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S EUROPEAN LAW BLOG

NEWS AND COMMENTS ON EU LAW

Challenging a bank's license withdrawal by the ECB: can the bank act or can its shareholders?

2 MAY 2019 / BY RENÉ SMITS

By René Smits

Summary

Pending before the European Court of Justice (ECJ) is a core issue of legal protection against European Union (EU) acts – can a bank itself challenge the withdrawal of its license by the European Central Bank (ECB) even when the powers of the bank's board have been taken over by a liquidator, or can the shareholders act for the bank or, alternatively, for the protection of their own interests?

Three years since the ECB withdrew the license of a Latvian bank, *Trasta Komerbanka*, in March 2016, this issue of effective judicial protection is at the centre of proceedings^[1] in which the Advocate General (AG)'s Opinion is just out. This post sketches the background to the on-going proceedings and summarises the AG's Opinion, highlighting the issue of contestation of withdrawal

of a bank's license: who can challenge the ECB in court: the bank's board, side-lined by the liquidator, or its shareholders?

Background

The specificities of Latvian law led to the bank [2] (hereafter: *Trasta*, or *TKB*) being put into liquidation almost immediately after the withdrawal of its authorisation[3], which Latvia's National Competent Authority (NCA)[4], the *Finanšu un kapitāla tirgus komisija* (in English: the Financial and Capital Markets Commission, or *FCMC*) had proposed to the ECB[5]. The liquidator, appointed at the request of the *FCMC*, had revoked all powers of attorney issued by the bank's board. In spite of this revocation, confirmed in a Latvian court decision against which no appeal was possible[6], the *Administrative Board of Review* (ABoR)[7] had considered the bank's review request admissible but held "that the allegations of procedural and substantive breaches entailed by the contested decision were unfounded and that [the ECB's] decision was sufficiently reasoned and proportionate, while recommending that the governing body of the ECB clarify certain elements." (General Court (GC)'s *Order*, para 7).

Thereupon, the ECB issued a new decision of withdrawal of the banking license. Court proceedings were initiated against both ECB decisions[8]: the original withdrawal of 3 March 2016 and the post-ABoR withdrawal decision of 11 July 2016. In the first of these cases (Case T-247/16, *Trasta Komerbanka and others v ECB*, renamed *Fursin and Others v ECB*), the GC issued an Order (ECLI:EU:T:2017:623) on 12 September 2017 rejecting the claim of *Trasta* as inadmissible and upholding the shareholders' claim as admissible. So, in the view of the GC, in the circumstances of this Latvian case, the bank's board could not challenge the withdrawal but the bank's shareholders could. This Order was contested by the ECB (Case C-663/17 P), the European Commission (Case C-665/17 P) and *Trasta* and its shareholders (Case C-669/17 P). Note that this threefold appeal still only concerns the *admissibility* of a judicial challenge, not the *substantive* issues of the license withdrawal.

The AG's Opinion in four sentences

On 11 April 2019, Advocate General (AG) Juliane Kokott gave her Opinion ([ECLI:EU:C:2019:323](#)). The AG advises the Court of Justice to rule that, even when a liquidator has revoked the mandate of the lawyer representing the credit institution, a bank – represented by its former management and not by its liquidator – can challenge an ECB license withdrawal in court. She suggests to – in so far – set aside the Latvian rules on revoking a bank's mandates in order to provide an effective remedy against the withdrawal of the authorisation. She also advises the ECJ to find that the shareholders have no right to challenge the withdrawal of the license of a bank.

The Advocate General's reasoning

Confronted with three appeals with conflicting aims [9] (the Commission and the ECB wished to see the General Court's Order to allow the shareholders to oppose the withdrawal in court annulled, whereas *Trasta* and its shareholders wished to see the Order quashed to be able to both oppose the withdrawal), the AG chooses to start with the appeal by the bank and its shareholders and, then, to discuss the appeals by the ECB and the Commission.

The principle of effective judicial protection

The AG quickly dismisses the appeal by the bank's shareholders: their submissions on admissibility had been upheld by the GC, so they cannot appeal against the Order [10]. She then discusses the admissibility of the appeal by the bank, and the substance of its arguments against the GC Order.

To establish whether the principle of effective judicial protection, invoked by *Trasta*, has been infringed, she focuses (para 41) on the question

“whether the General Court was right to rule in paragraph 36 of the order under appeal that the legal protection sought by the bank, namely the annulment of the decision to withdraw its licence, can be effectively achieved by reference to the person of the liquidator.”

Trasta had contested the GC's finding that the liquidator's mandate included the power to challenge the withdrawal (an error of *fact*), and considered that the GC had erred in *law* to regard action by the liquidator an effective legal remedy in the sense of Article 47 of the [Charter of Fundamental Rights](#)

of the European Union ('the Charter') (para 43). On the *factual* error, the AG concludes (para 59-67) that the GC's findings on Latvian law must be accepted as binding: there is no manifest inconsistency with the content of the national provisions at issue nor can an inappropriate significance attributed to Latvian law be pointed out. On the error in *law*, the bank had put forward three arguments why action by the liquidator could not be considered an effective legal remedy, which I quote here (para 43):

“First, the liquidator was appointed by the FCMC, on whose proposal the ECB withdrew the appellant's authorisation. He could not therefore effectively represent the interests of TKB vis-à-vis those institutions. Second, the board of directors alone had been substantively involved from the beginning in the process concerning the withdrawal of the licence, with the result that the liquidator cannot replace it at the stage of legal proceedings. Third, the liquidator would commit a breach of duty if he attempted to obtain the reinstatement of the licence and thus of the economic activities of the company whose business he is supposed to wind up”

Preceding her assessment of these claims in para 68-79 of her Opinion, the AG explores, in para 44, a preliminary question : whether EU law, contradicting national legal provisions governing the liquidator's powers and the representation of a liquidated bank, may justify the maintenance of the power of representation of the former directors for the purposes of bringing an action for annulment.

She argues as follows. Since the right to bring an action against an EU legal act addressed to a legal person is determined solely by EU law^[11], the issue of who can represent this legal entity ^[12] is likewise a matter of EU law. In the absence of EU provisions on legal representation of legal entities, one has to fall back on national law which, however, “may not impair the right to effective judicial protection” (para 46). AG Kokott argues forcefully that, should the GC have been right in considering binding the Latvian court's decision denying the right of representation of *Trasta* in ABoR proceedings or before the European Court (para 47-48),

“the possibility of effective judicial review of the ECB's decision, an EU act, would effectively depend on national law. It could even be entirely precluded by national law, for example if the liquidator did not have the power under the relevant domestic rules to bring an action for annulment.

However, national law cannot have the final decision whether an EU act may be (effectively) reviewed in an individual case.”

She gives illustrations from other cases concerning applicants whose legal personality was considered by the Court to continue for the sole purpose of challenging a legal act addressed to them. Acknowledging that the retention of legal personality was at issue in those cases, not the representation of the entity in court, she sees an underlying principle that the European Courts cannot be bound by national law where the application thereof would mean that effective judicial protection cannot be granted (para 52).

An action for damages [13] cannot be an adequate substitute for a direct challenge, certainly not when a legal act addressed to the applicant is concerned. Moreover, as the recent *Berlusconi* judgment[14] makes clear, even a theoretical possibility of challenging an ECB act before a national court, which might then request the European Court for guidance in a preliminary reference, does not exist.

Parallel proceedings are invoked to support her case: the Maltese Financial Services Tribunal[15] had found that representation of a Maltese bank by its board for the purposes of bringing an action for annulment against the withdrawal of the banking licence before the General Court was unaffected by the bank's liquidation and, remarkably, Latvian courts in cases concerning withdrawals of a banking license by the FCMC prior to the establishment of the SSM had held the same. The AG concludes that the GC erred in law when it considered “that the power of representation and thus the power to revoke the powers of attorney is in any event to be determined on the basis of national law alone” (para 56-57).

Before daring to conclude that this necessitates setting aside the Order of the GC, the AG explores “if the revocation of the power of attorney by the liquidator is actually likely to prevent the bank obtaining effective judicial protection against the withdrawal of its authorisation” – only then would the GC's error have to stand corrected. Therefore, she examines whether “the legal protection sought by the bank could be achieved equally effectively by the liquidator”. [16] She finds it could not, taking structural considerations into account [17]:

“(…) the existence of a purely formal possibility of a remedy cannot be sufficient if the legal framework conditions are designed such that de facto that possibility cannot be utilised. Otherwise the first paragraph of Article 47 of the Charter would be rendered meaningless.”

A liquidator entrusted with liquidating the assets of a bank whose license has been withdrawn cannot be expected to contest this withdrawal seriously: “(…) he would be expected to eliminate the cause in law for the winding up of the company. That is not part of his remit, however.” (para 71)

Also, *Trasta*’s argument that the board, having been involved in the long process leading up to the withdrawal, can only effectively represent the bank’s interest in challenging the ECB’s legal act finds a receptive ear. In this context, the AG notes (para 73-74):

“(…) that the ECB Board of Review did not consider the notice of review lodged by the board of directors against the withdrawal of the licence to be inadmissible and ruled on the substance even though the powers of attorney had been revoked by the liquidator and an order to the contrary had been made by the *Rīgas pilsētas Vidzemes priekšpilsētas tiesa* (Vidzeme District Court, Riga). This suggests that those persons should also be allowed to act for the bank at the stage of legal proceedings.”

The conflict of interest a liquidator would find her or himself in is also highlighted: the FCMC proposes a liquidator to the court and can seek to replace him at any time when it has no longer confidence in him. The AG notes that the ECB withdrew the licence at the behest of the FCMC.

A judgment of the European Court of Human Rights in a similar case^[18] underpins her argument.

The AG’s analysis of the possibility that the liquidator can effectively achieve protection of the bank’s rights results in a clear denial^[19]:

“79. Under these circumstances, the legal protection sought by TKB can [not] be considered to be effectively achieved by the reference to an action to be brought by the liquidator.”

Thereafter, the AG undertakes an examination whether an effective remedy against the withdrawal of a license can result from the shareholders acting, either for the bank or for the protection of their own rights (para 80-87). She concludes that shareholders acting in either capacity “cannot (in any event) be considered equally effective as an action brought by the bank itself” (para 84).

Her interim conclusion from all these considerations is crystal clear [20]:

“88. The legal protection sought by the bank cannot therefore be achieved effectively either by a reference to the liquidator or by a reference to an action brought by the shareholders. By rejecting, in paragraph 36 of the order under appeal, an infringement of the right to effective judicial protection, the General Court thus committed an error in law.”

She advises that the Court of Justice is to judge on the admissibility itself. As

“(…) TKB is able to obtain effective judicial protection against the withdrawal of its banking licence only through the action which was brought pursuant to the fourth paragraph of Article 263 TFEU on its behalf by the former board of directors.”

, she suggests to disregard the liquidator's power to revoke the power of attorney in so far as this has the consequence of depriving *Trasta* from effective judicial protection[21]. Thus, in so far, national law should be set aside. This is the most far-reaching element of the conclusion: EU law, and the protection of the right of effective judicial protection trump (the application of) provisions of contrary national law.

Interest and standing of shareholders to contest the license withdrawal

Having thus concluded that the GC Order needs to be set aside where it held that the bank, acting through its former board, could not challenge the withdrawal of its license, the AG's Opinion addresses the appeals by the ECB and the European Commission. AG Kokott distinguishes between the shareholders' interest in bringing proceedings (para 104-130) and their standing (para 131-134).

The criterion to establish “interest” is whether the binding legal effects of an act bring about a distinct change in the applicant’s legal position (para 104). The “pivotal point” is the answer to the question whether the shareholders have an interest of their own in bringing proceedings or can bring an action in defence of the interests of the bank (para 108). The test of direct and individual concern needs to be applied to the party on whose behalf proceedings are instituted, not to the party representing its interests.^[22] Before exploring, in para 123-129, whether the exception of shareholders having an interest in proceeding for the bank applies here, as the GC had found, the AG examines if the shareholders have an interest of their own.

The AG considers that the economic interest in retaining the license cannot create a right to bring proceedings for the shareholder since their interest overlaps with that of the bank. For a ‘non-privileged applicant’ to bring an action for annulment against a decision which is not addressed to it, establishing its interest to do so overlaps with the direct and individual concern of Article 263 TFEU. Involvement of the shareholders in the administrative procedure prior to the withdrawal of the licence does not give them an interest in bringing proceedings for themselves. This consideration is critical for the status of shareholders: a supervisory authority will involve shareholders in discussions about saving the bank they own, or about re-directing its business towards sustainability; should such talks fail to have the desired result, the bank’s authorisation will be revoked. Their earlier involvement will not give the shareholders an interest to pursue the matter in judicial (or administrative) review, according to the AG (para 114-116).

Are their property rights affected to such an extent by the revocation of a license that shareholders can be considered to be directly and individually concerned according to the criteria of established case law since the *Plaumann judgment* (ECLI:EU:C:1963:17)? The AG does not agree with the ECB and the Commission that the withdrawal of the authorisation directly affects the status of shareholders under company law. While this status is affected by liquidation, she notes that liquidation takes place subsequent to withdrawal of the banking license and is not required by EU law (but, as we have seen, a peculiarity of Baltic law) (para 118-119).

Loss of share value caused by the withdrawal, which jeopardises the object of the company, is not sufficient to establish direct concern either. Finding that the interest of shareholders in securing the

company's future is “not sufficiently separate from the bank's interest in retaining its license”, the AG concludes that “the shareholders do not have an interest of their own in bringing proceedings.” (para 120-122)

Neither do the shareholders, in the Opinion of the AG (para 127-128), have an interest in bringing an action for the bank. Under company law, a legal entity is represented by its board, not by its shareholders. She would only accept such an interest, exceptionally, “in cases where the company itself cannot effectively bring an action against [an EU legal act]”. Since Ms. Kokott has argued that the bank, represented by its board, does have an action, there is no reason to grant the shareholders a right to act for the bank. This is a critical point in the AG's reasoning: this exception fits exactly the *Trasta* case and is relevant for similar cases of banks whose (former) board can challenge the revocation of the authorisation, especially for banks with a restricted shareholder ownership.

Again, the AG considers that the GC Order should be set aside, this time at the request of the ECB and the Commission, namely in so far as the GC considered the shareholders to have an interest in bringing proceedings (para 129 and para 135); the AG suggests the ECJ to itself declare the shareholders inadmissible. She does not further investigate the shareholders' standing as she has concluded they have no interest to pursue proceedings.

References to ABoR

The role of the ABoR is given consideration where the Opinion argues that, in the review proceedings, the power of attorney of the advocate for the bank's board has been accepted and that this did not present practical obstacles (para 74 and footnote 41). Remarkable is the wording used[23] when referring to the ABoR: it is alleged to have decision-making power and the competence to instruct the [Governing Council](#). Both are a misreading of ABoR's competences: it is to give an *opinion* and to *propose* to the [Supervisory Board](#) how to proceed [24].

Sequel

Will the Court of Justice follow the AG and reverse the GC's findings by giving the bank rather than

its shareholders the right to challenge the ECB's decision to withdraw the license of this Latvian bank? The judgment of the Court will have to be awaited. It will determine the way legal protection can be sought against the withdrawal of a banking licence by the ECB in the particular circumstances of national laws which prescribe the immediate liquidation of a bank subsequent to the revocation of its authorisation. Other cases of revocation of banking licences are pending^[25] in which the status of shareholders and the position of liquidators may be relevant, as well as the interplay between national law and EU law. Once these issues have been sufficiently cleared in the European Court's case law, the substantive issues of the legitimacy of the withdrawals can be judicially assessed.

The judgment will also determine whether Latvian law will be set aside for a second time in 2019. Earlier this year, the CJEU annulled (ECLI:EU:C:2019:139) the Latvian measure hindering the independent exercise of his duties as National Central Bank Governor and member of the ECB's Governing Council of Ilmārs Rimšēvičs; Case C-202/18 (*Ilmārs Rimšēvičs v Republic of Latvia*) and Case C-238/18 (*European Central Bank v Republic of Latvia*). I wrote on this decision, applying Article 14.2 of the ESCB Statute in an earlier blog . Apart from setting aside Latvian law to give effect to EU law, the cases are related as allegations against the Latvian central bank Governor involved improper conduct in connection with *Trasta Komercbanka* .

[1] For a brief discussion of the case until the General Court's Order, now subject to appeal, see my [Interplay of administrative review and judicial protection in European prudential supervision – Some issues and concerns](#), *Quaderni di Ricerca Giuridica della Consulenza Legale* , number 84, <https://www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2018-0084/qrg-84.pdf>, at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3092805 .

[2] For the sake of easy reading, the terms 'bank' and 'credit institution' are used interchangeably here.

[3] For the sake of easy reading, the terms 'license' and 'authorisation' are used interchangeably here.

[4] The prudential supervisory authorities of the Member States, or NCAs, together with the ECB

form the [Single Supervisory Mechanism](#) (SSM) which, from November 2014, supervises credit institutions in the Euro Area.

[5] Authorisations and withdrawal of authorisations of credit institutions are a matter for the ECB which acts in concert with the national supervisory authority: Article 14 [SSM Regulation](#) [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 287/63, 29 October 2013]; Articles 80-84 [SSM Framework Regulation](#) [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 (SSM Framework Regulation) (ECB/2014/17), OJ L 141/1, 14 May 2014.].

[6] From the General Court's Order (para 5): "That court also rejected TKB's application for the powers of representation of its management body to be maintained as regards the lodging of a request for review with the ECB and the bringing of an action against the contested decision before the Court of Justice of the European Union. No appeal may lie against that judgment."

[7] Disclosure: I am an Alternate (i.e., non-voting) member of the ABoR.

[8] Even though the announcements in the *Official Journal* for both proceedings mention the 3 March 2016 decision being challenged.

[9] For a summary of the appeal grounds, see the [note](#) in the list of banking-union related case law: [The Banking Union and Union Courts: overview of cases](#), at: <https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/>.

[10] AG Opinion, para 37-38, referring to Article 56 of the [Statute of the Court of Justice](#) which allows appeals only "by any party which has been unsuccessful".

[11] Pursuant to (the case law on) Article 263 fourth paragraph TFEU.

[12] As legal persons have to act through a representative to make a claim.

[13] Which the Commission and the ECB apparently found sufficient legal protection against a license withdrawal.

[14] Judgment of 19 December 2018, ***Berlusconi and Fininvest*** (C-219/17, EU:C:2018:1023), notably paragraph 57.

[15] Case T-321/17, ***Niemelä e a. v ECB***. This case concerns the withdrawal of the license of *Nemea Bank*.

[16] AG Opinion, para 58. The examination is effected in para 68-79 of the Opinion.

[17] “(...) kann das Bestehen einer rein formalen Möglichkeit, einen Rechtsbehelf einzulegen, nicht ausreichen, wenn die rechtlichen Rahmenbedingungen so konzipiert sind, dass von dieser Möglichkeit faktisch kein Gebrauch gemacht wird. Andernfalls wäre Art. 47 Abs. 1 der Charta seines Sinns entleert”. AG Opinion, para 69.

[18] Where “the fact that an application for judicial review of the lawfulness of the withdrawal of a banking licence, which had resulted in the liquidation of the bank concerned, could be made only by the liquidator, but no longer by the former board of directors, constituted an infringement of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).” AG Opinion, para 76 and footnote 32, with references to ECtHR cases.

[19] As the German original makes clear:

79. *Unter diesen Umständen kann nicht angenommen werden, dass das Rechtsschutzziel von TKB durch den Verweis auf eine durch den Liquidator einzulegende Klage effektiv erreicht werden kann.*

The English translation erroneously misses the words ‘not’. The French and Portuguese translations

also make clear that the AG considers that action by the liquidator cannot provide effective legal protection for the bank.

[20] See, also, para 91: “(...) the order under appeal must be set aside in point 1 of the operative part (...)”.

[21] AG Opinion, para 99: “Consequently, the liquidator’s power under national law to revoke all powers of attorney is irrelevant from the point of view of EU law in so far as it concerns the power to bring an action under the fourth paragraph of Article 263 TFEU and has the consequence that effective judicial protection can no longer be obtained. Accordingly, the lawyers’ original power of attorney, the validity of which at the time when it was granted is undisputed, must still be regarded as effective.”

[22] AG Opinion, para 109-112, referring to case law on associations of undertakings in the area of state aid.

[23] AG Opinion, para 19: “In its decision of 30 May 2016, the Board of Review held (...). it instructed the ECB to clarify certain points of the decision” (emphasis added, RS). The German original contains the same kind of wording: “*Entscheidung* “ instead of „*Stellungnahme* “ and “*Ergab der EZB auf*” instead of “*schlug vor* ”.

[24] Article 24(7) [SSM Regulation](#) and Article 16 [ABoR Decision](#) [Decision of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16) (2014/360/EU), OJ L 175/47, 14 June 2014].

[25] [Case T-321/17](#) , **Niemelä e a. v ECB**; [Case T-351/18](#), **Ukrseļhosprom PCF and Versobank v ECB** and [Case T-584/18](#), **Ukrseļhosprom PCF and Versobank v ECB**; [Case T-564/18](#), **Bernis and Others v ECB**; [Case T-27/19](#) , **Pilatus Bank and Pilatus Holding v ECB**.

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About René Smits

Professor Smits has practised law for over 30 years, first at the Netherlands Central Bank (DNB) and, then, at the Netherlands Competition Authority (NMa) and its successor the Authority for Consumers & Markets (ACM). He has a broad command of legal issues, notably in the area of European Union law concerning the internal market, banking regulation, the euro and Economic and Monetary Union, and competition law. He is an authority on the European Central Bank (ECB).

