

## **ABLV + shareholders appeals against Orders in cases against ECB's FOLTF assessment dismissed**

Excerpts of the CJEU judgment of 6 May 2021; [ECLI:EU:C:2021:369](#) in Joined Cases C-551/19 P & C-552/19 P

The CJEU first rejects the ECB's plea that the appellants' pleas are manifestly unfounded and holds that a FOLTF finding by the ECB is a preparatory act that is not binding on the SRB (para. 33).

Whilst finding the appellants' ground of appeal to be admissible, the Court upholds the reasoning of the General Court that an FOLTF finding is a preparatory act and that an intermediate measure preparing for a final decision is not subject to appeal (para. 39).

The Court then assesses 'the actual substance' of the FOLTF finding 'on the basis of objective criteria': content, context and powers of the body that adopted the act (paras 40-41). Distinguishing between the subjective criterion of the intention of the author of the act (which only plays a complementary role to assess a legal act) and the objective criteria cited (para. 42), the Court finds that the General Court's analysis was consistent with the case law and correct.

The Court then considers whether the appellants' reliance on elements in the ECB's FOLTF finding (the proportionality analysis, the public announcement of the finding and its communication to the banks concerned, and its public statement that liquidation was inevitable) are sufficient to consider a legal act presumed to be binding unless the author of a particular act indicates that it is non-binding (para. 45). This presumption is rejected: it is for the courts to ultimately establish whether an act is binding, not for its author (para. 46). 'While it is (...) true that any decision-making act of an EU institution, body, office or agency must comply with the general principles of EU law, which include the principle of proportionality' the presence of a proportionality analysis is no evidence of the binding nature of the act (para. 47). The publicity relating to the FOLTF finding had been qualified as 'announcements of the ECB' rather than as publication of the act itself in the first instance – a finding which the Court cannot review (para. 48). The ECB's public statement about the inevitability of liquidation does not imply its finding was binding; the liquidation followed a decision by the shareholders following the SRB's decision resolution was not in the public interest (para. 48).

The assessment of the second ground of appeal relating to Article 18 of the [SRM Regulation](#) is preceded by preliminary considerations that recall the legislative intention of introducing 'more efficient resolution mechanisms' after the 2008 financial crisis with 'a speedy decision-making process': this objective cannot be disregarded in the determination whether Article 18 is a challengeable act as this would affect the speediness of the procedure (para. 55). Also, the provision in the [SRM Regulation](#) on judicial review (Article 86(2)) does not mention the ECB; from this, the Court derives that the ECB has not been conferred with decision-making power in the resolution procedure. Moreover, the FOLTF finding can be reviewed in the context of review of the SRB's ultimate decision (para. 56).

Interpreting Article 18 of the [SRM Regulation](#) (paras 58-75), the Court finds that the decision-making power on resolution lies with the SRB (and the Commission and the Council), with the ECB's having the primary role for carrying out the FOLTF assessment which is only one of the *three* conditions for the adoption of a resolution scheme. The FOLTF finding did not 'have a binding legal effect' on 'the interests of the appellants (...) by bringing about a distinct change in their position' (para. 66). While the ECB is, as a rule, best placed to make an FOLTF assessment' (para. 72), its assessment does not bind the SRB. The dichotomy between supervision and resolution in the banking union entails a separation of functions between the ECB and the SRB without altering the nature of a FOLTF assessment 'which remains a preparatory measure' (para. 73).

Furthermore, there is a distinction between a FOLTF assessment and a finding that the requirements for continuing the authorisation are no longer satisfied: a FOLTF assessment does not formally require a decision to withdraw the banking license (para. 75).

Finally, the Court makes short shrift of the argument that publication of the ECB's FOLTF assessment altered the position of the ABLV banks in Latvia and Luxembourg (para. 75): publication 'did not entail any change in their legal position' (contrasted with their economic situation).