INSIGHT

ERNESTS BERNIS (APPEAL) AND JUDICIAL REVIEW BY THE CJEU OF NON-RESOLUTION DECISIONS IN THE EU BANKING UNION: NO STANDING FOR THE SHAREHOLDERS OF THE RELEVANT ENTITY

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ABSTRACT: With the judgment of 24 February 2022 in case C-364/20 P *Bernis and Others v SRB* ECLI:EU:C:2022:115, the European Court of Justice has dismissed the appeal lodged by Ernests Bernis, Oļegs Fiļs, OF Holding SIA and Cassandra Holding Company SIA (shareholders of ABLV Bank) against the order of the General Court rendered on 14 May 2020 in case T-282/18 *Bernis and Others v SRB* ECLI:EU:T:2020:209, concerning the decisions not to take resolution action with respect to ABLV Bank. With this judgment, the ECJ has closed the judicial proceedings at stake and has ruled for the first time on the locus standi of the shareholders of a credit institution to challenge the decision not to take resolution action with respect to the same entity.

KEYWORDS: Non-resolution decisions – shareholders – standing – ABLV – Banking Union – SRMR.

I. INTRODUCTION

ABLV group was composed of ABLV Bank AS, a credit institution established in Latvia, (ABLV Latvia) and its subsidiary in Luxembourg ABLV Bank Luxembourg SA (ABLV Luxembourg), which was subject to direct supervision of the European Central Bank (ECB) pursuant to Council Regulation (EU) 1024/2013[1] and under the remit of the Single Resolution Board (SRB) pursuant to Regulation (EU) 806/2014.[2]

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[1] Regulation (EU) 1024/2013 of the Council of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

[2] Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) 1093/2010.

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Following the announcement of the US Treasury Department – through the Financial Crimes Enforcement Network – of its intention to take special measures that would prevent based on anti-money laundering grounds ABLV group from accessing the US dollar financial system, ABLV group faced a very rapid and severe liquidity crisis in February 2018.

Despite the efforts to obtain liquidity from different sources, the ABLV group did not manage to restore its financial position, which on 23 February 2018 lead the ECB to declare ABLV Latvia and ABLV Luxembourg failing or likely to fail (ECB's FOLTF assessments) and the SRB to adopt decisions not to take resolution action with regard to these two entities (SRB's non-resolution decisions).

In particular, the two decisions adopted by the SRB on 23 February 2018 were addressed to the relevant national resolution authorities of Latvia and of Luxembourg and found that a resolution action with regard to respectively ABLV Latvia and ABLV Luxembourg was not necessary in the public interest within the meaning of art. 18(1)(c) and (5) Regulation 806/2014. These decisions were based on the consideration that the two banks did not perform critical functions and their failure would not have a significant adverse impact on financial stability.

II. Procedural history of *Ernests Bernis (Appeal)* and related judicial proceedings

Following the adoption of the SRB's non-resolution decisions, ABLV Latvia and its shareholders brought a number of legal actions before the General Court of the EU. In particular, ABLV Latvia and its shareholders brought two separate legal actions for the annulment of the ECB's FOLTF assessments[3] and two separate legal actions for the annulment of the SRB's non-resolution decisions.[4]

The two court cases brought against the ECB's FOLTF assessments were dismissed as inadmissible by two separate orders of the General Court of the EU on 6 May 2019, which were subsequently appealed before the ECJ. The ECJ decided to join these two appeals and ruled on them with the judgment of 6 May 2021.[5] With this judgment, the ECJ confirmed, in line with the opinion[6] of the Advocate General in these cases, the orders of the General Court of the EU which dismissed as inadmissible the actions for annulment brought by ABLV Latvia and its shareholders against the ECB's FOLTF assessments.

The court case brought by ABLV Latvia against the SRB's non-resolution decisions (*ABLV Bank v CRU*) is pending before the General Court of the EU.

[3] Case T-281/18 *ABLV Bank v ECB* ECLI:EU:T:2019:296 and case T-283/18 *Bernis and Others v ECB* ECLI:EU:T:2019:295.

[4] Case T-280/18 *ABLV Bank v CRU* and case T-282/18 *Bernis and Others v CRU* ECLI:EU:T:2020:209.

[5] Joined cases C-551/19 P and C-552/19 P *ABLV and others v ECB* ECLI:EU:C:2021:369.

[6] Joined cases C-551/19 P and C-552/19 P *ABLV and others v ECB* ECLI:EU:C:2021:16, opinion of AG Campos Sánchez-Bordona.

The court case brought by the shareholders of ABLV Latvia against the SRB's non-resolution decisions (*Ernests Bernis (First Instance*)) was dismissed as inadmissible by General Court with the order of 14 May 2020. In particular, the General Court found that the SRB's non-resolution decisions adopted with respect to ABLV Latvia and ABLV Luxembourg do not concern the shareholders of ABLV Latvia directly in the sense required by art. 263(4) TFEU. This order was subject of an appeal before the ECJ[7], which is the main subject matter of this *Insight*. With this appeal, the shareholders of ABLV Latvia mainly requested the ECJ to set aside the order of the General Court, to declare their application for annulment admissible, and to refer the case back to the General Court for it to determine the action for annulment.

This appeal relied upon numerous pleas in law and claimed, among others, that the General Court of the EU erred in law by: *i)* considering the Luxembourg insolvency court's rejection of the Luxembourg national resolution authority's application for the winding-up of ABLV Luxembourg and the voluntary nature of ABLV Latvia's liquidation as relevant facts in its assessment of the admissibility of the action for annulment; *ii)* considering, in the assessment of the admissibility of the action for annulment of the SRB non-resolution decisions, the discretion of the national authorities in the implementation phase in accordance with respective Member States' domestic laws; *iii)* frustrating the appellants' right to an effective judicial protection; *iv)* basing the appealed order on an incorrect understanding of the concept of "intermediate rules" as developed in EU case law; *v)* basing the appealed order on an incorrect interpretation of relevant case law including the judgments of the ECJ in *Trasta Komercbanka and others v ECB* joined cases[8] and in *Deutsche Post and Germany v Commission* joined cases.[9]

III. Main findings of the Court in case *Ernests Bernis (Appeal)*

In its judgment in *Ernests Bernis (Appeal)*, the ECJ has grouped and streamlined the numerous pleas relied upon by the appellants and it has tried to assess them systematically. The ECJ has clarified a number of misunderstandings and misinterpretations on the part of the appellants as regards the contents and meaning of the two SRB's non-resolution decisions and of the appealed order.

The ECJ has stated very clearly that the two non-resolution decisions adopted by the SRB with respect to ABLV Latvia and ABLV Luxembourg did not require the winding-up of the two credit institutions and did not have the effect of withdrawing their banking authorisation. Quite the contrary, according to the ECJ, the two SRB non-resolution decisions merely stated that the two credit institutions were not to be placed under resolution as not all resolution conditions were satisfied. The ECJ has observed that several of

[7] Case C-364/20 P *Bernis and Others v SRB* ECLI:EU:C:2022:115.

[8] Joined cases C-663/17 P C-665/17 P and C-669/17 P *Trasta Komercbanka and others v ECB* ECLI:EU:C:2019:923.

[9] Joined cases C-463/10 P and C-475/10 P *Deutsche Post and Germany v Commission* ECLI:EU:C:2011:656.

the claims and pleas put forward by the appellants were based on the wrong premise that the SRB actually ordered the liquidation of the two credit institutions, which is also contradicted by the operative part of the two SRB non-resolution decisions.

In this regard, the ECJ has recalled the finding of the General Court that the applicable EU resolution legal framework makes no provision, in circumstances such as those of ABLV crisis case, for the winding-up of a credit institution in respect of which the SRB decided not to adopt a resolution scheme.

Moreover, the ECJ has observed that the sector-specific legislation does not have the purpose or effect of derogating from the conditions under which legal proceedings can be brought pursuant to art. 263 of the TFEU and relevant case law, and that the General Court had the responsibility to verify whether the appellants satisfied the conditions set out in that article.

In the case in comment, the ECJ has confirmed an interpretative stance, which is firmly rooted in settled case law in the banking sector[10] and other EU policy areas.[11] The ECJ has confirmed that the General Court adequately substantiated its finding that ABLV shareholders' application was inadmissible, on the ground that they were not affected in terms of legal effects (as opposed to economic effects) and thus were not directly concerned by the two SRB's non-resolution decisions. In particular, the rights of the shareholders to receive dividends and to participate in the management of ABLV Latvia and of ABLV Luxembourg, as companies constituted under Latvian and Luxembourg law, respectively, were not affected by the decisions at stake.

To support this finding, the General Court leveraged on the judgment in *Trasta Komercbanka and others v ECB* joined cases.[12] In these cases, the ECJ was called upon to decide on the order of the General Court concerning the decision of the ECB to withdraw the banking authorisation of Trasta Komercbanka. The ECJ rejected the assessment of the General Court based on the "intensity" of the effects and it clearly drew a distinction between economic effects and legal effects of a decision to withdraw a banking authorisation. In particular, the ECJ ruled that a decision to withdraw a banking authorisation does not affect the right of shareholders to receive dividends, to vote and to participate in the management of the company in accordance with the relevant national corporate law, even though obviously, the withdrawal of the banking authorisation prevents the company from performing banking activities and therefore its ability to distribute dividends becomes rather limited. According to the ECJ, however, such an effect is economic,

[10] See in particular joined cases T-351/18 and T-584/18 *Ukrselhosprom PCF and Versobank v ECB* ECLI:EU:T:2021:669.

[11] See in particular case C-465/16 P *Council v Growth Energy e Renewable Fuels Association* ECLI:EU:C:2019:155.

[12] *Trasta Komercbanka and others v ECB* cit. The ECJ has applied by analogy in *Ernests Bernis (Appeal)* the conclusions reached *Trasta Komercbanka and others v ECB* despite the different nature of a non-resolution decision and of a decision to withdraw a banking authorisation.

and not legal, in nature, and the possibility for the shareholders to decide to change the object of the company is not excluded.

In the ECJ's view, the references in the SRB's non-resolution decisions to the fact that the measures necessary to comply with these decisions include winding-up procedures under Latvian and Luxembourg law do not allow to conclude that the application was admissible. These references would not lead to the conclusion that the implementation of the two SRB's non-resolution decisions at national level was purely automatic and resulting from EU rules alone, with no role for intermediate national rules and for the domestic authorities' discretion in the implementation of the SRB's non-resolution decisions.

In relation to the latter point, the ECJ has also clearly stated that the General Court was not under the obligation to furnish further explanations on the rules of national law and the discretion of the national authorities required to implement the SRB non-resolution decisions.

In the last years, the ECJ has made significant efforts to shed light on the EU resolution framework and for the sake of completeness, it is also worth to incidentally signal the interpretative stances taken by the ECJ as regards the following two matters, which are closely related to *Ernests Bernis (Appeal)*: *i)* the legal nature of failing or likely to fail declarations pursuant to art. 18(1)(a) Regulation 806/2014; and *ii)* the relation between a decision to withdraw a banking authorisation and a failing or likely to fail declaration.

With regard to the legal nature of failing or likely to fail declarations, the ECJ found that the ECB's FOLTF assessments were measures of preparatory nature, which are not capable of changing the legal status of the appellants and did not have binding legal effects on them, and the ECJ reached this conclusion with respect to both the bank itself and its shareholders.[13] The ECJ found that the ECB's FOLTF assessments constituted, in this case, only the basis for the adoption by the SRB of decisions that resolution was not necessary in the public interest, against which, in light of the judgment in *Ernests Bernis (Appeal)*, action for annulment by shareholders of the bank would not be admissible.

With regard to the relation between the decision to withdraw a banking authorisation and a failing or likely to fail declaration, the ECJ had also the opportunity to clarify that there is no functional equivalence between a declaration of failing or likely to fail and a decision to withdraw a banking authorisation. Even though a declaration of failing or likely to fail may be based on the finding that the requirements for continuing authorisation are no longer satisfied pursuant to art. 18(4)(a) Regulation 806/2014, it does not require a prior decision to withdraw the banking authorisation by the relevant banking supervisor in accordance with art. 18 of Directive 2013/36/EU.[14] Therefore, the ECJ has

[13] *ABLV and others v ECB* cit.

[14] 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance.

acknowledged the existence of a relation between a failing or likely to fail declaration and a withdrawal decision, but it has concluded that the adoption of the former is not dependent on the adoption of the latter.[15]

IV. Conclusions

With the case in comment, the ECJ has provided further interpretative guidance on the conditions for bringing actions for annulment and has taken an additional step in the process of progressively shedding light on the relatively novel and complex EU legal framework on bank crisis management and resolution.

The judgment in *Ernests Bernis (Appeal)* represents a precedent of significant importance and a reference point for possible future cases concerning decisions not to take resolution action with respect to entities established in the Banking Union.

The judgment at stake not only has confirmed the SRB's position but has also provided the much desired clarity on how the requirements for the *locus standi* set out in art. 263 of the TFEU would apply in case of legal challenges before the CJEU by the shareholders of a credit institution against the decision not to take resolution action with respect to that entity.

In particular, the ECJ has excluded the admissibility of an action for annulment of a SRB non-resolution decision brought by the shareholders of the relevant entity because of the lack of direct concern due to the absence of legal effects on them and to the non-purely automatic implementation of the SRB decision at national level by relevant domestic authorities.

[15] *ABLV and others v ECB* cit.