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ECJ 26 February 2019, Cases C-202/18, *Ilmārs Rimšēvičs* v *Republic of Latvia*, and C-238/18 *European Central Bank* v *Republic of Latvia*, ECLI:EU:C:2019:139

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Introduction

When a national measure contravenes EU law, the usual route for applicants challenging the national legal act in question is to seek judicial review before a national court. The latter court can request a preliminary ruling from the European Court of Justice on the interpretation of the treaty or the EU legal act invoked against the national measure.[1] Not so, however, if the national legal act concerns the

[†]This case note is an elaboration of a blogpost entitled 'ECJ annuls a national measure against an independent central banker', of 5 March 2019 in the *European Law Blog*, available at ⟨europeanlawblog.eu/2019/03/05/ecj-annuls-a-national-measure-against-an-independent-central-banker/⟩ (all websites cited in this case note were visited on 20 February 2020).

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[1]Art. 267 TFEU.

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functioning of the governor of a national central bank in the Eurosystem.[2] Then, a direct appeal lies before the Court of Justice, both for the governor concerned and for the Governing Council of the European Central Bank.[3] Normally, only legal acts of EU institutions, bodies, offices and agencies can be challenged before the Union courts in Luxembourg directly;[4] national legal acts with an EU law connotation may come before the Court of Justice through a reference for a preliminary ruling or in infringement proceedings.[5] The novelty, or anomaly, of a direct action against a national measure affecting the independent functioning of a national central bank governor was inserted into the Treaty in 1993. It took 25 years for judgment to be rendered on this provision[6] which marked a further step in the increasing interweaving of EU law and national law in the area of central banking, not only substantively but also procedurally. Whilst neither the European Central Bank in its pleadings nor Advocate General Kokott in her Opinion[7] dared to submit to the Court that Article 14.2 of the Statute of the European System of Central Banks and of the European Central Bank implied a power for the Court of Justice to annul a national measure affecting the independence of the national central bank, the Court of Justice ruled that the annulment of a *national* legal act affecting the independence of the monetary authority lies with it, the *European* Court of Justice. As someone who posited, in 1997, that this direct recourse to the Court of Justice against a national measure 'is a novelty which crept into Community [now: Union] law through the backdoor of EMU provisions',[8] I welcome this outcome.

Before discussing how the Court of Justice came to this conclusion, some background is in order, on the independence of the central banks in the EU, decision-making on monetary policy in the Euro Area, and the exercise of supervision over Euro Area banks. The Court's judgment was given against the backdrop of major issues in banking and geo-politics: counteracting

[2]The Eurosystem is the term for the European Central Bank and the National Central Banks of the member states that have adopted the Euro: Art. 282(1) TFEU. This term is used to differentiate between the EU's monetary authority and the European System of Central Banks, which includes the Union's non-Euro Area central banks.

[3]The Governing Council of the European Central Bank is the ultimate decision-making body of the European System of Central Banks, and of the Eurosystem: Arts. 8, 10 and 12 of the Statute of the European System of Central Banks and of the European Central Bank (ESCB Statute). The Governing Council consists of the Executive Board of the ECB and the governors of the national central banks of the member states that have adopted the Euro: Art. 283(1) TFEU and Art. 10.1 ESCB Statute.

[4]Art. 263 TFEU.

[5]Arts. 267 and 258 TFEU.

[6]Art. 14.2 of the ESCB Statute.

[7]Opinion of AG Kokott of 19 December 2018, ECLI:EU:C:2018:1030.

[8]*The European Central Bank – Institutional Aspects* (PhD thesis 1997) p. 165.

money laundering and corruption, money from Russia,[9] 'misinformation'[10] and the measure of independence of central banks from day-to-day politics. This case note can only go into some of these wider issues as it focuses on the novelty of the European Court of Justice quashing a state measure.

Independent central banking in the European Union and the interweaving of EU and national law

The Maastricht Treaty,[11] which introduced Economic and Monetary Union, gave the central banks in the EU a strong and independent position. When exercising their mandate of maintaining price stability,[12] carrying out their tasks[13] and effecting their operations,[14] the European Central Bank and the national central banks are to operate in full independence.[15] This independence, which is counter-balanced by accountability mechanisms,[16] finds expression in guarantees of the institutional,[17] personal, functional[18] and

[9]The bank at the centre of the corruption allegations against the central bank governor is reported to have played a major role in channelling funds from Russia to off-shore destinations. *See* OCCRP, 'The Russian Laundromat Exposed', ⟨www.occrp.org/en/laundromat/the-russian-laundromat-exposed/⟩.

[10]On alleged misinformation from outside the EU in the corruption allegations against Mr Rimšēvičs, *see* the press release of the Latvian Defence Ministry of 20 February 2018: 'Ministry of Defence of Latvia: Information operation conducted against Latvia', ⟨www.mod.gov.lv/en/news/ministry-defence-latvia-information-operation-conducted-against-latvia⟩.

[11]Treaty on European Union, OJ C 191/1, 29.7.1992.

[12]Art. 127(1) TFEU and Art. 2 ESCB Statute.

[13]Arts. 127(2)-(6), 128 and 132 TFEU and Arts. 3, 4, 5, 6, 16, 25 and 34 ESCB Statute.

[14]Arts. 17-24 ESCB Statute.

[15]Art. 130 TFEU and Art. 7 ESCB Statute. The independence requirement also applies to central banks of the member states that have not introduced the Euro as the provisions cited are not excluded from application in these member states with a derogation (Art. 139 TFEU and Art. 42.1 ESCB Statute); only for the Bank of England the independence requirement is avoided on the basis of paras. 4 and 7 of Protocol No. 16.

[16]Which cannot be discussed here. For a recent overview, *see* N. Fraccaroli et al., 'The evolution of the ECB's accountability practices during the crisis', 5 *Economic Bulletin* (2018), ⟨www.ecb.europa.eu/pub/pdf/ecbu/eb201805.en.pdf?cf0d79521f2ebf831be86a8e836715ff⟩.

[17]The entities entrusted with providing the public good of price stability are separate legal entities and the European Central Bank is an institution: Art. 13(1) TEU; Arts. 282-284 TFEU.

[18]This refers to the attribution of autonomous decision-making powers to the central bank, thus allowing it to act without the need for political clearance when deciding how to carry out tasks that are core to the functioning of the European economy. G Tett, 'Central banks are rethinking their roles – Staunch independence makes less sense in deflationary times', *Financial Times*, 13 September 2019, provides a recent history of thinking on central bank independence; *see* ⟨www.ft.com/content/eb1143fc-d543-11e9-8367-807ebd53ab77⟩.

financial[19] autonomy of the central banks and needs to be assessed as 'sufficient' before a member state may adopt the Euro.[20] The personal independence of members of the Executive Board is assured through the appointment process[21] and the long duration of their mandate (eight years, non-renewable) as well as by protection against dismissal.[22] The tenure security of governors of national central banks, who are appointed and can be dismissed by national authorities, is expressed in Article 14(2) ESCB Statute, which reads as follows:

> 14.2. The statutes of the national central banks shall, in particular, provide that the term of office of a Governor of a national central bank shall be no less than five years.
>
> A Governor may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. A decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application. Such proceedings shall be instituted within two months of the publication of the decision or of its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

The members of the Executive Board of the European Central Bank and the governors of the national central banks of the Euro Area member states together form the ECB's Governing Council, which has ultimate decision-making authority[23] over monetary policy in the Euro Area.[24] Monetary policy is an exclusive Union competence,[25] at least for the 'in' member states,[26] to be pursued in

[19]The Eurosystem has its own finances, not included in the Union budget, whilst limited scrutiny by the Court of Auditors on the European Central Bank's 'operational efficiency' is foreseen (Art. 27.2 ESCB Statute), thus excluding interference with policy choices of the central banking system based on auditing concerns.

[20]Arts. 131 and 140(1) TFEU.

[21]The European Council may only appoint persons of recognised standing and professional experience in monetary or banking matters, on a recommendation of the Council and after consultation of the European Parliament and the ECB's Governing Council: Art. 283(2) TFEU and Art. 11.2 ESCB Statute.

[22]An Executive Board member can only be dismissed if he or she 'no longer fulfils the conditions required for the performance of his [her] duties or if he [or she] has been guilty of serious misconduct'. Then, 'the Court of Justice may, on application by the Governing Council or the Executive Board, compulsorily retire him' or her (Art. 11.4 ESCB Statute; female form added, RS).

[23]Arts. 8 and 12.1 ESCB Statute.

[24]Art. 127(2) TFEU and Art. 3.1 ESCB Statute.

[25]Art. 3(1)(c) TFEU.

[26]i.e. 19 out of the 28 member states, with two States having an opt-out from adopting the single currency (the United Kingdom and Denmark; *see* Protocol Nos. 15 and 16 to the TFEU), while the other seven have the status of a Member State with a derogation (Art. 139(1) TFEU and the

independence. Decisions of the Governing Council are taken with each member having one vote although, from the moment Lithuania adopted the Euro, a system of rotation became applicable[27] with Governors split into two groups to which different voting rights apply: the Governors from the five largest economies have four votes, while the remainder have 11 in total; voting rights are exercised on a rotating basis.[28]

The introduction of the Euro has led to a very unusual degree of intertwining of the EU and national legal systems in central banking: legal entities with diverse origins and constitutions were jointly entrusted with the shared task of acting as the single currency's guardian. The European Central Bank was established by the Treaties, whereas the national central banks – the other entities in the Eurosystem – are legal persons under member state law. The latter are governed partially by European law but primarily by national law, e.g. as regards the legal structure of the national central bank, their tasks and organisation, and the accountability of the central bank vis-à-vis parliament and the executive. As indicated, these national rules need to be in conformity with EU law prior to the adoption of the single currency and have to remain so.[29]

Next to the mandate to define monetary policy, the European Central Bank and the national central banks have been entrusted, by secondary law, with the prudential supervision of banks,[30] i.e. oversight of their safety and soundness in the interest of financial (as opposed to monetary) stability.[31] The European Central Bank and the national competent authorities[32] of the Euro Area member

Accession Treaties of 2003, 2005 and 2012), i.e. they are constitutionally obliged to adopt the Euro once they have met the convergence criteria (Art. 140 TFEU and Protocol No. 13).

[27]Art. 10.2 ESCB Statute. For the schedule in 2020 and 2021, *see* ⟨www.ecb.europa.eu/ecb/orga/decisions/govc/html/votingrights.en.html⟩.

[28]This system is explained in an article in the ECB's Monthly Bulletin, July 2009, 'Rotation of voting rights in the Governing Council of the ECB', ⟨www.ecb.europa.eu/pub/pdf/other/mb200907_pp91-99en.pdf⟩.

[29]Art. 131 TFEU.

[30]Based on Art. 127(6) TFEU and 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, 29.10.2013 (SSM Regulation).

[31]Monetary stability refers to price stability; financial stability refers to the stability of the financial system (Art. 25.2 ESCB Statute; recitals 30 and 65 to, and Art. 1 of, the SSM Regulation) and the stability of (financing conditions for governments and enterprises in) the Euro Area; for the latter, *see* the judgment of the ECJ of 27 November 2012 in Case C-370/12, *Pringle*, notably paras. 65, 110, 135-136, and 164.

[32]A national competent authority may also be the national central bank but this is not necessarily so; all national competent authorities are represented in the Supervisory Board of the ECB which proposes decisions to the Governing Council and executes them; next to the members of the ECB's Executive Board, only national central bank governors are members of the Governing Council. *See* ⟨www.bankingsupervision.europa.eu/organisation/nationalsupervisors/html/index.en.html⟩.

states together form the Single Supervisory Mechanism,[33] which is entrusted with supervising banks (formally, credit institutions). Within the Single Supervisory Mechanism, tasks have been allotted to the European Central Bank and to the national competent authorities respectively,[34] with the 'significance' (basically, size or relative importance)[35] of the bank determining which of them is responsible for day-to-day supervision. Decisions on supervisory matters are prepared and executed by the ECB's Supervisory Board,[36] established in 2014; ultimate decision-making power is held by the Governing Council, which can object to proposed decisions on prudential supervision submitted by the Supervisory Board.[37]

[33]The Single Supervisory Mechanism forms one pillar of the so-called 'banking union'. The second pillar is a Single Resolution Mechanism (SRM), with the Single Resolution Board as the Union agency to decide on resolution of significant banks. *See* Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a single resolution mechanism and a single resolution fund and amending Regulation (EU) No 1093/2010, OJ L 225/1, 30.7.2014, as amended by Regulation (EU) 2019/877 of the European Parliament and of the Council of 20 May 2019, OJ L 150/226, 7.6.2019. The third pillar of 'banking union' is intended to be a European Deposit Insurance Scheme for which the Commission has submitted a proposal in 2015 that is currently stalled in the Council.

[34]In another judgment, the allocation of powers under the SSM Regulation has been qualified as conferring exclusive powers to the European Central Bank with the national competent authorities implementing their tasks as derived, delegated powers under a decentralised system of operation of the Single Supervisory Mechanism; *see* the General Court's judgment of 16 May 2017 in Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank* v *ECB*, ECLI:EU:T:2017:337, confirmed by the ECJ's judgment of 8 May 2019 in Case C-450/17 P; ECLI:EU:C:2019:372. The German Constitutional Court takes issue with this interpretation in the *L-Bank* case in a recent judgment on the validity of 'banking union' under German law: Judgment of 30 July 2019, 2 BvR 1685/14, 2 BvR 2631/14. I summarise this ruling in my paper 'The ECB and the rule of law' for the ECB Legal Conference 2019: *Building bridges – central banking law in an interconnected world*, ⟨www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings201912~9325c45957.en.pdf⟩.

[35]Art. 6(4) SSM Regulation.

[36]*See supra* n. 32.

[37]Art. 26 SSM Regulation. In the proceedings before the European Court of Justice, the ECB had pleaded, rather incongruously, that the activity in which corruption was alleged to have taken place concerned a bank subject to the supervision of the *Finanšu un kapitāla tirgus komisija*, the Latvian Financial and Capital Market Commission. This activity was, therefore, beyond the withdrawal of the licence, outside the mandate of the ECB and, moreover, the ECB was involved 'only in the context of a procedure in which the Governing Council raised no objections and which does not require express consent on the part of its members'. The Advocate General easily dismissed such reasoning: the Governing Council is 'at least associated in the prudential supervision of credit institutions such as *Trasta Komercbanka* and responsible for taking decisions relating to their authorisation' so that 'it cannot be precluded outright' that the activity investigated by the Latvian authorities consisted of 'acts carried out by Mr Rimšēvičs in the performance of his duties as a Member of the Governing Council'; *see* paras. 149 and 150 of her Opinion.

The European Central Bank is entrusted with the gatekeeper function for all Euro Area credit institutions (not just for the significant banks): decisions on licensing and withdrawals of licences are taken by the Bank,[38] as well as decisions on acquiring or disposing of qualifying shareholdings[39] in banks.[40] The revocation of authorisation to engage in banking business of a Latvian bank, Trasta Komercbanka, a commercial bank allegedly engaged in money laundering,[41] is part of the background to the current case, as I will explain in the next section.

The facts of the case

As noted, the cases from Latvia have their origins in allegations of improper conduct by the Latvian central bank governor in connection with Trasta Komercbanka. The bank's licence had been withdrawn[42] and the bank was put into liquidation,[43] with its shareholders engaging in a battle at the European Court of Justice[44] to have their grievances[45] heard against the European Central Bank. Specifically,

[38]Art. 4(1)(a) in conjunction with Art. 6(4) SSM Regulation.

[39]i.e. shareholdings which exceed a certain threshold.

[40]Art. 4(1)(c) in conjunction with Art. 6(4) SSM Regulation.

[41]*See* the report by the Organized Crime and Corruption Reporting Project (OCCRP), 'Latvian Bank Was Laundering Tool', ⟨www.reportingproject.net/therussianlaundromat/latvian-bank-was-laundering-tool.php⟩.

[42]On the proposal of the Financial and Capital Market Commission, the Latvian competent authority.

[43]*See* the notice on the appointment of a liquidator, published pursuant to Directive 2001/24/EC on the reorganisation and winding-up of credit institutions in OJ C 123/2, 7.4.2016.

[44]*See* Case T-247/16, *Trasta Komercbanka and Others* v *ECB*, renamed *Fursin and Others* v *ECB*, notably the Order of the General Court of 12 September 2017 rejecting the claim of *Trasta Komercbanka* as inadmissible and upholding the shareholders' claim as admissible; ECLI:EU:T:2017:623. This Order has been the subject of a threefold appeal: by the ECB (Case C-663/17 P), by the Commission (Case C-665/17 P) and by *Trasta Komercbanka* itself (Case C-669/17 P), with the ECJ ruling, on 5 November 2019, 'that the General Court was wrong to consider that the shareholders of Trasta Komercbanka were directly concerned by the decision at issue' and, thus, rejecting the standing of shareholders, referring the case back for a decision on the action brought by *Trasta* against the ECB's withdrawal of its banking licence; ECLI:EU:C:2019:923. For the Opinion of Advocate General Kokott in Joined cases C-663/17 P, C-665/17 P and C-669/17 P of 11 April 2019 ECLI:EU:C:2019:323, *see* my summary, at ⟨ebi-europa.eu/wp-content/uploads/2019/05/Challenging-a-banks-license-withdrawal-by-the-ECB-can-the-bank-act-or-can-its-shareholders_280419_def_.pdf⟩. *See also* Case T-698/16, *Trasta Komercbanka and Others* v *ECB*.

[45]Disclosure: I have been a non-voting member in the review proceedings before the Administrative Board of Review, the ECB's body for independent outside administrative review of supervisory decisions, concerning *Trasta*. For a description of the *Trasta* cases, *see* my 'Interplay of administrative review and judicial protection in European prudential supervision – Some issues and concerns', 84 *Quaderni di Ricerca Giuridica della Consulenza Legale* p. 43-46.

Mr Ilmārs Rimšēvičs, governor of Latvijas Banka (the Bank of Latvia), had been alleged to be corrupt by the owners of this Latvian bank. As Advocate General Kokott pointed out,[46] Mr Rimšēvičs 'is suspected of influence peddling in favour of the Latvian bank Trasta Komercbanka', noting the ongoing proceedings in Luxembourg concerning that bank. The corruption allegations were made in the context of alleged money laundering activities by several Latvian banks.[47] The Court summarised the allegations as follows:[48] 'Mr Rimšēvičs is suspected of having sought and accepted a bribe in 2013 in his capacity as Governor of the Central Bank of Latvia, with a view to exerting influence in favour of a private Latvian bank'. At the time of the Court's judgment, a trial based on the corruption allegations against Mr Rimšēvičs had not yet started in the Latvian courts: national criminal proceedings only began[49] in November 2019.

In February 2018, the allegations against Rimšēvičs led the Latvian Anti-Corruption Office[50] to arrest[51] and interrogate him.[52] After the governor's release on 19 February 2018, the Anti-Corruption Office prohibited the Latvian central bank governor from participating in the decision-making of Latvia's Central Bank and from remaining in his post as governor. It also forbade him to leave Latvia without prior authorisation. This negatively affected him in the performance of his duties as a member of the ECB's Governing Council, as most of its monthly meetings take place in Frankfurt am Main. Also, having to rely on authorisation to leave the country to perform his duties as a member of the Governing Council at the European Central Bank's headquarters would have made his functioning dependent on the decisions of a third party.[53]

[46]In para. 2 of her Opinion.

[47]Another Latvian commercial bank, ABVL Bank, saw its licence withdrawn in 2018 after the US Treasury accused it of money laundering and circumventing sanctions against the People's Republic of Korea; appeals against the ECB's 'fail or likely to fail' decision leading to the closing of the bank were dismissed as inadmissible by Orders of 6 May 2019 in Case T-281/18, *ABLV Bank* v *ECB* and Case T-283/18, *Bernis and Others* v *ECB*; appeals pending: Case C-551/19 P and Case C-552/19 P.

[48]In para. 15 of the judgment.

[49]'ECB governor accused of bribery in Latvia corruption trial', *Reuters*, 4 November 2019, ⟨www.reuters.com/article/us-europe-ecb-fraud-latvia/ecb-governor-accused-of-bribery-in-latvia-corruption-trial-idUSKBN1XE1PJ⟩.

[50]The *Korupcijas novēršanas un apkarošanas birojs*, or *KNAB*; *see* ⟨www.knab.gov.lv/en/⟩.

[51]*See* the statement by the Latvian Prime Minister on the situation at the Latvian national central bank, 18 February 2018, ⟨www.mk.gov.lv/en/aktualitates/statement-prime-minister-maris-kucinskis-regarding-situation-bank-latvia⟩.

[52]Mr Rimšēvičs' story is recorded by *Bloomberg* in an interview published online on 25 September 2018, ⟨www.bloomberg.com/news/features/2018-09-25/the-face-of-latvia-s-scandal-ridden-financial-system-is-caught-in-a-corruption-case⟩.

[53]Art. 130 TFEU prohibits instructions from EU and member state authorities 'or from any other body'.

Both Mr Rimšēvičs and the European Central Bank contested the Latvian measure at the European Court on the basis of Article 14(2) ESCB Statute.[54] Mr Rimšēvičs immediately appealed two of the restrictions imposed on him (the prohibition on performing his duties at the Central Bank of Latvia and the prohibition on leaving the state without authorisation) but, within four days, the District Court of Riga dismissed that action.[55] Four months later, the public prosecutor charged Mr Rimšēvičs with three counts of corruption.[56] In the meantime, Mr Rimšēvičs had lodged his action in Luxembourg (16 March 2018), followed three weeks later by a similar action by the European Central Bank.

In his appeal in Luxembourg, the governor sought three declaratory remedies: a declaration that the decision by the Latvian Anti-Corruption Office had unlawfully relieved him from office as governor of the Latvian central bank, a declaration that the prohibition on performing the duties and exercising the powers of the governor of the Latvian central bank was unlawful, and a declaration that the restrictions on performing the duties and exercising the powers of a member of the ECB's Governing Council as a result of the decision had also been unlawfully applied to him.[57]

Separately, the European Central Bank sought a Court order for the Republic of Latvia 'to produce all relevant information relating to the investigations currently being carried out by the KNAB concerning Mr Rimšēvičs',[58] and a declaration that Latvia had infringed the second subparagraph of Article 14(2) of the ESCB Statute as the central bank governor had been 'relieved from office in the absence of a judgment convicting him delivered on the merits by an independent tribunal' while there was 'no exceptional circumstance capable of justifying Mr Rimšēvičs being relieved from office'.[59] The European Central Bank also sought interim measures, which the Vice-President of the Court granted by interlocutory order of 20 July 2018, four months after the decision of the Anti-Corruption Office. In that order,[60] the quorum necessary for Governing

[54]The statutory appeal against formal dismissal by the appointing authority, the parliament of Latvia, was unavailable to Mr Rimšēvičs, as the measure against him had been taken by another public authority, the Anti-Corruption Office. The Law on the Bank of Latvia provides that '[t]he Governor of the Bank of Latvia may lodge an appeal against the decision of the Parliament to relieve him from office according to the procedure laid down in Article 14.2'; *see* para. 10 of the judgment.

[55]*See* para. 17 of the judgment.

[56]*See* para. 18 of the judgment. As indicated, the criminal trial only started in November 2019.

[57]Para. 19 of the judgment.

[58]Under Art. 24 of the Statute of the Court of Justice of the European Union and Art. 62 of the Rules of Procedure of the Court of Justice.

[59]Para. 20 of the judgment.

[60]Interlocutory order of the Vice President of the ECJ of 20 July 2018 in Case C-238/18 R, *ECB* v *Latvia*, EU:C:2018:581.

Council decisions and the representativeness of that body for the entire Euro Area economy are considered reasons to qualify a prolonged absence of a voting national central bank governor or alternate as 'serious and irreparable damage to the ECB in view of its role as regards the proper functioning of the monetary policy of the Union, the Eurosystem, the ESCB and the SSM'. The interlocutory order required Latvia to take the necessary measures to suspend the Latvian Anti-Corruption Office's measures in so far as they prevented Mr Rimšēvičs from appointing an alternate to replace him as a member of the Governing Council of the European Central Bank.[61] In this phase of the proceedings, the outcome still conformed to the traditional dividing line between Union and national law: the Union judge orders the state to take the necessary steps towards provisional compliance with the Union norm and does not himself suspend the national measure.

Latvia's defence

Latvia opposed the admissibility of Mr Rimšēvičs' application, as this would have led to an interference by the European Court of Justice in the conduct of criminal proceedings. This would have been contrary to Article 276 TFEU, which bars the Court from reviewing the validity or proportionality of measures taken by national law enforcement agencies.[62] Additionally, Latvia took a restrictive view of the scope of Article 14(2), alleging that the provision only applied in the event of a 'decision severing the legal and institutional link between the governor of a national central bank and [the European Central Bank]'. Such a decision could only be taken by Latvia's parliament (the institution appointing and dismissing a central bank governor). Here, it merely concerned a national decision 'to guarantee the effective conduct of the investigation concerning [the governor]'.[63] In other words, Mr Rimšēvičs had been temporarily removed from active service, not dismissed; Article 14(2) thus did not apply. Latvia furthermore argued that, although the independence of the central bank is guaranteed under Latvian law, 'independence in performing the tasks of the Central Bank of Latvia does not

[61]Art. 10(2), second para., ESCB Statute allows that a member of the Governing Council who is prevented from attending for a prolonged period may appoint an alternate. *See* Arts. 3.3 and 3.4 of the Rules of Procedure of the ECB, Decision of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2004/2) (2004/257/EC), OJ L 80/3, 18.3.2004, as lastly amended by Decision (EU) 2016/1717 of the ECB of 21 September 2016 amending Decision ECB/2004/2 adopting the Rules of Procedure of the ECB (ECB/2016/27), OJ L 258, 24.9.2016, p. 17; consolidated version at ⟨eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02004D0002-20160924&from=EN⟩.

[62]Paras. 31 and 37 of the judgment.

[63]Paras. 33-36 of the judgment.

confer any criminal immunity on its governor and does not impose any restrictions on the Latvian law enforcement authorities'.[64] Since Latvian law provides the same guarantees enjoyed by the governor to the vice-governor, who performs the duties of the governor of that central bank in the governor's absence or when he has been 'relieved from office' or his term of office has expired, Latvia argued that there was no reason to apply Article 14(2) ESCB Statute: the governor could be replaced in function by the equally independent vice-governor.[65]

Opinion of the Advocate General

The Advocate General asked whether 'the remedy in Article 14.2 of the [ESCB Statute] (. . .) [must] be analysed as an action for annulment although, in the system of remedies established in the [TFEU], an action for annulment may in principle be brought solely in order to challenge the acts of the bodies and agencies of the European Union?'.[66] She sketched the practical dilemma the Court was facing as follows:

> if the Court were to annul the decision (. . .) imposing the restrictive measures at issue on Mr Rimšēvičs, he would be able to resume office immediately after the Court delivered its judgment. If, on the other hand, the Court were merely to find that the measures in question were incompatible with the [ESCB Statute], it would be for the Republic of Latvia to take the necessary measures to ensure that the judgment of the Court was implemented within its internal legal order.[67]

After an extensive exploration of the meaning of the provision on the basis of literal, systematic, and teleological methods of interpretation, she found that an action under Article 14(2) did not constitute a direct appeal that could lead to annulment of the relevant national act.[68] She relied on the existence of two 'interconnected but nonetheless quite separate legal spheres' in 'the system of legal remedies before the Courts of the European Union': legality review possibly leading to the annulment of legal acts emanating from the institutions, bodies, offices, and agencies of the European Union by the EU courts in Luxembourg, and a more aloof approach to acts of the member states, i.e. 'only by declaring that an act or a legal situation of national law is incompatible with EU law and the

[64]Para. 38 of the judgment.
[65]Ibid.
[66]Para. 38 of the Opinion.
[67]Para. 39 of the Opinion.
[68]'(. . .) the present actions must be analysed as actions for a declaration by the Court that (. . .) Latvia failed to fulfil its obligations under Article 14.2 of the [ESCB Statute]'; para. 68 of the Opinion.

obligations borne by the Member States under the Treaties'.[69] Thus, Advocate General Kokott approached the action as seeking 'a declaration by the Court that, in adopting with regard to Mr Rimšēvičs restrictive measures that prevent him from performing his duties as Governor of the Bank of Latvia, the Republic of Latvia failed to fulfil its obligations under Article 14.2'.[70] She suggested that the Court rule accordingly and find Latvia in breach of its Article 14(2) obligations.[71]

The judgment

The nature of the action

The Court disagreed. Even though the European Central Bank itself had merely requested the Court to declare that Latvia had infringed Article 14(2) by adopting the measure,[72] the Court held that 'both the literal and the systematic and teleological interpretations of Article 14.2 of that statute entail the action provided for in that article being classified as an action for annulment'.[73] Whereas the Advocate General considered that textual similarities[74] between Article 14(2) ESCB Statute and Article 263 TFEU 'do not seem to reflect a deliberate choice by the legislature to classify the action provided for in that provision as an action for annulment',[75] the Court, instead, relied on three similarities in wording to find otherwise: the action may be brought by an individual who is the addressee of the decision, both provisions prescribe the same two-months period for the action, and both allow the same 'pleas in law alleging "infringement of [the] Treaties or of any rule of law relating to their application"'.[76] The Court explicitly dismissed the Advocate General's argument that the Court could only issue a declaratory order because the 'architecture of the remedies' provided by the Treaties distinguished 'two spheres' of legality review for EU and national legal acts, which are 'interconnected but nevertheless quite separate'.[77] It acknowledged that by

[69]Paras. 54-55 of the Opinion.

[70]Para. 68 of the Opinion.

[71]Para. 167 of the Opinion.

[72]Para. 64 of the judgment. Mr Rimšēvičs himself had requested that the decision be declared unlawful.

[73]Para. 66 of the judgment.

[74]Both provisions provide (in French and other languages, e.g. Dutch) for an action 'against' a legal act; the similar wording of two grounds that can be invoked against the measure and the two-month deadline for contesting it constitute further terminological similarities: para. 43 of the Opinion.

[75]Para. 44 of the Opinion.

[76]Para. 67 of the judgment.

[77]Paras. 52-62 of the Opinion. The English word 'inadmissible' used in para. 62 is an awkward translation of the French *inadmissibilité* and the German *Unzulässigkeit*, which, in this context, must be read as unlawfulness or illegitimacy, not inadmissibility.

> expressly entrust[ing] the Court with power to review the lawfulness of an act of national law in light of "[the] Treaties or of any rule of law relating to their application", the second subparagraph of Article 14(2) of the [ESCB Statute] derogates from the general distribution of powers between the national courts and the courts of the European Union.

However, such derogation 'can be explained by the particular institutional context of the ESCB within which it operates'. It added:

> The ESCB represents *a novel legal construct in EU law* which brings together national institutions, namely the national central banks, and an EU institution, namely the European Central Bank, and causes them to cooperate closely with each other, and within which a different structure and *a less marked distinction between the EU legal order and national legal orders prevails*.[78]

Article 14(2):

> reflects the logic of this highly integrated system which the authors of the Treaties envisaged for the ESCB and, in particular, of the dual professional role of the governor of a national central bank, who is certainly a national authority but who acts within the framework of the ESCB and sits, where he is the governor of a national central bank of a Member State whose currency is the euro, on the main decision-making body of the ECB.[79]

The Court emphasised the specific, unique, and exceptional nature of the remedy[80] and relied heavily on the objective pursued by inserting this action into the Treaty as

> one of the main guarantees that the governors, although appointed by and, as the case may be, dismissed by the member states, are to carry out independently the tasks that are conferred on them by the Treaties and are not, pursuant to Article 130 TFEU and Article 7 of the [ESCB Statute], to take any instructions from national authorities. It thus represents an essential component of the institutional balance necessary for close cooperation between the national central banks and the ECB within the ESCB.

[78]Para. 69; italics added. Unless specified otherwise, further references to paragraphs are to the ECJ's judgment.

[79]Para. 70. The reference to a 'highly integrated system' contradicts the tenor of the AG who relied on 'the separation of those two spheres of competence' in EU law; the Eurosystem forms an exception to this.

[80]Para. 71.

It added that:

> Only an action for annulment, possibly supplemented by the interim measures which the Court may order pursuant to Articles 278 and 279 TFEU, is capable of addressing the concerns which led to the creation of that legal remedy. In particular, the intentions of the authors of the [ESCB Statute] would not have been fully respected if the judgment given under the second subparagraph of Article 14.2 of that statute were a declaratory judgment and the effects thereof were thus dependent on its enforcement by the national authorities.[81]

The applicability of the action to measures other than dismissal

The European Court of Justice rejected the view that Article 14(2) ESCB Statute is limited to situations involving 'the definitive severing of the link between the national central bank and its governor'. In doing so, it relied, beyond the language of the provision, on the context and objectives thereof, invoking the clear intention of the Treaty's authors 'to shield the ESCB from all political pressure in order to enable it effectively to pursue the objectives ascribed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by primary law'.[82] The European Court of Justice noted that '[by] directly conferring jurisdiction on the Court to determine the lawfulness of the decision to relieve the governor of a national central bank from office, the member states have demonstrated the importance which they attach to the independence of the holders of such positions'.[83] It considered that the independence of the national central bank governor and of the ECB's Governing Council 'would be severely undermined' if national central bank governors could be relieved from office 'without grounds'.[84] Even a temporary prohibition to perform his or her duties 'is likely to constitute a form of pressure on that person', certainly where, as Latvia had indicated, the ban could be lifted depending on the conduct of the central bank governor.[85] Moreover, easy circumvention of judicial review under Article 14(2) by adopting a sequence of temporary measures would be possible if that provision were to be

[81]Para. 74.

[82]Paras. 42-55, with a reference to its judgment in the *Gauweiler* case on the ECB's mandate to engage in non-standard monetary policy measures, the so-called Outright Monetary Transactions, announced in September 2012 and never actually employed – but the subject of fierce controversy in Germany, with the German Constitutional Court referring questions on the validity of the ECB's decision; judgment of 16 June 2015 in Case C-62/14; ECLI:EU:C:2015:400.

[83]Para. 49.

[84]Para. 51. The broad terminology of Art. 14.2, which speaks of 'relieved from office' ('*relevé de ses fonctions*') rather than 'dismissed', is helpful: even in the absence of a formal dismissal, protection is available.

[85]Para. 52.

read restrictively.[86] The Court also noted that the 22-month period during which the restrictive measures may be maintained under Latvian law might extend to the end of Mr Rimšēvičs's term, thus effectively making a temporary measure a definitive severing of ties. For all these reasons, the European Court of Justice held that it had jurisdiction 'to hear and determine an action brought against a measure such as the temporary prohibition on performing the duties of Governor of the Central Bank (. . .)'.[87] Thus, a national central bank governor and the European Central Bank can directly challenge, before the European Court of Justice, any measure limiting the free exercise of the former's function as member of the ECB's Governing Council, short of an outright 'relieving from office'.

No interference with national criminal law

In a further, clear rebuttal of Latvia's claims, the Court held that, although the EU has limited powers in criminal matters, EU law does set limits on the powers of member states in criminal matters. Those powers must be exercised in line with both fundamental freedoms and 'EU law as a whole' so that 'the national rules of criminal procedure may not preclude the jurisdiction conferred on the Court by the second subparagraph of Article 14.2 of the [ESCB Statute], wherever that provision is applicable'.[88] Nor does Article 276 TFEU help Latvia, since the limitation of judicial powers therein concerns the exercise of powers regarding the chapters on judicial cooperation in criminal matters and police cooperation, i.e., Articles 82-89 TFEU, whereas the application of a different provision is at issue here. Finally, Latvia's assertion that jurisdiction of the European Court of Justice would amount to criminal immunity for the governor of the central bank was rejected: Article 14(2) ESCB Statute only grants the right 'to contest before the Court any decision whereby [the] governor is relieved from office'. The European Court of Justice sees this case as 'exceptional': a temporary measure was taken 'that could be equated with relieving the governor of a national central bank from office' in national criminal proceedings. Moreover, the Court accepted the notion that a national central bank governor could be suspended temporarily from office in the context of a criminal investigation for which the national courts are responsible.[89] Additionally, the European Court of Justice

[86]Para. 53.
[87]Para. 55.
[88]Para. 57.
[89]Para. 91, which deserves to be quoted in full: 'It should be specified at the outset that it is not for the Court, when an action is brought before it on the basis of Article 14.2 of that statute, to take the place of the national courts having jurisdiction to give a ruling on the criminal liability of the governor involved, nor even to interfere with the preliminary criminal investigation being conducted in respect of that person by the competent administrative or judicial authorities under

reflected that corruption would, if proven, constitute 'serious misconduct' in the sense of Article 14(2) ESCB Statute.[90]

It is because of the importance of central bank independence and of 'the disadvantage inherent in any delay in penalising a decision to relieve a governor from office made in breach of the Treaties or of any rule of law relating to their application that the authors of those treaties made a legal remedy before the Court against such an act available to the ECB and the governor concerned'. The Court reflected that 'the prolonged lack of participation of a Member of the Governing Council is likely to seriously affect the proper functioning of that essential body of the ECB', and takes into consideration the 'serious and immediate consequences for the person concerned'.[91]

Applying Article 14(2) to the case at hand

After pondering the constitutional considerations, the European Court of Justice set out to assess whether the Latvian central bank governor had justifiably been placed under a restrictive measure that impeded his functioning in Riga and Frankfurt. Seeing its jurisdiction as limited, and conceding that a temporary suspension from gubernatorial office may be necessary during a criminal investigation,[92] the Court needed 'to verify that a temporary prohibition on the governor concerned performing his duties is taken only if there are sufficient indications that he has engaged in serious misconduct capable of justifying such a measure'.[93] Mr Rimšēvičs' guilt had not been proven in court: as indicated, a trial based on the allegations began only in November 2019. Also, the judgment of the Court and the Opinion of the Advocate General contain clear indications that there was a lack of evidence against Mr Rimšēvičs. Latvia had initially resisted giving the Court information on the investigation by the Anti-Corruption Office, claiming confidentiality under its Code of Criminal Procedure.[94] When the President of the Court ordered that 'the documents supporting the restrictive measures adopted by the Anti-Corruption Office' be produced, 44 documents were handed over, regarding which both the governor and the European Central Bank observed before the Court that 'Latvia has not adduced any evidence either of wrongdoing

the law of the Member State concerned. For the purposes of such an investigation, and in particular in order to prevent the governor concerned from obstructing that investigation, it may be necessary to decide to suspend that person temporarily from office'.

[90]Para. 90.

[91]Paras. 72-73, with a reference to the interlocutory order of the Vice President of the ECJ of 20 July 2018.

[92]Para. 91.

[93]Para. 92.

[94]Para. 39.

on the part of Mr Rimšēvičs or that the restrictive measures taken against him are well founded'.[95] The European Court of Justice drily recounted that 'none of the evidence put forward by the Republic of Latvia shows that the action provided for in the [ESCB Statute] would be such as to impede the normal conduct of the investigation' and ruled that it had jurisdiction, although limited, i.e. 'only in so far as [the decision at issue] temporarily prohibits Mr Rimšēvičs from performing his duties as Governor of the Central Bank of Latvia'.[96]

After rejecting an offer by Latvia, late in the proceedings, to provide unspecified further evidence, the Court held that Latvia had provided insufficient indications to the European Court of Justice; it upheld the plea that the decision of the Anti-Corruption Office was unjustified: 'the Court must hold that the Republic of Latvia has not established that the relieving of Mr Rimšēvičs from office is based on the existence of sufficient indications that he has engaged in serious misconduct for the purposes of the second subparagraph of Article 14.2 of the [ESCB Statute] and, accordingly, upholds the plea alleging that that decision is unjustified'.[97] The Court '[a]nnuls the decision of the (...) Anti-Corruption Office (...) of 19 February 2018 in so far as it prohibits Mr Ilmārs Rimšēvičs from performing his duties as Governor of the Central Bank of Latvia'.[98]

Comments

Swift and effective redress to protect European Central Bank independence

The judgment[99] in the Rimšēvičs cases underscores the independence of the Eurosystem and the members of the European Central Bank's decision-making bodies, while also highlighting the extent to which Union and state law permeate central banking in Europe[100] by giving 'cassatory effect' to Article 14(2), as Jürgen

[95]Paras. 26-28.

[96]Paras. 60-63.

[97]Paras. 91-96.

[98]Point 2 of the operative part of the judgment.

[99]Rendered in an expedited procedure in which interim measures were imposed on Latvia ordering it to allow Mr Rimšēvičs to designate an alternate member of the ECB's Governing Council; *see supra* n. 60.

[100]Illuminating on the integration of the national central banks in the Eurosystem is Art. 14.3 ESCB Statute, according to which '[t]he national central banks are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB. The Governing Council shall take the necessary steps to ensure compliance with the guidelines and instructions of the ECB, and shall require that any necessary information be given to it'.

Bast, another annotator, wrote.[101] A further peculiarity of this venue is that the direct route to the European Court of Justice bypasses the General Court which, in normal challenges of an *EU* legal act, is the first to adjudicate. When a *national* measure affecting the independence of a national central bank governor is at issue, resort to the *European* Court of Justice is the way forward. It is relevant in terms of guaranteeing central bank independence that the ESCB Statute allows both the affected governor and the Governing Council to appeal national decisions affecting the governor's position in the ultimate European Central Bank decision-making body 'so that one does not have to rely on the willingness of the Governor concerned to fight in court against the appointing (and 'relieving') authority', as I wrote[102] back in 1997. These joined cases, brought by the Latvian national central bank governor and the European Central Bank respectively, were evidence of these paths.

I welcome this judgment. Furthermore, I am somewhat surprised by the hesitance of others, including the European Central Bank as claimant, to read into Article 14(2) ESCB Statute an action of annulment against a national measure that interferes with the independence of the functioning of the Eurosystem. A reading of Article 14(2) by which the European Court of Justice is merely given the possibility to issue declaratory judgments, as proposed by Advocate General Kokott, would have undermined the speed with which intrusions by political or administrative bodies into the affairs of independent central banks can be repelled. In the case at hand, that would have required Latvia to take the necessary steps to comply with the Court's judgment (Article 260 TFEU) rather than provide immediate relief to the affected person (the governor of the national central bank) and entity (the European Central Bank). The specific set-up of the European central banking system justifies this exceptional venue in Luxembourg and the power of annulment of the European Court of Justice. As the Court noted, the member states showed how weighty they consider the independence of national central bank governors to be by attributing to the European Court of Justice the power to directly decide on the lawfulness of a decision to relieve a governor from office.[103] Unjustified measures to 'relieve' a national central bank governor from office would 'severely undermine' the independence of the ECB's Governing Council, as the Court observed.[104]

[101]'i.e. this provision vests the Court with the power to declare the contested act to be void': J. Bast, 'Autonomy in Decline? A Commentary on Rimšēvičs and ECB v Latvia', *Verfassungsblog*, 13 May 2019, ⟨verfassungsblog.de/autonomy-in-decline-a-commentary-on-rimsevics-and-ecb-v-latvia/⟩.

[102]*Supra* n. 8.

[103]Para. 49, cited in the text accompanying *supra* n. 83.

[104]Para. 51.

A certain level of doubt about national compliance with a mere declaratory decision colours the judgment.[105] The Court and the Advocate General emphasised that they were not convinced of Mr Rimšēvičs' guilt.[106] In other words, they found that the Latvian authorities had acted without sufficiently strong indications that the allegations of serious misconduct levelled against the governor were true. In future cases with more convincing evidence against a national central bank governor, the judgment has made it clear that even before a court judgment has established that the governor is 'guilty of serious misconduct', she or he may be temporarily 'relieved' of office. As the European Central Bank had accepted this in its arguments,[107] the European Court of Justice held that such a measure may be needed during preliminary criminal investigations, 'in particular in order to prevent the governor concerned from obstructing that investigation'.[108] Thus, there is neither immunity nor impunity for central bankers who seriously misbehave.

The possibility of direct appeal against a measure which equally 'relieves' – but does not outright remove – the governor from office, was grounded by the Court on the independence of the European System of Central Banks. Referring to earlier case law on the European Central Bank,[109] the Court stressed that the Treaty 'is intended to shield the ESCB from all political pressure'.[110] It also found that temporary prohibiting a national central bank governor from performing her or his duties 'is likely a form of pressure'.[111] The broad scope thus given to Article 14(2) should also be welcomed. Prohibiting a governor from performing his or her duties must be reviewable under Article 14(2) because, if it were not, a series of temporary measures could be adopted, thus evading judicial

[105] *See* the misgivings in paras. 51-54 and 93-96 of the judgment. In her assessment of 'whether [Latvia] has demonstrated to the requisite legal standard the reality of the facts in respect of which it accuses Mr Rimšēvičs', the AG is not convinced of the judicial protection the national central bank governor could rely on (Opinion, paras. 108-118).

[106] *See* para. 85 of the judgment: 'However, it could be accepted that, in exceptional circumstances, a governor of a central bank of a Member State whose currency is the euro could be relieved from office even before delivery of a judgment convicting him. This would be the case, for example, where the measure was adopted *on the basis of established or undisputed evidence*'. (italics added)

[107] Para. 85, cited in the previous footnote.

[108] Para. 91.

[109] The judgment of 10 July 2003 in Case C-11/00, *Commission* v *ECB*, EU:C:2003:395 on the competences of the Commission's anti-fraud office at the ECB, and the judgment of 16 June 2015 in Case C-62/14, *Gauweiler and Others*, on the non-standard monetary policy measure that the ECB envisaged to undertake in 2012 to ensure transmission of its monetary policy across the Euro Area and ensure the irreversible nature of the Euro.

[110] Para. 47.

[111] Para. 52.

review.[112] In this context, the Court noted that the restrictions applied to Mr Rimšēvičs might well last until the end of his term of office[113] in December 2019.

Interweaving: Rimšēvičs a Rubicon?

Daniel Sarmiento has called the *Rimšēvičs* case 'a genuine constitutional moment, crossing a Rubicon through the northern route, via Latvia'.[114] This lawyer for the European Central Bank in the *Rimšēvičs* case has argued that the *Rimšēvičs* judgment is 'a revolution with the potential of changing EU law forever' and expects similar rulings in other cases of a 'novel legal construct', e.g. the European Prosecutor's Office,[115] and the Single Supervisory Mechanism. The latter area is certainly rife with 'fusion' of national and EU law and the judgment underlines the unique character of the European Central Bank. Both in its monetary policy and other central bank tasks and in its novel supervisory tasks as the centre of the Single Supervisory Mechanism,[116] the European Central Bank is at the heart of a dual[117] system in which traditional lines between Union and state spheres become blurred. Together with the national competent authorities[118] of the Euro Area member states, the Bank forms the Single Supervisory Mechanism,[119] which supervises the banks in the Euro Area on the basis of the EU-wide Single Rulebook. This 'Single Rulebook'[120] consists of EU legal acts, notably the Capital Requirements Regulation[121] and Capital Requirements Directive.[122] In exercising

[112]Para. 53.

[113]Para. 54.

[114]D. Sarmiento, 'Crossing the Baltic Rubicon', *verfassungsblog*, 4 March 2019, ⟨verfassungsblog.de/crossing-the-baltic-rubicon/⟩.

[115]Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, OJ L 283/1, 31.10.2017.

[116]*See* the *L-Bank* judgment, referred to *supra* n. 34.

[117]i.e. the Eurosystem (monetary policy and adjacent tasks) and the Single Supervisory Mechanism (supervision).

[118]On national competent authorities and national central banks, *see supra* n. 32.

[119]*See supra* n. 33.

[120]*See* ⟨eba.europa.eu/regulation-and-policy/single-rulebook/interactive-single-rulebook⟩.

[121]See Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012, OJ L 150/1, 7.6.2019 (CRR).

[122]Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures, OJ L 150/253, 7.6.2019 (CRD).

its supervisory tasks, the European Central Bank is to apply 'all relevant Union law, and where this Union law is composed of Directives, [also] the national legislation transposing those Directives'.[123] A mandate to apply *national* law when exercising a *Union* mandate is further evidence of the growing intertwining of EU law and national law in central banking and also raises intriguing issues.[124] For example, what should the European Central Bank do when it is confronted with a national legal provision that does not faithfully implement a provision in a directive, or when there is no implementation at all? Beyond such acute matters, the European Central Bank is confronted on a daily basis with national provisions, in diverse languages, that transpose the provisions of directives differently from similar rules in the other 18 jurisdictions of the Euro Area. The observed interweaving of the European and national spheres is also core to other judicial decisions: for instance, the peculiarity of the immediate liquidation of de-licensed banks under the law of Latvia raises the question of who may challenge the supervisory measures affecting the former credit institution – its board or its shareholders?[125] Such issues originate from the simultaneous application of European and national law, hitherto insufficiently harmonised, under 'banking union'.

Nevertheless, I am not (yet) personally convinced that *Rimšēvičs* is the harbinger of a new chapter in the entwinement of the European and national legal orders by opening up further direct access to Luxembourg when contesting a national measure. A similar view is taken by fellow annotator Alicia Hinarejos.[126] I do not (yet) consider it likely that the European Court of Justice will quash any other kind of national measure. Although national preparatory measures for decisions of the European Central Bank (and there are many in the context of Euro Area supervision) cannot be directly challenged in Luxembourg, they will be taken into account when the General Court and, possibly, ultimately the European Court of

[123]Art. 4(3) SSM Regulation; I have added the word 'also' for clarity's sake.

[124]Discussed during the 2019 ECB Legal Conference *Building bridges – central banking law in an interconnected world* (*see supra* n. 34) by K. Banks, 'Incorrect implementation of EU directives: what effects for the ECB and the CJEU, and what mechanisms for rectification?', by M. Prek, 'Mutual judicial deference? The delineation of the (interpretative) competence of European and national courts in the judicial review of ECB acts based on national law', and by F. Amtenbrink, 'The application of national law by the European Central Bank: challenging European legal doctrine?'.

[125]*See* the proceedings concerning *Trasta* mentioned *supra* n. 44.

[126]A. Hinarejos, 'The Court of Justice annuls a national measure directly to protect ECB independence: *Rimšēvičs*', 56 *Common Market Law Review* (2019) p. 1649: 'The decision in *Rimšēvičs* is doubtless a momentous one, but it is too early to tell exactly how much so', calling the judgment 'clearly rooted in, and justified by (...) the specific institutional context and highly integrated nature of the area [of EMU]'. Asking whether the judgment is a 'feeler' for the Court to test the reactions before going further afield, she does not rule out an extension of the *Rimšēvičs* approach but considers it likely to be bound with the institutional setting and the safeguarding of the independence of the ECB.

Justice, address the legality of the Bank's decision. This was established in the *Berlusconi* case.[127] That case concerned another example of the entwinement of Union and national law under the Single Supervisory Mechanism: a preparatory act taken by a national competent authority for the adoption by the European Central Bank of a final decision had been contested before a national court. Basing itself on Silvio Berlusconi's reputation, the ECB – as a gatekeeper[128] of the banking market – had withheld authorisation from the former Prime Minister for his shareholding in an Italian bank. The European Court of Justice held that, when discretion lies with a Union institution to act on the basis of preparatory acts submitted by a member state authority, it is a matter for Union courts alone to decide on the legality of the legal act ultimately adopted by the exclusively competent EU organ. In other words: the legality of preparatory acts undertaken by a national competent authority cannot be reviewed by a national court but are for the European Court to assess in the context of a challenge to the Bank's legal act ultimately adopted on the basis of such preparatory acts.[129]

Sarmiento argued that, if the *Rimšēvičs* judgment is seen 'together with the Court's efforts to protect the independence and integrity of national judiciaries, the overall effect is one in which a *new* Court has emerged'. Going forward, and in the new area of the European Prosecutor's Office, I do not exclude the possibility of movement towards greater judicial entwinement. There are perhaps other contexts in which the interplay of national and Union law and practice is so closely intertwined that the Court might adopt a similar stance vis-à-vis a national legal act, as in *Rimšēvičs*. The approach in *Berlusconi* may be seen as a step in that direction, as it prevents national courts from ruling on the legality of a national legal act performed in the context of a Union decision-making procedure, although the national measure is not annulled but merely reviewed for its legality, *at EU level*, in the context of

[127]Judgment of 19 December 2018 in Case C-219/17, *Silvio Berlusconi and Fininvest* v *Banca d'Italia and Others*, ECLI:EU:C:2018:1023. For a summary by Federico Della Negra of this judgment, *see* ⟨ebi-europa.eu/wp-content/uploads/2019/01/Summary-judgment-Fininvest.pdf⟩. *See also* F. Brito Bastos, 'Judicial review of composite administrative procedures in the Single Supervisory Mechanism: Berlusconi', 56(5) *Common Market Law Review* (2019) p. 1355.

[128]*See* the text accompanying *supra* nn. 39 and 40.

[129]In para. 44, the Court held that 'a single judicial review' by the Union courts of European Central Bank acts to which preparatory measures by national competent authorities had contributed would 'rule on the legality of the final decision adopted by the EU institution at issue and to examine, in order to ensure effective judicial protection of the persons concerned, any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision'.

proceedings before the Union courts. Also, I do see an obscuring of the sharp line between the two legal spheres, or orders, that Advocate General Kokott maintained.

However, the reasoning advanced by the European Court of Justice for the exception also implies that the judgment does not open the floodgates to similar leapfrogging of national proceedings through direct access to the Court. There are, to my mind, no other similar constructs under the Treaties in which EU and state law and entities are so intertwined, although other 'networks' of regulators could reach a similar level of 'fusion'. The European Competition Network comes to mind, in which national competition authorities apply EU and national competition law, and the initiation by the Commission of proceedings relieves a national competition authority of its competence to apply Articles 101 and 102 TFEU in a given case.[130] Crucially, and to the best of my knowledge, there have hitherto been no similar provisions for redress against national measures under the Treaty. The *Rimšēvičs* case is therefore likely to be the exception that confirms the rule that direct action against national acts can only take place at the national level and that those acts can only be annulled by national judicial authorities. The fears of 'loss of sovereignty' by member states based on this judgment would be exaggerated. Nor do I see any good reason to expect that the *Rimšēvičs* case will prompt national courts to declare EU acts void, as feared by another annotator.[131] National courts that are willing to challenge the views of the European Court of Justice will find other means to promote their own opinions.[132]

As for now, I consider the outcome in *Rimšēvičs* to be a specific, central bank-related exception to the arrangements for judicial protection in a system based on the rule of law.[133]

[130]Art. 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1.

[131]Bast, *supra* n. 101, who wrote: '(. . .) a national court may cite *Rimšēvičs* as a precedent that in such a legal order neither side can hide behind a shield protecting its autonomy. If an EU court can declare a national act void, certainly a national court can do so vis-à-vis an EU act, as well? That national court will not fail to mention, just like the Court of Justice did, that such a legal remedy derogating from the general distribution of powers is "very specific" and will be exercised in "exceptional circumstances" only'.

[132]For instance, the German Constitutional Court's manner of requesting preliminary rulings (providing its own reading of EU law in the questions) or of ruling on the validity of EU measures (re-interpreting the *L-Bank* judgment of the ECJ while accepting banking union as not beyond the scope of EU integration allowed by the *Grundgesetz*). *See* the judgment of the ECJ of 16 June 2015 in C-62/14, *Gauweiler* and the sequel to the judgment of the ECJ of 11 December 2018 in Case C-493/17, *Weiss and Others*, ECLI:EU:C:2018:1000.

[133]Art. 2 TEU. For the rule of law in central banking, *see* 'The ECB and the rule of law', September 2019, my paper for the 2019 ECB Legal Conference; *see supra* n. 34.

Postscript

Mr Rimšēvičs was again mentioned as participating in voting in the Governing Council himself (rather than his Vice Governor, since the interlocutory order) until such time, at the end of his six-year mandate (2013–2019), as he was not voting under the rotating voting scheme of Article 10.2 of the ESCB Statute.[134] The trial before the Riga District Court, in which Mr Rimšēvičs is charged with two counts of graft and money laundering, has reportedly been suspended since the court intends to ask the European Court of Justice for an expedited opinion on the potential immunity he may enjoy as a member of the Governing Council.[135] The issue of immunity under Protocol (No 7) on the privileges and immunities of the European Union had been raised in the proceedings leading to the annotated judgment but was not given credence by the Court or the Advocate General.[136] As of 1 January 2020, Mr Martins Kazaks has succeeded Mr Rimšēvičs as governor of the Latvian national central bank.[137] A curiosity: the Latvian judge at the European Court of Justice in the present case has in the meantime become Latvia's President.[138] The person who alleged corrupt practices by the Latvian central bank governor[139] has sold off his shares in another

[134]*See supra* n. 27.

[135]'Court stays proceedings in Rimsevics' case, turns to Court of Justice of EU', *Leta100*, 20 December 2019, ⟨www.leta.lv/eng/home/important/BD288D88-8026-48E3-B70D-CA710F0F4808/⟩; A Eglitis, 'Latvian Court to Request ECJ Opinion on Rimsevics Immunity', *Bloomberg*, 20 December 2019.

[136]She stated: '(. . .) there is admittedly no need to dwell on the admissibility of any evidence that may have been obtained in breach of Mr Rimšēvičs's immunity before he was relieved from office, since the Republic of Latvia has not in any event adduced any evidence and, consequently, there is no need to adjudicate on Mr Rimšēvičs's complaint alleging infringement of Protocol (No 7) on the privileges and immunities of the European Union. Conversely, the immunity conferred on Mr Rimšēvičs by that protocol might become relevant again should he be reinstated in office following a judgment of the Court finding that the conditions for relieving him from office were not fulfilled' (paras. 147 and 148 of the Opinion).

[137]A. Eglitis, 'Toughest Test for New ECB Official Is Repairing Homeland's Image', *Bloomberg*, 19 December 2019.

[138]'ECJ judge set to become Latvia president', *Emerging Europe*, 17 April 2019, ⟨emerging-europe.com/news/ecj-judge-set-to-become-latvia-president/⟩; 'Latvian parliament elects former judge Levits president', *Reuters*, 29 May 2019, ⟨www.reuters.com/article/us-latvia-election-president/latvian-parliament-elects-former-judge-levits-president-idUSKCN1SZ18R⟩.

[139]N. Buckley, 'Latvia: a banking scandal on the Baltic', *Financial Times*, 23 February 2018, ⟨www.ft.com/content/e7b586c4-1883-11e8-9376-4a6390addb44⟩; 'Russian businessman behind shuttered Latvian bank PNB attacks ECB', *Reuters*, 16 August 2019, ⟨www.reuters.com/article/us-latvia-bank-closure/russian-businessman-behind-shuttered-latvian-bank-pnb-attacks-ecb-idUSKCN1V61NI⟩.

Latvian bank[140] that has been declared 'failing or likely to fail' by the European Central Bank[141] and was referred to the Single Resolution Board which held that PNB Banka SA could be liquidated under Latvian law.[142] That Latvian commercial bank is applying in court to have all decisions of the European Central Bank in respect of it annulled.[143] The involvement of the European Central Bank with Latvian banking issues thus continues.

[140]'Guselnikov sells off stake in Latvia's PNB bank', *eng.lsm.lv* (Latvian Public Broadcasting), ⟨eng.lsm.lv/article/economy/banks/guselnikov-sells-off-stake-in-latvias-pnb-bank.a323936/⟩.

[141]'ECB has assessed that AS PNB Banka in Latvia was failing or likely to fail', ECB press release, 15 August 2019, ⟨www.bankingsupervision.europa.eu/press/pr/date/2019/html/ssm.pr190815~b8e2038aa9.en.html⟩.

[142]'AS PNB Banka: SRB Decides No Resolution Required', SRB press release, 15 August 2019, ⟨srb.europa.eu/en/node/814⟩; A. Eglitis, 'Latvian Court Declares PNB Bank Insolvent After ECB Suspension', 12 September 2019, *Bloomberg*, ⟨www.bloomberg.com/news/articles/2019-09-12/latvian-court-declares-pnb-bank-insolvent-after-ecb-suspension⟩.

[143]The following proceedings are pending (*see* R Smits and F Della Negra, 'The Banking Union and Union Courts: overview of cases as at 19 August 2019', ⟨ebi-europa.eu/publications/eu-cases-or-jurisprudence/⟩): Case T-275/19, *PNB Banka and Others v ECB*, seeking annulment of the ECB's decision of 14 February 2019 to conduct an on-site inspection on the premises of PNB Banka AS; Case T-301/19, *PNB Banka and Others v ECB*, seeking annulment of the ECB's decision of 1 March 2019 to classify PNB Banka as a significant supervised entity; Case T-330/19, *PNB Banka and Others v ECB*, seeking annulment of the ECB's decision of 21 March 2019 on the proposed acquisition of qualifying holdings by the applicants in PNB Banka.