Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 25 May 2023[1]

Cases C-750/21 P and C-256/22 P

Pilatus Bank plc
v

European Central Bank (ECB)

(Economic and monetary policy – Single supervisory mechanism – Regulation (EU) No 1024/2013 – Special supervisory tasks conferred on the ECB – Decision concerning the withdrawal of an authorisation to take up the business of a credit institution – Indictment of the main shareholder in a third country – Criterion of good repute – Perception of good repute by the market – Blocking Statute (Regulation No 2271/96) – Effective exercise of the rights of defence by a legal adviser – Attribution of preparatory acts by national authorities to the ECB – Effective judicial protection – Articles 41 and 47 of the Charter)

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A. Case C-750/21 P 39

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I. Introduction

1. The present two cases are not formally linked but involve the same parties and the same administrative procedure, which resulted in the European Central Bank ('the ECB') withdrawing from the appellant, Pilatus Bank plc, the authorisation to act as a credit institution ('the authorisation').

2. Additionally, these cases raise the same questions of principle. First, it must be clarified whether the ECB, by virtue of its superior supervisory and decision-making powers, is responsible for safeguarding the credit institution's rights of defence by attributing serious procedural deficiencies to it during the national part of the (composite) administrative procedure. Second, it must be examined in this context whether a credit institution placed under special supervision or management by the national competent authority can fully exercise these rights of defence and its right to bring an action in relation to the (threatened) withdrawal of its authorisation through the legal adviser appointed by its Board of Directors.

3. Additionally, the two cases generally concern the scope of the ECB's supervisory powers under the rules of the Single Supervisory Mechanism.[2] It must be examined in this regard whether and to what extent the preparatory acts of national authorities can be attributed to the ECB, whether it must review them as to their lawfulness and whether said acts, together with the ECB's decision concluding the proceedings, are justiciable before the EU courts.

4. Case C-256/22 P raises the additional question as to the conditions under which the authorisation to take up the business of a credit institution can be withdrawn due to the absence or lapse of the 'good repute' of a credit institution's main shareholder. This is the first time that the interpretation of this indeterminate criterion is to be considered in the case-law of the Court of Justice.

[2] Article 2(9) of 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 2013 L 287, p. 63).

II. Legal framework

A. Regulation (EU) No 1024/2013

5. Regulation No 1024/2013 states the following in recitals 16, 20 and 21:

'(16) The safety and soundness of large credit institutions is essential to ensure the stability of the financial system. However, recent experience shows that smaller credit institutions can also pose a threat to financial stability. Therefore, the ECB should be able to exercise supervisory tasks in relation to all credit institutions authorised in, and branches established in, participating Member States.

…

(20) Prior authorisation for taking up the business of credit institutions is a key prudential technique to ensure that only operators with a sound economic basis, an organisation capable of dealing with the specific risks inherent to deposit taking and credit provision, and suitable directors carry out those activities. The ECB should therefore have the task of authorising credit institutions that are to be established in a participating Member State and should be responsible for the withdrawal of authorisations, subject to specific arrangements reflecting the role of national authorities.

(21) In addition to the conditions set out in Union law for the authorisation of credit institutions and the cases for withdrawal of such authorisations, Member States may currently provide for further conditions for authorisation and cases for withdrawal of authorisation. The ECB should therefore carry out its task with regard to authorisation of credit institutions and withdrawal of the authorisation in case of non-compliance with national law on a proposal by the relevant national competent authority, which assesses compliance with the relevant conditions laid down in national law.

6. Article 1 of Regulation No 1024/2013 provides, under the heading 'Subject matter and scope':

'This Regulation confers on the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions, with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State, with full regard and duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage.

The institutions referred to in Article 2(5) of the Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [3] are excluded from the supervisory tasks conferred on ECB in accordance with Article 4 of this Regulation. The scope of the ECB's supervisory tasks is limited to the prudential supervision of credit institutions pursuant to this Regulation. This Regulation shall not confer on the ECB any other supervisory tasks, such as tasks relating to the prudential supervision of central counterparties.

3 OJ 2013 L 176, p. 338.

When carrying out its tasks according to this Regulation, and without prejudice to the objective to ensure the safety and soundness of credit institutions, the ECB shall have full regard to the different types, business models and sizes of credit institutions.

No action, proposal or policy of the ECB shall, directly or indirectly, discriminate against any Member State or group of Member States as a venue for the provision of banking or financial services in any currency.

This Regulation is without prejudice to the responsibilities and related powers of the competent authorities of the participating Member States to carry out supervisory tasks not conferred on the ECB by this Regulation.

This Regulation is also without prejudice to the responsibilities and related powers of the competent or designated authorities of the participating Member States to apply macroprudential tools not provided for in relevant acts of Union law.'

7. Article 2(2), (3) and (9) of Regulation No 1024/2013 provides the following definitions:

'(2) "national competent authority" means a national competent authority designated by a participating Member State in accordance with Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms [4] and Directive 2013/36/EU;

(3) "credit institution" means a credit institution as defined in point 1 of Article 4(1) of Regulation (EU) No 575/2013;

…

(9) "Single supervisory mechanism" (SSM) means the system of financial supervision composed by the ECB and national competent authorities of participating Member States as described in Article 6 of this Regulation'.

8. Article 4 of Regulation No 1024/2013 defines the tasks conferred on the ECB, inter alia, as follows:

'1. Within the framework of Article 6, the ECB shall, in accordance with paragraph 3 of this Article, be exclusively competent to carry out, for prudential supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States:

(a) to authorise credit institutions and to withdraw authorisations of credit institutions subject to Article 14;

…

3. For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those

4 OJ 2013 L 176, p. 1.

Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options.'

9. Article 6 of Regulation No 1024/2013 provides, inter alia, that:

'1. The ECB shall carry out its tasks within a single supervisory mechanism composed of the ECB and national competent authorities. The ECB shall be responsible for the effective and consistent functioning of the SSM.

…

4. In relation to the tasks defined in Article 4 except for points (a) and (c) of paragraph 1 thereof, the ECB shall have the responsibilities set out in paragraph 5 of this Article and the national competent authorities shall have the responsibilities set out in paragraph 6 of this Article, within the framework and subject to the procedures referred to in paragraph 7 of this Article, for the supervision of the following credit institutions, financial holding companies or mixed financial holding companies, or branches, which are established in participating Member States, of credit institutions established in non-participating Member States:

– those that are less significant on a consolidated basis, at the highest level of consolidation within the participating Member States, or individually in the specific case of branches, which are established in participating Member States, of credit institutions established in non-participating Member States. The significance shall be assessed based on the following criteria:

  (i) size

  (ii) importance for the economy of the Union or any participating Member State;

  (iii) significance of cross-border activities.

  With respect to the first subparagraph above, a credit institution or financial holding company or mixed financial holding company shall not be considered less significant, unless justified by particular circumstances to be specified in the methodology, if any of the following conditions is met:

  (i) the total value of its assets exceeds EUR 30 billion;

  (ii) the ratio of its total assets over the GDP of the participating Member State of establishment exceeds 20%, unless the total value of its assets is below EUR 5 billion;

  (iii) following a notification by its national competent authority that it considers such an institution of significant relevance with regard to the domestic economy, the ECB takes a decision confirming such significance following a comprehensive assessment by the ECB, including a balance-sheet assessment, of that credit institution.

The ECB may also, on its own initiative, consider an institution to be of significant relevance where it has established banking subsidiaries in more than one participating Member States and its cross-border assets or liabilities represent a significant part of its total assets or liabilities subject to the conditions laid down in the methodology.

Those for which public financial assistance has been requested or received directly from the EFSF or the ESM shall not be considered less significant.

Notwithstanding the previous subparagraphs, the ECB shall carry out the tasks conferred on it by this Regulation in respect of the three most significant credit institutions in each of the participating Member States, unless justified by particular circumstances.

5. With regard to the credit institutions referred to in paragraph 4, and within the framework defined in paragraph 7:

(a) the ECB shall issue regulations, guidelines or general instructions to national competent authorities, according to which the tasks defined in Article 4 excluding points (a) and (c) of paragraph 1 thereof are performed and supervisory decisions are adopted by national competent authorities.

Such instructions may refer to the specific powers in Article 16(2) for groups or categories of credit institutions for the purposes of ensuring the consistency of supervisory outcomes within the SSM;

(b) when necessary to ensure consistent application of high supervisory standards, the ECB may at any time, on its own initiative after consulting with national competent authorities or upon request by a national competent authority, decide to exercise directly itself all the relevant powers for one or more credit institutions referred to in paragraph 4, including in the case where financial assistance has been requested or received indirectly from the EFSF or the ESM;

…’

10. Article 9(1) and (2) of Regulation (EU) No 1024/2013 reads:

‘1. For the exclusive purpose of carrying out the tasks conferred on it by Articles 4(1), 4(2) and 5(2), the ECB shall be considered, as appropriate, the competent authority or the designated authority in the participating Member States as established by the relevant Union law.

For the same exclusive purpose, the ECB shall have all the powers and obligations set out in this Regulation. It shall also have all the powers and obligations, which competent and designated authorities shall have under the relevant Union law, unless otherwise provided for by this Regulation. In particular, the ECB shall have the powers listed in Sections 1 and 2 of this Chapter.

To the extent necessary to carry out the tasks conferred on it by this Regulation, the ECB may require, by way of instructions, those national authorities to make use of their powers, under and in accordance with the conditions set out in national law, where this Regulation does not confer such powers on the ECB. Those national authorities shall fully inform the ECB about the exercise of those powers.

2. The ECB shall exercise the powers referred to in paragraph 1 of this Article in accordance with the acts referred to in the first subparagraph of Article 4(3). In the exercise of their respective supervisory and investigatory powers, the ECB and national competent authorities shall cooperate closely.'

11. Article 14 of Regulation (EU) No 1024/2013 provides, under the heading 'Authorisation':

'1. Any application for an authorisation to take up the business of a credit institution to be established in a participating Member State shall be submitted to the national competent authorities of the Member State where the credit institution is to be established in accordance with the requirements set out in relevant national law.

2. If the applicant complies with all conditions of authorisation set out in the relevant national law of that Member State, the national competent authority shall take, within the period provided for by relevant national law, a draft decision to propose to the ECB to grant the authorisation. The draft decision shall be notified to the ECB and the applicant for authorisation. In other cases, the national competent authority shall reject the application for authorisation.

3. The draft decision shall be deemed to be adopted by the ECB unless the ECB objects within a maximum period of ten working days, extendable once for the same period in duly justified cases. The ECB shall object to the draft decision only where the conditions for authorisation set out in relevant Union law are not met. It shall state the reasons for the rejection in writing.

4. The decision taken in accordance with paragraphs 2 and 3 shall be notified by the national competent authority to the applicant for authorisation.

5. Subject to paragraph 6, the ECB may withdraw the authorisation in the cases set out in relevant Union law on its own initiative, following consultations with the national competent authority of the participating Member State where the credit institution is established, or on a proposal from such national competent authority. These consultations shall in particular ensure that before taking decisions regarding withdrawal, the ECB allows sufficient time for the national authorities to decide on the necessary remedial actions, including possible resolution measures, and takes these into account.

Where the national competent authority which has proposed the authorisation in accordance with paragraph 1 considers that the authorisation must be withdrawn in accordance with the relevant national law, it shall submit a proposal to the ECB to that end. In that case, the ECB shall take a decision on the proposed withdrawal taking full account of the justification for withdrawal put forward by the national competent authority.

6. As long as national authorities remain competent to resolve credit institutions, in cases where they consider that the withdrawal of the authorisation would prejudice the adequate implementation of or actions necessary for resolution or to maintain financial stability, they shall duly notify their objection to the ECB explaining in detail the prejudice that a withdrawal would cause. In those cases, the ECB shall abstain from proceeding to the withdrawal for a period mutually agreed with the national authorities. The ECB may extend that period if it is of the opinion that sufficient progress has been made. If, however, the ECB determines in a reasoned decision that proper actions necessary to maintain financial stability have not been implemented by the national authorities, the withdrawal of the authorisations shall apply immediately.'

B. Regulation (EU) No 575/2013

12. Recital 5 of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012[5] states:

'Together, this Regulation and Directive 2013/36/EU should form the legal framework governing the access to the activity, the supervisory framework and the prudential rules for credit institutions and investment firms (referred to collectively as "institutions"). This Regulation should therefore be read together with that Directive.'

13. Article 4(1)(1) and (42) of that regulation sets out the following definitions:

'For the purposes of this Regulation, the following definitions shall apply:

(1) "credit institution" means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account;

…

(42) "authorisation" means an instrument issued in any form by the authorities by which the right to carry out the business is granted;

…'

C. Regulation (EU) No 468/2014

14. 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)[6] provides as follows in Article 27(1), under the heading 'Representation of a party':

'A party may be represented by its legal or statutory representatives or by any other representative empowered by written mandate to take any and all actions relating to the ECB supervisory procedure.'

[5] OJ 2013 L 176, p. 1.

[6] OJ 2014 L 141, p. 1.

D. Directive 2013/36/EU

15. Article 1 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC[7] provides:

'This Directive lays down rules concerning:

(a) access to the activity of credit institutions (collectively referred to as "institutions");

(b) supervisory powers and tools for the prudential supervision of credit institutions by competent authorities;

(c) the prudential supervision of credit institutions by competent authorities in a manner that is consistent with the rules set out in Regulation (EU) No 575/2013;

(d) publication requirements for competent authorities in the field of prudential regulation and supervision of credit institutions.'

16. Article 8(1) of Directive 2013/36 provides as follows, under the heading 'Authorisation':

'Member States shall require credit institutions to obtain authorisation before commencing their activities. Without prejudice to Articles 10 to 14, they shall lay down the requirements for such authorisation and notify EBA.'

17. Article 9(1) of this Directive provides as follows, under the heading 'Prohibition against persons or undertakings other than credit institutions from carrying out the business of taking deposits or other repayable funds from the public':

'Member States shall prohibit persons or undertakings that are not credit institutions from carrying out the business of taking deposits or other repayable funds from the public.'

18. Article 14 of Directive 2013/36, entitled 'Shareholders and members', provides in paragraph 2 thereof:

'Competent authorities shall refuse authorisation to commence the activity of a credit institution if, taking into account the need to ensure the sound and prudent management of a credit institution, they are not satisfied as to the suitability of the shareholders or members in accordance with the criteria set out in Article 23(1). Article 23(2) and (3) and Article 24 shall apply.'

[7] OJ 2013 L 176, p. 338.

19. Article 18 of Directive 2013/36 reads as follows, under the heading 'Withdrawal of authorisation':

'The competent authorities may only withdraw the authorisation granted to a credit institution where such a credit institution:

(a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has ceased to engage in business for more than six months, unless the Member State concerned has made provision for the authorisation to lapse in such cases;

(b) has obtained the authorisation through false statements or any other irregular means;

(c) no longer fulfils the conditions under which authorisation was granted;

(d) no longer meets the prudential requirements set out in Part Three, Four or Six of Regulation (EU) No 575/2013 or imposed under point (a) of Article 104(1) or Article 105 of this Directive or can no longer be relied on to fulfil its obligations towards its creditors, and, in particular, no longer provides security for the assets entrusted to it by its depositors;

(e) falls within one of the other cases where national law provides for withdrawal of authorisation; or

(f) commits one of the breaches referred to in Article 67(1).'

20. Article 23(1) and (2) of Directive 2013/36 provides:

'1. In assessing the notification provided for in Article 22(1) and the information referred to in Article 22(3), the competent authorities shall, in order to ensure the sound and prudent management of the credit institution in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on that credit institution, assess the suitability of the proposed acquirer and the financial soundness of the proposed acquisition in accordance with the following criteria:

(a) the reputation of the proposed acquirer;

(b) the reputation, knowledge, skills and experience, as set out in Article 91(1), of any member of the management body who will direct the business of the credit institution as a result of the proposed acquisition;

(c) the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the credit institution in which the acquisition is proposed;

(d) whether the credit institution will be able to comply and continue to comply with the prudential requirements based on this Directive and Regulation (EU) No 575/2013, and where applicable, other Union law, in particular Directives 2002/87/EC and 2009/110/EC, including whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities;

(e) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [8] is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

2. The competent authorities may oppose the proposed acquisition only if there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 or if the information provided by the proposed acquirer is incomplete.'

E. Joint Guidelines of the European Supervisory Authorities for banking, insurance and securities (EBA, EIOPA and ESMA) on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector

21. The Joint Guidelines of the European Supervisory Authorities for banking, insurance and securities (EBA, EIOPA and ESMA) on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector ('Joint Guidelines') provide, inter alia, as follows, under the heading '10. Reputation of the proposed acquirer – first assessment criterion':

'10.1 The assessment of the reputation of the proposed acquirer should cover two elements:

(a) his integrity; and

(b) his professional competence.

…

10.9 A proposed acquirer should be considered to be of good repute if there is no reliable evidence to suggest otherwise and the target supervisor has no reasonable grounds to doubt his or her good repute. All relevant information available for the assessment should be taken into account, without prejudice to any limitations imposed by national law and regardless of the country where any relevant events occurred.

…

10.13 Particular account should be taken of the following factors, which may call into question the integrity of a proposed acquirer:

(a) any conviction or prosecution of a criminal offence, in particular:

i. any offences under the laws governing banking, financial, securities and insurance activity, or concerning securities markets or securities or payment instruments;

ii. any offences of dishonesty, fraud or financial crime, including money laundering and terrorist financing, market manipulation, insider trading, usury and corruption;

iii. any tax offences;

8 OJ 2005 L 309, p. 15.

iv. any other offences under legislation relating to companies, bankruptcy, insolvency or consumer protection;

(b) any relevant findings from onsite and off-site controls, from investigations or enforcement actions, to the extent that they relate to the proposed acquirer either directly or indirectly, by way of its ownership or control, and the imposition of any administrative sanctions for non-compliance with provisions governing banking, financial, securities or insurance activities or those concerning securities markets, securities or payment instruments, or any financial services legislation and regulation or other matters contemplated in sub-paragraph (a) above;

(c) any relevant enforcement actions by any other regulatory or professional bodies for non-compliance with any relevant provisions; and

(d) any other information from credible and reliable sources that is relevant in this context. When considering whether information from other sources is credible and reliable, competent authorities should consider both the extent to which the source is public and trustworthy, as well as the extent to which the information is provided by several independent and reputable sources, is consistent over a period of time and there are no reasonable grounds to suspect that it is false.

…

10.16 Target supervisors should assess the relevance of such situations on a case-by-case basis, recognising that the characteristics of each situation may be more or less severe and that some situations may be significant when considered together, even though each of them in isolation may not be significant.'

III. Background to the dispute

A. Facts of the case

22. The applicant at first instance and the appellant in the two present cases is Pilatus Bank plc, a less significant credit institution established in Malta, which is subject to direct prudential supervision by the Malta Financial Services Authority (MFSA). The second applicant at first instance in Case T-27/19, Pilatus Holding Ltd, is not a party to the appeal proceedings.

23. According to a press release published by the United States Department of Justice on 19 March 2018, Mr Ali Sadr, the shareholder of the appellant who indirectly holds 100% of its capital and voting rights ('the main shareholder') was arrested in the United States on six charges. These were related to his alleged participation in a scheme in which approximately USD 115 million in payments to finance a project in Venezuela were embezzled for the benefit of Iranian individuals and undertakings.

24. According to the indictment adopted by the United States Attorney for the Southern District of New York, some of the funds used to establish and capitalise the appellant in 2013 had an illegal origin linked to the Venezuelan project.

25. Following the indictment of the main shareholder in the United States, the appellant received, inter alia, withdrawal requests totalling EUR 51.4 million worth of deposits, that is approximately 40% of the deposits on its balance sheet.

26. On 21 March 2018, the MFSA adopted a directive regarding the removal or suspension of voting rights by which it ordered, inter alia, that the main shareholder be removed from his post as director of the appellant with immediate effect and from all other decision-making roles within it, that he suspend the exercise of his voting rights and that he refrain from any legal or judicial representation of the appellant.

27. On the same date, the MFSA adopted the directive regarding the moratorium, by which it ordered the appellant not to authorise any banking transactions, in particular withdrawals and deposits by shareholders and members of the appellant's Board of Directors.

28. On 22 March 2018, the MFSA adopted the directive regarding the appointment of a competent person, in order to entrust that person, in essence, with the exercise of the main powers normally conferred on the appellant's governing bodies in respect of its specific activities and its assets.

29. On 29 June 2018, the European Central Bank (ECB) received a proposal from the MFSA to withdraw the appellant's authorisation in accordance with Article 14(5) of Regulation (EU) No 1024/2013.

30. On 2 August 2018, the MFSA submitted a revised proposal to the ECB to withdraw this authorisation.

31. By letter of 31 August 2018, the ECB invited the appellant to provide comments on the draft decision withdrawing the authorisation within five working days from the date of receipt of that letter.

32. On 6 September 2018, the appellant, represented by its legal adviser, requested an extension of the hearing period to 14 days as well as access to the file in that procedure.

33. Subsequently, on 10 September 2018, the ECB sent an email to the appellant in which it requested that the appellant direct its communications in the administrative proceedings relating to the withdrawal of its authorisation via the competent person or with the competent person's approval. On 20 November 2018, the appellant brought an action for annulment of this email before the General Court, which dismissed said action as inadmissible by order of 10 July 2019.[9] The appeal against the General Court's order of inadmissibility was likewise dismissed by order of the Court of Justice on 4 February 2021 – albeit with substitution of the grounds relied on by the General Court – as manifestly unfounded.[10]

34. At the appellant's request, the hearing period was extended initially until 17 September 2018 and subsequently until 21 September 2018.

35. By letter of 13 September 2018, the ECB granted the appellant access to the file relating to the administrative procedure.

[9] Order of 10 July 2019, *Pilatus Bank* v *ECB* (T-687/18, not published, EU:T:2019:542).

[10] Order of 4 February 2021, *Pilatus Bank* v *ECB* (C-701/19 P, not published, EU:C:2021:99).

36. On 21 September 2018, the appellant submitted its comments on the draft decision withdrawing authorisation, expressing the opposition of its management and shareholders to that draft decision.

37. On 2 November 2018, the ECB adopted, pursuant to Article 4(1)(a) and Article 14(5) of Regulation No 1024/2013, the decision by which it withdrew the appellant's authorisation ('the ECB decision at issue').[11]

38. After the competent person refused to use the appellant's funds to pay the legal advisor's fees, the appellant asked the ECB, by two emails of 13 November and 20 December 2018, to exercise its supervisory powers under Regulation (EU) No 1024/2013 and to order the competent person to approve payment of the lawyer's fees.

39. In an email of 21 December 2019 ('the email at issue'),[12] the ECB replied, in essence, that its supervisory powers under Regulation (EU) No 1024/2013 are limited to the supervision of credit institutions (Article 1(1) of this Regulation). As justification, the ECB argued that it was no longer competent to take any measures in respect of the appellant, as the latter's authorisation had been withdrawn with effect from 5 November 2018.

B. Order subject to appeal (Case C-750/21 P)

40. By submitting an application initiating proceedings to the Registrar of the General Court on 4 March 2019, the appellant brought an action for annulment of the email at issue.

41. By order of 24 September 2021, *Pilatus Bank* v *ECB* (T-139/19, not published, EU:T:2021:623; 'the order under appeal'), the General Court dismissed the action under Article 126 of its Rules of Procedure, on the grounds that it manifestly lacked any foundation in law.

42. The General Court first considered the first plea in law, which alleged that the ECB had committed an error of law in declaring that it was not competent to take over direct prudential supervision of the appellant and to order the competent person to authorise payment of the fees of the lawyer instructed by its Board of Directors. It reached the conclusion that the ECB manifestly lacked competence in this regard and dismissed that plea as manifestly lacking any foundation in law. With reference to the decision of 12 March 2021, *PNB Banka* v *ECB* (T-50/20, EU:T:2021:141), the General Court dismissed the remaining pleas in law as manifestly lacking any foundation in law.

C. The judgment under appeal (Case C-256/22 P)

43. By submitting an application initiating proceedings to the Registrar of the General Court on 15 January 2019, the appellant, together with Pilatus Holding, brought an action for annulment of the ECB decision at issue.

[11] This decision is the subject of appeal proceedings C-256/22 P.

[12] This email is the subject of appeal proceedings C-750/21 P.

44. By judgment of 2 February 2022, *Pilatus Bank and Pilatus Holding* v *ECB* (T-27/19, EU:T:2022:46; 'the judgment under appeal'), the General Court dismissed the action as inadmissible in so far as it was brought by Pilatus Holding, due to lack of direct concern to the shareholders, and as unfounded in all other respects.

45. The first plea in law concerns competence in the proceedings to withdraw the authorisation, as governed by Article 14(5) of Regulation (EU) No 1024/2013. The General Court found that there had been no infringement of this provision or the right to good administration pursuant to Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter').[13] As grounds, it held, inter alia, that even if the MFSA exceeded its powers with the directives of 21 and 22 March 2018, which preceded its proposal to have the appellant's authorisation withdrawn, this could not render the ECB decision at issue unlawful. If the MFSA did exceed its powers in such a way, this did not, specifically with respect to the ECB decision at issue, constitute an initiating act, preparatory act or 'non-binding proposal' within the meaning of the judgment of 19 December 2018 in *Berlusconi and Fininvest*[14] ('the judgment in *Berlusconi*').

46. The General Court also dismissed the second plea in law,[15] holding that it was based on a legally erroneous assessment of the grounds for withdrawal of the authorisation. This was due to the damaged reputation of the main shareholder and of the appellant and the resulting risk to the credit institution in question and to the financial system within the European Union and each individual Member State.

47. The General Court also dismissed the third and fourth pleas in law, which alleged that the ECB failed to exercise its discretion, or did so inappropriately, and that it failed to examine the relevant facts and to assess those facts impartially and objectively.[16]

48. Lastly, the General Court dismissed the fifth to eleventh pleas in law (infringement of the principle of proportionality and of the *nemo auditur* principle, as well as of the right to the presumption of innocence and of the principle of equal treatment; infringement of Article 19 and recital 75 of Regulation (EU) No 1024/2013 and a misuse of powers; infringement of the rights of the defence and, in particular, of the right to be heard, and of the obligation to state reasons).[17]

49. As grounds for its rejection of the tenth plea in law, which relates to infringement of the rights of the defence, in particular of the right to be heard, the General Court held, in essence, as follows:[18] the appellant received the ECB's letter of 31 August 2018, in which the ECB invited it to submit its observations on the draft decision to withdraw the authorisation, and the ECB's letter of 13 September 2018, in which the ECB granted it access to the file relating to the administrative procedure, to which letters the appellant simply replied that it confirmed its opposition to the proposed decision. The appellant had a total of three weeks in which to comment on the draft decision to withdraw authorisation. Therefore, the appellant was placed in a position in which it could effectively make known its views on the evidence adduced against it in the draft decision.

13 Paragraphs 41 to 56 of the judgment under appeal.

14 Case C-219/17, EU:C:2018:1023, paragraph 44.

15 Paragraphs 67 to 134 of the judgment under appeal.

16 Paragraphs 135 to 148 of the judgment under appeal.

17 Paragraphs 149 to 269 of the judgment under appeal.

18 Paragraphs 239 to 241 of the judgment under appeal.

50. As regards the fact that the appellant was allegedly unable to pay its legal adviser and to have access to its resources and information, the General Court held, inter alia, that those circumstances arise exclusively from the appointment of the competent person, considered during the administrative procedure to be the appellant's sole representative, which falls within the sole competence of the MFSA under Maltese law. In addition, such a decision appointing a competent person does not constitute an initiating act, preparatory act or a 'non-binding proposal' (see point 45 above) for the ECB decision at issue and is not, therefore, such as to render that decision unlawful. As this was a decision under Maltese law which fell within the competence of the MFSA and was only reviewable by the Maltese courts, the ECB cannot be held liable for the consequences of such a decision. Nor can the ECB be criticised for failing, on the basis of its general power to give instructions within the framework of the single supervisory mechanism, to prevent the MFSA from adopting the decision to appoint the competent person. The ECB is not under any obligation beyond the obligation to receive comments from the addressees of its decisions. Therefore, it would be for the applicants to challenge the legality of the appointment of the competent person and, where appropriate, of that person's decisions refusing to grant their requests for funds in order to pay their legal adviser or their requests for access to resources or information, at national level. If necessary, they would have to seek a request for a preliminary ruling in order to ask the Court of Justice to assess whether EU law, in particular the right to effective judicial protection, precludes such decisions or the appointment of a competent person. [19]

IV. The procedure before the Court of Justice and the forms of order sought

51. By way of a procedural document filed with the Registrar of the Court of Justice on 6 December 2021, the appellant brought the appeal in Case C-750/21 P.

52. The appellant claims that the Court should:

– set aside the order under appeal;

– annul the email at issue;

– in so far as the Court of Justice is unable to rule on the substance of the case, refer the case back to the General Court for a decision on the action for annulment; and

– order the ECB to pay all the costs.

53. The ECB claims that the Court should:

– dismiss the appeal as in part inadmissible and in part unfounded;

– in the alternative, declare the appeal as unfounded in its entirety; and

– in any event, order the appellant to pay all the costs.

54. By way of a procedural document filed with the Registrar of the Court of Justice on 12 April 2022, the appellant brought an appeal in Case C-256/22 P.

[19] Paragraphs 242 to 252 of the judgment under appeal.

55. The appellant claims that the Court should:

– set aside the judgment under appeal;

– annul the ECB decision at issue;

– in so far as the Court of Justice is unable to rule on the substance of the case, refer the case back to the General Court for a decision on the action for annulment; and

– order the ECB to pay all the costs.

56. The ECB claims that the Court should:

– dismiss the appeal as in part inadmissible and in part unfounded;

– in the alternative, declare the appeal as unfounded in its entirety; and

– in any event, order the appellant to pay all the costs.

57. On 13 December 2022, the Court asked the parties to respond to certain questions, which they did within the time limits set. The Court did not consider it necessary to hold a hearing.

V. Findings

58. First, I will address the complaints raised in Cases C-750/21 P and C-256/22 P regarding both the effective legal representation of the appellant and the exercise of its rights of defence (see section A.). Then I will turn to the complaints raised concerning the scope of the ECB's supervisory powers and other complaints (see section B.).

A. Effective exercise of the rights of defence in the composite administrative proceedings for withdrawal of the authorisation

1. Preliminary observations

59. Both appeals concern two fundamental, closely related points of law.

60. First, it must be examined whether the appellant was able to defend itself effectively in the composite administrative proceedings which led to the withdrawal of the authorisation, and whether the national courts or the EU courts have jurisdiction to monitor compliance with the rights of defence and must provide effective judicial protection in this respect. The General Court inferred from the judgment in *Berlusconi* that the MFSA and the Maltese courts bear sole responsibility for safeguarding those rights, which the appellant claims is erroneous in law.

61. Second, it is necessary to examine the circumstances under which such a legal defence must be guaranteed, and in particular whether it must be possible for that defence to be provided exclusively by the legal adviser appointed by the appellant. Under Maltese law, the appellant was also represented by the competent person, who had been appointed by the MFSA, throughout the entire administrative proceedings. Initially, the ECB had even acknowledged this person alone as

the appellant's representative within the meaning of Article 27(1) of Regulation No 468/2014 and as its point of contact. It was only later that the ECB also communicated with the appellant's legal adviser, sending him the draft of the decision at issue and granting him access to the file. The problems associated with this 'dual representation' were demonstrated when the competent person did not allow the legal adviser to access the appellant's premises or the information and evidence located there and refused to release funds to pay the adviser's legal fees.

62. These problems were also the subject, indirectly at least, of the proceedings definitively concluded in Cases T-687/18 [20] and C-701/19 P [21] (see point 33 above). In these proceedings, the appellant had challenged the ECB's email of 10 September 2018, in which the appellant was requested to direct its communications in the administrative proceedings relating to the withdrawal of its authorisation via the competent person or with the competent person's approval. However, both the action and the appellant's appeal were dismissed. In other cases involving similar scenarios, the question of infringement of the rights of defence was also raised but remained open in terms of the substance of the issue. [22] Accordingly, this question calls for a fundamental clarification.

63. In Case C-750/21 P, the appellant complains, inter alia, that it unsuccessfully asked the MFSA and then the ECB to instruct the competent person to pay its legal adviser's fees from the bank's funds. In the sixth complaint under the first ground of appeal, the appellant also essentially accuses the General Court of disregarding the fact that the ECB initially did not accept the legal adviser as the appellant's legal representative. Rather, the ECB insisted that the bank be represented only by the competent person, and subsequently failed to recognise that its legal adviser could not provide an effective legal defence without access to the bank's premises. In the second ground of appeal, the appellant claims, inter alia, that the General Court has denied it direct access to the EU courts, thus disregarding the appellant's right to effective judicial protection, as recognised in the judgment of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others* [23] ('the judgment in *Trasta Komercbanka*').

64. Under the first and fourth grounds of appeal in Case C-256/22 P, the appellant essentially complains that the General Court did not consider either the requirements arising from the judgment in *Trasta Komercbanka* or the fact that the appellant was denied an effective legal representation and defence both during the administrative proceedings to withdraw its authorisation and following the conclusion of those proceedings. Specifically, its legal adviser had no access to the relevant documents, information and evidence stored, inter alia, on the bank's premises and in its IT system. [24] Additionally, it was not the appellant, but only the competent person who was duly notified of the ECB decision at issue.

65. Against this backdrop, it is necessary to examine whether the General Court erred in law, specifically in paragraphs 242 to 252 of the judgment under appeal.

[20] Order of 10 July 2019, *Pilatus Bank* v *ECB* (T-687/18, not published, EU:T:2019:542).

[21] Order of 4 February 2021, *Pilatus Bank* v *ECB* (C-701/19 P, not published, EU:C:2021:99).

[22] See the similar circumstances giving rise to the judgment of 15 September 2022, *PNB Banka* v *ECB* (C-326/21 P, not published, EU:C:2022:693), and to the final decision of 8 November 2021, *Satabank* v *ECB* (T-494/20, not published, EU:T:2021:797).

[23] Cases C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraphs 54 et seq.

[24] See also the similar circumstances giving rise to the judgment of 15 September 2022, *PNB Banka* v *ECB* (C-326/21 P, not published, EU:C:2022:693), and to the final decision of 8 November 2021, *Satabank* v *ECB* (T-494/20, not published, EU:T:2021:797).

66. First, the question arises of whether the General Court was entitled to rule that any breach of the appellant's rights of defence in the composite administrative proceedings leading to the adoption of the ECB decision at issue cannot be attributed to the ECB and that there was no breach of the right to effective judicial protection because the actions at issue did not fall within the ECB's sphere of responsibility but within that of the MFSA and the Maltese courts (see points 69 to 76 below).

67. Second, it is necessary to examine the closely related question of whether the General Court failed to recognise that the appellant's effective legal defence in the administrative proceedings and in court must be provided exclusively by its appointed legal adviser. That is the case if the defence was likely to be impaired due to conflicts of interest caused by the competent person simultaneously exercising that person's powers of representation (see points 77 to 85 below).

2. Attribution of infringements of the rights of defence and the right to effective judicial protection in the composite administrative proceedings

68. The General Court's statements, specifically in paragraphs 242 to 252 of the judgment under appeal, are, in my view, incompatible with the division of jurisdictional powers as established in the case-law regarding the control of national authorities and of the ECB in the implementation of the Single Supervisory Mechanism. According to the judgment in *Berlusconi*,[25] it follows from Article 263 TFEU that the EU courts have sole jurisdiction to review the legality of acts of the EU institutions, of which the ECB is one (see (a)). The division of jurisdiction assumes that any infringement of the rights of defence by the national authorities can be attributed to the ECB and can only be reviewed, together with the latter's decision at issue, before the EU courts (see (b)). Lastly, I will examine the legality of the individual findings of the General Court in the judgment under appeal in Case C-256/22 P and in the order under appeal in Case C-750/21 P (see (c)).

(a) Exclusive jurisdiction of the Court of Justice

69. Effective judicial protection against acts for the enforcement of the Single Supervisory Mechanism involving national authorities and the ECB can only be granted by the Union judiciary.[26] The exclusive jurisdiction of the EU courts also covers the (incidental) review of the legality of certain preparatory acts or proposals by the national authorities concerned which are likely to affect the substance of the ECB's final decision.[27] It must be concluded from this that any infringement of the rights of defence by those authorities or the ECB in those administrative proceedings falls exclusively within the supervisory jurisdiction of the EU courts. This is all the more true given that national authorities are also obliged under Article 51(1) of the Charter to respect the fundamental procedural rights of the Charter when implementing Regulation No 1024/2013.[28]

[25] Judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023, paragraph 42 et seq.).

[26] Judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023, paragraph 42 et seq.). A detailed account of the fundamental problem can be found in the Opinion of Advocate General Campos Sánchez-Bordona in the case *Berlusconi and Fininvest* (C-219/17, EU:C:2018:502, point 57 et seq., with further citations).

[27] Judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023, paragraphs 42 to 44, 49 and 50).

[28] See judgments of 10 September 2013, *G. and R.* (C-383/13 PPU, EU:C:2013:533, paragraph 35); of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraphs 66 et seq.); of 26 July 2017, *Sacko* (C-348/16, EU:C:2017:591, paragraph 33); of 9 November 2017, *Ispas* (C-298/16, EU:C:2017:843, paragraphs 26 et seq.); and of 13 September 2018, *UBS Europe and Others* (C-358/16, EU:C:2018:715, paragraphs 59 et seq.). It also follows from the judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraphs 83 and 84), that national authorities, to whom Article 41 of the Charter does not apply, are required to respect the rights of the defence as a general legal principle of EU law.

70. In order for the composite administrative proceedings involving the national authorities and the ECB to be lawful, there must necessarily be a *single* judicial review by the EU courts, only once the decision of the ECB bringing the administrative procedure to an end has been adopted. That decision alone is capable of producing binding legal effects such as to affect the applicant's interests by bringing about a distinct change in its legal position. [29]

(b) Attribution of preparatory national acts to the ECB

71. Because the ECB concludes the administrative proceedings with a measure which is detrimental to the credit institution and which can only be challenged before the EU courts, it bears a special responsibility to ensure that said proceedings follow the proper course. First, the ECB must itself respect procedural safeguards. Second, it must ensure that the national authorities which carry out preparatory acts before the final measure also comply with these safeguards.

72. The possible unlawfulness of (preparatory) acts of national authorities, such as an infringement of the rights of defence, 'contaminates' the ECB decision at issue and is attributable to the ECB. [30] This contamination is consistent with the principle that implementing or preparatory acts that cannot be independently challenged should, at least, be reviewed as to their legality together with the decision bringing the administrative proceedings to an end and are capable of rendering that decision void. [31] In the composite administrative proceedings for withdrawing authorisation, this principle also takes account of the fact that the ECB has sole responsibility for granting a fair hearing with regard to the decision concluding the proceedings.

73. The General Court has respected this principle in the past, [32] but departed from it in the judgment under appeal.

[29] Judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023, paragraphs 47 et seq., especially paragraph 49).

[30] Similarly, in his Opinion in the case *Berlusconi and Fininvest* (C-219/17, EU:C:2018:502, point 112), Advocate General Campos Sánchez-Bordona stipulated that, in order to safeguard the right to an effective remedy, the EU Courts will have to examine whether preparatory measures taken by national authorities that are subsequently adopted by the ECB contained defects that rendered them void in a way that has *irreparably contaminated* the entire procedure.

[31] Settled case-law since the judgment of 11 November 1981, *IBM* v *Commission* (60/81, EU:C:1981:264, paragraph 12); see, inter alia, judgment of 22 April 2021, *thyssenkrupp Electrical Steel and thyssenkrupp Electrical Steel Ugo* v *Commission* (C-572/18 P, EU:C:2021:317, paragraph 50).

[32] See judgments of 6 December 1994, *Lisrestal and Others* v *Commission* (T-450/93, EU:T:1994:290, paragraphs 49 to 51), and of 19 June 1997, *Air Inter* v *Commission* (T-260/94, EU:T:1997:89, paragraph 65). See also judgment of 24 October 1996, *Commission* v *Lisrestal and Others* (C-32/95 P, EU:C:1996:402, paragraphs 28 et seq.). The judgment of 9 November 1995, *France-Aviation* v *Commission* (T-346/94, EU:T:1995:187, paragraph 30), is particularly clear on composite proceedings regarding implementation of the Customs Code: '… that the applicant's right to be heard in a procedure … must actually be secured in the first place in the relations between the person concerned and the national administration. Regulation No 2454/93 provides only for contacts to take place between the person concerned and the administration, on the one hand, and between the administration and the Commission, on the other. Although that legislation does not provide for direct contacts between the Commission's departments and the person concerned, it does not necessarily mean that the Commission may deem itself satisfied in every case where an application for repayment has been brought before it with the information transmitted to it by the national administration. Suffice it to say, in this connection, that Article 905(2) of Regulation No 2454/93 provides that the Commission may ask the Member State concerned to supply additional information. Consequently, the Court should consider whether in the instant case the Commission should have made such a request in order to ensure that the applicant's right to be heard was respected through the provision of additional explanations first provided by the applicant to the French administration and subsequently transmitted to the Commission'. See, in this regard, Nehl, H.P., *Principles of Administrative Procedure in EC Law*, Hart Publishing, Oxford, 1999, pp. 88 to 91; Eckes C./Mendes J., 'The Right to be Heard in Composite Administrative Procedure: Lost in Between Protection?', *European Law Review* 36 (2011), pp. 651 et seq.

(c) Error of law in the judgment under appeal and effective legal defence by the bank's legal adviser

74. On the basis of the premisses set out in points 69 to 73, the General Court's statements in paragraphs 242 to 252 of the judgment under appeal are vitiated by several errors of law.

75. First, in paragraphs 242 to 244 and 249 of the judgment under appeal, the General Court incorrectly held that certain circumstances or actions, such as those relating to the directive adopted under Maltese law regarding the appointment of a competent person, were *not* preparatory acts within the meaning of the judgment in *Berlusconi*[33] in relation to the ECB decision at issue, which could have led to the latter decision being unlawful. As noted in points 69 to 73 of this Opinion, and as demonstrated in the aforementioned judgment and in the judgment in *Trasta Komercbanka*[34], such circumstances or actions may be detrimental to the rights of defence of the person concerned and his or her right to effective judicial protection.[35] As I explain in point 102 et seq. of this Opinion, those actions are neither legally binding on the ECB nor open to challenge before the courts of the Member States in accordance with the principles set out in the judgment of 3 December 1992, *Oleificio Borelli* v *Commission*.[36] They must therefore be attributed to the ECB. This is the only way to ensure the necessary respect for fundamental procedural rights under EU law and the required uniform and effective judicial protection before the EU courts.

76. Second, contrary to the statements in paragraphs 245 to 248 of the judgment under appeal, the ECB should have ensured that the appellant could effectively exercise its right to be heard (see points 69 to 73). Articles 31 and 32 of Regulation (EU) No 468/2014 enshrine this right in law, as well as the right of access to files in an ECB supervisory procedure. As is clear from Article 6(1) and the second and third subparagraphs of Article 9(1) of Regulation (EU) No 1024/2013 in particular, the ECB was also in a position, by virtue of its general supervisory powers and its powers to issue instructions in respect of national authorities, to influence the MFSA. It could therefore have induced the national authority to grant the appellant's request for funds and access to the relevant documents and information in order to enable it to mount an effective defence. However, this does not mean that the ECB also had an independently enforceable obligation to do so. I will discuss this in more detail in points 88 to 93 below.

77. Third, the appellant's supposed obligation, discussed in paragraph 250 of the judgment under appeal, to challenge the legality of national procedural acts before the courts of the Member States and to seek a request for a preliminary ruling in order to ask the Court of Justice to clarify whether the right to effective judicial protection guaranteed in EU law precludes such decisions, is an error of law. It is contrary to the division of jurisdiction set out in points 69 to 73 of this Opinion.

78. Lastly, the General Court erred in law in its assessment of the tenth plea in law in paragraph 242 et seq. of the judgment under appeal, as it failed to challenge the ECB's legal appraisal of the appellant's 'dual representation'. According to the ECB's assessment, Maltese law and Article 27(1) of Regulation (EU) No 468/2014 allegedly allow the bank to be represented both by the competent person and by the legal adviser appointed by its management bodies during the

[33] Judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023, paragraph 44).

[34] Judgment of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraphs 70 et seq.).

[35] See also my Opinion in joined cases *ECB and Others* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:323, points 48, 52 and 99).

[36] Case C-97/91, EU:C:1992:491, paragraphs 9 to 13.

proceedings to withdraw its authorisation, with the legal representation provided by the former even taking precedence. This meant that the legal adviser was only able to exercise the appellant's right of defence partially or belatedly (see point 61 above).

79. However, such a situation involves conflicts of interest which may affect the rights of the bank concerned to an effective legal defence and to effective judicial protection,[37] because the competent person represents less the interests of the bank than the public interest in its management until the potential withdrawal of its authorisation. In addition, the competent person is closely linked to the national supervisory authorities, which ordered his or her appointment and prepared the proceedings for withdrawal of the authorisation. The restriction of the appellant's rights of defence, alleged in the fourth ground of appeal in Case C-256/22 P, is the result of such a conflict of interest. Under Maltese law and due to the refusal of the competent person, the appellant's legal adviser could neither gain access to the bank's premises and data carriers containing relevant information and evidence nor to the financial resources that he required effectively to exercise the appellant's right of defence.

80. Maltese law and Article 27(1) of Regulation (EU) No 468/2014 must thus be interpreted in the light of Articles 41, 47 and 48 of the Charter[38] as meaning that the legal adviser appointed by the bank must be able to defend the latter's rights and interests in the authorisation withdrawal proceedings and before the EU courts. This is also in line with the now unanimous view expressed by the parties in response to the Court's written questions, including with reference to Maltese law and case-law.

81. Consequently, the ECB must recognise the legal adviser of the bank concerned as a fully competent legal adviser within the meaning of Article 27(1) of Regulation (EU) No 468/2014. This applies particularly in the decisive phase of the proceedings it conducted. Although it recognised the legal adviser in the present case shortly before adopting its decision at issue,[39] it did not do so initially.

82. Those findings are consistent with the judgment of the Maltese Court of Appeal of 5 November 2018.[40] According to that judgment, the competent person is responsible only for managing the bank's operations and the associated legal and judicial powers of representation, for example conducting contractual disputes. By contrast, the competent person neither has the right legally to represent the bank in proceedings that might lead to the withdrawal of its authorisation by the ECB nor to bring an action against certain interim measures taken by the MFSA.

83. That interpretation is in line with the requirements of Article 47 of the Charter and the obligation effectively to protect the rights of defence. It reserves the right of defence in that regard, including bringing an action against the withdrawal of the authorisation before the EU courts, solely to the legal adviser appointed by the bank itself.

[37] On comparable conflicts of interest involving a liquidator who revoked the mandate of a legal adviser and a court-appointed administrator, see judgments of 5 November 2019, *ECB* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraphs 54 et seq.), and of 15 September 2022, *PNB Banka* v *ECB* (C-326/21 P, not published, EU:C:2022:693, paragraphs 39 to 43 and 56 to 58).

[38] See the case-law references cited in footnote 28.

[39] Therefore, the General Court was, in my view, correct in finding in paragraphs 239 to 241 of the judgment under appeal, in case C-256/22 P, that the appellant had been given sufficient opportunity to comment on the draft decision to withdraw its authorisation and to view the case files. The appellant does not dispute this in case C-256/22 P.

[40] See also paragraph 3 of the order under appeal.

84. Only such clearly defined, complementary powers of representation of the competent person on the one hand and the legal adviser appointed by the bank concerned on the other hand are capable of preventing conflicts of interest and impairment of the bank's rights of defence and its right to effective judicial protection pursuant to Article 47(1) of the Charter. Otherwise, there could even be contradictory procedural and litigation actions brought on the bank's behalf.

85. Consequently, the legal adviser appointed by the competent bodies of the bank in accordance with Article 27(1) of Regulation (EU) No 468/2014 alone has the authority to represent the interests and rights of the bank before the ECB in the proceedings for withdrawal of its authorisation. He or she must therefore be able to exercise the bank's rights of defence effectively.

3. Interim conclusion

(a) Case C-256/22 P

86. It follows from the aforementioned considerations that the fourth ground of appeal in Case C-256/22 P must be upheld. The judgment under appeal is to be set aside in so far as the General Court erred in law in its assessment of and dismissed the second part of the tenth plea in law. That part alleged infringement of the rights of the defence and, in particular, of the right to be heard. The reason for this was that the appellant did not have access during the administrative proceedings to documents and information in its IT system or to its financial resources in order to pay its legal fees.

87. However, in so far as the appellant also alleges, in the first ground of appeal, that its fundamental procedural rights were infringed on the grounds that it was not properly notified of the ECB decision at issue, I consider that complaint to be unfounded. I will cover this in more detail in points 100 and 101.

(b) Case C-750/21 P

88. In Case C-750/21 P, however, I do not consider either the sixth complaint under the first ground of appeal (impairment of the effective exercise of the appellant's rights of defence by its legal adviser) or the second ground of appeal (failure to guarantee the right to effective judicial protection) to be well-founded (see point 63 above).

89. The appellant was unable to demonstrate that the ECB had infringed its right of defence by initially recognising only the competent person as its legal adviser and subsequently[41] failing to order the former to pay the adviser's fees.

90. First, it is now undisputed between the parties (see points 78 and 80 above) that the ECB acknowledged the appellant's legal adviser as the representative defending its rights in the proceedings for withdrawal of its authorisation. As the General Court correctly held in paragraphs 239 to 241 of the judgment under appeal in Case C-256/22 P, and as the appellant also no longer disputes, the ECB granted the appellant access to the case files and sufficient opportunity to comment on the draft decision regarding withdrawal of its authorisation.

[41] Specifically, after the issuing of the ECB decision at issue in Case C-256/22 P.

91. Second, there is no apparent legal basis that empowers or authorises the ECB to order the competent person to pay the fees owed to the appellant's legal adviser, let alone after the proceedings for withdrawal of the authorisation have been concluded. The ECB is not subject to a *general* supervisory or monitoring obligation within the scope of Regulation (EU) No 1024/2013 regarding compliance with fundamental procedural rights under EU law, as the Court of Justice has inferred from Article 17(1) TEU for the European Commission in the field of economic and monetary policy.[42] Similarly, that regulation does not contain any legal obligations *independently enforceable* by the bank concerned for the ECB to issue instructions of this nature to the national authorities.[43]

92. That finding is not inconsistent with the fact that a restriction of the rights of defence of the bank concerned by the competent national authorities in the proceedings for withdrawal of its authorisation is attributable to the ECB and capable of contaminating the latter's final decision and rendering it unlawful (see points 69 to 73 above). Preparatory procedural acts, including those which serve to guarantee the effective exercise of rights of defence, cannot in principle be *independently* contested before the EU courts.[44] Instead, their legality can be disputed only together with that of the decision which brought the administrative proceedings to an end.[45] In addition, *following* the adoption of its decision at issue, the ECB's disputed refusal to intervene can no longer be regarded as a preparatory act.

93. Consequently, the sixth complaint of the first ground of appeal and the second ground of appeal in Case C-750/21 P are to be dismissed as unfounded.

B. Scope of the ECB's supervisory powers

94. Below, I shall examine the various grounds of appeal and the complaints in both appeals which relate to the scope of the ECB's supervisory powers. I shall start by examining the first ground of appeal in Case C-256/22 P, in particular the question of whether the General Court should have found that the ECB infringed Article 14(5) of Regulation (EU) No 1024/2013 (see 1.). I shall then consider the second ground of appeal, according to which the General Court misconstrued the concept of good repute pursuant to Article 23(1) of Directive 2013/36 (see 2.). After a brief discussion of the third ground of appeal (see 3.), I shall turn to the first ground of appeal in Case C-750/21 P, which concerns the scope of the ECB's powers under the Single Supervisory Mechanism (see 4.).

1. First ground of appeal in Case C-256/22 P: infringement of Article 14(5) of Regulation (EU) No 1024/2013

95. In the first ground of appeal in Case C-256/22 P, the appellant challenges the dismissal of the first plea in law. It alleges that the General Court infringed the division of jurisdiction in relation to the withdrawal of authorisation as governed by Article 14(5) of Regulation (EU) No 1024/2013 and

[42] Judgments of 20 September 2016, *Ledra Advertising* v *Commission and ECB* (C-8/15 P to C-10/15 P, EU:C:2016:701, paragraphs 57 to 59), and of 16 December 2020, *Council* v *K. Chrysostomides & Co. and Others* (C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028, paragraph 96).

[43] Judgment of 15 September 2022, *PNB Banka* v *ECB* (C-326/21 P, not published, EU:C:2022:693, paragraphs 56 to 58), regarding the inadmissibility of an action for annulment of a letter from the ECB in which it refused to issue a similar instruction.

[44] Also rejected in Order of 4 February 2021, *Pilatus Bank* v *ECB* (C-701/19 P, not published, EU:C:2021:99, paragraphs 33 to 38).

[45] See judgments of 11 November 1981, *IBM* v *Commission* (60/81, EU:C:1981:264, paragraph 12); of 13 October 2011, *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656, paragraphs 50 to 53); and of 6 May 2021, *ABLV Bank* v *ECB* (C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 39).

the right to good administration set out in Article 41 of the Charter. In the first plea in law, the appellant submitted that the ECB, first, in contravention of its comprehensive supervisory obligation under Article 6(5)(c) of Regulation (EU) No 1024/2013, failed to prevent the MFSA from implementing a de facto withdrawal of authorisation without any due process by adopting the directives of 21 and 22 March 2018. These directives resulted firstly in the withdrawal or suspension of voting rights, secondly in a moratorium on the authorisation of banking transactions and thirdly in the appointment of the competent person. Second, the ECB merely confirmed the MFSA's directives in its decision at issue.

96. In support of its appeal, the appellant submits that the General Court misconstrued the legal nature and legal effects of the Single Supervisory Mechanism by refusing to attribute overall responsibility for its functioning, including actions of the national competent authorities, to the ECB. This also applies in relation to the supervision of less significant credit institutions. The appellant raises several specific complaints in this connection, including an incorrect interpretation of Article 4(5) and Article 6(5)(c) of Regulation (EU) No 1024/2013 and a misinterpretation of the concept of a preparatory act and the meaning of the judgment in *Berlusconi*.

97. The appellant also complains in this regard that it was deprived of an effective legal defence in the administrative proceedings because the ECB initially only recognised the competent person as its legal adviser. In particular, it was not properly notified of the ECB decision at issue. The ECB initially only notified the competent person of that decision, as it assumed that that person alone was authorised to represent the appellant. Lastly, the latter only received the decision with the competent person's express consent. The appellant argues that this formal irregularity is enough to render the decision unlawful if it were not null and void from the outset.

98. In paragraphs 41 to 57 of the judgment under appeal, the General Court held that there had been no infringement of Article 14(5) of Regulation (EU) No 1024/2013 or of the right to good administration set out in Article 41 of the Charter. [46]

99. I shall first examine the alleged infringement of the right to good administration.

100. Contrary to the impression it gave, the appellant had not complained under the first plea in law before the General Court that it had been deprived of an effective legal defence from its legal adviser. This was only the subject of the tenth plea in law. By contrast, in the first plea in law, the appellant only submitted a very general complaint about infringement of Article 41 of the Charter. As the ECB rightly states, the appellant also did not complain in the first plea in law that it had not been properly notified of the ECB decision at issue. [47]

101. These complaints, raised for the first time during the appeal, therefore subsequently change the subject matter of the dispute and are inadmissible; [48] in any event, they do not succeed in calling into question the legality of the assessment of the first plea in law in the judgment under appeal. There can be no criticism of the fact that the General Court dismissed the complaint alleging infringement of Article 41 of the Charter as inadmissible and incompatible with the first

[46] See point 45 above.

[47] The fact that the competent person was served with the decision at issue on 5 November 2018 is not mentioned until paragraph 12 of the 'Introduction' of the application initiating proceedings.

[48] See, inter alia, judgment of 29 September 2011, *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraphs 35, 51 and 78).

paragraph of Article 21 of the Statute of the Court of Justice of the European Union in conjunction with Article 76(d) of the Rules of Procedure of the General Court due to lack of a specific submission, as the application initiating proceedings did no more than mention this right.

102. However, I consider that the General Court erred in law in finding that if the MFSA's directives of 21 and 22 March 2018, with which the MFSA de facto withdrew the appellant's authorisation and thus exceeded its competences, were in any way illegal, this could not result in the ECB decision at issue being unlawful.

103. In my view, the General Court erred in law in paragraph 42 et seq. of the judgment under appeal by holding that the directives at issue were not preparatory acts in relation to the MFSA's proposal that the appellant's authorisation be withdrawn by the ECB. This proposal was itself a preparatory act to the ECB decision at issue. In other words, both those directives and the MFSA's proposal were preparatory acts in the composite administrative proceedings that ultimately aimed to withdraw the appellant's authorisation. In so far as they are *not* legally binding on the decision-making EU institution, these actions are a dependent part of a procedure determined under EU law, any shortcomings of which are attributable to this institution and can only be challenged before the EU courts [49] (see points 69 to 73 above).

104. The General Court's assumption in paragraphs 45 and 46 of the judgment under appeal, according to which such a directive of the MFSA is 'not a non-binding proposal' within the meaning of the judgment in *Berlusconi*, is erroneous in law and difficult to understand. With the use of the double negative, the General Court can only have meant that such (preparatory) MFSA directives are *legally binding* on the ECB. It concluded from this that the condition of lack of legally binding force recognised in the judgment in *Berlusconi* as necessary for the EU courts to have exclusive jurisdiction to review such directives is not applicable here (see point 70 above). [50]

105. However, the MFSA directives at issue are *not* legally binding on the ECB and, furthermore, the ECB must verify their legality in the exercise of its superior supervisory and decision-making powers. In this regard, they likewise fall within the supervisory jurisdiction of the EU courts (see points 69 and 70 above).

106. The broad discretion generally granted to the ECB under the first subparagraph of Article 14(5) of Regulation (EU) No 1024/2013 with regard to withdrawing an authorisation on its own initiative ('may withdraw') also counters the argument that these acts are legally binding. The withdrawal decision is completely independent of any measures or proposals from the national supervisory authorities. Nor does it follow from the second subparagraph of Article 14(5) of this regulation that the ECB would be bound by any proposal or view that the national authority may have expressed in its previous directives. The ECB merely has to conduct the proceedings for withdrawing authorisation and verify, taking full account of the justification

[49] Similar measures taken by the Bank of Italy preparatory to a decision by the ECB were the subject of proceedings in the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023, paragraphs 36 and 37. See also, in this regard, the judgment of 11 May 2022, *Fininvest and Berlusconi* v *ECB* (T-913/16, EU:T:2022:279, paragraphs 237 et seq.); in that judgment, the General Court dismissed as inadmissible the plea in law alleging that the preparatory acts carried out by the Bank of Italy, in particular the decision to open proceedings and the draft proposal submitted to the ECB, contained deficiencies that rendered the ECB's decision unlawful. In their appeals in pending cases C-512/22 P and C-513/22 P, the appellants disputed the dismissal of this plea as erroneous in law, inter alia as it is, in their view, inconsistent with the principles acknowledged in the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023).

[50] See also judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023, paragraphs 45 and 46). This view is also supported by the statements in paragraph 250 of the judgment under appeal in response to the tenth plea in law concerning the infringement of the rights of defence, where the General Court refers the appellant to the national courts and the preliminary ruling procedure.

for withdrawal put forward by this authority, that the withdrawal is lawful and, in particular, proportionate. This is in line with the ECB's approach in the ECB decision at issue.[51] This duty to review and take account of the evidence implies that, in the event of insufficient justification or lack of legal basis, the ECB not only can refuse the proposal to withdraw authorisation, but it must do so. In addition, the ECB must verify and ensure that the national competent authority does not take or has not previously taken any measure that could prejudice its own, exclusive competence to withdraw the authorisation or its discretionary decision in that respect, could anticipate the legal effects of that decision or otherwise affect it.

107. This is consistent with the ECB's general powers to take action and make decisions[52] and its right to determine, by means of a reasoned decision, that proper actions necessary to maintain financial stability have not been implemented by the national authorities.[53]

108. By virtue of its general supervisory powers,[54] the ECB must supervise the national authorities in relation to compliance with the rules of the Single Supervisory Mechanism under the SSM Framework Regulation, including the associated national law. In so doing, the ECB must subject the proposals for withdrawal of authorisation submitted to it by the national authorities and any preparatory steps thereto to full legal scrutiny, considering, inter alia, the principle of proportionality and fundamental procedural guarantees (see points 69 to 77 above).[55]

109. Furthermore, the General Court did not examine whether the ECB had 'tak[en] full account' of the justification submitted by the MFSA within the meaning of the second subparagraph of Article 14(5) of Regulation (EU) No 1024/2013. In particular, it did not examine whether the ECB had discharged its power and obligation to review the legal infringements claimed by the appellant on account of the alleged de facto enforcement of the withdrawal of its authorisation even before the ECB decision at issue was adopted. While the ECB decision at issue briefly refers to the directives at issue of 21 and 22 March 2018, which preceded the MFSA's proposal, any complaints the appellant may have had in this regard are neither addressed nor rejected by the ECB.[56]

110. I agree with the General Court only in so far as those ECB powers and duties do not derive from Article 6(5)(b) of Regulation (EU) No 1024/2013, according to which, to ensure consistent application of high supervisory standards, the ECB may decide to itself exercise supervision over less significant credit institutions.[57] However, they arise from the ECB's general supervisory obligation under Article 4(3), Article 6(1) and the third subparagraph of Article 9(1) of Regulation (EU) No 1024/2013 and its special power to withdraw authorisation pursuant to the second subparagraph of Article 14(5) of this regulation (see points 106 to 108 above).

[51] In section 3.3 of its decision at issue, the ECB examines compliance with the legal requirements of the relevant rules in Regulation (EU) No 1024/2013 and Directive 2013/36, and the corresponding Maltese law transposing that directive (3.3.1), the proportionality of the withdrawal of authorisation, including whether it was an appropriate, necessary and reasonable measure (3.3.2) and the principle of the protection of legitimate expectations (3.3.3).

[52] First subparagraph of Article 14(5) of Regulation (EU) No 1024/2013.

[53] Article 14(6) of Regulation (EU) No 1024/2013.

[54] See Article 4(3), Article 6(1) and the third subparagraph of Article 9(1) of Regulation (EU) No 1024/2013.

[55] Recital 21 of Regulation (EU) No 1024/2013 reflects this by stating that 'the ECB [should] … carry out its task with regard to authorisation of credit institutions and withdrawal of the authorisation in case of non-compliance with national law on a proposal by the relevant national competent authority, which assesses compliance with the relevant conditions laid down in national law'.

[56] The ECB decision at issue merely gives an account of the proceedings from 29 June 2018 onwards in section 3.1 and only mentions the directives at issue on page 6 in section 3.3.1. However, it cannot be ruled out that the appellant raised its complaints in this regard for the first time in the proceedings before the General Court, which cannot be verified in the appeal proceedings.

[57] Paragraphs 49 to 52 of the judgment under appeal.

111. It follows that the first part of the first ground of appeal should be upheld.

2. Second ground of appeal in Case C-256/22 P: misinterpretation of the concept of good repute under Article 23(1) of Directive 2013/36

(a) Arguments of the appellant

112. In its second ground of appeal in Case C-256/22 P, the appellant alleges that the General Court erred in law in its appraisal and dismissal of the second plea in law. This was based on a legally incorrect assessment as to the existence of a ground for the withdrawal of authorisation, in particular a misinterpretation of the concept of good repute. [58]

113. In support of its appeal, the appellant claims, in essence and *mutatis mutandis*, that the General Court erred in law in finding that the concept of good repute does not necessarily have to be interpreted in accordance with the European Union legal order, so that an indictment in a third country, in this case the United States, for allegedly criminal conduct is sufficient for withdrawal of the authorisation. The appellant argues further that this is particularly true given that the conduct in question involved the infringement of sanction rules, which are not actionable under EU law and the prosecution of which is blocked in the EU. This follows from Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom ('Blocking Statute No 2271/96'), [59] as interpreted in the judgment of 21 December 2021, *Bank Melli Iran*. [60]

114. In this connection, the appellant also alleges that the General Court erred in law several times in the interpretation and assessment of the concept of good repute 'which requires further definition'. It complains that that Court exceeded its powers, substituted its (speculative) grounds for those of the ECB and distorted the evidence. The appellant further submits that, in its assessment, the General Court infringed the procedural guarantees provided to the appellant by the Charter and its obligation to state reasons. Lastly, the appellant submits that the General Court failed to recognise that the reputation of the shareholder is not relevant per se and cannot in any event negatively affect the reputation of the credit institution, is subject to only limited scrutiny and can at most lead to a suspension of voting rights in relation to the institution's management.

115. However, the appellant does not dispute that Article 14(2) of Directive 2013/36 empowers the competent authorities to refuse authorisation to take up the business of a credit institution if they are not satisfied that, inter alia, the *shareholders* meet the requirements put in place to ensure the sound and prudent management of the credit institution. This applies in particular where the assessment criteria set out in Article 23(1) of this directive, including the criterion of good repute, are not satisfied. As Article 18(c) of Directive 2013/36 enables these authorities to withdraw the authorisation if those requirements are no longer fulfilled, there can be no doubt that the ECB was authorised under the second subparagraph of Article 14(5) of Regulation (EU) No 1024/2013 to withdraw the appellant's authorisation following a proposal to that effect from the MFSA, if its main shareholder was not (or was no longer) able to meet the necessary requirement of good

58 Article 23(1) of Directive 2013/36.

59 OJ 1996 L 309, p. 1.

60 Case C-124/20, EU:C:2021:1035.

repute within the meaning of Article 23(1)(a) and (b) of this directive to the satisfaction of the MFSA or the ECB. This was established by the General Court in paragraphs 67 to 72 of the judgment under appeal, without any errors of law.

116. Therefore, the appellant's arguments that the reputation of the main shareholder is irrelevant to the withdrawal of authorisation are ineffective and must be dismissed.

(b) Dismissal by the General Court

117. The General Court also essentially justified its dismissal of the second plea in law, which was formulated quite succinctly in the application initiating proceedings, as follows:

118. First, a withdrawal of authorisation pursuant to Article 14(2) and Article 23(1) of Directive 2013/36 could be justified by the fact that the shareholders or partners are not (or no longer) considered suitable, for example due to a lack of good repute.

119. Second, the concept of (good) repute is an indeterminate legal concept which refers to the suitability of a person who complies with customary standards and rules and to the reputation which that person enjoys with the public as regards that suitability and his or her conduct, meaning that the perception of third parties is also relevant. The attainment of the objectives pursued is closely dependent on the confidence which the public and the participants in the banking market have in credit institutions. The loss of such confidence may lead to a loss of funding for those institutions and thus create a risk not only for the institution in question, but also for the financial system within the European Union and each Member State. [61]

120. Third, the doubts raised in the ECB decision at issue as to the reputation and suitability of the main shareholder due to the indictment against him are also such as to raise doubt as to the soundness and prudence of the management of the appellant. The subsequent negative perception of that repute by the public and the clients and partners of that credit institution may, provided that it is demonstrated on the basis of specific evidence, justify the withdrawal of the authorisation of the institution concerned, in so far as it is such as to create the aforementioned risks. [62]

121. Fourth, in the General Court's view, it is established or undisputed that this indictment had, inter alia, a negative impact on the assessment of the risk ratio established by a rating agency for the Maltese banking sector as a whole. It had led to withdrawals of deposits and the termination of the correspondent banking relationships as well as the early termination of the contracts of the appellant's main borrowers. As a result, its situation deteriorated significantly. The ECB relied on a series of negative factors and effects which followed on from the indictment at issue and which reveal, on an objective basis, the negative perception by customers of the good repute of the appellant's shareholder and their lack of confidence in the appellant following that indictment. This gave rise to a risk for the appellant and for the financial system within the European Union and each Member State. [63]

[61] Paragraphs 67 to 69 and 73 to 80 of the judgment under appeal.

[62] Paragraphs 96 to 102 of the judgment under appeal.

[63] Paragraphs 104 to 106, 111 and 112 of the judgment under appeal.

122. Fifth, in the light of the concrete negative effects for the appellant and the Maltese banking sector which had already emerged, it is irrelevant that the ECB failed to take account of the fact that the indictment at issue related to breaches of the rules relating to US sanctions against the Islamic Republic of Iran, while the conduct complained of might not have been unlawful or might have been of an 'exclusively technical nature' from the perspective of EU law. The ECB did not have to assess the merits of the prosecution contained within the indictment, but only the consequences of that prosecution on the main shareholder's reputation, on the situation of the appellant and on the banking market as a whole. [64]

123. I shall first address the interpretation of Article 23(1)(a) and (b) of Directive 2013/36 and the indeterminate legal concept of good repute, which is the subject of the case-law of the Court of Justice for the first time (see (c)). Then I shall examine whether the General Court erred in law in finding that the conditions of that legal concept, in accordance with the grounds of the ECB decision at issue, had been met (see (d)). Lastly, I will address the appellant's main objection that Blocking Statute No 2271/96 does not permit either the ECB or the General Court to use the indictment of its main shareholder in the United States to substantiate lack of good repute and the withdrawal of its authorisation (see (e)).

(c) Concept of good repute in Article 23(1) of Directive 2013/36

124. As held in paragraph 73 of the judgment under appeal, the concept of good repute in Article 23(1)(a) and (b) of Directive 2013/36 is an indeterminate legal concept which that directive does not define in detail.

125. In accordance with the principle set out in paragraph 74 of the judgment under appeal, the interpretation of a provision of EU law requires account to be taken not only of its wording, but also of its context, and the objectives and purpose pursued by the act of which it forms part. [65]

126. It is apparent from examining the various language versions [66] that the concept of good repute in its literal sense only refers to the honourability [67] of the person concerned in the French and Italian versions, and to the suitability [68] of the person concerned in the Portuguese version, that is to say an actual characteristic that can also be expressed in someone's conduct (which may or may not comply with customary standards and rules). In all other language versions, however, as the General Court correctly points out in paragraphs 76 and 77 of the judgment under appeal, that concept covers the reputation or repute [69] of this person, that is to say the perception of his or her qualities or his or her conduct by the public or by third parties.

127. Additionally, in the light of the objectives and the regulatory context of the Single Supervisory Mechanism as well as the functioning of the financial and banking markets concerned, the actual (objective) qualities of the individual concerned are less relevant. Rather,

64 Paragraphs 116 to 119 of the judgment under appeal.

65 Judgments of 15 March 2022, *Autorité des marchés financiers* (C-302/20, EU:C:2022:190, paragraph 63), and of 12 January 2023, *Österreichische Post (Information regarding the recipients of personal data)* (C-154/21, EU:C:2023:3, paragraph 29).

66 These versions are all equally binding; none of them can claim priority over the others; see judgments of 26 January 2021, *Hessischer Rundfunk* (C-422/19 and C-423/19, EU:C:2021:63, paragraph 65 and the case-law cited therein), and of 17 January 2023, *Spain* v *Commission* (C-632/20 P, EU:C:2023:28, paragraphs 40 to 42).

67 FR: 'honorabilité', and IT: 'onorabilità'.

68 PT: 'idoneidade'.

69 BG: 'репутацията'; CZ: 'pověst'; DA: 'omdømme'; DE: 'Leumund'; FI: 'maine'; EL: 'τη φήμη'; EN: 'reputation'; ES: 'reputación'; ET: 'maine'; HR: 'ugled'; HU: 'jó hírneve'; LT: 'reputaciją'; LV: 'reputācija'; MT: 'ir-reputazzjoni'; NL: 'reputatie'; PL: 'reputacja'; RO: 'reputația'; SK: 'dobrá povesť'; SL: 'ugled' and SV: 'anseende'.

the focus is on the (subjective) perception of the public, in particular market participants, of these qualities and this person's conduct. General confidence in the suitability, knowledge, skills, experience, integrity, reliability and financial soundness [70] of credit institutions, the solvency of which is constantly monitored by rating agencies, and of the persons determining the actions of those institutions is a key prerequisite for the proper functioning, protection and stability of the financial and capital markets. These markets are, in fact, very volatile, as can be clearly seen from the stock and bond markets. They react to public statements and even to rumours.

128. The concept of good repute thus refers to the (good) reputation of the credit institution and its shareholders and partners in the eyes of third parties, such as other market participants, in particular creditors and customers. If confidence in that credit institution or in the people acting on its behalf dissipates, or if this confidence is significantly compromised, this triggers an immediate reaction from market participants. This has a detrimental effect on financial transactions with that credit institution, leads to financial losses and may affect the overall functioning and stability of the financial market. [71]

129. As correctly established on several occasions in paragraphs 67 et seq. of the judgment under appeal, the rules of the Single Supervisory Mechanism, in particular Article 14(2) of Directive 2013/36, seek to protect the financial markets from precisely these risks by ensuring that, 'taking into account the need to ensure the sound and prudent management of a credit institution, the shareholders and members satisfy the necessary requirements' and meet the assessment criteria referred to in Article 23(1) of that directive.

130. The concept of good repute therefore does not require that the perception of market participants reflects the actual qualities of the person in question, let alone that this person must demonstrate certain qualities. In particular, contrary to the appellant's view, the ECB or the General Court was not obliged to prove that the person concerned had committed an offence that could be prosecuted in the EU (for more detail on this, see points 135 et seq. and points 142 et seq. below). Likewise, under Article 23(1)(e) of Directive 2013/36, it is sufficient to establish that there are reasonable grounds to suspect the existence of an attempt to commit or an increased risk of committing an offence of money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. [72]

131. The General Court therefore did not err in law in finding [73] that the indictment of the main shareholder called into question his reputation in the eyes of the public, despite the absence of a final conviction.

132. However, as set out in more detail in points 135 et seq., in doing so the ECB and the General Court must ensure that the allegations are not entirely invented or abusive.

[70] See also Article 23(1)(b) and (c) of Directive 2013/36.

[71] Moreover, this applies not only in the event of a loss of confidence, that is to say in a negative sense, such as in the well-known case of the Greek public debt crisis (see Order of 12 March 2020, *EMB Consulting and Others* v *ECB*, C-571/19 P, not published, EU:C:2020:208, and judgment of 7 October 2015, *Accorinti and Others* v *ECB*, T-79/13, EU:T:2015:756), but also in a positive sense, as shown in the case of the financial crisis at France Télécom and Orange, for example; the latter was only able to refinance itself on the capital market on its own merits following confidence-building public declarations by the French Minister for the Economy (see, in this regard, judgments of 19 March 2013, *Bouygues and Others* v *Commission and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175; and of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912).

[72] OJ 2005 L 309, p. 15.

[73] Paragraph 90 of the judgment under appeal.

133. The General Court was therefore entitled to find the relevant statements in the ECB decision at issue to be lawful in paragraphs 71 to 119 of the judgment under appeal.[74] It did not err in law in concluding that the *risk* to the stability of the financial system in the EU and in the Member States resulting from the damage to the main shareholder's reputation was sufficient to justify the withdrawal of the appellant's authorisation.

134. It must still be examined which procedural requirements and which standard of proof should be applied to the evidence of a lack of good repute and to the resulting risk, and whether these conditions have been met in the present case. As I shall explain below, not only is that the case, but the ECB has even demonstrated – and the General Court did not err in law in confirming – that the risk in question has in fact materialised.

(d) Procedural and evidential requirements for proving lack of good repute and the resulting risk

135. In accordance with the general requirement of due diligence and the duty of investigation, which also underlie the right to good administration under Article 41 of the Charter,[75] the ECB must, when applying indeterminate legal concepts which allow it a broad discretion in making a decision detrimental to the person concerned, examine carefully and impartially all the relevant elements of the situation in question.[76]

136. The General Court therefore did not err in law in paragraph 73 of the judgment under appeal by holding that, when assessing whether the indeterminate concept of good repute referred to in Article 23(1) of Directive 2013/36 has been met, the competent authorities and the ECB must take account of all relevant facts, the reasons underlying that concept and the objectives it pursues. That is also consistent with the requirements of the Joint Guidelines, which can only indirectly bind the ECB, if at all.[77] In points 10.9, 10.13 and 10.16, the Guidelines require that all relevant information available for the assessment from credible and reliable sources be taken into account and that case-by-case evaluations be carried out.[78] In addition, the General Court rightly requires, in paragraph 119 of that judgment, that the ECB take into account any evidence submitted capable of demonstrating the absence of any effect of such a prosecution on the reputation or management of the institution concerned and which might result from the abusive or manifestly unfounded nature of such a prosecution.

137. In this regard, the General Court took account, in paragraphs 81 to 85 of the judgment under appeal, of the fact that the ECB based its decision at issue on a press release published by the United States Department of Justice on 19 March 2018. According to this press release, the main shareholder had been arrested for his alleged participation in a scheme in which approximately USD 115 million in payments for a Venezuelan housing complex were allegedly embezzled for the benefit of Iranian individuals and undertakings. The indictment adopted by the United States Attorney for the Southern District of New York had been subject to intense international media

74 See pages 4 et seq., and in particular page 8, of the ECB decision at issue.

75 See the explanatory notes to the Charter of Fundamental Rights, explanatory note to Article 41 – Right to good administration (OJ 2007 C 303, p. 17).

76 In this regard, see judgment of 11 December 2018, *Weiss and Others* (C-493/17, EU:C:2018:1000, paragraph 30 with further case-law citations).

77 See, in this regard, inter alia, judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraphs 40 and 41). According to the statement set out in the introduction of the Joint Guidelines, these requirements are binding only on the EBA, EIOPA and ESMA in the first instance. However, the ECB is similarly bound in so far as it has adopted these guidelines as a supervisory authority.

78 See also paragraphs 75 and 86 of the judgment under appeal.

attention and resulted in negative press reports on the appellant, raising grave doubts about the integrity of its main shareholder and seriously tarnishing its reputation.[79] There is no evidence that these allegations were abusive or manifestly unfounded.

138. Additionally, in paragraphs 91 to 94 and 100 to 115 of the judgment under appeal, the General Court also assessed the facts and evidence submitted by the ECB, and not disputed by the appellant, which demonstrated that those criminal proceedings had had an impact on the reputation of the appellant itself, which led to a detrimental market sentiment. This was evidenced, first, by the significant number of requests for withdrawal of deposits subsequent to the initiation of the proceedings, representing more than 40% of the total amount of deposits shown on the appellant's balance sheet; second, by the termination of the correspondent banking relationships; third, by a deterioration in the risk ratio, established by a rating agency, for the Maltese banking sector as a whole, which is apparent from the references to those criminal proceedings, among others, in that agency's assessment report; fourth, by a letter from the appellant's main borrower requesting the early termination of its loan, which represented 90% of the appellant's loan book, which was, therefore, its main source of income and, fifth, by the fact that, of the remaining 10% of the loan book, consisting in five loans, three borrowers no longer honoured the interest and principal payments, whereas the two others had requested early termination of their loans.[80]

139. The General Court did not err in law in concluding from these circumstances that the indictment had damaged the reputation of the main shareholder and of the appellant and had had a series of negative effects not only on the appellant itself, in the form of capitalisation and liquidity difficulties, but also on the Maltese banking sector and on the stability of the financial system in the EU as a whole. The risk referred to in points 128 to 134 above had therefore actually materialised.

140. The General Court was therefore correct to hold, in paragraph 112 of the judgment under appeal, that the ECB relied on a series of negative factors and effects, which followed on from the indictment and which reveal, on an objective basis, that customers have a negative perception of the reputation of the main shareholder and the appellant and their confidence has been affected. This gave rise to a risk for the appellant and for the financial system within the European Union and each Member State.

141. The appellant's complaints alleging that the General Court misinterpreted or misapplied the concept of good repute, exceeded its powers, improperly substituted its own reasoning for that of the ECB, distorted the evidence or failed to give sufficient reasons for its judgment, must therefore be dismissed as unfounded.

[79] See pages 5 and 6 of the ECB decision at issue.

[80] Page 8 (in particular footnotes 21 and 22) of the ECB decision at issue.

(e) Significance of Blocking Statute No 2271/96

142. The appellant submits, in essence, that the General Court was not entitled to conclude that its reputation had been damaged nor to ascertain the subsequent risk. The indictment of its main shareholder is based on offences which cannot be prosecuted in the EU. In addition, Blocking Statute No 2271/96, in particular Article 4 thereof,[81] protects the person concerned from being prosecuted within the European Union.

143. In the light of the concrete negative effects for the appellant and the Maltese banking sector which had already emerged, the General Court did not object, in paragraphs 116 to 119 of the judgment under appeal, to the ECB's failure to consider, inter alia, the significance of Blocking Statute No 2271/96. The fact that the indictment concerned breaches of the rules relating to US sanctions against the Islamic Republic of Iran, while the conduct complained of might not be unlawful from the perspective of EU law, or the fact that the breaches in question were exclusively technical in nature and doubts might still persist about them, were not relevant in the General Court's view. This is because even if this conduct was not unlawful under US law or EU law, the ECB was not obliged to consider the merits of the criminal allegations contained in the indictment, but only, as the most important factor, the consequences of these allegations for the reputation of the main shareholder, for the appellant's situation and for the banking market as a whole.

144. I can see no error of law in this response by the General Court to the appellant's complaint at first instance.

145. The fact that the ECB had not considered that the allegations of criminal conduct might not have been punishable in the EU by virtue of Blocking Statute No 2271/96 or, in any event, could not be prosecuted,[82] does not call into question the conclusion drawn in points 135 to 141 above, which points out that the risk resulting from the damage to the appellant's reputation has in fact materialised. This is entirely unconnected to whether or not its main shareholder's conduct was actually punishable in the EU. As the General Court correctly held, and as the Commission also submits, the ECB was only obliged to assess whether the allegations were such as to cause negative consequences for the appellant and for the financial markets. It was under no obligation to examine whether these allegations had actually been proven or if they could be prosecuted within the EU.

146. This is also demonstrated by the reverse hypothesis. The MFSA and the ECB could not ignore the risk that had already materialised and allow the appellant to maintain its authorisation to operate as a credit institution simply because the conduct of which its main shareholder was accused was potentially not punishable in the European Union or could not be prosecuted there. This would have meant that these authorities would have had to allow, knowingly and contrary to their supervisory duty to take preventive measures, considerable disruption to and/or deterioration of the financial markets.

[81] This provision reads as follows: 'No judgment of a court or tribunal and no decision of an administrative authority located outside the Community giving effect, directly or indirectly, to the laws specified in the Annex or to actions based thereon or resulting there from, shall be recognized or be enforceable in any manner'.

[82] In relation to civil-law consequences and Article 5 of Blocking Statute No 2271/96, see judgment of 21 December 2021, *Bank Melli Iran* (C-124/20, EU:C:2021:1035, paragraphs 35 et seq.).

147. Lastly, it should be noted that neither the scope nor the protective purpose of Blocking Statute No 2271/96 are relevant in the context of proceedings for the withdrawal of a credit institution's authorisation. That regulation is intended to protect market operators from prosecution by courts or authorities in third countries or from claims for damages in the event of a breach of certain foreign sanction rules with extraterritorial application in international trade or capital transactions, [83] but not from the conduct in question and the effects thereof being taken into account when assessing suitability, integrity, reliability and reputation for conducting the activities of a credit institution.

148. This complaint must therefore also be rejected as unfounded.

149. The second ground of appeal in Case C-256/22 P must therefore be rejected in its entirety.

3. Third ground of appeal in Case C-256/22 P: error of law of the General Court, in particular the disproportionate nature of the withdrawal of the authorisation

150. In the third ground of appeal in Case C-256/22 P, the appellant submits that the General Court made several errors of law, inter alia when assessing the proportionality of the ECB's actions, which to some extent repeat or modify the complaints raised in the other two grounds of appeal. In the appellant's view, the fact that the ECB had not accepted an initial proposal by the MFSA to withdraw the appellant's authorisation demonstrates that its previous directives ordering the bank's closure were not justified. The withdrawal of its authorisation was disproportionate because the bank had already ceased operations and the withdrawal took place before the conclusion of the criminal proceedings instituted in the United States. Additionally, in its second proposal, the MFSA dropped the (untrue) allegations of financial difficulties, without reassessing proportionality.

151. From that submission, I am unable to ascertain with the necessary clarity and precision either the substance of these complaints or the allegedly legally erroneous statement of reasons in the judgment under appeal to which they relate. I therefore consider this ground of appeal to be inadmissible [84] and, in any event, incapable of proving that this judgment is unlawful.

152. The third ground of appeal in Case C-256/22 P must therefore be dismissed.

4. First ground of appeal in Case C-750/21 P: other complaints

153. By the remaining complaints in the first ground of appeal in Case C-750/21 P, the appellant challenges the findings of the General Court in paragraphs 33 to 51 of the order under appeal in response to the first plea in law. The appellant claimed that the ECB had erred in law in finding that it was not competent to give instructions to the MFSA or to assume direct supervision as a result of the withdrawal of the authorisation and the appellant's subsequent lack of status as a credit institution.

[83] See judgment of 21 December 2021, *Bank Melli Iran* (C-124/20, EU:C:2021:1035, paragraphs 35 to 37).

[84] See, inter alia, judgments of 14 October 2010, *Nuova Agricast and Cofra* v *Commission* (C-67/09 P, EU:C:2010:607, paragraphs 48 and 49), and of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others* v *Commission* (C-817/18 P, EU:C:2020:637, paragraph 115).

154. In support of its claim, the appellant essentially submits that the General Court committed several errors of law in its application of Regulations No 1024/2013 and 575/2013 and Directive 2013/36. Specifically, the General Court erred in law in considering that the status of 'credit institution' assumes the body in question (obligatorily) has the authority to operate as such.

155. In the order under appeal, the General Court found, first, that the ECB's competence extends only to 'credit institutions' and their activities within the meaning of Article 2(3) of Regulation (EU) No 1024/2013 in conjunction with Article 4(1)(1) of Regulation (EU) No 575/2013.[85] Second, it held that access to the activity of a credit institution pursuant to Article 14(1) of Regulation (EU) No 1024/2013 in conjunction with Article 4(1)(42) of Regulation No 575/2013 requires the relevant authorisation and that under Article 9(1) of Directive 2013/36, the Member States must prohibit persons or undertakings that are not credit institutions from carrying out the business of a credit institution.[86] Third, the General Court concluded from this that the former holder of an authorisation withdrawn in accordance with Article 14(5) of Regulation No 1024/2013 can no longer carry out such an activity nor be regarded as a 'credit institution', meaning that the rules laid down in Article 4(1) of this regulation establishing the ECB's competence in relation to these institutions no longer apply.[87] Therefore, it argued, the ECB was manifestly lacking in competence with regard to the appellant on 13 November and 20 December 2018 respectively, as the latter's authorisation had already been withdrawn on 2 November 2018. It correctly stated this in its email at issue.[88]

156. I consider the General Court's reasoning to be formalistic and legally erroneous.

157. It is evident from Article 4(1)(a) of Regulation (EU) No 1024/2013 that the ECB is entitled to both 'authorise credit institutions' and to 'withdraw authorisations of credit institutions'. However, the competence to grant authorisation necessarily implies that the ECB has to accept applications from natural or legal persons who are *not yet* a credit institution but intend to become one by virtue of authorisation. In addition, with regard to the ECB's competence *ratione temporis* to withdraw an authorisation, account must be taken of the fact that if such a withdrawal were to prove to be legally erroneous, it must be possible either for the ECB later to withdraw the decision as an *actus contrarius* on its own initiative or, on the basis of an action for annulment brought by the bank concerned under Article 263 TFEU, for it possibly to be removed retroactively from the EU legal order by way of an annulment judgment pursuant to the first paragraph of Article 264 TFEU. The ECB is then once again competent (also retroactively) and must take the implementing measures required by the first paragraph of Article 266 TFEU.

158. The provisions relied on by the General Court cannot justify a different assessment, since they merely define the concept of a 'credit institution' and its activity. Furthermore, it would seem rather arbitrary to consider the ECB's powers to have ceased once the decision to withdraw the authorisation has been adopted, without at least waiting for this decision to become final or to have the force of res judicata after the expiry of the deadline for bringing an action in the sixth paragraph of Article 263 TFEU. In any event, that deadline had not yet expired on 13 November or 20 December 2018, when the ECB replied by email to the appellant's request.

85 Paragraphs 35 to 39 of the order under appeal.

86 Paragraph 40 of the order under appeal.

87 Paragraph 41 of the order under appeal.

88 Paragraphs 42 to 44 of the order under appeal.

159. Consequently, the ECB still had competence in relation to the appellant within the meaning of Article 4(1)(a) of Regulation No 1024/2013 on 20 December 2018. The General Court therefore erred in law in finding that the ECB was manifestly without competence and that the first plea in law was therefore to be rejected as manifestly lacking any foundation in law.

160. It follows that the first ground of appeal must be upheld without it being necessary to examine each of the complaints raised by the appellant.

161. This notwithstanding, there can be no objection to the operative part of the order under appeal, according to which the action is dismissed. The email at issue does not constitute an act that can be independently challenged, nor is it apparent [89] that the ECB had any specific competence or obligation under Regulation (EU) No 1024/2013 to issue the instructions requested by the appellant, either before or after withdrawal of the authorisation (see points 88 to 93 above).

162. I therefore propose that the Court, similarly to its approach in the order of 4 February 2021, *Pilatus Bank* v *ECB*, [90] substitute the grounds relied on in the order under appeal in this regard and dismiss the first ground of appeal in Case C-750/21 P.

5. Interim conclusion and costs

(a) Case C-750/21 P

163. In Case C-750/21 P, the appeal is to be dismissed.

164. Consequently, in accordance with Article 184(2) of the Rules of Procedure, a decision is to be made as to costs.

165. Under Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the ECB has asked for costs, the appellant should be ordered to pay the costs of the appeal.

(b) Case C-256/22 P

166. In Case C-256/22 P, the first part of the first ground of appeal is upheld.

167. The same applies to the fourth ground of appeal, in so far as the General Court erred in law in assessing and dismissing the second part of the tenth plea in law concerning the infringement of the rights of defence, based on the fact that the appellant did not have access during the administrative proceedings to documents and information in its IT system or to its financial resources in order to pay its legal fees.

168. The appeal is well founded in this regard and the judgment under appeal dismissing the action in its entirety must be set aside.

[89] See judgment of 15 September 2022, *PNB Banka* v *ECB* (C-326/21 P, not published, EU:C:2022:693, paragraphs 56 to 58).

[90] C-701/19 P, not published, EU:C:2021:99, paragraph 38.

169. However, the Court of Justice is not in a position to rule on the substance of the case, meaning that the case is to be referred back to the General Court under Article 61 of the Rules of Procedure of the Court of Justice. Therefore, the decision on costs must be reserved in this respect.

170. In relation to the fourth ground of appeal, this results from the fact that the General Court did not examine whether the MFSA directives at issue were in fact capable of bringing about the de facto withdrawal of the appellant's authorisation and correspondingly anticipating or impairing the ECB's final discretionary assessment in the decision at issue. Similarly, it did not examine whether the ECB, for its part, had examined or should have examined a corresponding submission from the appellant during the administrative proceedings, in so far as it had in fact been put forward.

171. With regard to the first ground of appeal, the General Court also did not examine whether the appellant's or its legal adviser's lack of or limited access to documents and information in its IT system and to its financial resources for the purpose of paying its legal fees was in fact capable of infringing its rights of defence, because it could otherwise have defended itself more effectively and the administrative proceedings could therefore have reached a different conclusion. [91]

VI. Conclusion

A. Case C-750/21 P

172. In Case C-750/21 P, I propose that the Court should:

(1) Dismiss the appeal.

(2) Order Pilatus Bank plc to pay the costs of the appeal proceedings.

B. Case C-256/22 P

173. In Case C-256/22 P, I propose that the Court should:

(1) Set aside the judgment of the General Court of the European Union of 2 February 2022, *Pilatus Bank and Pilatus Holding* v *ECB* (T-27/19, EU:T:2022:46).

(2) Refer the case back to the General Court of the European Union.

(3) The decision as to costs is reserved.

[91] See, in this regard, judgments of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware* v *Council* (C-141/08 P, EU:C:2009:598, paragraph 81), and of 16 January 2019, *Commission* v *United Parcel Service* (C-265/17 P, EU:C:2019:23, paragraph 56).