COMMON MARKET LAW REVIEW

CONTENTS Vol. 57 No. 6 December 2020

Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Common Market Law Review is published bimonthly.
Subscription prices 2020 [Volume 57, 6 issues] including postage and handling:
2021 Print Subscription Price Starting at EUR 909/ USD 1285/ GBP 648.
This journal is also available online. Online and individual subscription prices are available upon request. Please contact our sales department for further information at +31(0)172 641562 or at lnternational-sales@wolterskluwer.com.
Periodicals postage paid at Rahway, N.J. USPS no. 663–170.
U.S. Mailing Agent: Mercury Airfreight International Ltd., 365 Blair Road, Avenel, NJ 07001.
Published by Kluwer Law International B.V., P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands

---

Printed on acid-free paper.

COMMON MARKET LAW REVIEW

Managing Editor: Alison McDonnell
Common Market Law Review
Europa Instituut
Steenschuur 25
2311 ES Leiden
The Netherlands
e-mail: a.m.mcdonnell@law.leidenuniv.nl
tel. + 31 71 5277549
fax: + 31 71 5277600

Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Editorial policy

The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication. If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

Submission of manuscripts

Manuscripts should be submitted together with a covering letter to the Managing Editor. They must be accompanied by written assurance that the article has not been published, submitted or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within three to nine weeks. Digital submissions are welcomed. Articles should preferably be no longer than 28 pages (approx. 9,000 words). Annotations should be no longer than 10 pages (approx. 3,000 words). Details concerning submission and the review process can be found on the journal's website http://www.kluwerlawonline.com/toc.php?pubcode=COLA

Common Market Law Review **57**: 1867–1886, 2020.

Different shades of legal standing and the right to judicial protection of private parties in the Banking Union: *Trasta Komercbanka*

Joined Cases C-663/17 P, C-665/17 P and C-669/17 P, *European Central Bank* v. *Trasta Komercbanka AS*, *Ivan Fursin and Others,* and *European Commission* v. *Trasta Komercbanka AS*, *Ivan Fursin and Others,* and *Trasta Komercbanka AS, Ivan Fursin and Others* v. *European Central Bank*, Judgment of the Court of Justice (Grand Chamber), EU:C:2019:923

1. Introduction

The direct access of private parties to EU courts has long been a critical issue in the EU system of justice. ECJ case law has set strict limits to their legal standing. As a result, while the addressees of EU acts can bring a case directly before EU courts, all other parties somehow affected by EU acts must pass a sophisticated test of individual and direct concern. If they fail, their protection can only be ensured indirectly: their case may be heard before national courts, in the course of which the ECJ may be requested by the national court to deliver a preliminary ruling.

The delicate equilibrium between direct and indirect access to EU courts has reached a new stage in the ruling annotated here. Special proceedings in the Banking Union create an untenable tension between the system of EU legal remedies as provided by the Treaties and the right to effective judicial protection granted under Article 47 of the Charter of Fundamental Rights. The judgments annotated concern a Latvian case regarding the withdrawal of a banking licence. Under the Single Supervisory Mechanism (SSM) this is a composite administrative procedure, which requires the cooperation of the competent national supervisory authority, which proposes the withdrawal, and the European Central Bank (ECB), which holds the final decision-making power. Under Latvian law, the withdrawal of the banking licence leads immediately to liquidation of the credit institution, and the removal of all the powers of the Board of Directors, including the power of attorney of the bank as a legal person. Latvian law mandates a crucial change: it passes the power of legal attorney to the appointed liquidator, removing any autonomy on the part of the bank's Board in relation to its own legal representation.

The combination of the composite administrative proceedings and national liquidation law is potentially able to preclude access to the EU courts for the very addressee of the ECB's decision: the bank as a legal person. Thus, the key

question is who can legitimately bring a direct action for annulment under Article 263(4) TFEU, in first instance before the General Court. The ECJ had to deal with two distinct issues. First, it assessed whether, although national law transferred the power of attorney to the liquidator, the addressee of the decision could still retain its standing rights under EU law. Secondly, it examined whether the shareholders have any right to seek the annulment of the ECB's decision, and whether they would pass the test for direct concern under EU law. Insights on these issues are critical for future developments on standing, especially in composite administrative proceedings.

In a nutshell, the ECJ admitted the standing of the bank in its former representation and rejected the standing of its shareholders on the ground of their lack of direct concern. This ruling completely overruled the Order of the General Court, and opens up new perspectives on the interpretation of Article 263(4) TFEU: the ECJ interfered with national law and displaced the application of national rules on the powers of attorney of banks being wound up, because of their incompatibility with the EU right to effective judicial protection. Conversely, it shielded the EU rules on the standing of private parties, applying a strict interpretation of the test on direct concern.

The ruling shows an underlying, selective tendency to centralize EU review over national laws. This centralization process applied to the standing of the bank, as the bank was the addressee of the ECB's decision. It did not, however, extend to the standing of the shareholders. Although liquidation was an automatic consequence of the composite administrative proceedings, the peculiarity of this regulatory framework was not sufficient to overcome the narrow application of the test of direct concern on shareholders, and it did not offer any further means of effective judicial protection. Hence, the protection of shareholders is left to the decentralized system of national courts. This combination of pro-activeness in the interference with national autonomy, and deference in the ECJ's interpretation of standing rights under Article 263(4) TFEU, shows that in its search for effective judicial protection the ECJ balances different interests, which reflect the relationship between EU and national jurisdictions.

2. Factual and legal background

The appeals before the ECJ concern the admissibility of actions for annulment brought before the General Court by a Latvian bank, Trasta Komercbanka AS, and its shareholders against the ECB's decision to withdraw its banking licence. The ECB adopted the measure on the proposal of the Latvian

supervisory authority, the Financial and Capital Market Commission (FCMC).

Under the Latvian law on credit institutions, the withdrawal of the banking licence requires the competent national court, the Vidzeme District Court of Riga, to start liquidation proceedings at the request of the FCMC. The Court also appointed a liquidator proposed by the FCMC. Before this ruling, Trasta had applied for the maintenance of the power of attorney of its Board of Directors for the purpose of challenging the ECB's decision before the ECB's Administrative Board of Review (ABoR) and the General Court. But this request was rejected; no appeal was lodged against that decision.

On 17 March 2016 – the very day of the publication of the notice of the initiation of the liquidation and of the appointment of the liquidator – the liquidator revoked all powers of attorney of the bank's Board of Directors. Despite this, Trasta started legal actions under EU law represented by the lawyers appointed by the former Board of Directors. On 3 April 2016, it submitted its application for review of the ECB's withdrawal decision before the ABoR. Subsequently, on 13 May 2016, both Trasta and its shareholders applied for judicial review before the General Court, seeking the annulment of the ECB's decision.

Although the ABoR admitted the action,[1] the ECB raised a plea of inadmissibility of the action of Trasta and its shareholders before the General Court. The ECB claimed that the power of attorney of Trasta's lawyers had been revoked by the liquidator and that the shareholders did not have an interest in bringing proceedings nor did they have standing distinct from that of the bank.[2]

By an order of 12 September 2017, the General Court partially upheld the plea of the ECB, recognizing that after the initiation of the liquidation proceedings, the liquidator acquired the power of attorney under national law so that Trasta's former lawyers had no legal standing in the action for annulment.[3] Conversely, as an exception, it admitted the legal standing of shareholders to protect the interest of the bank against the withdrawal of the

1. Case T-247/16, *Trasta Komercbanka AS* v. *European Central Bank (ECB)*, EU:T:2017:623, para 7. Following the ABoR's decision, the ECB adopted a new decision that confirmed the withdrawal of Trasta's banking licence on 11 July 2016 (Decision ECB/SSM/2016 — 5299WIP0INFDAWTJ81/2 WOANCA-2016-0005).

2. Case T-247/16, *Trasta*, para 15. In addition, the ECB also claimed that the action was devoid of purpose, as the contested decision had in the meantime been replaced by a new decision of the ECB.

3. Ibid., paras. 26–51. The General Court also ruled that despite the amendment of the ECB's decision after the ABoR's review, the applicants maintained an interest in the proceedings because the initial decision produced prohibiting effects on the bank's activity in the period between the date of its entry into force and the date of its repeal. In addition, if the contested decision was annulled, Trasta might decide to claim damages. See ibid., para 22.

banking licence since they were otherwise denied any possibility of exercising their influence under national company law.[4]

Three distinct appeals challenged the order of the General Court before the ECJ. Trasta and its shareholders challenged the lack of standing of the bank as represented by the lawyers appointed by the former Board of Directors and asked the ECJ to refer the case back to the General Court (Case C-669/17 P). According to Trasta, the conferral by national law of the power of attorney on the liquidator is incompatible with the right to effective judicial protection under EU law, because liquidation "is by its very nature at odds with maintaining the authorization of that company as sought by the action for annulment of the decision at issue."[5] However, according to the ECB, the liquidator can appropriately represent the bank in an action for annulment, because the success of such action may increase the value of the bank's recoverable assets.[6]

In parallel, the ECB challenged the interest of the shareholders in the action for annulment and asked the ECJ to adjudicate on the substance of the case (Case C-663/17 P). The Commission also contested the legal standing of the shareholders and pleaded for the inadmissibility of their action (Case C-665/17 P). According to the ECB and the Commission, despite the economic damage, the withdrawal of the banking licence had not affected the legal situation of the shareholders.[7] The negative economic impact was the result of national liquidation, while the ECB's decision did not preclude them from receiving dividends nor the bank from carrying on a different economic activity.[8]

In response to the pleas of the ECB and the Commission, Trasta and its shareholders contended that majority shareholders have a distinct interest, as they acted as interlocutors in the ECB's decision-making process and then suffered significant economic effects that require protection, including the possibility to establish a branch of the bank in another Member State and to decide on the voluntary liquidation of their company.[9] They also added that the consequences of applying national law must be taken into account in the assessment of the shareholders' standing.[10]

4. Ibid., paras. 52–72.
5. Judgment, para 48.
6. Ibid., paras. 49–51.
7. Ibid., para 92.
8. Ibid., paras. 93–95.
9. Ibid., paras. 96–98.
10. Ibid., para 99.

3. The Opinion of the Advocate General

The conflicting issues under appeal are potentially capable of precluding the direct access of private parties to judicial protection. If neither Trasta nor its shareholders were found to have legal standing under EU law, the right to effective judicial protection of private parties against EU measures would be at risk. If the liquidator is solely able to bring an action for annulment, the legal entity of the bank and those who hold its assets would have no power to challenge the withdrawal of the banking licence.

Advocate General Kokott clearly identified this issue in the opening of her Opinion. She emphasized that:

> "this reveals the fundamental issue of judicial protection underlying the present case. Should ultimately all routes to the Court of Justice really be blocked? And can it be lawful, in view of the Union's obligation to ensure effective judicial protection against EU acts having adverse effects, that national law attaches irreversible consequences to the withdrawal of a banking licence which preclude in practice an effective review by the European Union Courts?"[11]

Advocate General Kokott analysed key questions concerning the routes of the bank and its shareholders to EU judicial protection and advised the ECJ to admit the action of Trasta as represented by its former Board of Directors and to deny the action of the shareholders. She concluded that the case should be referred back to the General Court for a ruling on the merits of Trasta's action for annulment.

3.1. *The legal standing of Trasta*

Advocate General Kokott first analysed the admissibility of the action brought by Trasta as represented by its former Board of Directors. Her question was whether the recognition under national law of the exclusive power of the liquidator to represent the bank in all matters is compatible with the right to effective judicial protection under EU law.[12] The Advocate General argued that the right of a legal person to bring an action for annulment against an EU act is a matter of EU law. The representation of such a legal person is also a matter of EU law, insofar as it affects "its prospect of obtaining judicial protection".[13] In the absence of EU rules on the representation of legal

11. Opinion of A.G. Kokott in Joined Cases C-663, 665 & 669/17 P, EU:C:2019:323, para 3.
12. Ibid., para 41.
13. Ibid., para 45.

persons, however, it is up to national law to determine the authorized representatives. However, national law and its procedural requirements "may not impair the right to effective judicial protection".[14] In other words, national autonomy applies, but national law "cannot have the final decision whether an EU act may be (effectively) reviewed in an individual case".[15]

To emphasize her point, Advocate General Kokott referred to a few cases involving the retention of legal personality and not the retention of the power of attorney of legal persons. By recognizing the legal personality of entities that were in the process of obtaining it under national law, or had already lost it, EU case law shows that, regardless of legal status, any addressee of an EU act must be able to challenge it, with the result that national law can be legitimately set aside if it does not ensure effective judicial protection.[16] In addition, she observed that in a few cases, the power of attorney of the former Board of Directors was recognized under national law. This occurred in a Maltese case before the General Court[17] and in some Latvian cases preceding the SSM, where the FCMC had withdrawn banking licences. Advocate General Kokott claimed that if the interpretation of the General Court were upheld, its possibility to review an EU act would depend structurally on national conditions.[18] For this reason, in relying only on national law, the General Court had committed an error of law.[19]

On these grounds, Advocate General Kokott examined whether under the circumstances of the case, the conferral of the power of attorney on the liquidator alone could breach Trasta's right to effective judicial protection. To answer this question, she discussed two sub-questions: 1) should the possibility for the liquidator to bring an action be considered effective? and 2) is the action brought by the shareholders an effective alternative remedy?

The real task of the liquidator is to carry out the liquidation of assets and to wind up the company. It is not the role or the responsibility of the liquidator to challenge in court the withdrawal of the authorization, which is the legal basis for the liquidation proceedings.[20] In addition, national law creates a structural conflict of interests for the liquidator. Although the national court formally appoints the liquidator, this person is subject to a factual relation of trust with

14. Ibid., para 46.
15. Ibid., para 48.
16. Ibid., paras. 50–52 and 74. See Case 135/81, *Groupement des Agences de voyages* v. *Commission*, EU:C:1982:371, paras. 101–12 on the admissibility of an action for annulment brought by a company in the course of establishment under national law; Case C-229/05 P, *PKK and KNK* v. *Council*, EU:T:2005:48, paras. 37–38, concerning the recognition of legal standing although the organization had lost its legal personality.
17. Case T-321/17, *Niemelä and Others* v. *ECB*, pending.
18. Opinion, para 56.
19. Ibid., paras. 57–48.
20. Ibid., paras. 71–72.

the national supervisory authority, which also proposed the appointment. Since it is that same authority which also recommended that the ECB should withdraw the banking licence, the supervisory authority might lose trust in the liquidator if the liquidator were to act against the ECB's decision, and ask the national court for a replacement.[21] Such a conflict of interests would also exist with regard to the possibility of the liquidator to lodge an action for damages before EU courts.[22] In support of her views, Advocate General Kokott referred to the case law of the European Court of Human Rights (ECtHR), which identified a breach of Article 6 ECHR on the right to a fair trial where the liquidator was de facto controlled by the supervisory authority.[23] Trasta's right to effective judicial protection was therefore infringed.

As for the second sub-question, Advocate General Kokott argued that an action by the shareholders cannot be an effective remedy to protect the interest of the company for three reasons.[24] First, an action brought by a third party is structurally less effective, because it depends on the willingness of that party to act; second, shareholders may not have all the necessary information to represent the bank effectively; and third, the system of EU remedies is designed to grant direct judicial protection to the addressees of EU acts. The access of third parties to EU courts is much more limited, and their protection is mainly sought through national courts.

3.2. *The interest in the action and the legal standing of the shareholders*

In the second part of her Opinion, Advocate General Kokott analysed whether the General Court erred in law when admitting the action of the shareholders. To examine this issue, Kokott considered it "pivotal" to characterize the nature of the interest of the shareholders; that is, whether they have an interest of their own in bringing the action, or whether they are acting to defend the interests of the bank.[25]

For the shareholders to have an interest of their own – distinct from the interest of the bank – the withdrawal of the banking licence must produce binding legal effects on them and change their legal situation.[26] Hence, the existence of a mere economic interest in retaining the licence is not sufficient

21. Ibid., paras. 75 and 77.
22. Ibid., para 78.
23. Ibid., para 76. See ECtHR, *Capital Bank AD* v. *Bulgaria*, Appl. No. 49429/99, judgment of 24 Nov. 2005, paras. 91 and 117–118; ECtHR, *Credit and Industrial Bank* v. *Czech Republic*, Appl. No. 29010/95, judgment of 21 Oct. 2003, paras. 71–73.
24. Opinion, paras. 84–87.
25. Ibid., para 108.
26. Ibid., para 104.

to claim that the shareholders have an interest of their own.[27] According to Kokott, the withdrawal of the banking licence does not directly affect their property rights and status under company law. The significant legal effects on their status depend exclusively on the liquidation proceedings required by national law, and not by EU law.[28] In addition, the case law shows that the mere fact that the shareholders participated in the composite administrative proceedings leading to the withdrawal of the licence is not considered sufficient to establish their interest in the action.[29]

Insofar as the interest of the shareholders to act on behalf of the bank is concerned, Kokott instead considers that if the interest of the shareholders cannot be distinguished from that of the bank, their action cannot be admissible if the company itself can legitimately bring the action to protect its own interest.[30] Exceptions to this principle can only be acknowledged "in cases where the company itself cannot (effectively) bring an action against the EU act in question".[31] The General Court interpreted this right extensively, including the case where shareholders' rights under company law are restricted, as happened with the liquidation of Trasta. Instead, according to the Advocate General, the mere restriction of shareholders' rights is not sufficient to establish their right to act before EU courts; a fundamental impossibility to exercise such rights needs to be at stake. On these grounds, the issue of legal standing becomes "immaterial":[32] if the shareholders have no interest to bring the action for annulment on their own, their individual and direct concern is not relevant. Conversely, their standing rights in an action to defend the interests of the bank cannot be upheld where such rights are granted to the bank itself.[33]

4. The judgment

The ECJ followed the Opinion of Advocate General Kokott and focused its ruling on the two distinct, but closely connected, issues of the standing of Trasta and of its shareholders in the action for annulment. Firstly, the Court evaluated how the interaction between national law and EU law affects the

27. Ibid., paras. 114–115 and 120.
28. Ibid., para 119.
29. Ibid., para 116. See Case T-499/12, *HSH Investment Holdings Coinvest-C and HSH Holdings FSO* v. *Commission*, EU:T:2015:840, para 45.
30. Opinion, para 126.
31. Ibid., para 127.
32. Ibid., para 132.
33. Ibid., paras. 108–110.

legal standing of the bank before EU courts. Secondly, it considered the standing rights of the shareholders under Article 263 TFEU.

4.1. *The legal standing of Trasta*

The ECJ took a selective approach to the recognition of national autonomy. Insofar as no EU rules regulate the power of attorney of legal persons before EU courts, national law is competent. However, the application of national law may not disregard the fundamental rights ensured under EU law and, particularly, the right to an effective remedy and fair hearing enshrined in Article 47 of the Charter.[34] The ECJ justified this interpretation in the light of both the rule of law on which the EU legal order is based and the traditions common to the Member States as enshrined in the ECHR.[35] The ECJ also referred to its case law requiring Member States to "lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law".[36] On these grounds, the Court held that the right to an effective legal remedy would be infringed if national law creates "a risk that that liquidator may avoid challenging, in court proceedings, an act".[37]

Following the Advocate General, the ECJ found that the conferral of the power of attorney on the liquidator in Latvian law entails a specific risk, due to the relationship of trust which exists between the liquidator and the national supervisory authority, and the structural conflict of interests between the task of the liquidator and the action for annulment. First, the Court pointed out that the liquidator was appointed on the proposal of the FCMC, which took part in the decision to withdraw the licence.[38] Although the national court formally appointed the liquidator, the ECJ identified a "relationship of trust" between the FCMC and the appointed liquidator which aims at the final liquidation of the bank and might cause the liquidator to refrain from challenging the measure that, if annulled, would preclude the liquidation.[39] Secondly, the action for annulment might also involve the removal of the liquidator from its duties either by the national authority or on its proposal if the annulment action is successful.[40] The conflict of interests is further supported by the

34. Judgment, paras. 58–59.
35. Ibid., paras. 54–55.
36. See Case C-243/15, *Lesoochranárske zoskupenie VLK*, EU:C:2016:838, para 65.
37. Judgment, para 60.
38. Ibid., paras. 60–62.
39. Ibid.
40. Ibid., paras. 61 and 71.

factual circumstance that the national court appointed the liquidator proposed by the FCMC and rejected Trasta's request to maintain the power of attorney of its own Board of Directors for the purpose of legal representation in the action for annulment under EU law.[41]

For these reasons, the ECJ held that while, in principle, the conferral of power of attorney on the liquidator under national law does not infringe the right to effective judicial protection, in practice the circumstances of the case trigger a conflict of interests that affects the protection of such a fundamental right.[42] Hence, the legitimacy of the power of the liquidator under Latvian law to revoke the powers of the attorney of the bank "is not sufficient to justify recognition of such a revocation" under EU law, insofar as this would entail a breach of the right to effective judicial protection.[43] In support of this breach, the ECJ relied on the case law of the ECtHR, in particular the case *Capital Bank AD* v. *Bulgaria*,[44] where the liquidators of the bank in question were found to be inadequate to represent it in comparison to its former management board.[45] Unlike Advocate General Kokott, however, the ECJ emphasized the breach of Article 34 of the ECHR concerning the right to bring an individual application when States infringe a right protected under the Convention. The ECJ thus underlined that national law created a conflict of interests that made the right to bring an individual application "theoretical and illusory".[46] On these grounds, the ECJ declared the action of Trasta admissible and referred the case back to the General Court for a ruling on the substance.[47]

4.2. *The legal standing of shareholders*

Following the Opinion of Advocate General Kokott, the ECJ focused only on the interest of the shareholders to bring the action for annulment on their own right, and deemed it inadmissible because of their lack of direct concern in the ECB's decision.[48]

By upholding the positions of the ECB and the Commission, the ECJ considered that the observations of Trasta and its shareholders were not conclusive on the identification of the direct concern of the shareholders. According to the Court, the intensity of the effects of the ECB's decisions should not be confused with the production of legal effects, which is the

41. Ibid., para 64.
42. Ibid., para 77.
43. Ibid., para 70.
44. ECtHR, *Capital Bank AD,* cited *supra* note 23.
45. Judgment, para 76.
46. Ibid.
47. Case T-247/16 RENV, *Trasta Komercbanka* v. *ECB*, pending.
48. Judgment, paras. 117–119.

genuine threshold on which standing is based. In fact, the test of direct concern requires:

> "the fulfilment of two cumulative criteria, namely the contested measure must, first, directly affect the legal situation of the individual and, secondly, leave no discretion to the addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules".[49]

With regard to the first criterion, the ECJ held that the ECB's decision did not produce any direct effects on the legal situation of the shareholders, because they kept their property rights and their ability to participate in the management of the company.[50] More concretely, despite the practical impossibility of distributing dividends, their right to receive them was not affected.[51] In other words, they may suffer economic losses – even significant ones – but the withdrawal of the banking licence as such left their legal status unchanged.

Trasta and the shareholders contended that the case law on State aid and mergers recognizes the standing of competitors who are economically affected by EU measures,[52] but the Court clarified that standing for competitors only arises when their right not to be subject to distorted competition is infringed, and not their mere economic interests affected.[53] This means that in those circumstances EU acts produce legal effects on the position of rights of competitors, which must be protected under EU law. However, in the case at stake it is the liquidation of the company that directly affects the rights of the shareholders. This means that with reference to the criterion of the absence of discretion, the ECB's decision did not itself involve the automatic liquidation of the bank, which is the act affecting property and management rights. Hence, the limitation on shareholders cannot be blamed on EU law or on its necessary implementation under national law, but on purely national rules.[54] For these reasons, the legal standing of the shareholders under EU law cannot be justified.[55]

49. Ibid., para 103 and the case law cited therein.
50. Ibid., paras. 110–112.
51. Ibid., paras. 108–111. See also Opinion, para 120.
52. Judgment, para 97.
53. Ibid., para 112.
54. Ibid., para 114.
55. Ibid., paras. 113–114.

5. Comment

When adjudicating on the legal standing of the bank and its shareholders, the ECJ made new findings on the direct access of private parties to EU remedies. To use the words of Advocate General Kokott, the ruling opened some routes to the Court of Justice, while blocking others. The ECJ offered an extensive interpretation of the power of attorney so as to ensure the right of the bank to effective judicial protection, but took a narrow approach to the standing rights of the shareholders, precluding their direct access to EU courts. As is set out below, the ECJ was prepared to interfere with the application of national law where that would preclude the effectiveness of EU law, but it would not overturn a strict interpretation of EU law excluding additional direct access to EU remedies.

Taken individually, these findings further develop some more or less consolidated tendencies of EU case law. However, when analysed together, under the particular circumstances of this case, they reveal a selective policy on the part of the ECJ in the enforcement of the right to effective judicial protection. When reversing the General Court's Order, the ECJ bent the procedural rules for the addressee of the ECB's decision in light of Article 47 of the Charter.[56] Yet, the ECJ also restricted the direct access of shareholders to EU courts, confirming that in principle effective judicial protection does not require direct access to EU justice. One might, however, wonder whether in practice the specific framework of composite administrative proceedings might require a more comprehensive understanding of how national courts and EU courts should share jurisdiction.

5.1. *Intruding in national law*

The selective approach to the recognition of national autonomy allowed the ECJ to intrude in national law, and to accept jurisdiction at EU level. Although the establishment of the power of attorney of legal persons is not regulated under EU law, both Advocate General Kokott and the ECJ held this to be as a matter of EU law for the purpose of bringing an action for annulment against an EU act. This substantive approach was aimed at preserving the fundamental right to effective judicial protection, but encroached significantly on national regulatory autonomy.

56. Sarmiento, "The *Trasta* judgment and the Court's new approach on standing requirements in actions of annulment in banking supervision", *EU Law Live Blog* (2019), available at <eulawlive.com/blog/2019/11/05/the-trasta-judgment-and-the-courts-new-approach-on-standing-requirements-in-actions-of-annulment-in-banking-supervision/>, (all websites last visited 26 Aug. 2020).

In order to demonstrate that the power of attorney in bank settlement proceedings under Latvian law did not conform to the bank's standing under EU law, the ECJ had to examine at the same time both national law and the composite administrative proceedings that led to the adoption of the ECB's decision on the withdrawal of the banking licence. Based on these findings, it identified a specific conflict of interests that required setting aside national rules, as they had the practical effect of depriving the bank of an effective remedy against the ECB's decision.

Conversely, the General Court in the first instance adopted a more deferential approach, which distinguished the specific scope of application of domestic law. By relying on Directive 2001/24/EC on the reorganization and winding up of credit institutions, the General Court recognized that national law applies to the powers of credit institutions and their liquidators,[57] so its review should be limited to ascertaining whether the power of attorney was effectively revoked by virtue of national law.[58] The General Court had concluded that "the application of Latvian law does not lead to all banks whose approval was withdrawn being deprived of a remedy, but to the responsibility for seeking that remedy being entrusted to the liquidator".[59]

The divergence between these rulings is evident: the General Court distinguished purely domestic law from the scope of application of EU law, whereas the ECJ adopted a more intrusive approach to national law, justified by the goal of effectiveness of EU law. Unlike the General Court, both Advocate General Kokott and the ECJ assessed the practical consequences of the application of national law. They did not simply accept the competence of national law, but they checked the substantive compatibility of national rules with EU law and specifically identified the conflict of interests of the liquidator, which infringed the right to effective judicial protection of the bank on subjective and objective grounds.

From this standpoint, the ECJ confirms its tendency to functionally review national law for the purposes of application of EU law; this was prominently expressed in another Latvian case closely connected to the present one: *Rimšēvičs*.[60] The Governor of the Latvian Central Bank, Rimšēvičs, was accused of corruption in connection with the owners of Trasta, who had

57. Case T-247/16, *Trasta*, para 14. See Art. 10(2)(b), Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganization and winding up of credit institutions, O.J. 2001, L 125/15.

58. Case T-247/16, *Trasta*, para 39.

59. Ibid., para 36.

60. Joined Cases C-202 & 238/18, *Ilmārs Rimšēvičs* v. *Republic of Latvia*, EU:C:2019:139.

allegedly engaged in money laundering. Two consequences were that Trasta's banking licence was withdrawn, and the Governor of the Central Bank was suspended from office.[61] In *Rimšēvičs*, the ECJ annulled a national act in the field of criminal procedure with the aim of safeguarding the independence of the European System of Central Banks (ESCB) in the Monetary Union. In doing so, it also held that national rules must be exercised in line with EU law as a whole and the fundamental freedoms guaranteed by EU law.[62] This also applied to Trasta, as the ECJ set aside a national measure on the power of attorney of the bank in light of its incompatibility with the EU right to judicial protection. However, while the ruling in *Rimšēvičs* affected the validity of the national measure concerning suspension of the Governor, in *Trasta* the ECJ's decision only affected the rules on standing as part of the EU legal order and had no direct consequences for the status of national rules on the power of attorney within the domestic legal order.

Nonetheless, the expansive approach to the ECJ's jurisdiction highlights the underlying tendency to review the effects of the application of domestic law. In particular, it introduces some variations in the review of the compatibility of national law with EU law, which constitute a breakthrough in the relationships between courts in the EU legal order. In fact, the ECJ's indirect review of the validity and the interpretation of EU law through preliminary reference proceedings is now supplemented by direct actions for annulment under Article 263 TFEU. This change to some extent expropriates national courts from their power to check the compatibility of national law with EU law. As Sarmiento pointed out, this represents a "genuine constitutional moment" which is going to influence the relationships between national courts and the ECJ, putting the ECJ "at a constitutional apex".[63]

It is not by chance that the change occurred in proceedings that involve close cooperation between the supranational and national levels, like the EMU and the SSM. In these fields, the composite administrative proceedings that take place between national authorities and EU institutions blur the distinction between EU law and national law. Where legally binding effects are produced by EU acts, the recent case *Berlusconi and Fininvest* affirmed the exclusive jurisdiction of the ECJ, including the incidental review of national preparatory acts in the light of EU law, which renders any action proposed

61. See Smits, "A national measure annulled by the European Court of Justice, or: High-level judicial protection for independent central bankers", 16 EuConst (2020), 120–144, at 126–127.

62. Joined Cases C-202 & 238/18, *Rimšēvičs*, para 57.

63. Sarmiento, "Crossing the Baltic Rubicon", *Verfassungsblog*, 4 March 2019, <verfassungsblog.de/crossing-the-baltic-rubicon/>.

under national law irrelevant.[64] This means that in these proceedings, actions under Article 263 TFEU are going to supersede preliminary rulings and become the only admissible action.

Although some initial commentators have been cautious about the impact of *Rimšēvičs* beyond the specific field of EMU,[65] it cannot be denied that when considering this string of cases together, the key tenet of the separation between EU and national jurisdictions seems to be receding in the light of the need to ensure the consistency and the effectiveness of EU law. Hence, Sarmiento is right in thinking that the ECJ crossed the Rubicon, in the sense that it took some crucial steps to extend its review of national laws. In addition, both *Rimšēvičs* and *Trasta* show that the ECJ is going to exercise such review thoroughly; that is, by analysing the practical issues hidden in the folds of national law. In *Trasta,* in fact, the ECJ elaborated on the specific risk associated with the conferral of power of attorney on the liquidator. Likewise, in *Rimšēvičs* both direct and indirect effects of the restrictive measure on the capability of the Governor to exercise his functions within the ESCB were carefully examined.[66] This substantive approach shows that the ECJ is prepared to displace national law that might impair EU rights and to exercise full judicial review to ensure the effectiveness of EU law.

5.2. *Shielding the EU rules on standing*

The ECJ has not been equally keen to recognize the right of shareholders to access EU direct remedies. This means that the standing of the shareholders of a bank under resolution is excluded.[67] However, as Smits pointed out, this approach is going to affect the standing of shareholders beyond bank resolution cases, and it might also impact their standing in the administrative review procedures before the ECB's ABoR.[68]

64. Case C-219/17, *Berlusconi and Finanziaria d'investimento Fininvest*, v. *Banca d'Italia* EU:C:2018:1023, para 57. See Brito Bastos, "Judicial review of composite administrative procedures in the Single Supervisory Mechanism: *Berlusconi*", 56 CML Rev. (2019), 1355–1378.

65. Hinarejos, "The Court of Justice annuls a national measure directly to protect ECB independence: *Rimšēvičs*", 56 CML Rev. (2019), 1649–1660, at 1657–1660; Smits, op. cit. *supra* note 61, at 140 and 142.

66. Joined Cases C-202 & 238/18, *Rimšēvičs*, paras. 52–55.

67. See Tegelaar and Haentjens, "Judicial protection in cross-border bank resolution", in Haentjens and Wessels (Eds), *Research Handbook on Cross-Border Bank Resolution* (Elgar Publishing, 2019), pp. 260–287, at p. 271.

68. Smits, "Interplay of administrative review and judicial protection in European prudential supervision. Some issues and concerns", 2018, available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=3092805>, at 14.

Having saved the right to effective judicial protection of the bank, both Advocate General Kokott and the ECJ considered that the ECB's decision on the banking licence did not directly concern the shareholders. The General Court, instead, was drawn to admit their standing on an exceptional basis, because insofar as the General Court did not recognize the power of attorney of the previous Board of Directors, it would have otherwise prevented all the constituent parties of the bank from challenging the withdrawal measure before EU courts. This divergence in the application of the standing requirements shows that EU courts are still far from unequivocally applying the test of direct concern to private parties. As Sarmiento said, this is "a significant overruling of the General Court's position on a matter that, at this stage, should have been subject to an overall consensus among both courts", showing that EU courts "are still struggling in finding the right tone and scope in a subject-matter that should have been settled for years".[69]

Recently, this same problem has been raised in a pending case concerning the invalidity of the guidelines of the European Banking Authority (EBA) on product oversight and governance arrangements for retail banking products.[70] The Fédération bancaire française (FBF) asked the Conseil d'État to make a reference to the ECJ, to ascertain whether it could have direct access to EU judicial review of the EBA's guidelines "intended for the members whose interests it protects but which are not of direct or individual concern to it", or whether it can have indirect access pleading the invalidity of the guidelines through a reference for a preliminary ruling under Article 267 TFEU.[71]

In *Trasta*, the test of direct concern is particularly ambiguous. The ECJ bases direct concern on the fact that legal effects are produced, excluding any consideration of the economic impact of the measure. As a result, majority shareholders have no say in EU courts, even though they were heard during the decision-making process. Unlike the decision on the power of attorney, the fact that these rights can be empty in practice is not relevant, as this only applies to formal review. The ECJ correctly held that the liquidation of the bank – which is the act affecting property and management rights of the shareholders – cannot be blamed on EU law, because it depended on national law. However, as Smits pointed out, the withdrawal of a banking licence can lead to divergent outcomes under national laws.[72] In particular, this may become an issue where national arrangements are automatically connected to EU acts. The question is thus whether the protection of shareholders should be

69. Sarmiento, op. cit. *supra* note 56.

70. Case C-911/19, *Fédération bancaire française (FBF)* v. *Autorité de contrôle prudentiel et de résolution (ACPR)*, pending.

71. Ibid.

72. Smits, op. cit. *supra* note 68, at 14.

left to each individual State, or whether it should be addressed in the framework of composite administrative proceedings under the SSM. In the former scenario, which is the one followed by the ECJ, the test for direct access to EU courts is interpreted strictly; whereas the latter would require a wider interpretation of direct concern, taking into account the substantive relationship between ECB's decisions under the SSM and the ensuing arrangements under national laws.

Legal scholarship has been critical of the strict interpretation of individual and direct concern as requirements for the direct access of private parties to the action for annulment, leaving remedies to national law.[73] Although referring to acts of general application, Advocate General Jacobs, in his Opinion in *Unión de Pequeños agricultores* v. *Council,* emphasized the need to rely on the "substantial adverse effect" on the interests of the party in the assessment of individual concern.[74] A similar substantive approach could also apply to direct concern.

As Türk observed, under some EU case law the foreseeability of the impact on the legal position of an individual may generate the required direct legal effects.[75] In *Piraiki-Patriaiki*, the ECJ held: "It is true that without the implementing national measures adopted at the national level the Commission decision could not have affected the applicants. In this case, however, that fact does not in itself prevent the decision from being of direct concern to the applicants if other factors justify the conclusion that they have a direct interest in bringing the action."[76] In that case, France aimed to restrict the system of licences for imports of cotton yarn from Greece. Therefore, it would be "entirely theoretical" to think that France might have decided not to make use of the Commission's authorization to take some protective measures on cotton yarn imports.[77] Albors-Llorens pointed out that the notion of discretion might be ambiguous and the focus of the test should rather be on "the existence of a direct causal link between a Community measure and the effect of that measure on the legal position of the party applying for its annulment".[78] If this test is applied to the case of Trasta's shareholders, the fact that liquidation was an automatic procedure under Latvian law once the banking licence is

73. See Craig, *EU Administrative Law*, 2nd ed. (OUP, 2012), pp. 308–309.

74. Opinion of A.G. Jacobs in Case C-50/00 P, *Unión de Pequeños agricultores* v. *Council*, EU:C:2002:197, para 60.

75. Türk, *Judicial review in EU Law* (Elgar Publishing, 2009), p. 65.

76. Case 11/82, *Piraiki-Patraiki*, EU:C:1985:18, para 7.

77. Ibid., para 9.

78. Albors-Llorens, "The standing of private parties to challenge Community measures: Has the European Court missed the boat?", 62 CLJ (2003), 72–92, at 75; Albors-Llorens, *Private Parties in European Communities Law. Challenging Community Measures* (OUP, 1996), p. 73.

withdrawn might suggest that because of the specific circumstances of national law, a direct causal link exists between the ECB's decision and the damage for shareholders.

By avoiding focusing on the peculiarity of the immediate liquidation, and being careful not to extend the standing of private parties under Article 263(4) TFEU, the ECJ confirmed the separation between EU law and national law and their respective jurisdictions. In substance, this means that shareholders can only seek protection before national courts, and indirect access to EU courts. Insofar as under Latvian law liquidation is automatically connected to the withdrawal of the banking licence in the composite administrative proceedings between the national supervisory authority and the ECB, the case of the shareholders could still reach the ECJ through the preliminary reference procedure. According to Advocate General Jacobs in *Unión de Pequeños agricultores*, however, this approach cannot ensure the right to effective judicial protection, because there is no individual right to initiate the preliminary reference procedure and national courts cannot grant remedies on their own.[79] Although national courts might be well-disposed to cooperate, they may legitimately refuse to refer questions to the ECJ, they may frame questions so as to refine applicants' claims, or even err in their preliminary assessment of the case. In addition, insofar as national rules on standing apply and national courts may react to the questions for preliminary references differently, individual protection in composite administrative proceedings across the different national jurisdictions is fragmented.

Despite the fact that Article 263(4) TFEU has extended direct access to EU justice against regulatory acts of direct concern that do not entail implementing measures, the question of effective protection raised by Advocate General Jacobs is still relevant. One may still wonder how intense the protection of the right to effective judicial protection is under Article 263(4) TFEU, especially in the case of composite administrative proceedings.

6. Conclusion

The ruling shows that the ECJ applied different tests to ensure the right to effective judicial protection of private parties seeking the annulment of the ECB's decision. On the one hand, the ECJ extended powers of attorney in the action for annulment under Article 263(4) TFEU displacing national law; on the other hand, it relied on national courts to ensure protection of those parties whose economic interests have been affected by EU acts, but who were not able to demonstrate direct concern under EU law.

79. Opinion in Case C-50/00 P, *Unión de Pequeños agricultores*, para 42.

The expansive approach to the interpretation of national law to grant the direct access of the bank to EU judicial review is counterbalanced by the narrow approach to the standing of shareholders under EU law. The ECJ's stance reverses the approach of the General Court, which instead abided by national law and preferred to extend, exceptionally, standing rights under EU law to ensure the protection of the bank shareholders. This twist in the ruling of the ECJ shows that the right to effective judicial protection applies with all its overflowing effects only to the very addressee of the decision at stake. Standing must be, however, denied to other interested parties who are not the legal addressees of the decision, with all due respect to the right to effective judicial protection.

The findings of the ECJ highlight two different issues that go beyond the enforcement of the right to effective judicial protection. Firstly, in composite administrative proceedings there is a progressive centralization of judicial review in the ECJ, which makes national laws and remedies recede in comparison to the need for a uniform and exhaustive review by the ECJ. The intense cooperation between national and supranational administrations is reflected in the relationships between national courts and the ECJ, pulling jurisdiction to the EU level. Direct access of private parties is thus extended to enable the ECJ to review the proceedings. However, this process does not affect the application of the EU law rules on standing under Article 263(4) TFEU. The second issue is thus whether the strict application of the rules on standing before the ECJ are effective where the special structure of composite administrative proceedings is at stake; that is, where national measures strictly depend on EU acts.

It may be asked whether this mixed approach to standing is sustainable, or should some specific rules on direct access to justice be designed when composite administrative proceedings are at stake? In its ruling, the ECJ managed to ensure an effective remedy, excluding the theoretically possible scenario of the lack of any protection under EU law against the ECB's decision. However, one may wonder whether the balance reached between the national and the EU courts can fairly ensure the consistency of standing rights in composite administrative proceedings. This case solved some untenable conflicts in the enforcement of the right to effective judicial protection, but it has also fuelled new tensions in the allocation of jurisdiction between national and EU courts.

Marta Simoncini*

* Assistant Professor, LUISS "Guido Carli" University Rome.

COMMON MARKET LAW REVIEW

Subscription information
2021 Print Subscription Price Starting at EUR 909/ USD 1285/ GBP 648.

Personal subscription prices at a substantially reduced rate as well as online subscription prices are available upon request. Please contact our sales department for further information at +31 172641562 or at International-sales@wolterskluwer.com.

Payments can be made by bank draft, personal cheque, international money order, or UNESCO coupons.

All requests for further information
and specimen copies should be addressed to:

Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands
fax: +31 172641515

For Marketing Opportunities please contact International-marketing@wolterskluwer.com

Please visit the Common Market Law Review homepage at http://www.kluwerlawonline.com for up-to-date information, tables of contents and to view a FREE online sample copy.

Microfilm and Microfiche editions of this journal are available from University Microfilms International, 300 North Zeeb Road, Ann Arbor, MI 48106, USA.

The Common Market Law Review is indexed/abstracted in Current Contents/Social & Behavioral Sciences; Current Legal Sociology; Data Juridica; European Access; European Legal Journals Index; IBZ-CD-ROM: IBZ-Online; IBZ-International Bibliography of Periodical literature on the Humanities and Social Sciences; Index to Foreign Legal Periodicals; International Political Science Abstracts; The ISI Alerting Services; Legal Journals Index; RAVE; Social Sciences Citation Index; Social Scisearch.