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10 years of Banking Union case law

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IN-DEPTH ANALYSIS

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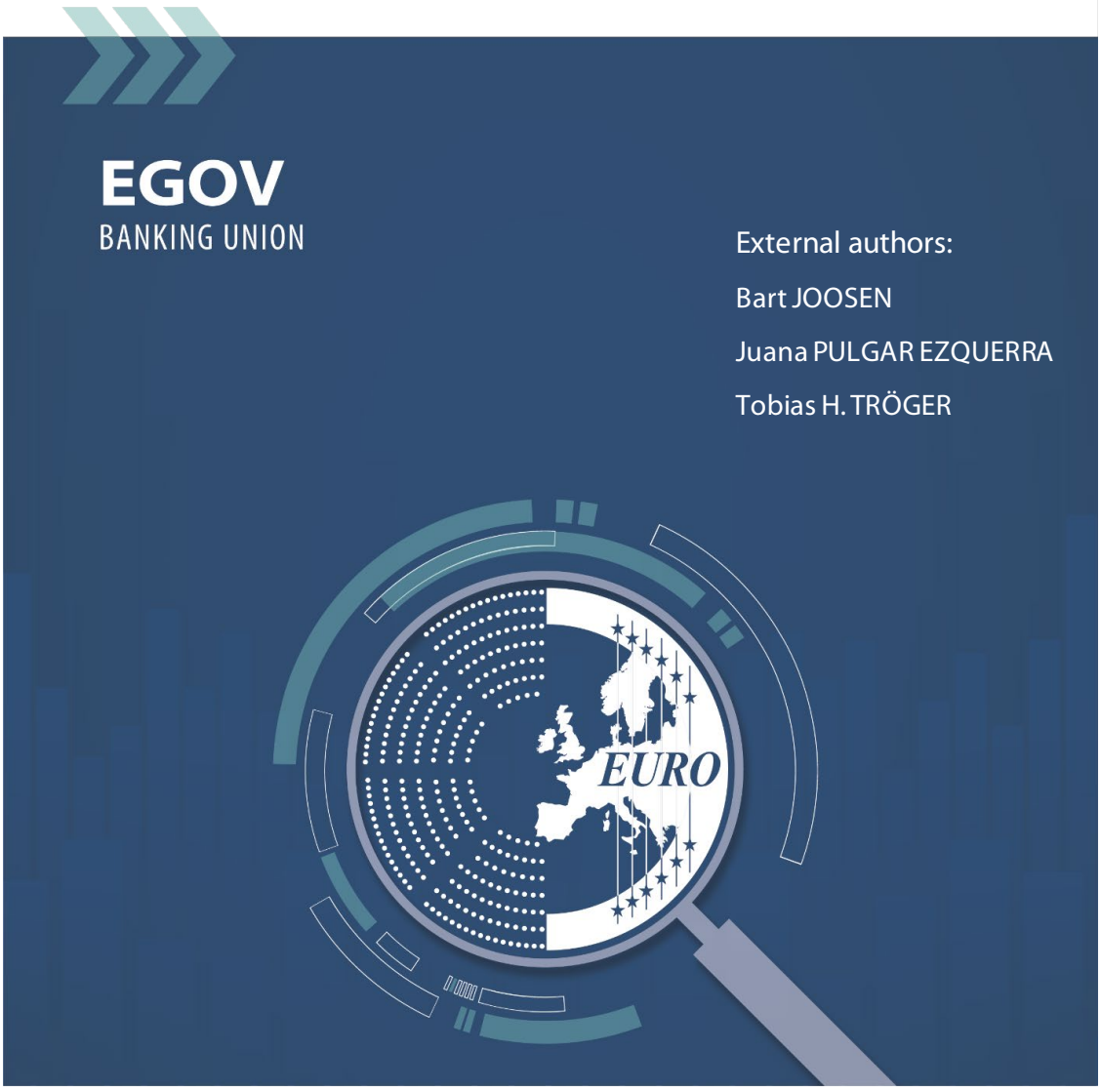
10 years of Banking Union case law

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

Banking Union is crucial for European integration, ensuring financial stability in the single market for financial services. The Court of Justice of the European Union (CJEU) plays an essential role in interpreting and enforcing the legal framework of the Banking Union, especially regarding the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). This in-depth analysis scrutinises the pertinent CJEU case law and highlights its implications for the Banking Union and the EU legal order.

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LIST OF ABBREVIATIONS

BRRD	Bank Recovery and Resolution Directive
CJEU	Court of Justice of the European Union
CMDI	Crisis Management and Deposit Insurance
CRR	Capital Requirements Regulation
ECB	European Central Bank
EGC	European General Court
EU	European Union
FOLTF	Failing or likely to fail
G-SII	Global systemically important institution
Ibid	Ibidem
L-Bank	Landeskreditbank Baden-Württemberg
LSI	Less significant institution
NCA	National Competent Authority
NCWO	No Creditor Worse Off
NRA	National Resolution Authority
PIA	Public Interest Assessment
SRB	Single Resolution Board
SREP	Supervisory Review and Evaluation Process
SRM	Single Resolution Mechanism
SRMR	Single Resolution Mechanism Regulation
SSM	Single Supervisory Mechanism
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

Background

The European Banking Union has brought unprecedented institutional integration to ensure the uniform, stringent, and impartial administration of prudential regulation and resolution regimes in the participating member states. With due exceptions, supranational supervisory and resolution decisions are also subject to judicial review by the CJEU. The rule of law thus makes courts important agents that shape supervisory and resolution practice in the Banking Union with their judgments.

Aim

This in-depths analysis scrutinizes how the CJEU contributed to the development of the Banking Union. We focus on a number of important subject areas significantly influenced by CJEU adjudication and find:

— The CJEU respects the decisions of the ECB and the SRB, recognising their expertise and discretion in supervising and resolving banks. The CJEU rarely annuls or modifies their acts, and often defers to their assessments, their exercise of discretion and their methodologies.

— The CJEU takes a pro-centralisation stance and thus contributes to a functioning supervisory framework at the European level. The Court contributes to ensuring a regulatory level-playing field which hinges on a consistent application of the relevant EU legislation across the member states.

— However, the CJEU also respects the European co-legislators' decisions, to grant national options and discretion in the implementation of harmonized banking regulation. The Court draws clear boundaries for the ECB, following from its function as a prudential supervisor in the multilevel governance arrangements, characterising the Banking Union and the EU as a whole, reflected in the fundamental principles of conferral, subsidiarity, proportionality, and legal certainty.

— The CJEU's insistence on the uniform and centralised application of the SSM and SRM regulations may limit the flexibility and adaptability of the Banking Union to the diverse and evolving needs and circumstances of the EU banking sector, which remains fragmented and shows significant structural variation across member states. The CJEU's deference to the ECB and the SRB may also reduce the accountability and transparency of these authorities' actions, ultimately undermining the balance of powers and interests within the Banking Union.

— The CJEU champions effective supervision and accepts financial stability as an overriding policy objective.

— The CJEU sometimes overreaches and neglects opposing public interests. Occasionally, the CJEU's expansive interpretation of the ECB's and the SRB's powers and discretion may encroach on the competences and prerogatives of other EU institutions, compromise the rights and interests of the affected parties, and hamper effective judicial review, ultimately jeopardizing institutional legitimacy.

— The CJEU has recently provided clarity on the distribution of competences in resolution, safeguarding the principle of legal certainty. The CJEU has clarified the roles and responsibilities of the various actors involved in the resolution process, such as the SRB, the Commission, the Council, and the national resolution authorities.

— In this context, the Court has also ruled that ex post compensation of aggrieved equity and debtholders has to follow from remedies provided by the CMDI framework. Resolution,

underpinned by the overriding financial stability objective largely precludes remedies that contract and securities laws provide to investors in case of misinformation.

1. THE ROLE OF COURTS IN THE BANKING UNION

KEY FINDINGS

The CJEU takes a pro-centralisation stance and thus contributes to a functioning supervisory framework at the European level. The Court contributes to ensuring a regulatory level-playing field which hinges on a consistent application of the relevant EU legislation across the member states.

The CJEU's insistence on the uniform and centralised application of the SSM and SRM regulations may limit the flexibility and adaptability of the Banking Union. The CJEU champions effective supervision and accepts financial stability as an overriding policy objective. The CJEU sometimes overreaches and neglects opposing public interests, e.g. in institutional accountability.

The European Banking Union has brought unprecedented institutional integration to ensure the uniform, stringent, and impartial administration of prudential regulation and resolution regimes in the participating member states. With due exceptions, supranational supervisory and resolution decisions are also subject to judicial review by the CJEU (Arons 2020). The rule of law thus makes courts important agents that shape supervisory and resolution practice in the Banking Union with their judgments. This in-depth analysis scrutinizes critical decisions by the competent European court that have a bearing on important aspects of bank supervision and resolution in participating member states. We do not aim at completeness. Instead, we deliberately focus on a number of important subject areas significantly influenced by CJEU adjudication.

The scope and limits of the ECB's supervisory powers under the SSM Regulation[1] have been challenged before the CJEU by several credit institutions subject to the ECB's decisions. In particular, some of these decisions concerned the assessment of whether a credit institution was FOLTF, a determination prerequisite for triggering the resolution mechanism under the SRM Regulation.[2] Some court rulings involved the ECB's competence to apply national laws, specifically whether or not such national laws implemented European Directives – the premise for the ECB's competence. Finally, some formative decisions concerned the interpretation and application of the CRR[3], which sets out the prudential requirements for credit institutions, such as the leverage ratio and the large exposure rules.

We structure our in-depth analysis around the following main topics considered in the essential CJEU jurisprudence:

1. Proportionality

[1] Council Regulation (EU) No. 1024/2013 of 15 October 20131 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287/63.

[2] 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 [2014] OJ L 225/1.

[3] 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 [2012] OJ L 176/1.

2. The power of the ECB to apply national law (implementing Union law)
3. Interpretation of CRR rules on Leverage Ratio (the power of ECB to make own interpretations of statutes)
4. ECB Approach on irrevocable payment commitments (IPC)
5. Mandate ECB under SSM Regulation – Significant/less-significant
6. Authorities' competencies under the CMDI framework and judicial protection

We are aware of other relevant developments in the CJEU case law, for instance, in the context of the acquisition of qualifying holdings (approvals and revision of approvals) or the withdrawal of banking licences by the ECB after a negative resolution decision has been adopted by the SRB. It is important to emphasise that 10 years of CJEU jurisprudence regarding the Banking Union have already led to many dozens of cases. Nevertheless, we believe that the most impactful decisions of the CJEU can be found in the cases we have selected.

2. SELECTED AREAS

2.1. Proportionality

Art. 5(4) of the TEU[4] sets out proportionality as a general principle of EU law. Three questions must be considered cumulatively to meet the constitutional requirements: first, whether the act in question is appropriate or adequate to achieve the aim pursued; second, whether the measure is necessary to achieve that aim, or whether that aim can be achieved by a less burdensome method; third, whether the disadvantages caused are not disproportionate to the aims pursued (proportionality *stricto sensu*). When member states challenge EU law restricting fundamental freedoms, proportionality is applied more strictly.[5]

To the fullest extent, this principle applies to the actions of the ECB as an EU institution when it exercises its powers under the SSM Regulation, i.e., the exclusive competence to supervise the prudential soundness of credit institutions in the euro area and in participating Member States whose currency is not the euro that have established close cooperation between the ECB and their NCA. Therefore, several credit institutions, subject to the ECB's decisions, challenged the scope and limits of the ECB's supervisory powers before the CJEU, typically (also) on the grounds that the ECB decisions breached the principle of proportionality.[6] One of the main grounds for appeal raised by the applicants was that the ECB had violated the principle of proportionality by adopting decisions that were either unnecessary or disproportionate to achieve the objectives of the SSM Regulation and the CRR.

In the landmark case of Landeskreditbank Baden-Württemberg (L-Bank) of May 2017[7], the applicants challenged the designation of a state development bank as a significant institution within the meaning

[4] Consolidated Version Treaty on European Union [2012] OJ C 326/13-38.

[5] See for the general doctrine as regards the principle of proportionality, e.g., Judgment of 10 September 2002, British American Tobacco v. Secretary of State for Health C-491/01; Judgment of 9 March 2010, ERG and others C-379/08; Judgment of 22 January 2013, Sky Österreich v Österreichischer Rundfunk, C-283/11; Judgment of 16 June 2015, Gauweiler c.s. v. Deutscher Bundestag C-62/14; Judgment of 4 May 2016, Philip Morris c.s. v. The Secretary of State for Health, C-547/14; Judgment of 4 May 2016, Poland v. Parliament and Council, C-358/14; and Judgment of 6 September 2017, Slovakia and Hungary v. European Council, C-643/15.

[6] See, among other Judgments, Judgment of 13 December 2017, Crédit mutuel Arkéa v. European Central Bank, T-52/16; Judgment of 8 May 2019, Landeskreditbank Baden-Württemberg-Förderbank v. ECB, C-450/17-P; Judgment of 16 June 2021, Crédit Agricole SA et all v. European Central Bank, joint cases C-456/20 up to and including C-458/20 P; Judgment of 6 May 2021, ALBV and others v. European Central Bank, in joined cases C-551/19 P and C-552/19 P; Judgment of 7 December 2022, PNB Banka AS v. ECB, T-301/19; Judgment of 28 February 2024, Sber Vermögensverwaltungs AG v. European Central Bank, T-99/22; and Judgment of 28 February 2024, BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v. European Central Bank, T-667/21.

[7] Judgment of 16 May 2017, Landeskreditbank Baden-Württemberg - Förderbank v. European Central Bank, T-122/15.

of Art. 6(4) of the SSM Regulation, which implies that the ECB is directly responsible for its supervision. Before the General Court, they argued that the ECB had failed to consider the bank's specific characteristics, such as its public-law status, low-risk profile, compliance with capital requirements, or sovereign-backed restructuring plans.

The General Court dismissed L-Bank's motion, holding, among other things (on other aspects of the L-Bank judgments see below 2.5), that the ECB did not have to carry out a proportionality assessment before classifying a bank as a significant institution. The main argument was that the proportionality principle was already embedded in the design of the SSM Regulation and the SSM Framework Regulation[8], which provide for distinct categories of credit institutions and adjust the intensity of centralised or decentralised supervision depending on institutions' significance. L-Bank appealed the judgment of the General Court to the CJEU, but the CJEU dismissed the appeal and concurred with the reasoning of the General Court[9].

In other decisions, the CJEU has consistently supported the ECB's supervisory powers and decisions and has confirmed that they respect the principle of proportionality (as well as other principles and rules of EU law). The CJEU has recognized that the ECB has broad discretion and a high level of expertise in carrying out its supervisory tasks and has to act effectively and preventively to safeguard the soundness and stability of the banking system in the euro area (Ioannidis 2021).

The CJEU judgments do not elaborate on a frequently perceived tension between proportionality and financial stability objectives in prudential regulation and supervision. Proportionality aids in avoiding excessive burdens on the industry. However, some feel that existent regulations are overly onerous, particularly for smaller banks. Such banks stress that they are disproportionately affected by rules designed to correct problems present primarily at their larger peers. Due to limited resources, they struggle to meet all regulatory demands. By definition, small banks also cannot spread fixed compliance costs over large sets of business activities. Therefore, these institutions and their federations have consistently called for prompt changes to correct this regulatory burden disparity (Joosen and Lehmann 2019).

This logic suggests that the CJEU interprets the principle of proportionality with a specific view to financial stability issues. These issues should have more traction in the ECB's supervision of major (significant) banks. They should, therefore, allow the court to validate more rigorous examinations for banks critical to financial stability. Conversely, many cases brought before the CJEU involved smaller entities deemed 'significant' based on their market share in their domestic markets. Yet, these institutions might not be considered systemically important compared to larger EU institutions.

The observed wide variation in directly ECB-supervised banks' characteristics is enshrined in the SSM Regulation, particularly the definition of a 'significant institution'. This category defines relatively small credit institutions as 'significant,' which, under strictly risk-oriented assessment criteria, would not be deemed systemically important at a regional, national, or global level (Joosen and Lehmann 2019).

Therefore, the ECB directly supervises a materially heterogeneous group of credit institutions, ranging from large 'globally systemically important institutions' (G-SII) to exceedingly small ones. The latter are classified as significant because of their position in the local markets. Often, the rigorous routines that the ECB also applies to these smaller organisations seem disproportionate (Joosen and Lehmann 2019).

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[8] 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.

[9] Judgment of 8 May 2019, Landeskreditbank Baden-Württemberg-Förderbank v. ECB, C-450/17-P.

However, the case law of the CJEU does not accept these considerations, primarily due to a firm legalistic stance that the court shares with the ECB. The supranational prudential supervisor and the judiciary reviewing their actions see the responsibility for introducing more nuanced distinctions based on banks' characteristics, as lying with the EU co-legislators. Under the current regulatory framework, it is the legislative decision to enforce the Single Rule Book on all European banks, no matter their size or relative market share at the EU level, that constrains the actions of both the ECB and the CJEU (Joosen et al. 2018; Joosen and Lehmann 2019).

Generally, the TEU principle of proportionality has no discrete function in the review of supervisory actions. Instead, the specific transpositions of the general principle in the prudential framework are deemed to ensure the proportionality of supervisory (and resolution) actions. Hence, both the ECB and the CJEU follow a legalistic approach and apply the banking law framework without factual distinctions in individual cases based on banks' characteristics beyond black letter law if the wording of Level 1-legislation does not explicitly permit the exercise of discretion. Therefore, the CJEU indirectly safeguards the principle of proportionality in a judicial review of ECB decisions and checks if these decisions comply with the procedural and substantive guarantees provided by the SSM Regulation, the SSM Framework Regulation, and most importantly, the Single Rule Book.

2.2. The power of the ECB to apply (Union law implementing) national law

Art. 4(3) of the SSM Regulation states that

> *"for the purpose of carrying out the tasks conferred on it by [the SSM] regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of directives, the national legislation transposing those directives".*

This provision implies that the ECB has to respect member states' transposition choices in applying national law as long as the national law does not contradict or undermine EU law or the objectives of the SSM Regulation.

Unsurprisingly, this unprecedented (Amtenbrink 2019; Biondi and Spano 2020) and rather open provision served to challenge ECB decisions in several cases before the CJEU. Claimants alleged that the ECB had disregarded or misapplied the national law or practice of the member state where the credit institution was established and that, therefore, the ECB had exceeded its competence by imposing its interpretation of the EU law or the SSM Regulation. In all these cases, the CJEU upheld the ECB's decisions and rejected the applicants' arguments, finding that the ECB had not infringed the provision of Art. 4(3) SSM Regulation and instead acted within the discretion afforded by applicable EU law and its national implementation.

However, in a recent case, the General Court rejected the argument of the ECB and the European Commission that the provision of Art. 4(3) SSM Regulation would justify applying the procedures set out in the BRRD, rather than strictly applying the national laws implementing the relevant provisions of this directive. The case concerned early intervention measures (the replacement of existing management) at the Italian Banca Carige SpA. In *Francesca Corneli v. ECB and European Commission*, the General Court held:

> "*It follows from that provision [Art. 4(3) of the SSM Regulation], however, that, where the EU law involves directives, it is the national law transposing those directives that must be applied. The provision cannot be read as having two distinct sources of obligations, namely EU law in its entirety, including directives, to which the national law transposing them should be added. Such an interpretation would imply that the national provisions differ from directives and that, in such a case, the two types of document are binding on the ECB as separate legislative sources. Such an interpretation cannot be accepted, since it*

> *would be contrary to Article 288 TFEU, which provides that 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. Furthermore, according to settled case-law, a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual."*[10]

The significance of this holding cannot be underestimated. The judgment highlights where severe frictions can arise in implementing the prudential and particularly the CMDI framework. Various measures, such as the early intervention measures to replace directors at the ailing Italian bank, can only be based on national provisions that transpose the supranational legislation into member states' legal systems. Authorities have to dissolve ambiguities in transposing national legislation by applying the rules according to national legislators' intentions when adopting the laws transposing the objectives of harmonizing European directives (e.g., the BRRD). However, crisis management decisions must be made under severe time pressure, discouraging extensive legal research on national legislators' motivations, which, in addition, are notoriously ambiguous. Despite these restrictions, European case law precludes the ECB from adopting its own interpretation of the relevant provisions. Instead, the supranational supervisor must submit to national teleology and jurisprudence.

This result, ultimately due to the choice of the legislative instrument (*cf.* Art. 288(3) of the TFEU), champions subsidiarity considerations over effectiveness in bank supervision and crisis management. Yet, it illustrates that the European courts take a restrictive approach to the ECB's manoeuvring space in trading off the conflicting objectives. It negatively affects the decisiveness with which supranational authorities can exercise their powers, particularly in a bank crisis.

Having said that, the CJEU judgment also rebuts the fears expressed in the literature that affected parties may enjoy only insufficient legal protection in cases where the ECB is required to apply national law (Coman-Kund and Amtenbrink 2018). In contrast to this supposition, the CJEU has taken important steps in this area to ensure adequate legal protection, at least equivalent to national courts' standards.[11]

2.3. Interpretation of CRR rules on Leverage Ratio (the power of ECB to make own interpretations of statutes)

The leverage ratio is a prudential requirement that aims to limit the leverage of credit institutions, i.e., prescribing a maximum acceptable ratio between their total exposure and their Tier 1 capital. Since 2019, the leverage ratio is set at a binding minimum requirement of 3% by the CRR (Pillar 1). Still, the ECB has the power to impose additional requirements on credit institutions under the so-called Pillar 2, which allows the ECB to tailor the prudential framework to each credit institution's specific risks and circumstances. The ECB exercises this power through the Supervisory Review and Evaluation Process (SREP), which regularly assesses the credit institutions' risk profile, governance, and capital adequacy.

These rules played a fundamental role in the six identical cases brought to the General Court of the EU by French banks regarding the application of Art. 429(14) CRR, permitting institutions to exclude specific exposures from the calculation of the total exposure measure as the denominator of the

[10] Judgment of 12 October 2022, Francesca Corneli v. European Central Bank and European Commission, T 502/19, para 112. See also the case law cited *ibid.*

[11] The Judgment of 28 February 2024, Sber Vermögensverwaltungs AG v. European Central Bank, T-99/22; and the Judgment of 28 February 2024, BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v. European Central Bank, T-667/21 may be considered to be a confirmation of this point, even though in these cases the CJEU came to the conclusion that the ECB incorrectly applied Austrian national law provisions by relying on an incorrect interpretation of these provisions by Austrian courts, and the ECB was therefore erroneously not applying its margin of discretion that would have resulted in a potential different decision. Here the CJEU protected the claimants against the adverse decisions of the ECB based on an incorrect application of national law.

leverage ratio.[12] The applicants in these cases contested the ECB's decision to refuse such an exclusion, alleging that the ECB used its discretion to deprive the option under Art. 429(14) CRR of any practical application.[13]

Although the General Court confirmed that the ECB has discretion to grant an exclusion even if the conditions set out in Art. 429(14) CRR are met[14], it also held that the application of the discretion by the ECB on grounds that would deprive the provision of its practical effect and make it virtually inapplicable cannot be permitted.[15] The General Court concluded that the decision of the ECB suffered from an error of law because it did not consider all the circumstances and made no further assessments to apply the derogation set out in Art. 429(14) CRR. The General Court also concluded that the reasoning of the ECB was manifestly incorrect and that, therefore, the applicants' pleas had to be upheld and the contested decisions of the ECB to be annulled.[16] The General Court fully reviewed the ECB's decision-making and also took corrective action by setting aside the supervisor's decisions (Ioannidis 2021).

In subsequent issues (on an ECB decision taken in relation to, *inter alia*, the Crédit Lyonnais), the ECB, taking into account this case-law, handed down a decision which the affected credit institution again submitted to the General Court of the EU. The EGC confirmed the earlier 2018 case law. In an appeal brought by the ECB, the Court of Justice ruled:

> "*As the General Court pointed out, …, in so far as the ECB has a broad discretion in deciding whether or not to apply Article 429(14) of Regulation No 575/2013, the judicial review which the Courts of the European Union must carry out of the merits of the grounds of a decision such as the decision at issue must not lead it to substitute its own assessment for that of the ECB, but seeks to ascertain that that decision is not based on materially incorrect facts and that it is not vitiated by a manifest error of assessment or misuse of powers.*"[17]

The CJEU found that the General Court wrongly cancelled the decision *vis-à-vis* Crédit Lyonnais. The lower court had made its own judgment about how likely Crédit Lyonnais was to sell its assets quickly, instead of showing how the ECB's judgment was clearly wrong. By doing this, it went beyond its role of reviewing the decision. It also overstepped its role by alleging that the ECB did not look carefully and adequately at all the essential facts.[18] The CJEU concurred with the primary argument of the ECB's appeal and set aside the judgment that partly cancelled the supervisory decision, based on fundamental considerations about the scope of judicial review.

The lessons to be drawn from this jurisprudence are that, on the one hand, the CJEU applies the criteria for judicial review of discretionary decisions of European institutions developed in the case law also to supervisory decisions. Therefore, ECB decisions are not insulated from judicial scrutiny. On the other hand, the CJEU is very vigilant in imposing judicial restraint and, hence, only polices the outer bounds of the margin of discretion the ECB enjoys under applicable prudential rules (Ioannidis 2021).

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12 Judgment of 13 July 2018, Banque postale v ECB, T-733/16; Judgment of 13 July 2018, BPCE v ECB, T-745/16; Judgment of 13 July 2018, Conféderation nationale du Crédit mutuel v ECB, T-751/16; Judgment of 13 July 2018, Société Générale v ECB , T-757/16; Judgment of 13 July 2018, Crédit agricole v ECB , T-758/16; and Judgment of 13 July 2018, BNP Paribas v ECB , T-768/16.

13 See the General Court's considerations in this regard in para 76 of the Judgment of 13 July 2018, Banque postale v ECB, T-733/16.

14 See General Court's considerations in this regard in para 58 of the Judgment of 13 July 2018, Banque postale v ECB, T-733/16.

15 See General Court's considerations in this regard in paras 79 to 93 of the Judgment of 13 July 2018, Banque postale v ECB, T-733/16 referring to Judgment of 11 December 2008, Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing, C-407/07.

16 See General Court's considerations in this regard in paras 110 to 118 of the Judgment of 13 July 2018, Banque postale v ECB, T-733/16.

17 Judgment of 4 May 2023,European Central Bank v. Crédit Lyonnais, C-389/21 P, , para. 55 and the case law cited therein.

18 Judgment of 4 May 2023, European Central Bank v. Crédit Lyonnais, C-389/21 P, paras. 73 and 74.

2.4. ECB approach to irrevocable payment commitments (IPC)

IPCs constitute an option for discharging the obligation to contribute to resolution funds or deposit guarantee schemes by entering into a contract providing, on the one hand, that the debtor will be pay the amount due at first request and, on the other hand, that they will post collateral equivalent to the amount due. The ECB has considered banks' obligations under IPCs as exposures to the resolution authority or the deposit guarantee scheme and applies the rules of Art. 36 CRR to deduct IPC obligations from the Common Equity Tier 1 (CET1) capital of the bank. Several credit institutions from Germany and France contested this interpretation. In a line of unpublished decisions ('the 2020 judgments')[19], the EGC had already rejected the argument that the ECB has no power to require the full deduction of certain items from own funds, because such a power would amount to a general requirement not provided for by the legislature in Art. 36 of CRR. In their recent, more nuanced line of attack, the appealing banks argued that IPCs are not exposures but contingent liabilities and should not be subject to the large exposure regime.

The General Court has recently again concurred with the ECB's position and dismissed the actions brought by the credit institutions as unfounded.[20] The General Court found that the IPCs fall within the definition of exposure under the CRR since they create a direct credit risk for the institution towards the resolution authority or the guarantee scheme. The General Court further held that the collateral provided under the IPCs does not meet the requirements of recognition and valuation under the CRR and does not eliminate the credit risk for the institution. The General Court has further rejected the arguments of the credit institutions based on the principle of proportionality, legal certainty, legitimate expectations, and equal treatment, finding that the ECB had acted in accordance with the EU law and the objectives of the SSM Regulation.

These cases illustrate the General Court's deference to the ECB's supervisory decisions and its endorsement of the ECB's interpretation of the CRR. The CJEU has confirmed the ECB's authority and discretion to impose additional capital requirements under the applicable prudential rules. The Court thereby endorses a uniform, consistent, and stringent application of the regulatory framework in the banking union to ensure the financial stability and resilience of the credit institutions under ECB supervision.

2.5. The scope of the ECB's supervisory mandate under the SSM Regulation for less-significant institutions

As the central body of the SSM, the ECB is not only responsible for the effective and uniform functioning of joint supervision (Art. 6 para. 1 sentence 2 SSM Regulation), but also assumes original supervisory tasks. The ECB directly supervises 'significant' banks within the meaning of the SSM Regulation. To this end, the ECB exclusively and directly performs the full range of prudential supervisory tasks vis-à-vis significant banks. 'Less significant' institutions, are in principle supervised by the NCAs, whose supervisory practices the ECB can, however, influence indirectly through regulations, guidelines and

[19] These cases are in furtherance of the Judgments of 9 September 2020, Société Générale v ECB (T-143/18, not published,); of 9 September 2020, Crédit agricole and Others v ECB (T-144/18, not published); of 9 September 2020, Confédération nationale du Crédit mutuel and Others v ECB (T-145/18, not published); of 9 September 2020, BPCE and Others v ECB (T-146/18, not published); of 9 September 2020, Arkéa Direct Bank and Others v ECB (T-149/18, not published); and of 9 September 2020, BNP Paribas v ECB (T-150/18 andT-345/18, not published), ('the 2020 Judgments'). In the 2020 Judgments the General Court of the EU already rejected the regards the argument that the ECB has no power to require the full deduction of certain items from own funds, which amounts to a general requirement not provided for by the legislature in Art. 36 of CRR.

[20] Judgments of 5 June 2024, Deutsche Bank and others v European Central Bank, T-182/22; BNP Paribas v. European Central Bank, T-186/22, BPCE v. European Central Bank, T.187/22; Crédit agricole v. European Central Bank,T-188/22; and Confédération nationale du Crédit mutuel v. European Central Bank T-189/22.

general or even individual bank-related instructions (see Art. 6 para. 5 lit. a) and Art. 6 para. 3 sentence 2 SSM Regulation). These powers are flanked by the NCA's duty to provide information (Art. 6 para. 5 lit. e) and Art. 6 para. 7 lit. c) SSM Regulation) as well as the ECB's own investigative powers vis-à-vis the institutions subject to supervision (Art. 6 para. 5 lit. d) SSM Regulation). If the exhaustion of this arsenal of powerful instruments is not sufficient to ensure the consistent application of high supervisory standards, the ECB can finally place individual non-significant banks under its direct supervision at any time, see Art. 6 para. 5 lit. b) SSM Regulation (for an example, ECB 2019).

In the L-Bank litigation the CJEU commented *obiter dictum* on the nature of the competences conferred on the ECB by the SSM Regulation in a manner that goes far beyond the case before the court. The deliberations concern the very foundations of the distribution of competences in the SSM. In this respect, it confirms the opinion of the General Court[21] and Advocate General Hogan[22] that the ECB has been given exclusive competence in all areas of microprudential supervision of all credit institutions mentioned therein by Art. 4 and Art. 6 of the SSM Regulation; only the exercise of this exclusive competence is carried out in a decentralized framework with regard to less significant institutions.[23] The General Court added, without the CJEU contradicting this, that the exercise of this supervision by the NCA does not constitute the "exercise of national competence", but only the implementation of Union law by the member states as provided for in Art. 291 (1) TFEU.[24] In this view, the NCAs do not have any original competence within the scope of application of Art. 4 and 6 SSM Regulation; rather, they derive their competences from the ECB and assist the supranational supervisory authority "in carrying out the tasks conferred on it by Regulation No 1024/2013, by a decentralised implementation of some of those tasks in relation to less significant credit institutions".[25]

The CJEU's jurisprudence can be criticized on doctrinal (Tröger and Tönningsen 2020) and also on fundamental normative grounds drawing on insights from the economic theory of fiscal federalism (Oates 1972; 1999; Kobayashi and Ribstein 2007). However, it is hard to deny the significant practical impact of this position for the hubs and spokes approach within the SSM because it increases the influence of the hub when it comes to integrating supervisory practices. Empirical evidence shows that the ECB's approach to supervision diverges significantly from NCAs established practices (Haselmann, Singla, and Vig 2022). Against this background, in the L-Bank litigation, the CJEU strengthened the position of the ECB by relegating NCAs *de facto* to branch offices of the supranational prudential supervisor. This is all the more true because the CJEU also brushes aside subsidiarity considerations in its judgment that the claimants had advanced in their appeal.[26] In day-to-day supervisory practice, the ECB indeed exercises significant influence to push for uniform standards in NCAs' supervision of LSIs, primarily through the so-called country desks that oversee the supervision of LSIs in each participating member state.

Depending on the perspective, this bolstering of ECB powers may be hailed as a much-needed step to achieving centralized supervision of the banking sector and overcoming frictions from options and national discretions or dismissed as yet another foray into an inefficient supervisory landscape

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21 Judgment of 16 May 2017, Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank, T-122/15 paras. 54 and 63.

22 Opinion of Advocate General Hogan of 5 December 2018, , Landeskreditbank Baden-Württemberg - Förderbank v ECB C-450/17 P para. 50 *et seq.*

23 Judgment of 8 May 2019, Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank, C-450/17 paras. 38 and 41.

24 Judgment of 16 May 2017, Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank, T-122/15 paras. 72 and 73.

25 Judgment of 8 May 2019, Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank, C-450/17 para. 41. The German Constitutional Court favours a much narrower reading of the Judgment, though, see BVerfG, Judgment of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 para. 191.

26 While the CJEU (Judgment of 16 May 2017, Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank, T-122/15, para. 65) engaged in a superficial discussion oft he principle of subsidiarity, the CJEU considered the issue as mute, because of the assumption of an exclusive ECB competence.

dominated by a one-size-fits-all approach, heedless of national banking sectors' idiosyncrasies. Yet again, it should not be underestimated that even in the supervision of significant institutions, NCAs remain important players through their role in JSTs. They typically serve as the interface with the bank, their stance can be very impactful (e.g. in qualifying holding assessments), and NCA representatives in JSTs can influence the daily supervision of individual institutions significantly.

2.6. Authorities' competencies under the CMDI framework and judicial protection

The jurisprudence of the CJEU has clarified, among other things, how the joint decision-making of various European authorities involved in the resolution process is coordinated in its phases: initiation, decision, authorization, enforcement, and appeals against the decision to initiate or not to initiate a resolution procedure.

In the landmark case *PNB Banka (AS)*, the EGC[27] has clarified the competencies of authorities vis-à-vis each other. The General Court clarified the relationship and interplay of powers between, on the one hand, the ECB, which must in any case carry out an initial FOLTF assessment and decide independently whether the institution is non-viable[28], and, on the other hand, the SRB, which assesses the ECB's determination and has the exclusive power to decide on the implementation of the resolution tools and the possible judicial review of its decision (2.6.1)[29]. Furthermore, the EGC has clarified the relationship between the SRB's decision and the European Commission's authorization of the resolution scheme in cases where the SRB decides to initiate a resolution procedure (2.6.2). Finally, the court ruled on the relationship between the SRB and the NRAs if the SRB considers that the preconditions for adopting a resolution scheme are not met (2.6.3).

2.6.1. The FOLTF Assessment Triggering resolution

The ECB has a central role in the initial assessment of the non-viability of the institution if it concerns credit institutions subject to its direct supervisory powers (i.e., 'significant institutions').[30] Its FOLTF assessment based on objective criteria is a prerequisite for the SRB to decide whether or not to adopt a resolution scheme, depending on the fulfillment of other legally required conditions, i.e., a FOLTF assessment by the ECB does not necessarily lead to the adoption of a resolution scheme.

Two possible scenarios can be distinguished: If the ECB assesses that the institution is not FOLTF within the meaning of Art. 18(1)(a) SRMR, resolution will not be initiated, and the SRB, therefore, cannot begin to assess the other requirements. In this scenario, the ECB would retain the ultimate decision-making authority. The supervisor would not have to communicate its decision to the SRB[31], let alone see the SRB appeal the decision.[32] However, under Art. 18.1 subpara. 3 SRMR, the SRB's Executive Board may assess independently whether the institution has reached the FOLTF status, if it provides the ECB the prior opportunity to make that assessment itself (within three days). If the ECB fails to take the decision, the SRB may make its own FOLTF determination and assess the other requirements for resolution.

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27 See Judgment of 15 November 2023, PNB Banka AS v. Single Resolution Board, T- 732/19.

28 See Art. 32.1.a) of the BRRD and Art. 18.1 a) of the SRMR.

29 See Judgment of 15 November 2023, PNB Banka AS v. Single Resolution Board, T- 732/19., para. 157.

30 See Art. 18.1 of the SRMR.

31 Art. 18 (1) subpara. 3 SRMR requires no communication between the ECB and the SRB, unless the supervisor considers that the institution is FOLTF.

32 See Judgment of 15 November 2023, PNB Banka AS v. Single Resolution Board, T- 732/19, para. 44 and the case law cited therein (Judgment of 6 May 2021, ABLV Bank and others v. ECB, C-551/19P and C-552/19 P, paras. 67 and 70).

Conversely, suppose the ECB finds that the institution is FOLTF. In that case, it will carry out an objective assessment of the institution's financial situation (factual assessment), considering the economic situation of the institution at the time of the assessment. In this assessment, the ECB will account for potential measures proposed by the institution to restore its capital and liquidity. Only if the ECB considers these measures as sufficiently robust to restore the financial condition of the institution will it refrain from an otherwise warranted FOLTF determination. [33]

In this context, the EGC has also recognized[34] that the principle of protection of legitimate expectations (legal certainty) restricts the ECB's autonomy for the FOLTF assessment only when the supervisor has given an interested party unconditional and constant assurances from authorised and reliable sources that the supervisory authority will not arrive at a FOLTF assessment if the institution implements specific recovery measures. This ruling gives the ECB, as a prudential supervisor, significant leeway to effectively urge recovery measures and still adapt its stance to the evolution of the institution's financial and economic situation[35].

However, a FOLTF assessment by the ECB is not sufficient for the adoption of a resolution scheme, which is the exclusive power of the SRB. [36] The SRB determines whether the bank meets the other two conditions for resolution. [37] In the event all these conditions are met the SRB shall decide on the appropriate resolution action, including the potential application of resolution tool(s). [38] To be sure, there is a significant *de facto* scope for judgement in determining whether the conditions of Art. 18.1 (a) up to (c) SRMR are present. However, once resolution is triggered, the SRB enjoys no discretion in adopting the resolution scheme beyond choosing the specific resolution tool(s) stipulated in the CMDI framework. [39]

The EGC has ruled that the principle of proportionality cannot be invoked in this area because it is embedded in the legislative design of the SRM, particularly the resolution tools in the CMDI framework. Therefore, a distinct proportionality test is unnecessary[40] (for a similar rule in the judicial review of the application of the SSM Regulation, see above 2.1).

Concluding, the CJEU has sharpened the remits of the ECB and the SRB in the banking union's decentralized model of resolution decision-making (for a description see Tröger 2018) and protected these authorities' leeway for effective decision making on a resolution weekend against judicial second guessing.

2.6.2. Judicial review of resolution decisions

Decisions to either initiate the resolution or to wind-up a FOLTF institution under national law may be subject to judicial review before the CJEU[41]. The central issues are in which forum the appeal should

[33] See Judgment of 15 November 2023, PNB Banka AS v. Single Resolution Board, T- 732/19,para. 123.

[34] See Judgment of 15 November 2023, PNB Banka AS v. Single Resolution Board, T- 732/19, para. 178.

[35] See Judgment of 15 November 2023, PNB Banka AS v. Single Resolution Board, T- 732/19paras. 179 to 183 and the case law cited therein (Judgment of 19 July 2016 Kotnik and others v. Državni zbor Republike Slovenije, C-526/14, para. 66).

[36] See Judgment of 15 November 2023, PNB Banka AS v. Single Resolution Board, T- 732/19,paras. 137 and 157 and the case law cited therein (Judgment of 6 May 2021, ABLV Bank and others v. ECB,C-551/19 P and C-552 /19 P, para. 64).

[37] The conditions are: (i) there is no reasonable prospect that any alternative private sector measures, including measures by an institutional protection scheme (IPS), or supervisory action, including early intervention measures or the write-down or conversion of relevant capital instruments and eligible liabilities taken in respect of the institution, would prevent the failure of the institution within a reasonable timeframe and (ii) a resolution action is necessary in the public interest, Art. 32. 1 b) and c) of the DRRB and Art. 18 .1 b) and c) SRMR.

[38] See Artt. 37.3 BRRD and arts 18.6.b) , 22.2 SRMR.

[39] See Judgment of 15 November 2023, PNB Banka AS v. Single Resolution Board, T- 732/19, paras. 46 and 131 to 134.

[40] See Judgment of 15 November 2023, PNB Banka AS v. Single Resolution Board, T- 732/19,paras. 46,and 131 to 134.

[41] See Judgment of 6 May 2021, ABLV Bank AS and Others v European Central Bank,C-551/19 P, paras. 56 and 66.

be lodged and which parties are entitled to bring such an action. The decision to adopt a resolution scheme involves different European authorities, while the SRB's decision not to deal with a FOLTF institution in resolution is an autonomous one (above 2.6.1).

The CJEU had to address the question whether actions seeking the annulment of decisions to adopt a resolution scheme according to Art. 263(4) TFEU should be directed against the SRB or the Commission, which authorizes the resolution and closes the complex procedure.

While the CJEU held that the SRB's decision can be challenged independently without tackling the subsequent Commission's endorsement of the SRB decision[42], the CJEU recently ruled in the landmark Case Banco Popular that the correct defendant in an annulment action is typically the Commission or, as the case may be, the Council.[43] The key argument of the Court was that the SRB's decision does not produce binding legal effects independently of the Commission's (Council's) approval.[44] Hence, despite the SRB's autonomy in assessing whether the conditions for the adoption of a resolution scheme are met and which resolution tools shall be applied[45], the SRB's decision remains preparatory and does not affect the interests of a natural or legal person as required in Art. 263(4) TFEU.[46]

The CJEU position draws on prior case law[47], in particular the Meroni doctrine[48] which prevents the delegation of discretionary power from EU institutions, such as the Commission, to autonomous entities not foreseen in the Treaties, such as the SRB.[49] The Court need not deny the discretionary aspects of the SRB's resolution decisions, yet it emphasizes that such decisions are at any time framed by specific legal criteria enshrined in legislation[50] and consistently verified by Treaty institutions (Commission or Council). The framework, therefore, provides minimal space for an abuse of power.[51]

This recent judgment has the practical effect of restricting the SRB's ability to defend a particular resolution scheme as a defendant in the case before the CJEU. Relegating the SRB to the role of an interested party supporting the Commission (Council) before the CJEU risks weakening the Board's role as a specialized authority tasked by secondary legislation[52] with highly technical assessments required to initiate and execute the resolution of an institution.

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42 The CJEU distinguished between the discretionary aspects of the SRB's resolution decision that would depend on the Commission's authorization and the technical aspects not linked to the Commission's endorsement, Judgment of 1 June 2022, Aeris Invest Sàrl v European Commission and Single Resolution Board, T-628/17paras 124, 129 and 130; and Judgment of 6 May 2021, ABLV Bank et al. ECB, C-551/19 P and C-552/19 P.

43 Judgment of 18 June 2024, European Commission as appellant in the EGC case involving Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v Single Resolution Board, C 551/22P.

44 See Judgment of 18 June 2024, European Commission as appellant in the EGC case involving Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v Single Resolution Board, C 551/22P, para. 92.

45 See Artt. 18, 22(2), 23(1) and 86(2) of the SRMR.

46 Judgment of 18 June 2024, European Commission as appellant in the EGC case involving Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v Single Resolution Board, C 551/22P, para 89.

47 Judgment of 13 October 2011, Deutsche Post y Alemania v Commission ,C-463/10 P and C-475/10 P, EU: C: 2011: 656, Paragraph 53 (outlining that only the measure which, at the end of the procedure, definitively fixes the position of the competent body or agency of the Union, and not intermediate measures, the purpose of which is merely to prepare that definitive measure and which do not produce autonomous legal effects, constitutes the subject-matter of an annulment action).

48 And also recalling the landmark judgment of 22 January 2014, United Kingdom v. Parliament and Council, C270-12.

49 Judgment of the Court of 13 June 1958, Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community, Case 9-56.

50 In particular, Art. 18(5) SRMR.

51 Judgment of 18 June 2024, European Commission as appelant in the EGC case involving Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v Single Resolution Board, C 551/22P, para. 69.

52 It is important to acknowledge in the context of the Meroni doctrine that the SRB's competences were created *ex lege* by the EU co-legislators in Art. 7(2) of the SRMR and do not evolve from a delegation decision of the European Commission.

On the other hand, this judgment provides the necessary clarity regarding the formal framework within which the SRB must conduct its activities. It acknowledges the elaboration of the preparatory work of the SRB, the timely involvement of a Commission representative in these preparations, and the clear timing of the various steps in the brief period dictated by the institutional architecture of the SRM. The CJEU emphasises that the far-reaching consequences of a resolution, especially of a significant institution whose failure may have a significant impact on the internal market and financial stability, require that the application of executive powers must indisputably comply with the formal frameworks for their exercise. This desideratum is independent of protecting the interests of shareholders and creditors in the *ex-post* procedures provided for in the CMDI framework: The steps towards resolution must be taken without any uncertainty about their legal status, because litigants could seize a legal vacuum to disrupt the effectiveness of resolution procedures and extract rents.

2.6.3. Judicial review of decisions refusing resolution

In cases where the SRB decides not to initiate a resolution under the CMDI framework, the process concludes without the intervention of the Commission or the Council. The CJEU recently held that an action for annulment against a decision of the SRB not to implement resolution but instead refer the case to the national authorities competent to initiate ordinary liquidation proceedings can be brought if the decision directly affects the plaintiff and they can prove that the resolution measure would have improved the bank's economic position.[53] The court does not override the SRB's discretionary judgment and will, therefore, only assess that the decision is not based on materially incorrect facts, or is vitiated by the misuse of power or an error of assessment.

However, measures taken by the NRA under national insolvency law as an alternative to resolution (see Art. 29(1) SRMR) are outside the SRB's scope of powers and must, therefore, be challenged in appropriate national procedures against the NRA or the competent authorities responsible for the enactment of the liquidation proceedings.[54] This interpretation and the resulting division of labor between national and European courts is convincing even though the SRB's decision – in conjunction with the ECB's FOLTF assessment – typically leaves NRAs no other option than initiating the national proceedings, resulting in the liquidation of the non-viable bank. National courts are in a superior position to review the execution of the liquidation under national laws. In an annulment action, the CJEU reviews the *de facto* consequences of the SRB's non-resolution decision incidentally, assessing, in particular, if liquidation achieves resolution objectives equally well as resolution as required under Art. 18(5) of the SRMR.

2.6.4. Standing in annulment actions

Parties can bring an annulment action against the decision of the SRB or the Commission under Art. 263(4) TFEU if they show that the contested measure or decision directly affects their legal situation of the party and that the measure must leave no discretion to those responsible for its implementation. The implementation must be automatic, arising solely from European Union rules, without applying intermediate rules or discretionary interpretation.

The CJEU recently held that shareholders of a bank, for which the SRB refused to initiate a resolution (see above 2.6.3), do not have standing to bring an annulment action against the SRB's decision. The Court reasoned, rather restrictively, that the decision does not directly concern the shareholders because it neither affects their right to receive dividends nor their ability to participate in the

[53] See Judgment of 15 November 2023, PNB Banka AS v. Single Resolution Board, T- 732/19paras 83 and 84.

[54] Judgment of 15 November 2023, PNB Banka AS v. Single Resolution Board, T- 732/19 paras 38,47 and 48.

institution's management.[55] In contrast, a non-viable institution would have standing, as its ability to continue functioning in the market depends on the validity of the SRB decision, which is made solely based on European Union rules without intermediate evaluations.

However, meeting these requirements alone is insufficient for a successful action against the SRB's decision; the appellant must also demonstrate a legitimate interest. The institution must show how it would benefit from the annulment of the SRB's decision[56] and establish a clear link between the decision and the deterioration of its financial situation.[57] The EGC has held that the ECB's FOLTF decision is insufficient to conclude that the non-viable bank has a legitimate interest, as this assessment carries no legal weight for the credit institution concerned and does not concern the operative part of the non-resolution decision.[58]

The CJEU's restrictive stance conforms with the basic structure of property rights protections in the CMDI framework, which relies primarily on compensatory remedies *ex post* to prevent opportunistic litigation that threatens to derail the effective resolution of failed institutions (hold up strategies). Shareholders (and creditors) have ample procedural rights to request *ex post* judicial review of the correct application of the principles of the resolution framework, such as the 'No Creditor's Worse Off' (NCWO) principle and request adequate compensation if these principles were violated.

2.6.5. Transparency of FOLTF assessments and company valuations

In any bank resolution, there is an inherent tension between transparency and confidentiality, particularly manifest when authorities still contemplate the optimal strategy for dealing with the ailing bank. The banking turmoil of March 2023 highlighted this tension, as, unlike the Banco Popular case, news of the U.S. regional bank's and Credit Suisse's difficulties spread rapidly, leading to bank runs. The swift withdrawal of deposits, primarily facilitated by digital banking, exacerbated the crises.

While good reasons may exist to maintain secrecy during the build-up of a banking crisis, the approach to transparency should change once resolution is triggered. At this stage, full transparency to the market, the institution under resolution, and its stakeholders becomes crucial, allowing agents, inter alia, to adequately exercise rights of defense. Against this background, it is welcome also from a banking policy perspective, that, in principle, any citizen of the European Union, as well as any natural or legal person residing or registered in a Member State, has the right to access ECB documents[59], including its FOLTF assessment of a particular institution. However, the ECB is obliged to refuse disclosure if it would undermine protected interests, unless there is an overriding public interest in disclosure.[60]

In the only case thus far, the CJEU, unfortunately, did not thoroughly address the ambiguities arising from this multilayered relationship of rule, exception, and return exception. Yet, the Court clarified that the specific interest of a particular person in having access to the FOLTF assessment cannot be protected, emphasizing that individuals cannot use the general mechanisms for public access to ECB documents for private purposes.[61] Specifically, the Court ruled that exploiting access to information

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55 Judgment of 15 November 2023, PNB Banka AS v. Single Resolution Board, T- 732/19para. 42.

56 Judgment of 15 November 2023, PNB Banka AS v. Single Resolution Board, T- 732/19 para 54. Again the CJEU dwells on standards established in case law, Judgment of 17 September of 2015, Mory and others v Commission, C-33/14 P, para 55.

57 Judgment of 15 November 2023, PNB Banka AS v. Single Resolution Board, T- 732/19 para 53.

58 Judgment of 15 November 2023, PNB Banka AS v. Single Resolution Board, T- 732/19para 53.

59 See Art. 2.1.1.Decision 2004 /258.

60 See article 4.1.Decision 2004/258.

61 Judgment of 27 April 2023, Aeris Invest v ECB (Banco Popular Case), C-782/21 P.

rights to receive, among other documents, the ECB's FOLTF assessment to strengthen one's arguments in an annulment action against an SRB decision to resolve the institution[62] constitutes a private interest and cannot be justified even under Art. 47 of the Charter of Fundamental Rights. Denying access does not violate the right to effective judicial protection. Decision 2004/258 is not intended to protect specific interests or to regulate the evidence required in legal proceedings.[63]

We believe that this restrictive stance curtails institutional accountability because the Court's judgment suggests that the restriction might only be overcome in the case of class actions, where the information from the ECB assessment could potentially be used to support a collective legal challenge. However, such class actions will be frequently unavailable in the context of a resolution decision, particularly as shareholders have no standing before the CJEU if they challenge the SRB's decision that the conditions for resolution are met and the Board's selection of the resolution tools (above 2.6.4). Again, restricting would-be litigants' options to challenge the validity of resolution actions aligns with the CMDI framework's choice to point aggrieved private parties to *ex post* compensatory remedies.

2.6.6. Bank resolution and investor protection

In the landmark case of Banco Popular, the CJEU also examined the relationship between investor protection and bank resolution under the CMDI framework.[64] The Court specifically considered whether the cancellation of shares and other regulatory capital (own funds) instruments in resolution (private sector loss absorption) precludes remedies arising under contract, corporate, or securities laws based on errors or defects in subscription agreements or material misinformation of investors, such as actions of voidance or claims for damages.

The CJEU emphasized that bank resolution is an extraordinary procedure to satisfy the public interest by resolving banking crises swiftly and maintaining financial stability with minimal depletion of public resources. The mechanism to compel shareholders and creditors to absorb the losses of the FOLTF bank is critical for achieving these objectives because it preserves public funds and avoids moral hazard. Resolution is distinct from ordinary insolvency procedures, which vary across EU member states due to the lack of harmonization in insolvency law, except for the pre-bankruptcy restructuring (European Commission 2022).

The public interest objectives underpinning the CMDI framework justify the suspension of certain contract and company law rules, particularly those related to investor protection under the European Prospectus Regime[65], when they conflict with the resolution objectives. The Court concluded that claims for damages or subscription nullification based on a defective prospectus are, once resolution is initiated, effectively discharged and cannot be enforced against the institution under resolution.[66] Compensation for damages due to defective information or subscription nullification is viewed as

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62 Decision SRB/EES/2017/08 on a resolution scheme for Banco Popular on the basis of Regulation No 806/2014 and which was approved by the Commission by Decision (EU)2017/1246 of 7 June 2017 (OJ 2017,L178,p15).

63 Judgment of 27 April 2023, Aeris Invest v ECB (Banco Popular Case), C-782/21 P, paras. 38, 39, and 45.

64 Judgment of 5 May 2022, Banco Santander, SA v J.A.C. and M.C.P.R (Banco Popular Case), C-410/20.

65 At the time of the Banco Popular resolution, Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, [2017] OJ L 345/64 was still in force. In the meantime, the Directive was superseded by Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, [2017] OJ L 168/12. However, the CJEU's argument applies mutatis mutandis to the new legislation.

66 Judgment of 5 May 2022, Banco Santander, SA v J.A.C. and M.C.P.R (Banco Popular Case), C-410/20, para 41. (para. referring to Art. 53(3) and implicitly Art. 60(2) of the BRRD).

equivalent to undoing shareholders' and (certain) creditors' contributions to loss absorption, which would undermine the resolution process and its objectives. [67]

The CJEU further equated securities market investors with shareholders, asserting that this interpretation respects the fundamental rights of property and effective judicial protection. These rights are not absolute[68] and are adequately safeguarded by the NCWO principle, which allows investors to claim compensation for losses incurred in resolution due to the cancellation, write-off, or conversion of capital or debt instruments, provided these losses exceed those they would have faced in an ordinary insolvency proceeding.[69]

If adequate *ex post* remedies and procedures protect the full value of bank capital and debt investors' claims, no welfare-decreasing second-round effects loom. Under effective NCWO protection, investors receive precisely the value of their claim as determined by insolvency law as the inherent limit of any property right. They thus have no rational incentive to demand higher risk premiums because of the overriding character of the CMDI framework, voiding supplanting remedies regularly available under securities laws. Efficient capital allocation *ex ante* remains unimpaired, whereas overlapping remedies within and outside of the CMDI framework would provide for windfall profits and increase the incentives for redistributive litigation. Higher risk premiums and less favorable refinancing conditions for banks should be interpreted as a sign of improved market discipline in a regime with private sector loss-bearing, where banks' refinancing conditions are, at least to some degree, aligned with their risk profile (Tröger 2018).

[67] Judgment of 5 May 2022, Banco Santander, SA v J.A.C. and M.C.P.R, (Banco Popular Case) C-410/20 , para. 43 (referring to Art. 34(1)(a) of the BRRD).

[68] Art. 17 of the Charter of Fundamental Rights. See: Judgment of 5 May 2022, Banco Santander, SA v J.A.C. and M.C.P.R, (Banco Popular Case) C-410/20, paras. 47 and 51.

[69] Judgment of 5 May 2022, Banco Santander, SA v J.A.C. and M.C.P.R, (Banco Popular Case) C-410/20, paras. 48 to 50.

3. CONCLUSIONS

This in-depth analysis has examined the role of the CJEU in the Banking Union, focusing on its case law on the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). The main conclusions are:

— The CJEU respects the decisions of the ECB and the SRB, recognising their expertise and discretion in supervising and resolving banks. The CJEU rarely annuls or modifies their acts, and often defers to their assessments and methodologies.

— The CJEU takes a pro-centralisation stance and thus contributes to a functioning supervisory framework at the European level (Véron 2024; Angeloni 2024). The CJEU reinforces the authority and legitimacy of the ECB and the SRB as the central actors of the Banking Union, by supporting the primacy and uniformity of the SSM and SRM regulations. The CJEU contributes to ensuring a regulatory level-playing field which hinges on a consistent application of the relevant EU legislation across the member states.

— However, the CJEU also respects the European co-legislators' decisions to grant national options and discretion in the implementation of harmonized banking regulation. The Court draws clear boundaries for the ECB, following from its function as a prudential supervisor in the multilevel governance arrangements, characterising the Banking Union and the EU as a whole, reflected in the fundamental principles of conferral, subsidiarity, proportionality, and legal certainty. The CJEU, therefore, does not allow the ECB to adopt general regulatory measures that go beyond the scope of the SSM regulation, or to interpret and apply national law, implementing secondary EU legislation (Directives), in a way that conflicts with the discernible objectives of member states' legislators. The ECB is subject to the judicial review of the CJEU on the basis of the SSM regulation and the Charter of Fundamental Rights of the EU.

— The CJEU's approach may not satisfy those who value variation in supervisory approaches accounting for national idiosyncrasies and allowing for regulatory innovation (Romano 2013). The CJEU's insistence on the uniform and centralised application of the SSM and SRM regulations may limit the flexibility and adaptability of the Banking Union to the diverse and evolving needs and circumstances of the EU banking sector, which remains fragmented and shows significant structural variation across member states. The CJEU's deference to the ECB and the SRB may also reduce the accountability and transparency of these authorities' actions, ultimately undermining the balance of powers and interests within the Banking Union.

— The CJEU champions effective supervision and accepts financial stability as an overriding policy objective. The CJEU recognises the importance and urgency of ensuring the soundness and resilience of the banking sector, especially after the global financial crisis and the euro area sovereign debt crisis. The CJEU gives priority to the objectives of the Banking Union over other competing or conflicting interests, such as the protection of fundamental rights, the preservation of national sovereignty, or the promotion of market competition.

— The CJEU sometimes overreaches and neglects opposing public interests, especially in terms of institutional accountability within the CMDI framework. The CJEU's expansive interpretation of the ECB's and the SRB's powers and discretion may encroach on the competences and prerogatives of other institutions, such as the European Parliament, the Council, the Commission, or the national authorities. The CJEU's limited scrutiny of the ECB's and the SRB's acts may also compromise the rights and interests of the affected parties, such as the banks, their shareholders, creditors, employees, or customers. The CJEU's endorsement of the ECB's and the SRB's reliance on

confidential or non-public information may also impair the accessibility and intelligibility of their decisions, and hamper the possibility of effective judicial review, ultimately jeopardizing institutional legitimacy.

— The CJEU has recently provided clarity on the distribution of competences in resolution, safeguarding the principle of legal certainty. The CJEU has clarified the roles and responsibilities of the various actors involved in the resolution process, such as the SRB, the Commission, the Council, and the national resolution authorities.

— In this context, the Court has also ruled that ex post compensation of aggrieved equity and debtholders has to follow from remedies provided by the CMDI framework. Resolution, underpinned by the overriding financial stability objective, largely precludes remedies that contract and securities laws provide to investors in case of misinformation.

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Banking Union is crucial for European integration, ensuring financial stability in the single market for financial services. The Court of Justice of the European Union (CJEU) plays an essential role in interpreting and enforcing the legal framework of the Banking Union, especially regarding the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). This in-depth analysis scrutinises the pertinent CJEU case law and highlights its implications for the Banking Union and the EU legal order.
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