become more transparent and provide more information in the future.

7. AN OVERVIEW OF THE BANCO POPULAR RESOLUTION CASES AND MAIN CONCLUSIONS

Applicants' grievances coalesce around areas that fall into administrative, public, and constitutional law as well as private law. As mentioned, applicants' requests were for the annulment of the contested decision(s), claiming violations of the SRM regulation, the BRRD directive and the Charter. In some instances, Articles 18 and 20 of the SRM Regulation are considered to be in violation of some fundamental rights (mainly right to property and right to good administration). The breadth of applicants' requests is clearly shown by the fact that the pleas included in each case fall under all the macro areas described below.

7.1. Valuation reports and the valuer

The applicants' main claims regarding valuation reports include several points. First, they argue that the SRB made manifest errors in approving V3,[57] and that V2 violated Article 20(1) of the SRM Regulation by not being fair, prudent, or realistic. They also claim V2 was based on incorrect criteria,

[54] T-330/20, (fn 48), at (39).

[55] *Ibid* at (40).

[56] JUDGMENT OF THE GENERAL COURT (Third Chamber, Extended Composition) 1 June 2022 in case T-570/17 Algebris (UK) Ltd and Anchorage Capital Group LLC, v EU Commission retrieved from https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=T-570/17 at 108.

[57] T-330/20, (fn 48).

speculative assessments, and lacked a proper balance sheet update, violating Articles 20(7) and (9). Furthermore, the independent expert failed to analyse objectives outlined in Article 20(5)(a)-(c) and (f). Additional claims cite breaches of Article 20(11) for lacking an ex post valuation and allege the expert's lack of independence in V2, methodological flaws, and the overall unreliability of V2.[58] Lastly, they assert manifest errors in applying Articles 14, 18, 20, 21, 22, and 24 of the SRM Regulation, contending that valuations were incapable of supporting the contested decision, lacked fairness,[59] and needed a definitive ex post valuation.[60]

Regarding the valuer, the applicants primarily claim the lack of independence of Deloitte.[61] They argue that the SRB infringed Article 20(1) and Article 44 of the SRM Regulation, along with Articles 38 to 41 of Delegated Regulation 2016/1075, due to Deloitte's lack of independence.[62] Additionally, they assert a violation of Article 20(1) of the SRM Regulation, claiming that the valuation was neither fair nor prudent because the valuer was not independent.[63]

These claims involve highly technical issues related to how assets and liabilities are valued, including the assumptions for both performing and non-performing loans, and legal contingencies. They also touch on procedural aspects, such as the scope of Valuation reports, the need (or not) for an *ex-post* valuation as mentioned in Article 20(11) of the SRM Regulation, and the expectations for counterfactual scenarios. However, the Court sometimes appears to rely uncritically on expert valuations or focus on flaws in the applicants' arguments when assessing certain scenarios or assumptions.[64]

These claims also offer insights into broader issues, such as how to interpret the criteria for assessing the independence of the valuer and the fairness, prudence, and realism of their valuations. They examine how private and public actions interact when public decisions rely on private evaluations and the level of detail required in justifying the use of a valuer's report. Additionally, they allow for speculation about the type of evidence and reasoning the Court expects from applicants in counterfactual scenarios, technical matters, and national law interpretations.[65] They also clarify the level of detail needed in reports drafted under urgent conditions.

Here, we can see another example of how litigation may have nudged a change in behavior of the SRB. In determining whether compensation needed to be granted to affected shareholders and creditors, the SRB gave interested parties the opportunity to submit comments to the Notice which indicated its preliminary decision not to pay any compensation, under a "right to be heard" process.[66] The SRB was not legally required to do so but might have done it to comply with general principles of good administration particularly in light of the looming or pending lawsuits.

[58] T- 481/17, (fn 42).

[59] T-570/17, (fn 55).

[60] T-510/22, (fn 34).

[61] T-330/20, (fn 48).

[62] T-523/17, (fn 45).

[63] T-481/17, (fn 42).

[64] See for instance T-330/20, (fn 48), at 199. However, as discussed above, this is consistent with the scope of the review of the Court.

[65] In T-330/20, (fn 48), one of the pleas relates to the interpretation given by the valuer and the applicants of procedure, objective, timing, and existing case law related to Spanish Law 22/2003. This is the law that would have been applied should the entity be resolved under national insolvency proceedings.

[66] See Decision of the Single Resolution Board of 17 March 2020 determining whether compensation needs to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular Español S.A. have been effected (SRB/EES/2020/52) available here https://www.srb.europa.eu/en/content/banco-popular.

As this behavior has been assessed positively by the Court, it can be argued that it will be repeated in future. Also, the outcome of the process did not change SRB initial decision not to grant compensation but forced the Board to engage directly with aggrieved stakeholders, to justify its decisions further, and to demand the same to the valuer with requests for further clarifications. All this has in turn the effect of strengthening its accountability, which in turn reflects positively on the architecture of the Banking Union.

However, these claims represent a missed opportunity for the Court to further examine the interpretation of independence criteria and the necessity of drafting an ex-post valuation report. In valuation report cases, the Court focused on technical and legal compliance with the relevant provisions[67] but did not provide any supporting commentary on the applicants' claims. While the cases questioning the valuer's independence were ultimately unfounded or based on factual errors, they nonetheless raised valid concerns about the appearance of independence. In the second case, the Court could have expanded more on the reasons why it agreed with SRB view that an *ex-post* valuation could not have served any practical purpose in the context of Article 20(11) of Regulation No 806/2014, nor would it lead to a compensatory decision provided for in Article 20(12) of that regulation.[68]

7.2. Procedures, conditions for resolution, provision of Emergency Liquidity Assistance, choice of tool, alternative to resolution, power to wind down, marketing process

Regarding the procedures, the applicants primarily allege several infringements. They allege violations of Article 18(1)(a) and Article 18(1)(a)-(c) of the SRM Regulation, arguing that public interest conflicted with general EU principles such as proportionality and led to discriminatory or arbitrary interventions.[69] Further claims include breaches of Article 21(1) of the SRM Regulation[70] and Article 32 of the BRRD. Additionally, they argue that the sale procedure violated Article 24 of the SRM Regulation and Article 39(2)(a)(b)(d)(f) of the BRRD by lacking transparency, favoring Santander, giving Santander a competitive advantage, and not maximizing the selling price.[71]

The relevance of this set of claims stands mainly (1) in their clarification of the different phases of the procedure; (2) in their contribution to the definition of public interest and on the hierarchical relationship among different public interest objectives (financial stability; preservation of critical functions) and private interests (no creditors worse off; right to compensation; competitive marketing process); (3) in their assessment of when a liquidity crisis can morph into a solvency one that requires intervention; and (4) on the considerations at the base of the choice of resolution tool, particularly when it differs from the one indicated in a bank's resolution plan.

The Court decisions set an important milestone in the 'day-to-day' dynamics of resolution, on giving actual content to the condition for resolution as well as on the hierarchy of considerations to be taken into account.

They also make a useful digression on the elements that are assessed in the choice of resolution vs national insolvency laws.

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[67] Included in the SRM Regulation and the Delegated Regulation 2016/1075.

[68] T-523/17, (fn 45), at 278 and T-481/17, (fn 42), at 703.

[69] T-523/17, (fn 45).

[70] T-510/22, (fn 34).

[71] T- 481/17, (fn 42).

As one of the main criticalities in deciding which option can better meet the resolution objectives is indeed the potentially disruptive effects or the unpredictability of the outcome in a national insolvency procedure, it is for the EU legislative bodies to start a process of harmonization of those national laws at EU level.

7.3. Delegation of powers

Here cases can be of two different types: i) those related to delegation of powers among EU institutions (having fundamentally to do with an alleged violation of the Meroni Doctrine), and ii) those related to a public-to-private delegation of powers, specifically between the SRB and the independent valuer.

On the unlawful delegation of powers from the Commission to the SRB: claimants say that *a*) art 18 and art 22 SRM Regulation are unlawful because they infringe principles related to delegation of powers;[72] and *b*) the Commission failed to examine the resolution scheme before endorsing it, in so doing delegating its discretionary power to the SRB;[73]

On SRB delegating powers to the valuer: claimants say that the SRB 'merely summarised Valuation 3 and the Clarification Document, namely the essential aspects of the exercise of the discretion whether to compensate the applicants or not. The delegation to the Valuer of the assessment of all issues relating to the valuation without reviewing the underlying data or the comments of the affected shareholders and creditors, and without checking the manifestly inconsistent assumptions detailed in the first plea, is contrary to the principle laid down in the judgment of 13 June 1958, Meroni v High Authority'.[74]

The issue of delegation of powers within the current institutional architecture of the EU as a whole is one that has gained further prominence as a consequence to the recurrent creation of agencies. These bodies allow for a speedier approach to regulation and supervision, but their use of discretion may clash with the general prohibition of delegation of discretionary powers to bodies that were not included in the Treaty.

Settled case law has established the boundaries for delegating powers. The impact of delegation varies based on whether it involves clearly defined executive powers or discretionary powers.[75] Clearly defined executive powers, which are subject to strict review based on objective criteria set by the delegating authority, do not significantly alter the consequences of their exercise.[76] In contrast, discretionary powers, which allow a wide margin of discretion and can influence economic policy, involve an actual transfer of responsibility from the delegator to the delegate.

The core of the first type of cases at stake relates to an alleged unlawful delegation of the Commission of its power to adopt a resolution decision to the SRB. It is claimed that the Commission's control over the process is minimal, or that (legitimate) urgency reasons limit its ability to assess the content of the resolution scheme presented by the SRB for approval. The Court convincingly rebuts those claims by highlighting the role that the Commission play throughout the entire process, mainly via having a representative taking part in all decision-making stages and by retaining the ability to object to the decision. So, the approval of the Commission is not a 'rubber stamp' process that takes place in an hour.

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[72] T-570/17, (fn 55) and T-510/22, (fn 34).

[73] T-570/17, (fn 55).

[74] T-330/20, (fn 48).

[75] Judgment of 22 January 2014 United Kingdom v Parliament and Council (C-270/12, EU:C:2014:18) as reported in T-330/20, (fn 48), at 358.

[76] Judgment of 13 June 1958, Meroni v High Authority (9/56, EU:C:1958:7) as reported in T-330/20, (fn 48), at 359.

In this regard, the Court weighs in the resolution perspective to an already extensive debate on the Meroni doctrine, confirming its main findings.

A specular argument has been used to decide the second type of cases, alleging a delegation of powers from the SRB to the Valuer. Here the Court insisted on the fact that the actual decision not to grant compensation comes from the SRB and that 'the fact that the SRB entrusted the Valuer with carrying out Valuation 3 cannot be construed as a delegation of its power to adopt the decision'[77] because it is the law (Article 76 (1)(e) SRM Regulation) that explicitly provides that the SRB decision on this matter must be based on the results on an independent valuation.

In this case the reasoning of the Court is not as robust, convincing, or detailed as in other pleas, and it may be a matter for the Parliament to clarify those aspects, either with a normative reform or by accountability measures.

An interesting conclusion is the one reached in one of the cases[78] where the Court allowed applicants to ask for the annulment of the SRB decision on a resolution scheme, without also seeking the annulment of the Commission decision. The latter objected to the admissibility of the claim stating that the SRB is merely an intermediate act, but the Court rejected this position arguing that the SRB decision in itself is capable of producing binding effects on third parties and as such can be challenged under art 263 TFEU.

The reasoning given by the Court is in principle in lines with existing case law that requires an investigation of the substance of the act under dispute, taking into account objective criteria, such as the content of the act, the context and the powers of the institutions that adopted it. However, it is often contradictory and if left unchecked could have represented a political bombshell in the debate of institutional decision-making powers. This is because by allowing the SRB act to be scrutinised in its own merits as an act able to produce legally binding effects on third parties, the Court is *de facto* transferring the adoption power to the SRB as well as expropriating the Commission of its legal prerogative. In this way the Court would have altered the current balance of powers in the EU and put into serious question the Meroni doctrine case law.

The judgement has been successfully appealed[79] by the Commission, with the EU Parliament intervening asking to uphold the Commission appeal. Interestingly, from a political point of view, the SRB contented that the Court should have dismissed the appeal.

One possible way to overcome the dichotomy created by the Meroni doctrine is to amend the Treaty to recognise regulatory/supervisory bodies. The appealed judgement shows how relying on the judicial power to maintain stability may actually expose EU Institutions to unpredictable outcomes.

7.4. Violation of rights included in the Charter and/or of fundamental principles of EU law

The applicants' claims concerning violations of rights cover several key areas. They allege breaches of the duty to give reasons and the right to good administration (Article 41(2)(b) and (c)), along with violations of the right to an effective remedy and fair trial (Article 47), the right to be heard (Article 41(2)(a)), and the right to property (Article 17(1)). They also claim infringements of the freedom to conduct a business (Article 16), the principle of legitimate expectations, and the proportionality

[77] T-330/20, (fn 48), at 365.

[78] T-481/17, (fn 42).

[79] C-551/22 P (fn 50)

principle, arguing that the right to property was disproportionately affected.[80] Further claims include violations of confidentiality,[81] access to the file, the obligation to state reasons, professional secrecy, and effective judicial protection. The applicants also argue that Article 18 of the SRM Regulation infringed their rights to be heard and to an effective remedy, while infringing principles of proportionality and legitimate expectations.[82]

This set of cases is important because it highlights the broader range of issues and interests at stake when a bank is resolved. The conclusions of the Court are relevant to assess the behavior of the SRB within a broader public law context and its ability to reach decisions in a way that does not negatively impinge on the fundamental rights of a broader constituency. In fact, a resolution decision is technically addressed to the entity, but has wider repercussions on its shareholders and creditors which cannot be ignored in the design of the resolution action.

In this respect, the processes have been found to be sound by the Court and the Court's reasoning can find possible application also in case of liquidation under national insolvency procedures.

The more sensitive aspects here are those where the Court has to balance different interests, like the ones of the parties to be heard during the process, or to have access to the file, or to be subjected to an effective remedy to those of confidentiality, protection of financial stability, and preservation of critical functions.

In assessing the claims, the Court is again treading on a thin line between the duty to avoid undue interference in authorities' discretionary choices and the one-off ensuring that aggrieved parties receive effective judicial protection. The Court's reasoning is sound, but it concedes very little to the claimants' position and to possible error of law in the ruling. This in effect limits parties' chances for an appeal.

8. TAKE-AWAY FROM THE CASES PERTAINING TO RESOLUTION DECISIONS

The scrutiny of the Court is of great value for different reasons. First it has contributed to **better define a resolution procedure** in terms of actual processes/timing/responsibilities and has shone a light on the reasoning behind the decision-making process of the entities involved. The cases also make clear how long the path to resolution planning can be. This in turn makes the process **more transparent and potentially more predictable**.

Second it clarifies the **division of powers** among EU entities responsible for resolution, the **objectives** of different valuations**,** the **conditions** for resolution, and the **scope** of judicial review. Third, it brings the **resolution perspective** in the debate on the evaluation and hierarchy of EU fundamental rights and principles.

However, this scrutiny should not be immune from criticisms. Essentially the Court reasoning has always been within the four corners of the law and tended to side with the black letter of the procedural safeguards, rather than engaging in more details with the positions of the claimants.

[80] T- 481/17, (fn 42).

[81] T-523/17, (fn 45).

[82] T-510/22, (fn 34).

This approach has two immediate effects, both valuable. On one hand, it complies with the rule of law by ensuring predictability of the outcome. On the other hand, it contributes to the preservation of the current institutional architecture of the Banking Union. This is because it leaves open little room for further litigation; it defines the balance of powers while at the same time ensuring the integrity of the process.

Conversely though, this may have the effect of **limiting external scrutiny** of the agencies, and the **effectiveness of legal redress** in a situation where judicial protection is the main protection stakeholders can have. Yet stakeholders' claims may not be completely arbitrary or self-protective.

The system treats shareholders and creditors as one group for valuation purposes, even though their positions are fundamentally different. Shareholders usually lose their investment in both insolvency and resolution, while creditors might face different outcomes depending on the procedure. Although the valuation report addresses both groups separately, the law does not, which could lead to biased assessments by the agency. While the Court may not fix this bias directly, it could give more attention to the interests of the group that is less adequately considered.

There are also instances, like the assessment of independence or the reliance on the medium-term value of stress test, or on the existence of an *ex-post* valuation, where the evaluation of legitimate expectations may require more attention.

Overall, the **Court misses the chance of being a critical friend** to the institutions involved in a resolution process.

As noted, the Court's reasoning strictly follows the letter of the law, which can sometimes lead to circular arguments, such as those concerning public interest or the conditions for resolution. However, the Court does not address the appropriateness of certain evaluations or decisions. Although such comments might not have changed the final outcome, they could have served as a warning for future cases. Essentially, the Court chose not to use moral persuasion to influence the agencies or encourage changes in their behavior. While this approach is lawful and legitimate, it means that other EU institutions must step in, and exercise **heightened scrutiny on the SRB** through strong accountability mechanisms.

In light of the foreseeable approval of the Crisis Management and Deposit Insurance (CMDI) reform, that will most likely increase the scope of resolution by revisiting the Public Interest Assessment and thus potentially bringing more credit institutions under resolution (Arnal, Lannoo and Lastra, 2024), the need for a heightened scrutiny on the SRB will become more critical.

9. CONCLUSIONS

Judicial cases concerning supervisory decisions reveal several critical insights into the interplay between political interventions, legal frameworks, and the ECB's supervisory authority. One notable conclusion is that political agreements can lead to ad-hoc legal amendments overriding established EU legislation, undermining the work of both the supervisor and the judiciary, fostering the perception of arbitrariness and weakening the credibility of the supervisory framework. This highlights the vulnerability of established regulatory frameworks to political influence. Additionally, while the ECB's supervisory powers are extensive, particularly under Pillar 2, they are restricted to credit institutions. The ECB retains authority for consolidated supervision but cannot alter legal provisions or rely solely on abstract descriptions, emphasizing the need for detailed risk assessments.

The jurisprudence of the CJEU has been instrumental in refining supervisory practices within the Banking Union, clarifying the ECB's role and ensuring that its decisions are consistent with EU principles. However, political decision-making risks undermining the supervisory framework's credibility if it results in arbitrary legal amendments. Furthermore, the requirement for the ECB to harmonize national legislative interpretations with EU law introduces a layer of complexity, necessitating cautious and balanced application of both national and EU regulations. This ensures that the ECB's actions remain proportionate and aligned with broader legal standards, fostering greater transparency and consistency in its supervisory role.

The Court's scrutiny of resolution decisions has significantly clarified the resolution process by defining procedures, timing, responsibilities, and decision-making rationale, making the process more transparent and predictable. This oversight also delineates the powers among EU resolution entities, the objectives of different valuations, and the scope of judicial review, while integrating the resolution perspective into the broader discussion of EU fundamental rights and principles. However, the Court's adherence to procedural safeguards without delving into the specific positions of claimants can limit external scrutiny and the effectiveness of legal redress for stakeholders, particularly as it treats shareholders and creditors as a single group despite their differing positions in insolvency and resolution.

While the Court's approach upholds legal predictability and supports the existing Banking Union framework, it may also restrict the thorough examination of institutional practices and evaluations, potentially biasing assessments. The Court's focus on the letter of the law, rather than the appropriateness of evaluations or decisions, limits its role as a critical reviewer. With upcoming reforms potentially expanding the scope of resolution processes, there will be an increased need for other EU institutions to enforce rigorous accountability mechanisms on the Single Resolution Board (SRB) to ensure fair and effective oversight.

REFERENCES

- Allegrezza S. and Voordeckers O. (2015), *Investigative and Sanctioning Powers of the ECB in the Framework of the Single Supervisory Mechanism: Mapping the Complexity of a New Enforcement Model*, European Criminal Law Associations' Forum – EUCRIM, Issue 4, pp. 151-161, https://eucrim.eu/articles/investigative-and-sanctioning-powers-ecb-framework-single-supervisory-mechanism/.
- Arnal, J., Lannoo, K. and Lastra R. (2024), *Is CMDI what the Banking Union needs?*, CEPS Policy Brief, February 2024-01, https://cdn.ceps.eu/wp-content/uploads/2024/02/DefXOCOx-CEPS-PB2024-01_Is-CMDI-what-the-Banking-Union-needs.pdf.
- Lamandini, M. and Thomadakis, A. (2024), A decade of the Single Supervisory Mechanism - lessons learned and future direction, *Journal of International Banking Law and Regulation*, Vol. 39, Issue 9, pp. 341-344.
- Thomadakis A. and Arnal J. (2024), Ten Years of the Single Supervisory Mechanism: Looking into the Past, Navigating into the Future, *Journal of Financial Regulation*, jae005, pp. 1-6, https://doi.org/10.1093/jfr/fjae005.

This study examines key rulings on the supervision and resolution of credit institutions in the EU and their impact on the Banking Union framework. It explores how case law has refined the European Central Bank's practices, shareholders' and boards' rights, and the interaction between ECB and Single Resolution Board powers during 'failing or likely to fail' assessments. While highlighting how litigation has clarified processes, rights, and the criteria for resolution, the study's findings underscore the need for heightened scrutiny of agencies to prevent political interference and ensure effective oversight.
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