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10 years of Banking Union case law – how did CJEU judgments shape supervision and resolution practice in the Banking Union?

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10 years of Banking Union case law – how did CJEU judgments shape supervision and resolution practice in the Banking Union?

Abstract

This paper discusses EU case law developed over the past decade relating to decisions taken by the European Central Bank within the Single Supervisory Mechanism (SSM) and within the Single Resolution Mechanism (SRM). The cases centre around embracing and solidifying the BU framework, inter alia, with the admissibility to challenge ECB's supervisory and licence withdrawal decisions, the application of national law by the ECB in its supervisory competence and the methodology attached to the setting of administrative pecuniary penalties. Other cases concern the determination of the *ex-ante* contributions to the Single Resolution Fund, the perimeter of resolution decision-making, and the responsibility of the decision-making bodies involved in the resolution process. This document was provided by the Economic Governance and EMU Scrutiny Unit at the request of the ECON Committee.

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CONTENTS

LIST OF ABBREVIATIONS

ABoR	Administrative Board of Review
AML	Anti-Money Laundering
BRRD	Bank Resolution and Recovery Directive
BU	Banking Union
CET1	Common Equity Tier 1
CFT	Countering the Financing of Terrorism
CJEU	Court of Justice of the EU
CMDI	Crisis Management and Deposit Insurance
CNCM	Confédération Nationale du Crédit Mutuel
CRD	Capital Requirements Directive
CRR	Capital Requirements Regulation
EBA	European Banking Authority
EBU	European Banking Union
ECB	European Central Bank
ECHR	European Court of Human Rights
EDIS	Deposit Insurance Scheme
EU	European Union
FOLTF	Failing or Likely to Fail
FSA	Financial Supervisory Authority
GFCC	German Federal Constitutional Court
LSI	Less Significant Institution
NCA	National Competent Authority
NRA	National Resolution Authority
QLH	Qualifying Holdings
SI	Significant Institution
SSM	Single Supervisory Mechanism
SRB	Single Resolution Board
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
TFEU	Treaty on the Functioning of the European Union

LIST OF BOXES

LIST OF TABLES

EXECUTIVE SUMMARY

This paper discusses selected EU Courts' cases over the first decade of existence of the Banking Union (BU). The Court of Justice (CJEU) has consistently followed an EU integration approach, reinforcing the responsibility of the European Central Bank (ECB) in banking supervision and delimiting decision-making governance in bank resolution. The BU emerged within a specific EU constitutional and institutional framework, which has been embraced and solidified by the CJEU in terms of the legal bases found in the Treaty on the Functioning of the EU (TFEU), decision-making processes, governance and multilevel dynamics. Case law affirmed the ECB's exclusive competence over prudential supervision for both significant institutions (SIs) and less significant institutions (LSIs), in granting and withdrawing licences and qualifying holdings procedures. The EU Courts have explored the *locus standi* of applicants (in particular banks and shareholders) with ongoing cases expected to clarify whether their right to effective judicial protection is ensured. Moreover, the application of national law within the BU, particularly under the supervision area, raise complex legal questions. The *Corneli* case highlighted the oddity of EU institutions required to apply national laws that contradict EU law. The shield that must be given to the principle of primacy of EU law could warrant a different approach in cases where national laws infringe EU prudential regulation.

The Single Resolution Fund (SRF) ex-ante contributions have given rise to extensive litigation. Banks have challenged the Single Resolution Board (SRB)'s decisions on these contributions relatively with success. The General Court has annulled several of these decisions, particularly those from 2017, 2021, and 2022, mostly on procedural grounds. Pending cases may clarify substantive law aspects and address unresolved issues. Regarding the resolution decision-making process, the *Commission v SRB (C-551/22 P)* judgment of June 2024 seems to revive the *Meroni* doctrine, which constrains the delegation of powers and discretion to EU agencies. This case, alongside earlier litigation on the resolution of *Banco Popular Español*, addressed the complexity of resolution decision-making. The Courts assessed the legal nature and justiciability of acts like the ECB's failing or likely to fail (FOLTF) assessment and the SRB's resolution scheme and (no) resolution decisions. Importantly, the Court of Justice determined that the European Commission, not the SRB, is the entity responsible for endorsing the resolution scheme, reinforcing the distinction between EU institutions and agencies.

Additionally, the BU legal frameworks provide entities the opportunity to request internal administrative reviews, which may be followed by judicial reviews. However, the effects of these reviews on legal rights and effective judicial protection are still being shaped. Finally, there has been promising judicial dialogue between national courts and the CJEU. However, the German Federal Constitutional Court has been more reticent.

Overall, the case law of the BU reflects the great extent to which this construction advances further integration in the EU legal frameworks, economic integration, as well as the European construction generally.

1. INTRODUCTION

The experiences of the Global Financial and Euro debt crises led to the political decision to establish a Banking Union (BU) in 2012.[2] The immediate objectives of the BU were to: (1) sever the vicious link between bank and sovereign fragility, which had dominated the euro area sovereign debt crisis, (2) re-establish private liability and (3) minimise the risk of taxpayer-funded bailouts of failing banks. There was also a related goal to reinforce the regulatory framework for an integrated banking system in the euro area.[3] The main institutional innovations as part of the BU were the creation of the Single Supervisory Mechanism (SSM) at the European Central Bank (ECB) in 2014 and of the Single Resolution Mechanism (SRM), including the Single Resolution Board (SRB) and the Single Resolution Fund (SRF), in 2015. Besides, the EU Single Rulebook constitutes another regulatory innovation, which aims to ensure harmonisation and the consistent application of rules[4] with, at its core since 2013, the Capital Requirements Directive (CRD IV) and Capital Requirements Regulation (CRR)[5] – the first directly applicable regulation adopted in EU banking law – and the Bank Recovery and Resolution Directive (BRRD) and Deposit Guarantee Schemes Directive (DGSD) adopted in 2014.[6]

However, prudential regulation and resolution frameworks evolved over the first decade of the BU. Specifically, the CRD and CRR were revised twice, in 2019 and 2024, reaching the CRD VI and CRR III to date[7] (including some quick fixes during the pandemic). Pending the Crisis Management and Deposit Insurance (CMDI) review, we will reach the BRRD3, while the SRM Regulation,[8] which has been amended several times (four), will also be significantly reviewed by the co-legislators during the current 10th term of the European Parliament. In contrast, the SSM Regulation itself – adopted under a special legislative procedure and unanimity in the

[2] Herman Van Rompuy and others, 'Towards a Genuine Economic and Monetary Union - Four Presidents' Report' (2012).

[3] Claudia Buch, 'Financial Integration in Europe: Where Do We Stand after the Banking Union's First Decade? - Speech by Claudia Buch, Chair of the Supervisory Board of the ECB, at the "Globalisation: What's Next?" Conference Co-Organised by the Banque de France, the Centre for Economic Policy Research, the World Bank and the University of Surrey' ("Globalisation: What's Next?" conference, Paris, 30 April 2024) <https://www.bankingsupervision.europa.eu/press/speeches/date/2024/html/ssm.sp240430~68c9861180.en.html>.

[4] Asen Lefterov, 'The Single Rulebook: Legal Issues and Relevance in the SSM Context' (2015) 15 ECB Legal Working Paper Serie.

[5] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC OJ L 176, p. 338–436 and Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176, p. 1–337

[6] 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 OJ L 173, p. 190–348 and Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ L 173, p. 149–178

[7] Directive (EU) 2024/1619 of the European Parliament and of the Council of 31 May 2024 amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, and environmental, social and governance risks OJ L, 2024/1619 (CRD VI) and Regulation (EU) 2024/1623 of the European Parliament and of the Council of 31 May 2024 amending Regulation (EU) No 575/2013 as regards requirements for credit risk, credit valuation adjustment risk, operational risk, market risk and the output floor OJ L, 2024/1623, (CRR III)

[8] 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, p. 1–90 (SRM Regulation)

Council[9] – and the accompanying SSM Framework Regulation[10] adopted by the ECB to set up the cooperation framework within the supervisory system, were left untouched.

Over the past ten years, decisions of the new supervisory and resolution authorities have often been contested by supervised entities and other stakeholders (e.g. shareholders, creditors, investment fund managers, among others) in EU Courts through different judicial avenues.[11] In turn, this has led to a body of EU case law shaping bank supervision and resolution in the BU and steering the application and interpretation of rules as well as administrative practices.[12] The cut-off date for the EU case law that is considered and discussed under the scope of this paper is the end of August 2024.

These cases concern the SSM, most notably the ECB's exclusive competence: (1) in determining an institution as significant or less significant (2) in supervision of both significant and less significant institutions and (3) in leading common supervisory procedures, once again, regardless of their significance. Among those procedures, the cases centred around the admissibility of challenges to the ECB's licence withdrawal decisions as well as the justiciability of preparatory acts of national supervisors in qualifying holding procedures. Importantly, the case law of the Court of Justice of the EU (CJEU) drew certain lines regarding the application of national law by the ECB in its supervisory competence, as per Article 4(3) SSM Regulation. The case law also confirmed the ECB's consolidated supervision regardless of the legal structure of the group's parent, and, in a set of litigation against ECB's fines, the case law led to higher transparency in the methodology attached to the setting of administrative pecuniary penalties imposed after breaches of EU prudential requirements (section 2). Other cases concern the SRB, including the determination of the SRF *ex-ante* contributions (or levies) since 2016 and the perimeter of resolution decision-making, which impacts the nature of the acts adopted, their justiciability and the responsibility of the decision-making bodies involved in the resolution process (section 3). A final set of cases relates to the interaction of the European Banking Union (EBU) with other frameworks, most notably, the judicial dialogue that has taken place between the EU and national Courts, the interplay of prudential supervision with Anti-Money Laundering (AML), and with liquidation proceedings (section 4).

Overall, the case law of the Banking Union reflects the great extent to which this construction advances further integration in the EU legal frameworks, economic integration, as well as the European construction generally.[13] The BU also emerged within a specific EU constitutional and institutional framework,[14] which has been embraced and solidified by the Court of Justice

[9] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions OJ L 287, p. 63–89 (SSM Regulation)

[10] Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (ECB/2014/17) OJ L 141, p. 1–50 (SSM Framework Regulation)

[11] Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing 2021).

[12] It is covered on an excellent database updated a few times a year, see European Banking Institute, 'The Banking Union and Union Courts: Overview of Cases (as of 21 December 2023)' (*EBI*, 2023) <https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/>.

[13] Pedro Gustavo Teixeira, *The Legal History of the European Banking Union: How European Law Led to the Supranational Integration of the Single Financial Market* (Hart Publishing, an imprint of Bloomsbury Publishing, 2020).

[14] Takis Tridimas, 'The Constitutional Dimension of the Banking Union' in Stefan Grundmann and Hans-W Micklitz (eds), *The European banking union and constitution: beacon for advanced integration or death-knell for democracy* (Hart Publishing 2019); Gianni Lo Schiavo (ed), *The European Banking Union and the Role of Law* (Cheltenham, Edward Elgar, Elgar Financial Law series 2019); Danny Busch and Guido Ferrarini (eds), *European Banking Union* (Second edition, Oxford University Press 2020).

in terms of the legal bases found in the Treaty on the Functioning of the EU (TFEU), decision-making processes, governance and multilevel dynamics.

In this paper, we discuss several Court cases that have either confirmed the ECB's supervisory decisions / the SRB's decisions or contested them on procedural or substantive grounds, while some of them focus on substantive issues in the EU prudential/resolution frameworks. The geography of case law covered in this paper (combining primarily actions for annulment and preliminary references from national courts) cover ten Member States for this first decade, i.e. Austria, Estonia, France, Germany, Italia, Latvia, Luxembourg, Malta, Portugal and Spain. The paper does not aim at being exhaustive, but representative of significant developments and, sometimes, of tensions, with points still unresolved or contentious (see the selection of pending cases in Appendix).

The important role of litigation of new laws, regulations and institutions reflects the nature of Europe's legal system, where (unlike Napoleon's vision), legislators cannot always design brightline rules and foresee all contingencies. In this regard, well-functioning judicial review in the BU arena also reinforces the accountability of European institutions and agencies in a very furnished area of EU Law.

The remainder of the paper is structured as follows. Section 2 examines selected case law related to Banking Supervision, Section 3 focuses on judicial review in the area of Bank Resolution, while Section 4 considers the interactions of the EBU with other frameworks stemming from EU Courts' scrutiny or preliminary rulings. Section 5 summarises with some key takeaways.

2. BANKING SUPERVISION

In this section, we discuss cases from the EU Courts that relate to supervisory tasks, responsibilities and powers of ECB Banking Supervision vis-à-vis supervised entities, and within the SSM. In particular, we focus on early jurisprudence that shaped the system for banking supervision (2.1.) and clarified the scope of Banking Supervision (2.2.). We also discuss the interactions between judicial review and internal administrative review of ECB's supervisory decisions (2.3.).

2.1. Shaping the system

One important element of the SSM is the distinction between Significant Institutions (SIs) and Less Significant Institutions (LSIs), where the former are directly supervised by the ECB (through Joint Supervisory Teams), while the latter are directly supervised by National Competent Authorities (NCAs). In this respect, the first EU case law in banking supervision since the SSM establishment has been paramount to asserting the exclusive competence of

the ECB in prudential supervision for both SIs and LSIs, in addition to the specific examination of legal provisions determining the significance of the bank.[15]

The first case law in the BU turned around a challenge introduced by *Landeskreditbank* (hereinafter 'L-Bank') in March 2015, a German regional promotional bank, which was assessed as a *Significant* Institution by the ECB in September 2014, hence falling under its direct prudential supervision. The bank, willing to remain under the direct supervision of the NCA – *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin), contested the ECB's significance decision. It argued that the transfer of competences for prudential supervision to the ECB was made only for SIs, while supervision of *Less* Significant Institutions remained with NCAs in application of the principle of subsidiarity[16] and that there were 'particular circumstances' justifying its status as LSI.

The application of particular circumstances entails that, although meeting one of the significance criteria and therefore qualifying as SI, those entities may nevertheless be classified by the ECB as less significant. Those particular circumstances are determined in accordance with the fifth sub-paragraph of Article 6(4) of the SSM Regulation and Article 70 of the SSM Framework Regulation. L-Bank alleged that BaFin's supervision was sufficient given its 'particularly weak risk profile'[17] and contested the second ECB decision adopted in January 2015 (after an internal administrative review by the SSM Administrative Board of Review (ABoR), see section 2.3). The Court of Justice confirmed the General Court's approach.[18]

This case law is particularly important for two major points: concerning the system of banking supervision in EU Law and supervisory cooperation, and regarding specifically the significance assessment regime set forth in the SSM legal framework (see Box 1 for more details). Finally, putting this into perspective, the contested ECB's significance decision in this litigation was adopted at the very start of the SSM, in a phase of adaptation from both the supervised entities and supervisors' sides. L-Bank as a public investment and promotional bank of Baden-Württemberg may have at that time preferred the proximity with the supervisor and the particular relationship considering its business model, in which the Land is the only shareholder, and allegedly higher administrative costs. While the EU Courts' judgments did not uphold the request of L-Bank, it is noteworthy that, following a legislative review of the CRD/CRR in 2019, the bank was exempted from prudential supervision by the co-legislators.[19] Indeed, some exceptions in the CRD exempt some institutions, whatever their significance

[15] See also Antonio Luca Riso, 'A Prime for the SSM before the Court: The L-Bank Case' in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing 2021); Filippo Annunziata, 'European Banking Supervision in the Age of the ECB: Landeskreditbank Baden-Württemberg—Förderbank v. ECB' [2020] European Business Organization Law Review <https://doi.org/10.1007/s40804-019-00170-y> accessed 16 July 2020.

[16] Case T-122/15 *Landeskreditbank Baden-Württemberg v ECB* – hereinafter *L-Bank* (ECLI:EU:T:2017:337) para 35

[17] Case T-122/15 *L-Bank* (ECLI:EU:T:2017:337) para 32, see also para 36

[18] Paras 54, 63 and 72 of the judgment under appeal, General Court, *Case T-122/15 L-Bank*.

[19] Article 2(5)(5), Directive 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (OJ L 150 p. 253–295)

status, from prudential supervision both in the BU participating and non-participating Member States.

Box 1: Two critical point-s about the *L-Bank* case

Given the timing of this judicial review, this case had important repercussions for shaping the supervisory system within the BU and the relationships between ECB and NCAs.

First, it affirmed that the ECB is exclusively competent 'to carry out, for prudential supervisory purposes, the tasks listed in Article 4(1) in relation to 'all' credit institutions established in the participating Member States, without drawing a distinction between [SIs] and [LSIs]'. Furthermore, this system relies on a decentralised implementation of banking supervision by the NCAs. In the Court's reading, within the SSM Regulation and the supervisory tasks conferred on the ECB as listed in its Article 4, 'the Council conferred on the ECB exclusive competence, the decentralised implementation of which by the [NCAs] is enabled by Article 6 of that regulation, under the SSM and under the control of the ECB, in relation to less significant credit institutions, within the meaning of the first subparagraph of Article 6(4), and in respect of some of the tasks.'[20] In other words, Article 6 focuses on the cooperation within the SSM, and its paragraph (4) is at the heart of the classification scheme that divides SIs under the ECB's direct supervision and LSIs under the NCAs' direct supervision – save for common supervisory procedures that are ECB's sole responsibility (see section 2.2.1.). The wording 'under the control of the ECB' should not be taken erroneously, and in our understanding, simply reflects the fact that the legislator assigned to the ECB the responsibility for the 'effective and consistent functioning of the SSM' as per Article 6(1) SSM Regulation.

Second, it allows to stress the exclusive competence of the ECB in the assessment of significance of credit institutions – in application of the SSM legal framework.[21] Hence, in the application of Article 70 SSM Framework Regulation, there is no distribution of tasks between the ECB and the NCAs, but an exception or a derogation to the significance criteria, for which only the ECB can determine and define the particular circumstances.[22]

2.2. Scope of banking supervision

2.2.1. Common Supervisory Procedures

The ECB has the power to grant and withdraw the authorisation of any credit institutions and to assess the acquisition or increase of qualifying holdings in credit institutions. Therefore, the ECB is solely responsible for these common supervisory procedures regardless of the significance of the banks, while it relies on the NCAs in the process, for instance for the notification of the initial applications or for some joint assessment. These supervisory procedures were part of EU judicial reviews in particular as regards the withdrawal of authorisation and qualifying holdings procedures.

Authorisation and withdrawal

The granting of authorisation is not controversial as it allows the entities to commence their activities as credit institutions (as per Article 8 CRD VI and Article 4(42) CRR 3). The ECB grants the licence to take up the business of a credit institutions (as per Article 14(3) SSM Regulation). In comparison, the withdrawal of authorisation is far more contentious, with several cases

[20] Case C-450/17 P *L-Bank* (ECLI:EU:C:2019:372) paras 49
[21] Articles 6(4) SSM Regulation, and Articles 70 and 71, SSM Framework Regulation
[22] Case C-450/17 P *L-Bank* (ECLI:EU:C:2019:372) paras 48-49

being contested in Courts, sometimes at the intersection of prudential supervision and AML supervision (see section 4.2. below).

A major judicial review in this area concerned the bank *Trasta Komercbanka* with several legal actions seeking to annul the ECB's licence withdrawal decision.[23] The most contentious point is the *locus standi* of the applicants, in other words whether the actions introduced by a bank and its shareholders were admissible before the EU Courts. This issue matters to determine the scope, and potential limits, of judicial review in the context of bank authorisation withdrawal litigation, and in turn, the right to effective judicial protection granted to the applicants. The last word has not been given considering other pending case law at EU Courts and parallel developments at the European Court of Human Rights (ECHR).

Following consultation with the Latvian NCA, the ECB had withdrawn the licence of the credit institution, which led to its liquidation.[24] In first instance, the General Court rejected the claim of the bank as inadmissible but upheld the claim of shareholders as admissible.[25] In other words, in EU Law, the bank's shareholders were considered directly and individually concerned by the ECB's withdrawal decision.[26] However, the action brought by the bank itself was considered not admissible because the lawyer no longer had authority to represent the bank, as its power of attorney was, as considered by the General Court, lawfully and effectively revoked by the liquidator.[27]

The Court of Justice went in the opposite direction. In an appeal on the admissibility, it has reversed the approach of the General Court as regard the locus standi in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *ECB and Others* v *Trasta Komercbanka and Others*.[28]

Regarding the bank's action, it considered it admissible and well founded. Even if the power of the liquidator to revoke power of attorney previously issued by the board is rightfully determined under national law, its application cannot infringe the bank's right to effective judicial protection, as provided by Article 47 of the Charter of Fundamental Rights.[29] This pertains to due process requirements and follows the reasoning of Advocate General Kokott.[30] Regarding the shareholders of TKB, the Court of Justice considered that the shareholders of the bank, whose authorisation was withdrawn, were not directly concerned by the ECB's licence withdrawal decision. Therefore, the Court considered the action inadmissible

[23] This case also raised an issue in the interaction between a licence withdrawal and the regime for liquidation under national law, which may be addressed by the CMDI review (see section 4.3.). On locus standi, see Giorgia Marafioti, 'The Trasta Komercbanka Cases: Withdrawals of Banking Licences and Locus Standi' in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing 2021).

[24] Several grounds were introduced, among which a violation of Article 24 SSM Regulation concerning the ABoR's review (see section 2.3), the violation of general principles of law, including proportionality, equal treatment, legitimate expectations and legal certainty.

[25] Case T-247/16 *Fursin and Others v ECB* (ECLI:EU:T:2017:623)

[26] ibid. paras 65, 71

[27] ibid. paras 48-50

[28] Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *ECB and Others* v *Trasta Komercbanka and Others*, (EU:C:2019:923). The cases correspond respectively to the appeal by the ECB, the European Commission, and the bank and its shareholders.

[29] ibid. paras 70, 75. There was also a conflict of interest for the liquidator, see paras 74 and 76 with reference to ECHR decision of 9 September 2004, *Capital Bank AD v Bulgaria* (CE:ECHR:2004:0909DEC004942999)

[30] Opinion of AG Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P (ECLI:EU:C:2019:323), paras 75-77. For a full analysis, see René Smits, 'Challenging a Bank's License Withdrawal by the ECB: Can the Bank Act or Can Its Shareholders?' (*European Law Blog*, 2 May 2019) <https://europeanlawblog.eu/2019/05/02/challenging-a-banks-license-withdrawal-by-the-ecb-can-the-bank-act-or-can-its-shareholders/> accessed 1 December 2020.

regarding the shareholders, as argued by the ECB and the Commission intervening during the proceeding.[31]

This finding was reiterated in *Pilatus Bank and Pilatus Holding v ECB*, although the Court of Justice set aside the General Court judgment due to unlawfully granted legal representation (see Box 2 for more details). However, this jurisprudence could be reversed considering a different approach by the ECHR, who delivered a judgment with a different outcome.[32] At national level, the Supreme Administrative Court in Bulgaria considered that only *Korporativna Targovska Banka AD (KTB)*, the failing bank whose licence was withdrawn for negative own funds and CET1 and Tier 1 ratios, had legal standing.[33] The ECHR overturned this stance and considered that Bulgaria breached Article 6 §1 of the Convention, and in particular violated the shareholders' and executives' rights to a fair trial.[34] National legislation and its application led to denying KTB a 'proper judicial review' of the decision to withdraw the licence.[35] In sum, were the EU Courts to consider this ECHR decision, it may lead to a more lenient approach towards the admissibility of shareholders' legal actions – though the directly and individually concerned criteria may be a high threshold to pass.

[31] Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *ECB and Others* v *Trasta Komercbanka and Others* (EU:C:2019:923) paras 91-93 and 119

[32] Decision of 30 August 2022 *Korporativna Targovska Banka AD v Bulgaria* (CE:ECHR:2022:0830JUD004656415)

[33] ibid. para 31

[34] ibid. paras 203-204

[35] ibid. para 145

Box 2: Pilatus Bank and Pilatus Holding v ECB

In the first instance of case *Pilatus Bank and Pilatus Holding v ECB*, the applicants' action that sought the annulment of the ECB's withdrawal decision was rejected on all pleas in law.[36] The General Court also considered that the action brought by the second applicant—who is the majority and sole shareholder of Pilatus Bank—was inadmissible because shareholders of a bank whose authorisation was withdrawn are not directly concerned by the same withdrawal decision,[37] in line with the *Trasta* case abovementioned. Furthermore, the General Court had concurred with the ECB withdrawing its authorisation on the basis of lack of good repute of a unique shareholder and the related adverse effects for the credit institution's safety and soundness, the banking market and financial stability.[38] It acknowledged that the ECB rightly exercised its supervisory discretion in adopting such decision,[39] on the basis of a proposal by the Maltese NCA.

In appeal, the Court of Justice declared the action inadmissible and set aside the General Court's judgment because it considered that the latter failed to verify of its own motion the lawfulness of the authority to act conferred to the applicants' lawyer, by an authorised representative of the legal person.[40] It concluded that the Board of Directors no longer had the capacity to represent the appellant or to authorize a lawyer, following the appointment by the Maltese Financial Services Authority of a competent person.[41]

Qualifying holdings procedures

In the applications from banks related to qualifying holdings (QLH) in credit institutions, the supervisors will assess both the acquisitions and the increases of qualifying holdings. The approval of qualifying holdings has several implications for other areas in prudential supervision, i.e., the bank's governance with the assessment of fit and proper criteria, AML and reputation risks, and, as a result of the approved QLH procedure, the (ad hoc) assessment of the significance of the entity concerned if the QLH changes significantly the profile of the bank.

The two cases discussed here relate to the same event, with, first, a preliminary reference by the Italian Council of State and, second, an action for annulment of the ECB's decision to refuse to authorise the QLH acquisition of a shareholding by Fininvest and by Mr Silvio Berlusconi in the credit institution Banca Mediolanum SpA, by Mr Berlusconi and Fininvest.

Litigation at national level had given rise to a major preliminary ruling from the Italian Council of State in Case C-219/17 *Berlusconi and Fininvest*,[42] for which the Court of Justice examined in particular the question whether the EU Courts or national Courts are competent to decide in a challenge to 'decisions to initiate procedures, preparatory acts and non-binding proposals' as adopted by the NCA.[43] Those elements are essential to the supervisory procedures, and show the interplay between the NCAs and the ECB in direct prudential supervision. In administrative law, these common supervisory procedures are examined by the scholarship as composite

[36] Case T-27/19, *Pilatus Bank and Pilatus Holding v ECB* (ECLI:EU:T:2022:46)

[37] ibid., paras 32-34

[38] ibid., paras 71, 78-80 see also Christy Ann Petit, "Bank's license withdrawal following shareholder's damaged reputation and market confidence loss – Judgment of the General Court in Pilatus Bank and Pilatus Holding v ECB", *EU Law Live*, 1 March 2022

[39] Case T-27/19, *Pilatus Bank and Pilatus Holding v ECB* (ECLI:EU:T:2022:46), paras 138-143

[40] Case C-256/22 P *Pilatus Bank and Pilatus Holding v ECB* (ECLI:EU:C:2024:125), paras 39, 46-47

[41] Ibid. paras 60, 64-72, and distinct from the liquidator in the *Trasta Komercbanka* case.

[42] Case C-219/17 *Silvio Berlusconi, Finanziaria d'investimento Fininvest SpA (Fininvest) vs Banca d'Italia, Istituto per la Vigilanza Sulle Assicurazioni (IVASS)* (ECLI:EU:C:2018:1023) (*Berlusconi and Fininvest*)

[43] ibid. para 39

procedures[44] for the very reason of their compound nature in the interplay between EU and national orders and bringing together, and, within the same system, the NCAs and the ECB for the SSM, and the NRAs and the SRB for the SRM.

The legality of EU legal acts can be reviewed following an action for annulment under Article 263 TFEU, which allows to contest the legality of legal acts adopted by the EU institutions in front of the CJEU. In the context of this preliminary ruling, the Court of Justice considered that 'Article 263 TFEU must be interpreted as precluding national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by [NCAs]' in the common procedure for qualifying holdings,[45] in line with Advocate General Campos Sánchez-Bordona's Opinion.[46] (For more details on QLH in ECB decision-making governance and the contours of EU judicial review, see Box 3.)

Applied to the SSM, the Court demonstrated how the QLH procedure is implemented within the SSM and based on Article 22 CRD IV and Article 15 SSM Regulation. It insisted on the ECB's responsibility for the effective and consistent functioning of the SSM, and the fact that the principle of sincere cooperation governs the relations between the ECB and the NCAs (as per Article 6(1) and (2) SSM respectively). In such system, the NCAs' role is to register applications for authorisation and to assist the ECB, 'which alone has the decision-making power, in particular by providing it with all the information necessary for carrying out its tasks, by examining such applications and then by forwarding to the ECB a proposal for a decision, which is not binding on the ECB and which, moreover, EU law does not require to be notified to the applicant.'[47] All in all, the QLH procedures brings together preparation from the NCAs, which will submit a draft supervisory decision, which is reviewed by the ECB and finally adopted by the ECB decision-making bodies.[48]

[44] Filipe Brito Bastos, 'Judicial Review of Composite Administrative Procedures in the Single Supervisory Mechanism: Berlusconi' (2019) 56 Common Market Law Review 1355; Vittorio Di Bucci, 'Procedural and Judicial Implications of Composite Procedures in the Banking Union' in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing 2021); Andrea Magliari, 'Composite Procedures and Judicial Protection: In Fininvest and Silvio Berlusconi v. European Central Bank (T-913/16) the General Court Delivers a "Pilate's Judgment"' (*Review of European Administrative Law*, 27 September 2022) <https://realaw.blog/2022/09/27/composite-procedures-and-judicial-protection-in-fininvest-and-silvio-berlusconi-v-european-central-bank-t-913-16-the-general-court-delivers-a-pilates-judgment-by-andrea/> accessed 30 September 2022.

[45] And provided for in Articles 22 and 23 of CRD IV, in Articles 4(1)(c) and 15 of the SSM Regulation and in Articles 85 to 87 of the SSM Framework Regulation. See para 59.

[46] Opinion of AG Campos Sánchez-Bordona of 27 June 2018 (C-219/17, ECLI:EU:C:2018:502)

[47] Case C-219/17 *Berlusconi and Fininvest* (ECLI:EU:C:2018:1023) paras 55

[48] Christy Ann Petit, 'The SSM and the ECB Decision-Making Governance' in Gianni Lo Schiavo (ed), *The European Banking Union and the Role of Law* (Edward Elgar Publishing 2019) <https://www.elgaronline.com/view/edcoll/9781788972017/9781788972017.00013.xml> accessed 9 May 2019.

Box 3: Case C-219/17 *Berlusconi and Fininvest*: common supervisory procedure and preparatory acts in the EU system of remedies

The starting point is a basic principle of EU institutional law and the system of remedies. The Court reiterates that Article 263 TFEU confers upon the CJEU 'exclusive jurisdiction to review the legality of acts adopted by the EU institutions, one of which is the ECB'.[49] The core issue is then to qualify the nature of the NCAs' decisions to initiate procedures, preparatory acts or non-binding proposals, in the context of qualifying holdings procedures. The Court had an effective and expedient reasoning which relied on the demonstration of the locus of the 'final' and 'exclusive decision-making power'[50] – which lies with the ECB – and not with the national authorities whose preparatory acts or proposals are part of a stage of a procedure and thus not binding on the EU institution.

Beyond that point of EU law and judicial review, the Court elaborated on the nature of the administrative procedure represented by the qualifying holdings procedures set forth in the SSM Regulation – and which can very much be applied to the other *common* supervisory procedures. First, in abstract, it emphasised that, '[w]here the EU legislature opts for an administrative procedure under which the national authorities adopt acts that are *preparatory* to a final decision of an EU institution which produces legal effects and is capable of adversely affecting a person,' the legislators sought to establish between the EU institution and the national authorities 'a specific cooperation mechanism which is based on the exclusive decision-making power of the EU institution'.[51]

In Case T-913/16,[52] the General Court examined the action for annulment introduced by Mr Berlusconi and Fininvest. The General Court focused on the QLH supervisory procedure, as an 'autonomous concept of EU Law'[53] for the purposes of application of Article 15 SSM Regulation and Article 22 CRD, which must be interpreted uniformly. It considered, through an extensive interpretation, that QLH may cover 'various types of transactions such as forward transactions or option transactions or share-for-asset swap transactions,'[54] and encompass both direct and indirect QLH. This illustration gives an important interpretation of EU Law and how it may be transposed into national legal frameworks (insofar as Article 22 CRD must be transposed in the Member States' legal frameworks),[55] which is important guidance for the application of national law by the ECB (see section 2.2.3.).

AG Sánchez Campos-Bordona's Opinion from May 2024 differed and proposed to set aside the judgment by the General Court and to annul the ECB's decision.[56] The Advocate General considered that the General Court erred in law in several respects, including in the conditions that entitle the ECB 'to impose the requirement of authorisation on the [QLH] acquisition or increase'.[57] Moreover, he considered that the two new pleas that alleged the illegality of the Bank of Italy's preparatory acts, considered inadmissible in first instance, were infringing the applicants' right to effective judicial protection, as enshrined in Article 47 of the Charter of

[49] Case C-219/17 *Berlusconi and Fininvest* (ECLI:EU:C:2018:1023) para 42

[50] ibid. paras 43-44

[51] ibid. para 48

[52] Case T-913/16 *Finanziaria d'investimento Fininvest SpA (Fininvest) and Silvio Berlusconi v ECB* (ECLI:EU:T:2022:279)

[53] ibid. para 49

[54] ibid. para 51

[55] Filippo Annunziata, 'Op-Ed: "Qualifying Shareholders and the Fit and Proper Assessment. A New Chapter in Fininvest-Berlusconi v ECB (Case T-913/16)"' (*EU Law Live*, 25 May 2022) <https://eulawlive.com/op-ed-qualifying-shareholders-and-the-fit-and-proper-assessment-a-new-chapter-in-fininvest-berlusconi-v-ecb-case-t-913-16-by-filippo-annunziata/> accessed 25 August 2024.

[56] Opinion of AG Campos Sánchez-Bordona in Case *Fininvest v ECB and Others* (Joined Cases C-512/22 P *Fininvest v ECB* and C-513/22 P *Others Berlusconi v ECB and Fininvest* ECLI:EU:C:2024:414)

[57] ibid. para 51

Fundamental Rights.[58] This will be clarified in the upcoming judgment in Joined Cases C-512/22 P *Fininvest v ECB* and C-513/22 P *Others Berlusconi v ECB and Fininvest*. Moreover, another pending case before the General Court is seeking annulment of a negative QLH decision, on the grounds, *inter alia*, of infringements of the QLH assessment procedure and the right to be heard.[59]

The case law in the area of QLH procedures highlighted features of the ECB's decision-making process, the relationship between the ECB and the NCAs, as well as points of EU substantive law and their interpretation. Forthcoming case law may elaborate further on due process requirements and QLH compound processes.[60]

2.2.2. ECB's consolidated supervision

The scope of ECB's direct banking supervision was challenged as regards its consolidated supervision over a group headed by an entity that is not, legally, a credit institution. It constituted the second appeal ever brought in the area of prudential supervision. In that specific case, the Court of Justice examined in detail the legal basis of the SSM, i.e. Article 127(6) TFEU, and objectives attached to prudential supervision.

In *Crédit Mutuel Arkéa v ECB*,[61] the credit institution sought, unsuccessfully, the annulment of prudential requirements set for the *Crédit Mutuel* group by challenging the ECB's competence for prudential supervision. In essence, it argued against ECB's consolidated prudential supervision over institutions affiliated to the central body – *Confédération Nationale du Crédit Mutuel* (CNCM), considering that the latter is not a credit institution.

At the heart of banking governance, this case grounded the objectives of the system, based on Article 127(6) TFEU and the SSM regulatory scheme,[62] as it confirmed that the central body of a group does not have to be a credit institution. In particular, the Court of Justice considered that the ECB 'must be able to exercise prudential supervision on a consolidated basis over a group such as that referred to in Article 2(21)(c) of [the SSM Framework Regulation], *irrespective of the legal form of the central body* to which the entities forming part of that group are affiliated and provided that the conditions laid down in Article 10 of [CRR] are fulfilled' (emphasis added).[63]

The Court of Justice's judgment is important for asserting prudential supervision, right after the *L-Bank* case (see section 2.1), and the fact that a specific banking governance structure as the one of CNCM does not hinder the application of prudential rules set in the CRR and SSM Framework Regulation.[64] This case also has implications for the application of national law referred in Article 10 CRR – issue which we examine next.

[58] ibid. paras 107-108

[59] Case T-366/23, *YH v ECB*, pending

[60] Joined Cases C-512/22 P and C-513/22 P and Case T-366/23, pending

[61] Joined Cases C-152/18 P and C-153/18 P *Crédit Mutuel Arkéa v ECB* (ECLI:EU:C:2019:810). Before the appeal, the General Court had upheld the ECB's decisions.

[62] ibid. paras 53-63

[63] ibid. para 65, and in line with Advocate General Pitruzzella's Opinion of 18 June 2019 (ECLI:EU:C:2019:505), paras 62-64

[64] The Court upheld the General Court's finding that neither Article 10(1)(b) nor Article 11(4) CRR mandates that a central body must have credit institution status for Article 2(21)(c) of the SSM Framework Regulation to apply.

2.2.3. Application of National Law

In the SSM Regulation, the legislators introduced a provision according to which the ECB applies national law. Namely, as per Article 4(3) SSM Regulation, in its supervisory tasks, 'and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and *where this Union law is composed of Directives*, the national legislation transposing those Directives. Where the relevant Union law is *composed of Regulations* and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options' (emphasis added). In sum, this provision allows the ECB to apply, interpret and enforce national laws implementing EU Directives or exerting options granted to Member States in EU Regulations. The application of national law by EU institutions, to this extent and outside the judiciary in an administrative capacity, is unprecedented in EU Law and shapes the way the EU legal order interacts with national legal orders.[65]

The following focuses mainly on the case *Francesca Corneli v ECB*. It is important to note earlier cases, such as *Crédit Mutuel Arkéa v ECB*[66], which also raised points of national law in first instance and in appeal,[67] as well as in *Crédit Agricole and others* (T-133/16 to T-136/16),[68] and the two cases related to *Berlusconi and Fininvest* examined above for QLH procedures.

In the case *Francesca Corneli v ECB* (T-502/19),[69] the General Court circumscribed the interaction between EU and national law in the field of banking supervision. In a nutshell, its Extended Chamber's judgment considered that the ECB must respect national law, regardless of a breach of EU Law by the transposing national law. This led to the annulment of the ECB's decision to place *Banca Carige SpA* under temporary administration (see Box 4.). This judgment, under appeal, has severe limitations considering it can constrain EU institutions to enforce a national legal framework that did not transpose adequately EU Law.[70]

[65] Florin Coman-Kund and Fabian Amtenbrink, 'On the Scope and Limits of the Application of National Law by the European Central Bank within the Single Supervisory Mechanism' (2018) 33 Banking & Finance Law Review 133; Andreas Witte, 'The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?' (2014) 21 Maastricht Journal of European and Comparative Law 89.

[66] Examined above, see Joint Cases C-152/18 P and C-153/18 P *Crédit Mutuel Arkéa v ECB* (ECLI:EU:C:2019:810). Before the appeal, the General Court had upheld the ECB's decisions.

[67] Daniel Sarmiento, 'National Law as a Point of Law in Appeals at the Court of Justice. The Case of Crédit Mutuel Arkéa/ECB' (*EU Law Live*, 16 September 2019) <https://eulawlive.com/2019/10/08/national-law-as-a-point-of-law-in-appeals-at-the-court-of-justice-the-case-of-credit-mutuel-arkea-ecb/> accessed 8 October 2019.

[68] Examined below, see Joined Cases T-133/16 to T-136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence and Others v ECB* (ECLI:EU:T:2018:219)

[69] Case T-502/19, *Francesca Corneli* v *ECB* (T-502/19, EU:T:2022:627). This case law is also relevant for shareholders' standing insofar as the General Court considered that Ms Corneli is directly and individually concerned (paras 54 and 76). See the analysis on the *Trasta* judgment C-663/17 P, C-665/17 P and C-669/17 P.

[70] The BRRD/Directive 2014/59/EU was transposed by the Italian Consolidated Law on Banking.

Box 4: *Francesca Corneli v ECB* (T-502/19) and limits to the duty of conform interpretation

The case opposed a shareholder of Banca Carige SpA to the ECB, in which the European Commission intervened in support. The Italian bank had been under the direct prudential supervision of the ECB since the start of the SSM in 2014. However, the bank's financial situation deteriorated dramatically in 2017 and 2018. Following failed recapitalisation and a wave of bank board members' resignations, the ECB stepped in and adopted temporary administration measures. The shareholder of the bank, Ms Corneli, opposed this measure and challenged its validity before the General Court, seeking the annulment of the ECB's decisions[71] to place the bank under temporary administration, and the three decisions that extended that measure.

The ECB fulfilled its responsibility to apply national law and did so in accordance with the duty of conform interpretation. It gave precedence to an interpretation of Italian legislation in light of Union law – Article 29 of the BRRD – to appoint temporary administration.[72] However, this happened in a situation in which national law – Article 69*octiesdecies* and Article 70 of the Consolidated Law on Banking – was not compatible with Union law. The opposite would, indeed, create an 'anomaly'[73] in which the ECB as a Union institution applies a national provision contrary to Union law. However, the General Court revolves to the limits of the principle of conforming interpretation to justify its stance.[74]

The General Court, in its judgment of 12 October 2022, followed a highly formalistic approach. The judgment led to the annulment of the ECB's measures of temporary administration and its following extension in duration. It considered the ECB's interpretation of an EU legal provision to be *contra legem*, while it took national law as reference point. The General Court in that case did not see a conflict of law. The outcome of this judicial review gave rise to diverse inconsistencies: a *blank over* the principle of legality and the principle of primacy of EU Law. The General Court also falls short of fully understanding Article 4(3) of the SSM Regulation in its supervisory context and the goals of the EU Resolution framework.

As this judgment is under appeal,[75] it could still be reversed to give precedence to the principle of primacy of Union law and a sounder interpretation of Article 4(3) of the SSM regulation to ensure effective enforcement in banking supervision.

2.2.4. Enforcement

The enforcement powers of European supervisors have been bolstered over the last decade through banking legislative packages with the objective to foster compliance with regulatory requirements and supervisory measures. However, supervised entities contested in some instances the fines received, with the annulment of the ECB's decisions on procedural grounds. Following case law, we can observe developments both in supervisory practice and in the legal framework considering the latest legislative review from 2024 (see Box 5.).

[71] ECB Decision ECB-SSM-2019-ITCAR-11 of 1 January 2019 and ECB Decision ECB-SSM-2019-ITCAR-13 of 29 March 2019

[72] Italian law did not transpose the BRRD correctly: When faced with a significant financial deterioration, the Italian law proposes the removal of senior management and not the appointment of temporary administration in this specific context.

[73] Daniel Sarmiento, 'Op-Ed: "Setting the Limits of Implementation of National Law by EU Institutions: The Corneli v ECB Case (T-502/19)"' (*EU Law Live*, 24 October 2022) <https://eulawlive.com/op-ed-setting-the-limits-of-implementation-of-national-law-by-eu-institutions-the-corneli-v-ecb-case-t-502-19-by-daniel-sarmiento/> accessed 16 March 2023.

[74] Filippo Annunziata and Thomas de Arruda, 'The Corneli Case (T-502/19). Challenges and Issues in the Application of National Law by the ECB and EU Courts - Weekend Edition N°131' (*EU Law Live*, 18 February 2023) 8 <https://eulawlive.com/weekend-edition/weekend-edition-no131/>.

[75] Case C-777/22 P *ECB v Corneli*, pending and Case C-789/22 P European Commission v Corneli, pending

Sanctions is a general term that reflects the supervisory powers of the ECB to adopt decisions (or regulation) when facing breaches of Union Law, as per Article 18 SSM Regulation. Enforcement measures include the adoption of administrative measures or fines, in the form of administrative pecuniary penalties and periodic penalty payments, in case of ongoing breaches of prudential requirements set in supervisory decisions/ECB regulations. This breach can be made intentionally or negligently.

To start with a general observation, litigation remains moderate in this area at EU level, while in contrast, litigation seems more active at national level, with a total number of proceedings of 371 in 2023, of which 18 were initiated at the ECB's request.[76] It is worth noting that the infringement of national rules that transpose or implement Union law falls under the responsibility of NCAs, which are also equipped with supervisory powers in this area, and may be requested by the ECB to initiate a proceeding. Upcoming litigation outcomes regarding supervisory sanctions are indicated on the ECB Banking Supervision webpage, while what happened at national level is reported in Annual Reports on Sanctioning Activities in the SSM.[77]

The first set of case law in this area had a positive implication as it enticed the ECB to clarify its methodology used to set the amounts of the penalties.[78] The cases *Crédit Agricole v ECB* (T-576/18), *Crédit Agricole Corporate and Investment Bank v ECB* (T-577/18), and *CA Consumer Finance v ECB* (T-578/18)[79] were the first judgments concerning administrative pecuniary penalties imposed by the ECB in its supervisory arm, together with Case *T-203/18 VQ v ECB* (see hereinafter).[80] The General Court partly annulled the ECB's decisions for inadequate reasoning, while confirming a breach of EU Law committed by the credit institutions.

In the Cases *Crédit Agricole and others*, the ECB considered the credit institutions classified capital instruments as Common Equity Tier (CET) 1 without obtaining prior permission, which is in breach of EU prudential regulation. They breached in particular Article 26(3) of the CRR as regards their issuance of ordinary shares and the classification of capital instruments as CET1 instruments in quarterly reporting on own funds and public disclosures. The ECB decided to impose administrative penalties for continued breaches of these requirements on 16 July 2018, with three decisions addressed to the respective credit institutions.[81]

The General Court confirmed that the credit institutions had breached prudential requirements, but that the ECB had failed in stating the reasons to justify the amounts of the pecuniary penalties, which undermined essential procedural requirements in administrative

[76] ECB, 'Annual Report on Sanctioning Activities in the SSM in 2023' (2024) 3.

[77] ECB, 'Supervisory Sanctions' (*ECB Banking Supervision*, 23 May 2024) <https://www.bankingsupervision.europa.eu/banking/sanctions/html/index.en.html> accessed 23 August 2024.

[78] ECB, 'Guide to the Method of Setting Administrative Pecuniary Penalties Pursuant to Article 18(1) and (7) of Council Regulation (EU) No 1024/2013' (2021) <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.guidetothemethodofsettingadministrativepecuniarypenalties_202103~400cbafa55.en.pdf>.

[79] Case T-576/18 *Crédit agricole v ECB* (ECLI:EU:T:2020:304), *Crédit Agricole Corporate and Investment Bank v ECB* (T-577/18, ECLI:EU:T:2020:305), and *CA Consumer Finance v ECB* (T-578/18, ECLI:EU:T:2020:306) . The appeals, Case before the Court of Justice C-456/20 P, led to an order that considered the appeals partly manifestly inadmissible and unfounded.

[80] See Christy Ann Petit, "First ECB penalties partly annulled: prudent banks and reasoned administration", EU Law Live, 10 July 2020, and Laura Wissink, 'The VQ Case T-203/18: Administrative Penalties by the ECB under Judicial Scrutiny' in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing 2021).

[81] Available and published on the ECB Banking Supervision website, 'Supervisory sanctions' https://www.bankingsupervision.europa.eu/banking/sanctions/html/index.en.html (last accessed 21 August 2024)

procedures. Importantly, the obligation to state the reasoning is part of the right to be heard and the adversarial principle. Moreover, safeguarding procedural rights of credit institutions in administrative procedures is paramount in cases in which the ECB holds wide discretion to determine the amount of the pecuniary penalty.[82]

Besides, Case *T-203/18 VQ v ECB* was rendered on the same date, tackling the bank's failure to request the ECB's prior permission to repurchase its own CET1 instruments (both negligently and intentionally).[83] Moreover, a new issue dealt with the (lack of) anonymisation in the publication of the ECB's decision setting the administrative pecuniary penalty of 1,6 million euros. In this regard, the Court considered that anonymisation of the penalties published is an exception,[84] in line with Article 132(1)(b) SSM Framework Regulation. The latter provision states the eventuality in which publication would cause 'disproportionate damage to the supervised entity'. This judicial stance must be welcomed to guarantee the effectiveness of enforcement in prudential supervision, *inter alia* with direct dissuasive effect of penalties and attached effects in terms of reputation, following their publication.

This set of the judgments is the only, to date, that led to the partial annulment of supervisory decisions adopted by the ECB which had set pecuniary penalties for breaches of EU prudential regulation. After that, the ECB published a Guide to the method of setting administrative pecuniary penalties.[85]

[82] Case T-576/18 *Crédit agricole v ECB* (ECLI:EU:T:2020:304), para 133.

[83] Case T-203/18 *VQ v ECB* (EU:T:2018:261), para 65

[84] ibid., para 79

[85] ECB, 'Guide to the Method of Setting Administrative Pecuniary Penalties Pursuant to Article 18(1) and (7) of Council Regulation (EU) No 1024/2013' (n 78).

Box 5: CRD VI and the enhancement of supervisory powers for effective enforcement

In the area of administrative measures and sanctions, the legislative amendments adopted in 2024 are the most significant with the aim of ensuring the effectiveness of supervisory tools and powers to sanction bank's actual misconduct and ensure deterrence, and ultimately that the SSM performs its supervisory functions effectively.[86] Overall, the co-legislators added periodic penalty payments and introduced procedural safeguards for the effective application of penalties when administrative and criminal penalties are cumulated on because of the same breach.

Yet, there are still disparities in enforcement within the BU as we observe a minimum level of harmonisation in sanctioning powers (the transposition of the CRD is uneven as regards competent authorities' sanctioning powers across Member States).[87] It remains to be seen after the CRD VI transposition – while this will not change the nature of the legal act as a directive.

2.3. Administrative review

The judicial review by EU Courts may refer to prior internal administrative reviews of the contested supervisory decisions,[88] as already mentioned in the *L-Bank* case above. After examining the findings of the EU Courts regarding *Trasta*, we provide an overview of the case law referenced in EU Courts cases and ECB Annual Reports on Supervisory Activities (see Table 1).

The ECB's withdrawal decision for *Trasta* had been subject to an internal administrative review by the ABoR and replaced by a second ECB decision after its review, in accordance with Article 24 SSM Regulation. The ABoR had considered the case admissible for internal review, but held that the ECB's withdrawal decision did not entail procedural and substantive breaches, and that it was 'sufficiently reasoned and proportionate, while recommending that the governing body of the ECB clarify certain elements'.[89] Both the first ECB decision of 3 March 2016, and the following one issued after the ABoR's review on 11 July 2026, were contested in legal proceedings.[90]

In Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *ECB and Others* v *Trasta Komercbanka and Others*, the Court of Justice reversed the General Court's stance on admissibility, and considered the action brought by the bank admissible. It therefore referred the case back to the General Court. In an order,[91] the latter confirmed that the first withdrawal decision was replaced 'with retroactive effect, by an identical act, which is not affected by the potential annulment of the first act'.[92] The General Court held that the interests of the parties are protected by the possibility to introduce judicial reviews against the second act, adopted post-administrative review (both annulment and action for damage). Therefore, the General Court

[86] See amended Articles 66, 67 and 70 CRD VI.

[87] ECB, 'Annual Report on Sanctioning Activities in the SSM in 2023' (n 76) 1.

[88] Eleni Koupepidou, 'Administrative Pre-Litigation Review Mechanism in the SSM: The Administrative Board of Review' in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing 2021).

[89] Case T-247/16 *Fursin and Others v ECB* (ECLI:EU:T:2017:623), para 7

[90] For other actions: Case T-698/16 *Trasta Komercbanka and others v ECB* (ECLI:EU:T:2022:737). The challenge in that Case was unsuccessful as the General Court dismissed the action in its entirety. It is subject to an appeal (Case C-90/23 P *Trasta Komercbanka v ECB* pending), while another was rejected because the liquidator did not have the power of attorney to act in the litigation (Case C-103/23 P *Trasta Komercbanka v ECB* (ECLI:EU:C:2024:483).

[91] Order of 17 November 2021 Case T-247/16 RENV

[92] ibid. para 60

considered that the action had become devoid of purpose and the applicant had lost interest in seeking the annulment[93] of the first withdrawal decision, considered replaced retroactively.

The General Court decided in a similar way in *Heikki Niemelä and Others v ECB*, where the initial decision was replaced, and whose outcome was the 'definitive disappearance of the original decision from the legal order'.[94] An appeal is pending,[95] and may reverse this finding, should the Court follow the Opinion of AG Kokott who considered that there can be an interest to challenge the first decision, adopted before the ABoR's internal administrative review.[96] Such a reversal would be significant, not only for the interpretation of the legal framework, but also for the potential actions for damages.

The ABoR's work is described through some aggregated some data, made available in an overview of the ABoR's work as of September 2022. [97] This overview is based on judicial scrutiny, which made information about the ABoR's Opinions available publicly, and on general reporting that did not identify the banks concerned by the ABoR internal administrative review. In some cases, the bank may have had recourse only to the internal administrative review (e.g. for internal models or on-site inspections). Moreover, there could be cases where, while judicial review was pursued, the EU Courts may have not referred to the prior administrative review in their decisions (hypothesis unchecked but considered unlikely).

Table 1: Scope of internal administrative review as referenced in ABoR's work and ECB Annual Report on Supervisory Activities

Subject matter covered by administrative review / judicial review	Case law and ECB Annual Reports on Supervisory Activities
Significance of credit institutions	L-Bank (Cases T-122/15 and C-450/17 P)
SREP decision and finding wide powers for the ECB under Article 16 of the SSM Regulation	Arkéa (Cases T-712/15, T-52/16, C-152/18 P and C-153/18 P)
Combination of executive and non-executive functions: The General Court came to the same conclusions as the ABoR while following a separate line of reasoning	Crédit Agricole (Cases T-133/16, T-134/16 and T-135/16)
The withdrawal of a banking licence together with the preliminary question of shareholder standing in Trasta	Trasta (Cases T-247/16, T-698/16 and C-663/17 P, C-665/17 P and C-669/17 P)
Withdrawal of authorisation as a credit institution	Niemelä and Others (Case T-321/17)
SREP	BNP Paribas (Cases T-150/18 and T-345/18)
Withdrawal of authorisation as a credit institution	Ukrselhosprom PCF and Versobank (Cases T-351/18 and T-584/18)

[93] ibid. para 62

[94] Case T-321/17 *Niemelä e a. v ECB* (ECLI:EU:T:2021:942) para 45

[95] Case C-181/22 P *Nemea Bank and Others v ECB*, pending

[96] Opinion of Advocate General Kokott in C-181/22 P *Nemea Bank and Others v ECB*, 30 November 2023; (ECLI:EU:C:2023:935) paras 61-63 and 64-74. This would change also the conclusions from Versobank.

[97] Completed with the Annual Reports for 2022 and 2023, see also ECB, 'Administrative Board of Review: Eight Years of Experience Reviewing ECB Supervisory Decisions' 8–9 <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.aborreview202212~ce9fb4e503.en.pdf>.

The imposition of sanctions	VQ (Case T-203/18)
significance cases	Annual Report 2014
Corporate governance, and compliance with the supervisory requirements, withdrawal of a licence	Annual Reports 2016, 2017, 2018 and 2019
Administrative sanctions, including anonymising ECB decisions	Annual Reports 2017 and 2019
Acquisition of qualifying holdings	Annual Reports 2018 and 2019
Internal models	Annual Reports 2019 and 2020
On-site Inspections	Annual Report 2020
Power to adopt supervisory measures based on national law	Annual Report 2021
Principle of proportionality	Annual Report 2022
Withdrawal of banking licences by the ECB	Annual Report 2023

3. BANK RESOLUTION

This section discusses two types of cases relating to the Single Resolution Mechanism: the SRF ex-ante contributions (3.1.) and the perimeter of resolution-decision making (3.2.). As we will discuss, one important aspect relates to the liability of the SRB and/or the European Commission as the ultimate decision taker of the resolution (or non-resolution) decision. We also acknowledge the work of the SRB Appeal Panel (3.3.), although it is limited in terms of substantive areas.

3.1. Most contentious area of litigation: SRF ex-ante contributions

The Single Resolution Fund (SRF) *ex-ante* contributions have raised intense litigation since the start of the operations of the SRM. Banks challenged those contributions set in the SRB's decisions from 2016 onwards, with a 'growing corpus of jurisprudence'[98] on the resolution framework and, in particular, the determination of SRF *ex-ante* contributions. Indeed, litigation accelerated over years, and, from 2016 until 2023, 126 legal actions were introduced regarding the SRB's decisions setting ex-ante contributions.[99]

3.1.1. SRF status and calculations of ex-ante contributions

The SRF is designed to provide financial support in the resolution of banks that are failing or likely to fail, enabling the SRB to effectively use resolution tools. It acts as an "emergency fund" and helps prevent the use of taxpayers' money. The Fund has been established over eight years since January 2016 through contributions from the banking sector, also called levies. As

[98] Christy Ann Petit, "SRF ex-ante contributions and statement of reasons in SRB decisions before the General Court – 2023", *EU Law Live*, 2nd April 2024.
[99] SRB, 'Annual Report 2023' (Single Resolution Board 2024) 51.

of February 2024, the SRF had accumulated €78 billion,[100] with its resources now fully mutualised following the end of the transitional period on 31 December 2023. It has confirmed that it will not collect regular annual contributions in 2024, and – in the future – it only would 'in the event of specific circumstances or resolution actions involving the use of the SRF.'[101] We do not know yet about SRF contributions in 2025, but more information will be available in the third quarter of 2024.[102]

The calculations of *ex-ante* contributions to the SRF, applicable for each year, are set in an administrative decision adopted by the SRB, following Article 70(2) of the SRM Regulation.[103] The primary issue centres around the higher *ex-ante* contributions required from certain institutions, which are allowed by the legal provisions in the resolution framework.

Overall, the General Court annulled the SRB's decisions setting the *ex-ante* contributions mostly on formal procedural grounds. The SRB has already appealed in some instances, which will allow the Court of Justice to elaborate further on substantive law aspects related to those contributions. The following focuses on selected case law with challenges introduced by some banks contesting the 2017, 2021 and 2022 ex-ante contributions setting precedent on the matter. However, several unanswered questions could be clarified – including upon appeals (see the Appendix) – and in relation to the 2023 ex-ante contributions (which are the most challenged ones).

3.1.2. *Landesbank Baden-Württemberg* – 2017 ex-ante contributions

In joined cases C-584/20 P and C-621/20 P, *Commission v Landesbank Baden-Württemberg and SRB and case SRB v Landesbank Baden-Württemberg*, the Court of Justice examined the SRF ex-ante contributions set for 2017 by the SRB.

The General Court annulled the SRB decision setting the 2017 ex-ante contributions on the basis of inadequate reasoning.[104] In appeal, the Court of Justice set aside the judgment by the General Court but annulled the SRB's decision on different grounds. The Court considered that the General Court infringed the principle of *audi alteram partem* in respect of the SRB and erred in law in the interpretation of the obligation to state reasons.[105]

First, the SRB was not provided the opportunity to submit evidence in relation to the authentication of the SRB decision – raised by the General Court in its own motion. Second, the Court considered that the General Court had interpreted the statement of reasons too extensively. In particular, the Court stated that 'it cannot be inferred from the case law of the Court that the statement of reasons for any decision of an EU institution, body, office or agency

[100] SRB Press release, 'Single Resolution Fund: No Expected Contribution in 2024 as Target Level Reached' (15 February 2024) <https://www.srb.europa.eu/en/content/single-resolution-fund-no-expected-contribution-2024-target-level-reached> accessed 17 March 2024.

[101] ibid.

[102] '2025 SRF Contributions Cycle' (29 July 2024) <https://www.srb.europa.eu/en/content/2025-srf-contributions-cycle> accessed 23 August 2024.

[103] The decisions are not published but some elements are available on the SRB website per year, see SRB, 'SRF levies (contributions)' https://www.srb.europa.eu/en/content/ex-ante-contributions-0

[104] Case T-411/17, *Landesbank Baden-Württemberg v SRB* (ECLI:EU:T:2020:435). The French Banking Federation intervened in the proceeding in support of Landesbank Baden-Württemberg, while Spain intervened in support of the Commission and the SRB.

[105] ibid. see paras 67, 72 and paras 124-125

imposing the payment of a sum of money on a private operator must necessarily include all the evidence enabling the addressee to verify the accuracy of the calculation of the amount of that sum of money.' [106]

The Court of Justice annulled the SRB decision on different grounds:[107] the SRB disclosed only a portion of the relevant information that could have been shared without compromising business secrets (including the 'limit values of each 'bin' and those of the relevant indicators').[108] An adequate statement of reasons must ensure that sufficient information is disclosed to the bank 'to understand how its individual situation was taken into account in calculating its 2017 *ex-ante* contribution to the SRF, relative to the situation of all the other financial institutions concerned.'[109] This seems, for now, settled case law considering similar outcomes in other cases.[110]

3.1.3. *Banque Postale and others* – 2021 ex-ante contributions

On 20 December 2023, the General Court rendered seven judgments: in *Banque postale v CRU*, T-383/21, *Confédération nationale du Crédit mutuel and Others v CRU*, T-384/21, *BPCE and Others v CRU*, T-385/21, *Société Générale and Others v CRU*, T-387/21, *Crédit Agricole and Others v CRU*, T-388/21, *Landesbank Baden-Württemberg v CRU*, T-389/21, and *BNP Paribas v CRU*, T-397/21. [111] These judgments represent just a small share of the litigation that is ongoing in relation to the 2021 *ex-ante* contributions (see Box 6.).

The General Court considered that the SRB failed to fulfil its obligation to state adequate reasons as regards the annual target level for the banks' SRF ex-ante contributions applicable for 2021. Indeed, the General Court identified inconsistencies in the determination of such annual target level when compared to the methodology the SRB presented during the hearing.[112] This flaw in the statement of reasons corresponds to the infringement of essential procedural requirements, but it is not an error affecting the substance of the decision itself.[113] Indeed, the SRB can request higher ex-ante contributions from some banks considering the resolution framework criteria that 'seek to ensure that institutions with more risky methods of operation are required to pay higher ex-ante contributions than those which have adopted a less risky model'.[114] In this way, those criteria seek to 'apportion the amount of the annual target level between all of the institutions concerned',[115] following the approach of the Court of Justice in Joined Cases C-584/20 P and C-621/20 P *Commission v Landesbank Baden-*

[106] ibid. para 105

[107] See also an analysis by Laura Wissink, 'Analysis: "Court of Justice Rules on Authentication and Statement of Reasons for SRB Decisions on Ex-ante SRF Contributions and Legality of Delegated Regulation 2015/63"' (*EU Law Live*, 26 July 2021) <https://eulawlive.com/analysis-court-of-justice-rules-on-authentication-and-statement-of-reasons-for-srb-decisions-on-ex-ante-srf-contributions-and-legality-of-delegated-regulation-2015-63-by-laura-wissi/> accessed 23 August 2024.

[108] Case T-411/17, *Landesbank Baden-Württemberg v SRB* (ECLI:EU:T:2020:435) paras 167-168.

[109] ibid. para 165, see also paras 122 and 171

[110] With the first instance judgment set aside and the SRB decision annulled insofar as it concerned the bank's ex-ante contributions for 2021, see Case C-663/20 P, *SRB v Hypo Vorarlberg Bank*, and Case C-664/20 P, *SRB v Portigon and Commission*.

[111] It should be noted that the SRB, as the defendant, was supported by the European Parliament, the Council of the EU, and the European Commission in those cases, except for Case T-389/21, where only the European Commission intervened in support.

[112] Case T-383/21 *Banque postale v CRU* (ECLI:EU:T:2023:845) paras 286-289, see also Christy Ann Petit, "SRF ex-ante contributions and statement of reasons in SRB decisions before the General Court – 2023", *EU Law Live*, 2nd April 2024.

[113] Case T-383/21 *Banque postale v CRU* (ECLI:EU:T:2023:845) paras 369-370

[114] ibid. para 165

[115] ibid. para 169

Württemberg and SRB and case SRB v Landesbank Baden-Württemberg (examined above in 3.1.2.).[116]

However, following the annulment on procedural grounds, to maintain legal certainty, the effects of the SRB decision were maintained until a new decision of the SRB was adopted, within a reasonable period of maximum six months.

Box 6: 2021 ex-ante contributions: progress on litigation and languages

In mid-2023, 2021 ex-ante contributions represented 24% of the pending cases concerning ex-ante contributions,[117] which have progressed since. In particular, seven judgments were rendered regarding the *ex-ante* contributions set for six banks headquartered in France and one in Germany in December 2023 (*Banque Postale and others* examined above).

On 20 March 2024, the General Court annulled the SRB decision on ex-ante contributions in relation to six other banks established in Germany. The challenge was based on different grounds, including procedural and substantive grounds, and in particular the lack of clarity and motivation, i.e. Case T-390/21 *DZ Bank v SRB*, Case T-391/21 *Deutsche Kreditbank v SRB*, Case T-392/21 *Landesbank Hessen-Thüringen Girozentrale v SRB*, Case T-394/21 *Bayerische Landesbank v SRB*, Case T-395/21 *DZ Hyp v SRB*, Case T-404/21 *DVB Bank v SRB*.

On 8 May 2024, the SRB decision was annulled by the General Court as regards Case T-393/21 *Max Heinr. Sutor v SRB*.

On 17 July 2024, the SRB decision was annulled as regards several credit institutions: Case T-396/21 *Deutsche Bank v SRB*, Case T-402/21 *UniCredit Bank AG v SRB*, Case T-403/21 *Norddeutsche Landesbank Girozentrale v SRB*, Case T-412/21 *Norddeutsche Landesbank Girozentrale v SRB* and Case T-142/22 *Landesbank Baden-Württemberg v SRB*.

3.1.4. *Dexia and others* – 2022 ex-ante contributions

One of the most recent cases published in April 2024 set a precedent as regards the upper limit to determine the SRF ex-ante contributions, followed then by a set of case laws published in May and July 2024 (see Box 7.).

Indeed, the General Court annulled the decision of the SRB on the 2022 SRF ex-ante contribution insofar as it concerns Dexia in Case T-411/22, *Dexia Crédit Local v SRB* because it exceeded an upper limit set by the SRM Regulation.[118] The SRB must ensure 'that the amount of the ex-ante contributions due by all the institutions authorised in [the participating Member States] does not exceed 12.5% of the forecast final target level',[119] in accordance with Article 70(2) of SRM Regulation, subparagraphs 1 and 4. However, as the SRB did acknowledge at the hearing, the amount of the 2022 ex-ante contributions exceeded that cap.[120] The General Court also confirmed that this requirement applied during the initial period of contributions to the SRF, i.e. from 2016 until 2023 as stated above, and as emphasized in earlier case law.[121]

[116] Cases C-584/20 P and C-621/20 P *Commission* v *Landesbank Baden-Württemberg and SRB* and *SRB v Landesbank Baden-Württemberg*, (EU:C:2021:601)
[117] SRB, 'Annual Report 2022' (Single Resolution Board 2023) 54.
[118] Case T-411/22, *Dexia Crédit Local v SRB* (ECLI:EU:T:2024:216)
[119] ibid. para 48
[120] ibid. para 64
[121] Ibid. para 30 and Case T-758/18 *ABLV Bank v SRB* (EU:T:2021:28), paras 68, 69 and 100

Therefore, the General Court upheld the action of Dexia and annulled the decision, and provisionally maintained its effects for a maximum period of six months (so, until October 2024 in this case), in line with previous case law above examined.[122] This case was appealed by the SRB, which argues that the legal provisions of the SRM Regulation were misinterpreted by the General Court, whose approach, inter alia, failed to observe the principle of sound administration, infringed the Meroni doctrine and, whose reasoning was inconsistent and circular.[123]

Box 7: 2022 ex-ante contributions: progress on litigation

In most recent cases, the General Court followed a similar reasoning and approach to the 12.5% cap of the forecast final target level in assessing the 2022 ex-ante contributions determined by the SRB, whose decision was contested insofar as it concerned some French credit institutions i.e. in Case T-391/22 *Société Générale and Others v SRB*, Case T-392/22 *Confédération nationale du Crédit mutuel v SRB*, Case T-393/22 *BPCE v SRB*, Case T-394/22 *La Banque postale*, Case T-410/22 *Crédit Agricole and Others v SRB*, Case T-420/22, *BNP Paribas v SRB*, as well as, next to other grounds for: Case T-406/22, *Volkskreditbank v SRB* and Case T-395/22, *Hypo Vorarlberg Bank v SRB*.

The General Court also highlighted in those cases the inconsistency between the methodology set in the legal framework and the SRB's methodology applied in its decision.

The development of the SRF ex-ante contributions jurisprudence will continue for some years considering several pending challenges, including for the 2023 *ex-ante* contributions (which is reported to be the highest share of litigations cases on the matter, with 38%).[124] The SRB's new, replacing, decisions to set the *ex-ante* contributions for banks that won their cases will need to be legally and procedurally sound to pass the potential new legal challenges introduced by some banks.

3.2. Shaping the perimeter of resolution decision-making

The Single Resolution Board as an EU agency has faced from early on questions to which extent EU institutions may delegate decision-making power and discretion to EU agencies. With *Commission v SRB* (C-551/22 P), the Court of Justice may have 'revitalised' the Meroni doctrine, which is actively debated as regards the transformations of EU agencies and EU administrative law, and the potential erosion of the doctrine.[125] In the case law examined, EU Courts confronted the intricacies and complexity of the resolution decision-making procedure within the SRM. This includes the assessment of the nature of the legal acts and measures adopted along the resolution process, both the ECB's failing or likely to fail (FOLTF) assessment (one of the conditions for resolution) and the SRB decision for resolution (or no resolution), and as a result, their justiciability.

[122] It should be noted that a more recent judgment even extended this period to twelve months. See Case T-599/22 *Hypo Vorarlberg Bank* v CRU (ECLI:EU:T:2024:587)

[123] Appeal brought on 26 June 2024 by the SRB against the judgment of the General Court (Eighth Chamber, Extended Composition) delivered on 10 April 2024 in Case T-411/22, SRB v Dexia, application published *OJ C/2024/4958*. (Case C-454/24 P)

[124] SRB, 'Annual Report 2023' (n 99) 53.

[125] Marco Bodellini and Giulio Giacomo Cimini, 'Op-Ed: "And Meroni Spoke Again – the SRB Does Not Resolve Banks, the Commission Does It"' (*EU Law Live*, 12 July 2024) <https://eulawlive.com/op-ed-and-meroni-spoke-again-the-srb-does-not-resolve-banks-the-commission-does-it/> accessed 23 August 2024; Marta Simoncini, 'Op-Ed: "'Live and Let Die?' The Meroni Doctrine in 2023"' (*EU Law Live*, 26 September 2023) <https://eulawlive.com/op-ed-live-and-let-die-the-meroni-doctrine-in-2023-by-marta-simoncini/> accessed 23 August 2024.

3.2.1. Judicial review of the Resolution scheme

The EU Courts examined the 'resolution scheme' and its admissibility for legal challenge, giving an important division line among the decision-makers and bodies involved in the resolution process. In particular, the Court of Justice is examining the appeals[126] that followed the General Court's dismissal of several actions brought against the SRB resolution scheme decision for Banco Popular Español, S.A.[127] These were, in 2022, the initial steps of judicial scrutiny over the resolution scheme adopted by the SRB.

The judicial interpretation matters significantly for the parties' right to introduce a legal challenge and identify against which act(s) and which bodies involved in the resolution procedure/process. Put schematically, the SRB transmits the resolution scheme to the European Commission within 24 hours and the Commission decides on its endorsement or objection within 12 hours, in accordance with Article 18 SRM Regulation.[128]

Following an appeal introduced by the European Commission against the decision of the General Court in Case T-481/17, the Grand Chamber of the Court of Justice delivered its judgment in June 2024 in *Commission v SRB* (C-551/22 P). It revolved around two key questions. First, whether the *resolution scheme* is capable of producing binding legal effects and constitutes an act that can be legally challenged. Second, if it is challengeable, who bears responsibility for the resolution scheme and, therefore, should be sued before the EU Courts in an action for annulment?

In the first instance, the Extended Composition of the General Court, of its own motion, considered that the resolution scheme is a challengeable act under Article 263 TFEU, and that the action was admissible as it is, namely against the SRB (even if it ultimately dismissed the action as unfounded).[129] The Advocate General Opinion differed: the legally responsible author is the Commission, therefore an action for annulment can 'only be brought against that institution'[130] and the resolution scheme has 'no independent legal existence', therefore it 'cannot be challenged independently of the Commission's endorsement'.[131]

The Court of Justice disagreed with the General Court and gave a stricter interpretation of the locus of discretion exerted within the resolution decision-making process, relying on the principles determined in the *Meroni* Doctrine (see also section 3.2.3 below).[132] This judicial review clarified the act that can be challenged – the endorsement by the Commission – and thereby identified the decision-maker liable for that act – an EU institution.

[126] Several appeals to the BPE resolution scheme are pending. See e.g. Case C-448/22 P *SFL v CRU*, Case C-541/22 P *García Fernández and Others v Commission and SRB*, Case C-535/22 P *Aeris Invest v Commission and CRU*

[127] Christy Ann Petit, "Financial stability objective and delegation of powers in resolution – a consolidation of EU case law. The 'Banco Popular' cases before the General Court", *EU Law Live*, 16 June 2022.

[128] It was not the case here but when the European Commission objects on grounds of public interest or there is a use of the SRF, it will transmit the scheme to the Council of the EU within 12 hours.

[129] Case T-481/17 *Fundación Tatiana Pérez de Guzmán el Bueno and SFL v SRB* (ECLI:EU:T:2022:311)

[130] Opinion of Advocate General Ćapeta delivered on 9 November 2023; ECLI:EU:C:2023:846 in Case C-551/22 P, in Commission v SRB, para 29

[131] Ibid, para 133

[132] Case *Meroni v High Authority* (EU:C:1958:7)

The Court considered that the resolution scheme is not a challengeable act that can be annulled under Article 263 TFEU, but the Commission endorsement decision can be.[133] The Court of Justice restricted the resolution action as 'definitely fixed' after the Commission's endorsement decision, which produces binding legal effects, for which the Commission and not the SRB must answer before the EU Courts.[134] In other words, the supervised entity must introduce a legal action against the European Commission's endorsement.[135]

3.2.2. Review of the FOLTF Assessment and (non) resolution decision

Joined Cases C-551/19 P and C-552/19 brought to the fore both the FOLTF assessment of the ECB for ABLV Bank and its subsidiary in Luxembourg, and the SRB (non) resolution decision.[136] The Court considered that 'the SRB's adoption of a resolution scheme, (…) or the decision not to adopt such a scheme may be the subject of proceedings before the Courts of the [EU], in the context of which the ECB's FOLTF assessment could be subject to judicial review.'[137] Therefore, this case law clarified that, while the FOLTF assessment is not an act open to challenge, it could be reviewed in a challenge against the SRB's decision.

Furthermore, the resolution procedure is regarded as 'a complex administrative procedure involving a number of authorities, only the outcome of which, resulting from the SRB's exercise of its power, may be subject to the judicial review provided for in Article 86(2) [SRM] regulation.'[138] The complex administrative procedure echoes the composite procedures that were mentioned as regards ECB's qualifying holding procedures (see section 2.2.1.).

In that case law, the Court also clarified the interaction of the ECB's FOLTF assessment with the SRB. It considered that the FOLTF assessment by the ECB – who has a primary but not exclusive power for such assessment – is not a binding act on the SRB.[139] These findings were also applied in a later judgment in *ABLV Bank AS v SRB*, Case T-280/18 (for which the appeal is still pending).[140] The FOLTF assessment of the ECB differs as it did not have a binding legal effect capable of affecting the appellants' interests, hence it is not considered an act open to challenge. However, judicial scrutiny can be limited to a review made in the presence of

[133] Decision 2017/1246 as cited in C-551/22 P *Commission v SRB* (ECLI:EU:C:2024:520), paras 96-97

[134] C-551/22 P *Commission v SRB* (ECLI:EU:C:2024:520), para 88

[135] Pending cases in appeal regarding Sberbank resolutions include for the two subsidiaries the Commission's decision endorsing the resolution scheme, see the appeal in Case C-791/23 P and Case C-792/23 P, while for the Parent it has been introduced against the valuation decision and the non-resolution decision, see Case C-793/23 P

[136] Cases C-551/19 P and C-552/19 P *ABLV Bank and Others* v *ECB* (EU:C:2021:369). In total four actions for annulment were introduced against the FOLTF assessments and the SRB decisions for ABLV Bank and its subsidiary in Luxembourg. The action by the shareholders were declared inadmissible, see *Case T-282/18, Bernis v SRB (ECLI:EU:T:2020:209) appealed in Case C-364/20 P Bernis v SRB, (ECLI:EU:C:2022:115)*, and Case T-281/18 *ABLV v ECB*; Case T-283/18 *Bernis v ECB*, appealed in Joined Cases *ABLV v ECB*, C-551/19 P and C-552/19. For all cases of FOLTF since 2017, see Christy Ann Petit, 'Failing or Likely to Fail: Banking Union Cooperation Tested since 2017' (2023) 45 *Journal of European Integration* 157.

[137] Joined Cases C-551/19 P and C-552/19 P *ABLV Bank and Others* v *ECB* (EU:C:2021:369) para 56

[138] ibid. para 66

[139] ibid. para 67, see also para 70. The SRB also has this power (see paras 67-68).

[140] Case T-280/18 *ABLV Bank AS v SRB* (ECLI:EU:T:2022:429), see also Barbora Budinská, '*ABLV Bank AS v SRB: judicial review of non-resolution decisions and failing or likely-to-fail assessments*', EU Law Live, 13 September 2022. Similar in Case T-732/19 *PNB Banka and Others v CRU* (ECLI:EU:T:2023:721)

complex economic assessments,[141] i.e. on procedures, statement of reasons, factual grounds and manifest errors of assessment or misuse of powers.[142]

In contrast, the General Court has considered that both the decision to adopt and the decision not to adopt a resolution decision constitute an act open to challenge, due to the legal effects produced vis-a-vis the entity.[143] The appeal to this case may lead to some adjustments insofar as the General Court recognised the broad discretion enjoyed the SRB[144] – which is in tension with case *Commission v SRB* (C-551/22 P) discussed hereinafter.

3.2.3. Locus of discretion in resolution decision-making and *Meroni* Doctrine

In case *Commission v SRB* (C-551/22 P),[145] the Court of Justice reversed the General Court's judgment and sided with the European Commission to consider its endorsement a reviewable act. It considered that 'the discretionary aspects of a resolution scheme, which relate both to the establishment of the resolution conditions and to the determination of the resolution tools, are inextricably linked to the more technical aspects of resolution.'[146] Thus, it disagreed with the General Court's approach that distinguished between the discretionary and technical aspects, where the former would be with the Commission and the latter with the SRB. It also rejected the view of the SRB and shareholders that, following the resolution framework, the 'role of the Commission and the Council is limited to participating in the resolution procedure and reviewing the discretionary aspects of the resolution scheme.'[147]

Therefore, the locus of the discretion is constrained by the precepts of the *Meroni* Doctrine, which prevent the delegation of a wide margin of discretion to agencies or autonomous entities not established by the Treaties. In the post-financial crisis period, the legislators therefore circumvented it with complex (resolution) decision-making processes that involve indeed EU institutions, like the European Commission in this case, and sometimes the Council of the EU.

3.3. SRB Appeal Panel

The SRB Appeal Panel's decisions are published on a thematic register, with anonymity granted to the appellants, with 106 decisions published as of June 2024.[148] In comparison, the ABoR's Opinions have their content accessible only in the context of judicial review (the EU Courts rely on the substance and reasoning of such Opinions) or, in abstract, through annual reporting (see section 2.3. above).

In contrast with the SSM, the SRM Regulation states the areas that can lead to an appeal against SRB decisions, e.g., MREL determination, impediments to resolution, simplified obligations,

[141] ibid. paras 91-92, 108
[142] Raffaele D'Ambrosio and others, 'Pandectae. Digest of the Case law on the Banking Union Jul-Dec 2022' (Banca d'Italia 2023) 96 21–22.
[143] Case T-280/18 *ABLV Bank AS v SRB* (ECLI:EU:T:2022:429) paras 35 and 82
[144] ibid. 108
[145] Also examined above in 3.2.1.
[146] C-551/22 P *Commission v SRB* (ECLI:EU:C:2024:520), para 87
[147] ibid, para 60
[148] SRB, 'Appeal Cases' (*Single Resolution Board*, 2024) <https://www.srb.europa.eu/en/cases/search> accessed 23 August 2024.

public access requests for documents, and contributions to administrative expenditure of the SRB,[149] as per Article 85(3) of the SRM Regulation.

This review mechanism is important as a quasi-judicial review step, which could be better connected to EU Courts' judicial review, and revised considering its narrow remit of competences.[150]

4. THE EUROPEAN BANKING UNION (EBU) AND OTHER FRAMEWORKS

This section discusses the interaction between the legal frameworks of the banking union and other legal frameworks; specifically, the dialogue (or tensions) between European and national Courts (4.1.), the interaction between supervisory rules and the AML framework (4.2.), and the limbos situations following the withdrawals of bank licences, which revealed flaws in (national) liquidation regimes (4.3.).

4.1. EBU and judicial dialogue

Preliminary references allow a judicial dialogue between national and EU Courts, which ultimately should aim at preserving conformity and uniformity in the application and interpretation of EU Law across Member States (under Article 267 TFEU). The judicial dialogue also entails the use, by EU Courts, of the interpretation of national provisions by national Courts. We will see that, in contrast, some points of substantive law did not lead to a preliminary reference – with the German Federal Constitutional Court by-passing a judicial dialogue with the Court of Justice. Overall, the first decade of the BU shows an initial judicial dialogue, though it could be reinforced.

First, as examined above, the Italian *Consiglio di Stato* introduced a preliminary reference to clarify the scope of judicial review of NCAs' preparatory acts in the context of qualifying holding procedures.[151] It also did so on the obligation of professional secrecy, and its implication for the NCAs' disclosure of confidential information in the context of commercial or civil proceedings, after liquidation.[152] Furthermore, a reference from the *Conseil d'État* led to a major ruling giving directions on EBA Guidelines' justiciability and their validity. The Court of Justice considered that EBA Guidelines EBA/GL/2015/18 are not legally binding and cannot be subject to an action for annulment, while it confirmed that those EBA Guidelines are valid under EU Law. This judicial approach has seen departing views considering the importance of such Guidelines (i.e. level 3 acts in the EU Single Rulebook providing interpretation) and the

[149] SRB, 'Annual Report 2023' (n 99) 53.

[150] Marco Lamandini and David Ramos Muñoz, 'Administrative Pre-Litigation Review Mechanism in the SRM: The SRM Appeal Panel' in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing 2021) 56–58.

[151] The Italian Council of State in Case C-219/17 *Berlusconi and Fininvest* (see section 2.21 above).

[152] Case C-594/16 *Enzo Buccioni v Banca d'Italia* (ECLI:EU:C:2018:717)

attached comply-or-explain mechanism [153] – which could give them another degree of bindingness in the BU overall and in the European System of Financial Supervision.

Second, judicial dialogue happens in the other direction: EU Courts also directly refer to national Courts' interpretation of national provisions, which applies settled case law and is not specific to BU-related cases.[154] In *Crédit Mutuel Arkéa v ECB*,[155] the Court of Justice relied on an interpretation of the French *Conseil d'État* given in a decision that strengthened the prudential obligations of the central body over the *Crédit Mutuel* network.[156] That *Conseil d'État*'s decision was delivered during the proceedings of the appeal, i.e. after the General Court's judgment. This case law showed the extent to which Article 4(3) of the SSM Regulation, which requires an EU institution to apply national law (see section 2.2.3. above), led to a complete judicial scrutiny of EU Courts. Indeed, in that case the Court examined national provisions as points of law, including by relying on the judicial interpretation of such provisions given within the national legal order.[157] It is worth noting that in Joined Cases *Crédit Agricole and others* (T-133/16 to T-136/16),[158] the General Court had done the same to interpret the meaning of the national provision transposing the CRD as regards bank's good governance and the prohibition to cumulate executive and non-executive functions,[159] and referred to another judgment of the French *Conseil d'État*. It sided with the ECB in considering that 'Article L. 511-58 of the *Code monétaire et financier* (CMF) precluded the appointment of the chairmen of the applicants' boards of directors as their 'effective directors''.[160] Finally, the cases rendered in *Berlusconi and Fininvest* also showed that the EU Courts were ready to provide their own interpretation of national substantive rules.[161]

Third, the German Federal Constitutional Court (GFCC) renounced from engaging in a judicial dialogue with the CJEU. Its Second Senate published a judgment on 30 July 2019,[162] which had many tensions with the EU Courts' jurisprudence established in the *L-Bank case,* discussed above (and reiterated in subsequent cases).[163] It is, overall, problematic from the viewpoint of the EU legal order and the principle of primacy of EU Law. Indeed, we find ourselves in a (not so new) situation where, according to the GFCC, the BU legal framework is considered

[153] Note the divergent approach in the Opinion of Advocate General Bobek in Case C-911/19 *FBF v ACPR* (ECLI:EU:C:2021:294), see an excellent analysis in Merijn Chamon and Nathan de Arriba-Sellier, 'FBF: On the Justiciability of Soft Law and Broadening the Discretion of EU Agencies: ECJ (Grand Chamber) 15 July 2021, Case C-911/19, Fédération Bancaire Française (FBF) v Autorité de Contrôle Prudentiel et de Résolution, ECLI:EU:C:2021:599' [2022] European Constitutional Law Review 1.

[154] See for instance, Case C-433/13 *European Commission v Slovak Republic* (ECLI:EU:C:2015:602) para 81

[155] See above, section 2.2.2., Joined Cases C-152/18 P and C-153/18 P *Crédit Mutuel Arkéa v ECB* (ECLI:EU:C:2019:810).

[156] Decision No 399413 of the (French) Conseil d'État (Council of State) of 9 March 2018, see also Joined Cases C-152/18 P and C-153/18 P *Crédit Mutuel Arkéa v ECB* paras 103-105

[157] Joined Cases C-152/18 P and C-153/18 P *Crédit Mutuel Arkéa v ECB* (ECLI:EU:C:2019:810), para 107

[158] Joined Cases T-133/16 to T-136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence and Others v ECB* (ECLI:EU:T:2018:219)

[159] Article 88(1)(e) of Directive 2013/36, transposed by Article L. 511-58 of the CMF

[160] Joined Cases T-133/16 to T-136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence and Others v ECB* (ECLI:EU:T:2018:219), para 102

[161] Annunziata and Arruda (n 74) 15.

[162] *Judgment of the Second Senate* [2019] BVerfG 2 BvR 1685/14, 2 BvR 2631/14.

[163] It is worth noting that for the GFCC the EU Courts' finding regarding exclusive competence and decentralised implementation is an obiter dictum, ibid.

compatible with national Constitutional Law, provided that it is interpreted in line with the GFCC conditions.[164]

The GFCC argued for an (overly) strict interpretation of the current BU frameworks.[165] While the GFCC did not consider the SSM Regulation was *ultra vires*, it did so by a circumvention and contestable view that the SSM Regulation does not ensure a 'full conferral of banking supervision' to the ECB, reproducing an old debate about the Treaty legal basis, i.e. Article 127(6) TFEU and its strict interpretation.[166] As regards the SRM, it emphasised the limits of discretion granted to the SRB and the absence of 'exclusive decision-making competence'[167] stressing the key role of the Commission – which is, to some extent sensible, in light of the *Meroni* doctrine and the current judicial developments on resolution decision-making (see section 3.2 above).

The GFCC withheld a judicial dialogue with the CJEU on the matters,[168] which for some reflects a rather laudable behaviour to avoid explicit disagreements and acknowledges the initial political compromises that have been found in the current BU framework.[169]

4.2. EBU and Anti-Money Laundering

In several cases that prompted litigation after the withdrawal of the bank's licence, the EU Courts were facing both prudential rules and regulatory requirements from the anti-money laundering and countering the financing of terrorism (AML/CFT) framework. This subsection gives a snapshot of several cases that elucidated money laundering risks or concerns in the EU Banking Sector over the first decade of the BU.

In *Versobank* v *ECB* (C-803/21),[170] the Court of Justice reasserted the exclusive competence of the ECB to withdraw authorisation for both SIs and LSIs, under Articles 4(1)(a) and 14(5) SSM Regulation,[171] and based on breaches of national AML/CFT provisions. The ECB withdrew the licence of Versobank (an LSI) considering its failure to put in place adequate governance arrangements as required by the Estonian Financial Supervisory Authority (FSA), its lack of an effective AML/CFT regime despite three on-site AML/CFT inspections, several meetings and notices issued by the FSA, its failure to implement proposed measures, and its submission of misleading and incorrect documents and information to the FSA.[172]

In that case law, the Court highlighted the link between AML/CFT and prudential supervision by focusing on the letter of the CRD in banking regulation and its connection with the (then) AML Directive 2005/60. In line with the General Court's reasoning, it restated the respective

[164] This comes back to the *Solange* saga, see Pietro Faraguna and Donato Messineo, 'Light and Shadows in the Bundesverfassungsgericht's Decision Upholding the European Banking Union' (2020) 57 Common Market Law Review 1629, 1640–2.

[165] Bundesverfassungsgericht Press release, 'If Interpreted Strictly, the Framework for the European Banking Union Does Not Exceed the Competences of the European Union, Judgment of 30 July 2019, 2 BvR 1685/14, 2 BvR 2631/14, Press Release No. 52/2019 of 30 July 2019' (30 July 2019) <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-052.html> accessed 5 August 2019

[166] *Banking Union Judgement* (n 162) para 161 and para 171 and seq.

[167] ibid para 259

[168] Raffaele D'Ambrosio and Donato Messineo (eds), *The German Federal Constitutional Court and the Banking Union*, vol 91 (Banca d'Italia 2021) 25–26.

[169] ibid 28

[170] Case C 803/21 P *Versobank v ECB* (EU:C:2023:630), from the appeal of Case T-351/18 found devoid of purpose and Case T-584/18

[171] ibid. paras 91, 94, 97, 98

[172] ibid. para 30

prudential and AML legal frameworks, in particular the fact that the CRD mentions serious breaches of the national AML/CFT provisions implementing AMLD to justify the withdrawal of a bank's authorisation.[173]

Therefore, this judgment asserted the ECB's exclusive competence for withdrawal, based on breaches of AML/CFT provisions and on a prior proposal by an NCA, and set a precedent for future case law.

Indeed, in *Anglo Austrian AAB AG v ECB* (T-797/19),[174] the General Court considered that the ECB's decision to withdraw Anglo Austrian AAB Bank's authorisation as a credit institution was justified by the serious breaches of AML/CFT rules by the bank. The ECB considered that *Anglo Austrian AAB AG* was unable to 'ensure a sound management of its risks',[175] based on the Austrian Financial Markets Supervisory Authority findings regarding the bank's serious, repeated or systematic breaches of AML/CFT and internal governance requirements. The General Court concluded that an administrative decision adopted by an NCA and a finding that the bank is liable for such serious breaches of its AML/CFT obligations under national law are considered sufficient grounds for the ECB's decision to withdraw that bank's authorisation.[176] While the appeal was pending at the time of writing,[177] Advocate General Ćapeta suggested to dismiss it, following the established case law.[178]

It is worth noting that, over the first decade of the BU, the failure of several banks provoked by (alleged or real) money laundering issues have prompted a review of the legal and institutional framework for AML – with the AML Single Rulebook and the forthcoming AML Authority – which should bring prudential and AML supervision cooperation to another level.

4.3. EBU and liquidation

The interaction of the BU framework with liquidation regimes determined under national law has shown limbo situations and differentiated treatment of entities that were deemed FOLTF across Member States. While the co-legislators are currently examining solutions to that limbo under the CMDI review, EU Courts have already come across such difficulty. Indeed, the important question of the interplay between bank's licence withdrawal and liquidation under national law provisions was at the heart of the *Trasta* case and *ABLV bank* case (examined in section 2.2.1. regarding their licence withdrawal decisions).

In *Trasta*, the Court emphasised that, after the licence withdrawal, the liquidation of Trasta was not the implementation of the withdrawal decision, i.e. 'EU rules make no provision for the liquidation of a credit institution whose authorisation has been withdrawn'.[179] Furthermore, national rules are very diverse across Member States for the procedures to organise the exit

[173] ibid. para 140, EU Law provisions cited therein, and paragraph 143 of the judgment under appeal

[174] Case T-797/19 *Anglo Austrian AAB AG v ECB* (ECLI:EU:T:2022:389)

[175] ibid. para 7

[176] ibid. para 50

[177] Case C-579/22 P, *Anglo Austrian AAB v ECB and Far East* (ECLI:EU:C:2024:731) with a request from the applicant to set aside the General Court judgment and annul the ECB's licence withdrawal decision, which was dismissed by the Court of Justice.

[178] Opinion of Advocate General Ćapeta delivered on 11 April 2024 in Case C-579/22 P (ECLI:EU:C:2024:296), paras 58-59, 62

[179] Joined cases *ECB and Others* v *Trasta Komercbanka and Others*, C-663/17 P, C-665/17 P and C-669/17 P, (EU:C:2019:923) para 114

from the market (i.e. from insolvency to special regimes for insolvency and liquidation), which is hampering the orderly and smooth exit of the banks.

In the case of *ABLV Bank AS* determined as FOLTF in 2018 and with a negative Public Interest Assessment by the SRB, the parent in Latvia was placed in *voluntary* liquidation by the shareholders (emphasis added).[180] Moreover, its subsidiary in Luxembourg was left in a limbo situation. While declared FOLTF, the latter was not able to exit the market for a long time. A suspension of payments regime was applied, and nearly two years later, a judicial liquidation procedure started. Overall, this situation showed the discrepancy of winding up procedures that should have taken place equally in Latvia and Luxembourg after the ECB's FOLTF assessment and the SRB's no public interest test outcome.

Those limbo situations – where there are risks of failing banks not properly exiting the markets – have not been fixed by the 2019 Banking Package (and revised Article 32b BRRD) but are indeed part of the current CMDI review. Some amendments are aiming at ensuring market exit, within a reasonable timeframe, currently under the legislators' review.[181]

5. MAIN TAKEAWAYS

This section summarises some of the major points discussed in this paper around selected topics.

1. SSM and SRM governance

As regards the systems for banking supervision and bank resolution, the CJEU has followed an EU integration approach. The will of the legislators was to assign to the ECB and the SRB, respectively, the responsibility for the effective and consistent functioning of the SSM (in accordance with Article 6(1) SSM Regulation) and of the SRM (in accordance with Article 7(1) SRM Regulation) and Courts have reinforced these responsibilities even where national institutions (NCAs or NRAs) are part of the decisions' preparation, and implementation processes.[182] These responsibilities are, however, overshadowed by the significant difference that the ECB is an EU institution, while the SRB is an EU agency, as showcased by the case law in the area of resolution decision-making, which, for now, drew a line between the European Commission's decision endorsement and the resolution decision by the SRB (see point 4 below).

The EU Courts asserted in several instances, from the *L-Bank* Case and seq., the exclusive competence of the ECB in prudential supervision for both SIs and LSIs, and responsibility for common supervisory procedures (the granting and withdrawal of licences, and the qualifying

[180] Box 11 European Commission, Commission staff working document impact assessment report accompanying the proposals for a directive of the European Parliament and Council amending directive 2014/59/EU as regards early intervention measures, conditions for resolution and financing of resolution action regulation of the European Parliament and Council amending regulation (EU) 806/2014 as regards early intervention measures, conditions for resolution and financing of resolution action directive of the European Parliament and Council amending directive 2014/49/EU as regards the scope of deposit protection, use of deposit guarantee schemes funds, cross-border cooperation, and transparency 2023 [SWD/2023/225 final].

[181] Article 32b(3) and 32b(4) BRRD, European Commission Proposal

[182] Christy Ann Petit, 'Differentiated Governance in the Banking Union: Single Mechanisms, Joint Teams, and Opting-Ins' (2022) 7 *European Papers - A Journal on Law and Integration* 889.

holding procedures). The EU case law has also explored the *locus standi* of applicants, especially for banks and shareholders. Pending case law will clarify whether the current stance is upheld and respects their right to effective judicial protection following the ECHR judgment in *Korporativna Targovska Banka AD v Bulgaria*.

Some of the case law discussed demonstrates the central role of the BU legal frameworks in providing entities the possibility to request internal administrative reviews (or the Appeal Panel in Resolution) and pursue judicial actions. However, the effects of internal reviews on legal rights and effective judicial protection in the context of the request for annulment of decisions are still being determined by the EU Courts' jurisprudence.

2. Application of National Law

While the application of national law is also relevant in the area of resolution (considering the BRRD), it has been primarily examined by EU Courts in the supervision area. The application of national law by EU institutions, in an administrative capacity and to this extent, is unprecedented in EU Law and shapes the way the EU legal order interacts with national legal orders. The *Corneli* case (under appeal) has given rise to an oddity where an EU institution can be obliged to apply national law that is in breach of EU Law. The shield that must be given to the principle of primacy of EU law could warrant a different approach by the EU Courts in cases where national laws contravene or infringe EU prudential regulation.

This legal and institutional feature – foreseeing the application of national law – has been replicated in the new AML supervisory system as Article 4(3) SSM Regulation has a twin in the AML supervisory system, namely, Article 5(6) of the AML Authority Regulation.[183]

3. Resolution: a series of annulment of SRF ex ante contributions decisions for some banks

The SRF *ex-ante* contributions have raised intense litigation since the start of the operations of the SRM. Several banks challenged those contributions set in SRB's decisions from 2016 onwards and are still very active in this field. Overall, the General Court annulled the SRB's decisions setting the *ex-ante* contributions mostly on formal procedural grounds (with inadequate reasoning and inconsistencies in the methodology). The SRB has already appealed in some instances, which will allow the Court of Justice to elaborate further on substantive law aspects related to those contributions (see the Appendix including selected pending case law). The paper focused on selected litigation contesting the 2017, 2021 and 2022 ex-ante contributions as regards specific banks, which set a precedent on the matter. However, several unanswered questions could still be clarified – including upon appeals (see the Appendix) – and in relation to the 2023 ex-ante contributions (which have been the most challenged ones).

4. Perimeter of resolution decision-making

With *Commission v SRB* (C-551/22 P) delivered in June 2024, the Court of Justice may have 'revitalised' the Meroni doctrine, which is actively debated considering the developments in EU 'agencification' in the financial area and beyond. In the case law examined in this paper, EU

[183] Regulation (EU) 2024/1620 of the European Parliament and of the Council of 31 May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010 OJ L, 2024/1620

Courts confronted the intricacies and complexity of the resolution decision-making procedure within the SRM. This started with the SRB resolution of Banco Popular Español, which were the initial steps of judicial scrutiny over the resolution scheme.

Judicial reviews covered the assessment of the nature of the legal acts and measures adopted along the resolution process, both the ECB's FOLTF assessment (one of the conditions for resolution) and the SRB's decision for resolution (or no resolution), and as a result, their justiciability. In this regard, the judicial interpretation matters significantly for the parties' right to introduce a legal challenge and to identify against which act(s) and which bodies involved in the resolution procedure a legal challenge can be introduced. The latest judicial review in *Commission v SRB* (C-551/22 P) took a stance as to the act that can be challenged – the endorsement by the Commission of the resolution scheme – and thereby identified the decision-maker liable for that act – an EU institution and not an EU agency.

5. Judicial review and judicial dialogue

Overall, the first decade of the BU shows an initial judicial dialogue, though it could be reinforced. This paper focused on functioning judicial dialogues between Italian/French national Courts and the CJEU, but a reticence to do so from the German Federal Constitutional Court. Several other preliminary references were not examined in the scope of this paper but have been coming up from Italian national Courts, and other EU Member States' national Courts.[184]

This shows an encouraging use of the preliminary rulings' route. However, considering the complexity of the regulatory frameworks and the margin for interpretation in some regulatory requirements (despite clarification provided by level 2 and level 3 acts in the EU Single Rulebook), we could expect national Courts to use this channel more promptly in the future decade – provided litigation happens in the first place.

Moreover, it could be warranted to guarantee access to an English version of the judgments more rapidly. For instance, in resolution litigation consulted for this paper, in most cases, the judgments were initially available in French, German or Spanish, following the language of the proceedings and working language of the CJEU, with few exceptions of judgments available in English.[185]

6. Fixing gaps and shortcomings in (national) legal frameworks

While it is clear that BU frameworks have been further harmonised over the past decades, in both the supervisory and resolution frameworks, Directives - i.e. the CRD VI and the forthcoming BRRD3 - may lead to an incomplete harmonisation across the EU due to the very nature of this EU Legal Act and insofar as they have to be transposed timely and accurately in national legal frameworks. It is hoped that the CMDI review will also address shortcomings in

[184] See, for instance, the preliminary references introduced by the Portuguese Supreme Administrative Court in Case C-83/20, *BPC Lux 2 Sàrl and Others v Banco de Portugal and Others* (ECLI:EU:C:2022:346); the Spanish provincial Court in Case C-410/20, *Banco Santander, SA v J.A.C. and M.C.P.R.* (ECLI:EU:C:2022:351); the Constitutional Court of Slovenia in C-45/21 *Banka Slovenije* v *Državni zbor Republike Slovenije* (ECLI:EU:C:2022:670) on the liability of central banks for resolution of banks and its compatibility with the independence of NCBs. This is not exhaustive as other courts have introduced a preliminary reference in those Member States as well as in Austria, Bulgaria, Germany, Latvia, Lithuania.

[185] e.g. T-383/21 *Banque postale v CRU* and T-388/21 *Landesbank Baden- Württemberg v CRU*.

insolvency/liquidation proceedings observed after the bank's licence withdrawals (and subject to judicial review). Those limbo situations – where there are risks of failing banks not properly exiting the markets – have not been fixed by the prior 2019 Banking Package (and revised Article 32b BRRD).

Furthermore, the EU Courts' judgment asserting the ECB's exclusive competence for withdrawal, which can be based on breaches of banks' governance and AML/CFT provisions and a prior proposal by an NCA determining the breaches, set a precedent for future case law. The evolution of EU secondary law also reinforces a functioning interplay between prudential and AML supervision. Indeed, the new AML Single Rulebook, which includes a directly applicable Regulation, contains specific provisions to enhance cooperation between prudential and AML supervisors. Therefore, we can hope for an efficient and timely handling of supervised entities involved in alleged or proven money laundering and terrorism financing activities, as well as their aftermath in prudential terms.

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APPENDIX

LIST OF SOME PENDING CASES TO FOLLOW IN BU LITIGATION

This list is based on pending cases indicated in the analysis conducted in this paper. It is not an exhaustive list.

- Application of National Law and standing of shareholders

Case C-777/22 P *ECB v Corneli*, and Case C-789/22 P European Commission v Corneli

- Withdrawal

Case C-90/23 P *Trasta Komercbanka v ECB* pending

Case C-181/22 P *Nemea Bank and Others v ECB*, pending

- Qualifying holdings

Case T-366/23, YH v ECB, pending

Case C-101/23 P, *PNB Banka v ECB* pending

Case C-102/23 P, *PNB Banka v ECB pending*

- SRF ex-ante contributions

Case C-454/24 P SRB v Dexia

- Resolution decision-making and justiciability of acts

Case C-602/22 P *ABLV Bank v CRU*

Case C-74/24 P *PNB Banka v SRB*

Case C-791/23 P *Sberbank v Commission and SRB*

Case C-792/23 P *Sberbank v Commission and SRB*

Case C-793/23 P *Sberbank v Commission and SRB*

- Actions in the context of BPE Resolution

Case C-448/22 P *SFL v CRU*

Case C-541/22 P *García Fernández and Others v Commission and SRB*

Case C-535/22 P *Aeris Invest v Commission and CRU*

This paper discusses EU case law developed over the past decade relating to decisions taken by the European Central Bank within the Single Supervisory Mechanism (SSM) and within the Single Resolution Mechanism (SRM). The cases centre around embracing and solidifying the BU framework, inter alia, with the admissibility to challenge ECB's supervisory and licence withdrawal decisions, the application of national law by the ECB in its supervisory competence and the methodology attached to the setting of administrative pecuniary penalties. Other cases concern the determination of the ex-ante contributions to the Single Resolution Fund, the perimeter of resolution decision-making, and the responsibility of the decision-making bodies involved in the resolution process.
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