

## Shareholder standing when a bank license is withdrawn

Judgment in three appeal cases concerning *Trasta Comercbanka* (*Trasta*)

### Background

The banking license of *Trasta Comercbanka*, a Latvian bank, had been withdrawn by the ECB at a proposal of the [Finanšu un kapitāla tirgus komisija](#) (the Financial and Capital Markets Commission, or [FCMC](#)), the Latvian NCA.<sup>1</sup>

The [liquidator](#) of *Trasta*, appointed at the request of the FCMC, had revoked all powers of attorney issued by the bank's board. In spite of this revocation, confirmed in a Latvian court decision against which no appeal was possible<sup>2</sup>, the [Administrative Board of Review](#) (ABoR)<sup>3</sup> had considered the bank's review request admissible but held "that the allegations of procedural and substantive breaches entailed by the contested decision were unfounded and that [the ECB's] decision was sufficiently reasoned and proportionate, while recommending that the governing body of the ECB clarify certain elements."<sup>4</sup>

Thereupon, the ECB issued a new decision of withdrawal of the banking license. Court proceedings were initiated against both ECB decisions<sup>5</sup>: the original withdrawal decision of 3 March 2016 and the post-ABoR withdrawal decision of 11 July 2016. In the first of these cases ([Case T-247/16, \*Trasta Komercbanka and others v ECB\*](#), renamed *Fursin and Others v ECB*), the General Court issued an Order ([ECLI:EU:T:2017:623](#)) on 12 September 2017 rejecting the claim of *Trasta* as inadmissible and upholding the shareholders' claim as admissible. So, in the view of the General Court, in the circumstances of this Latvian case, the bank's board could not challenge the withdrawal but the bank's shareholders could. This Order was contested by the ECB (Case [C-663/17 P](#)), the European Commission (Case [C-665/17 P](#)) and *Trasta* and its shareholders (Case [C-669/17](#)

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<sup>1</sup> See: [Challenging a bank's license withdrawal by the ECB: can the bank act or can its shareholders?](#), René Smits, European Law Blog, 2 May 2019, from which the introductory paragraphs are taken.

<sup>2</sup> The General Court's Order specifies in para 5: "That court also rejected TKB's application for the powers of representation of its management body to be maintained as regards the lodging of a request for review with the ECB and the bringing of an action against the contested decision before the Court of Justice of the European Union. No appeal may lie against that judgment."

<sup>3</sup> Disclosure: I am an Alternate (i.e., non-voting) member of the ABoR.

<sup>4</sup> General Court (GC)'s [Order](#), para 7.

<sup>5</sup> Even though the announcements in the *Official Journal* for [both proceedings](#) mention the 3 March 2016 decision being challenged.

P). Note that this threefold appeal still only concerns the *admissibility* of a judicial challenge, not the *substantive* issues of the license withdrawal.

### The AG's Opinion in a few sentences

On 11 April 2019, Advocate General (AG) Juliane Kokott gave her Opinion ([ECLI:EU:C:2019:323](#)). The AG advised the Court of Justice to rule that, even when a liquidator has revoked the mandate of the lawyer representing the credit institution, a bank – represented by its former management and not by its liquidator – can challenge an ECB license withdrawal in court. She suggested to – in so far – set aside the Latvian rules on revoking a bank's mandates in order to provide an effective remedy against the withdrawal of the authorisation. She also advised the ECJ to find that the shareholders have no right to challenge the withdrawal of the license of a bank.<sup>6</sup>

### Judgment of 5 November 2019 ([ECLI:EU:C:2019:923](#))

The ECJ rejects the appeal against the Order of the General Court by the shareholders as they “have not, in whole or in part, been unsuccessful”, a requisite for filing appeal.

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### Even a bank in liquidation may contest the withdrawal of its license

On *Trasta's* appeal, the ECJ begins by recalling the rule of law upon which the EU is based:

“that the European Union is a Union based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with, inter alia, the Treaty on the Functioning of the European Union and the general principles of law, that treaty having established a complete system of legal remedies and procedures designed to permit the Court to review the legality of acts of the EU institutions” [para 54; emphasis added, RS]

### Effective judicial protection is a core principle of EU law...

“(…) the principle of the effective judicial protection of individuals' rights under EU law, also referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States. That principle has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. It is now reaffirmed by Article 47 of the Charter (…)” [para 55]

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<sup>6</sup> The Opinion of the AG is extensively summarised in my blogpost mentioned in footnote 1 above.

.... that ensures an appeal before the CJEU against an act addressed to it which has been adopted by an EU institution:

“The effective judicial protection of a legal person such as Trasta Komerbanka, whose authorisation has been withdrawn by a decision of an EU institution such as the ECB, adopted on the basis of an act of the European Union such as Regulation No 1024/2013, is ensured by the right of that person, pursuant to the fourth paragraph of Article 263 TFEU, to bring an action for annulment of that decision before the Courts of the European Union.” [para 56; emphasis added, RS]

Absent EU rules on the matter, it is for national law to establish which bodies of a legal person are entitled to take the decision to appeal against the withdrawal [para 58]. Yet, the “the autonomy enjoyed by the Member States in that regard is restricted by their obligation, in particular, to ensure compliance with the right to an effective remedy and to a fair hearing enshrined in Article 47 of the Charter” [para 59]. The right to an effective remedy would be undermined if the legal person depended on a liquidator, appointed at the behest of the very authority initiating the withdrawal of the license, to contest the revocation of the authorisation. The Court cites the relationship of trust between the appointed liquidator and the national competent authority and the liquidator’s task of carrying out the liquidation of the legal person affected by the contested act:

“The right of a legal person, such as Trasta Komerbanka, to an effective legal remedy before the Courts of the European Union would be infringed if, under the law of the Member State concerned, a liquidator empowered to take such decisions were to be appointed on the basis of a proposal from a national authority which took part in the adoption of the act adversely affecting the legal person concerned and which resulted in its going into liquidation. Having regard to the relationship of trust between that authority and the appointed liquidator which is involved in such an appointment procedure and to the fact that a liquidator’s task is to carry out the final liquidation of the legal person which has gone into liquidation, there is a risk that that liquidator may avoid challenging, in court proceedings, an act which that authority has itself adopted or which has been adopted with its assistance and which has led to the legal person concerned going into liquidation.” [para 60]

The fact that the liquidator may be out of function when the NCA so decides and if the withdrawal of the license (leading to the liquidation) would be annulled underlines the conflict of interest that the liquidator has, which affects the right to an effective remedy for the bank concerned [para 62]. The ECJ holds the considerations of the General Court on the consequences of Latvian law to be

“vitiated by an error of law” [para 69] and sidesteps Latvian law<sup>7</sup> as the revocation by the liquidator of the power of attorney to the lawyer representing the bank, recognised under Latvian law, infringes *Trasta*’s right to effective judicial protection under Article 47 of the Charter [para 70]. The Court explains this in paras 71-75, first, by recalling the close connection between the withdrawal of the banking license and the liquidation:

Given that the liquidation of *Trasta Komerbanka* is, in accordance with the applicable provisions of Latvian law, a consequence of the withdrawal of its authorisation by the decision at issue, the annulment of that decision following the action brought by *Trasta Komerbanka* may lead to the withdrawal of the decision ordering the liquidation of that company and, consequently, of the decision appointing the liquidator. [para 71]

and, then, by alluding to the task of a liquidator under Latvian law (“the sole purpose of the liquidator is to collect debts, sell assets and satisfy the claims of creditors in order to bring about the total cessation of that person’s activity”), which is not the same as usually given to the management of the legal person [para 72] while, finally, by recognising what the General Court failed to take into account, namely the interwovenness of the liquidator with the FCMC:

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Moreover, the General Court failed to take account of the fact, relied on before it by *Trasta Komerbanka*, that the liquidator, in accordance with Article 377(2) of the Law on Civil Procedure, had been appointed at the suggestion of the FCMC and that, by virtue of Article 387(2) of that law, the FCMC could request that the liquidator be discharged if it no longer had confidence in that liquidator. [para 73]

Although the FCMC is neither the author of the decision at issue nor the defendant before the General Court, that person being the ECB in both instances, the fact remains that the FCMC participated in the adoption of the decision at issue, which was adopted at its suggestion. Having regard to the task conferred on it pursuant to Latvian law, the liquidator has a conflict of interests because the challenge, before the Courts of the European Union, to the withdrawal of the authorisation of the legal person which it represents could lead it, contrary to that task, to deprive the liquidation proceedings concerning that person of any legal basis. [para 74; emphasis added, RS]

The Court concludes that

“(…) it follows from the existence of such links between the FCMC and the liquidator and from the role played by the FCMC in the adoption of the decision at issue that the responsibility for any revocation of the power of attorney issued to *Trasta Komerbanka*’s lawyer for the purpose of bringing an action before the Courts of the European Union against that decision cannot be given to that liquidator without infringing *Trasta Komerbanka*’s right to effective judicial protection within the meaning of Article 47 of the Charter. [para 75; emphasis added, RS]

<sup>7</sup> For the second time this year: in the *Rimšēvičs* case, this was also the outcome. See [ECJ annuls a national measure against an independent central banker](#), René Smits, 5 March 2019, on the judgment of 26 February 2019, [ECLI:EU:C:2019:139](#) in *Case C-202/18 (Ilmārs Rimšēvičs v Republic of Latvia)* and *Case C-238/18 (European Central Bank v Republic of Latvia)*.

The ECJ refers to a judgment of the ECHR in *Capital Bank AD v. Bulgaria* ([CE:ECHR:2004:0909DEC004942999](#)).

In para 78, the ECJ concludes that the General Court, when it recognised as valid the liquidator's revocation of the power of attorney of the lawyer acting for the company, has erred in law and .....

"could not take that revocation into account, given that it infringed Trasta Komerbanka's right to effective judicial protection as enshrined in Article 47 of the Charter"

..., thus finding that

"the appeal lodged by Trasta Komerbanka in Case C 669/17 P is both admissible and well founded"

The case is referred back to the General Court for deciding on the merits [para 80-83].

### Shareholders do not have standing to contest the withdrawal of a bank's license

Finding the appeal lodged by the ECB in Case C-663/17 P admissible [para 87], the ECJ continues to consider the appeals by the ECB and the Commission against the Order of the General Court for considering *Trasta's* shareholders admissible.

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After summarising the arguments of the parties, the ECJ restates that Article 263, fourth paragraph, TFEU allows a natural or legal person to institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to him or her. "Direct concern" entails:

"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 (...)" [para 103]

The ECJ sees only direct effect for *Trasta*, not for its shareholders as the banking license "had been issued to Trasta Komerbanka itself and not to its shareholders *ad personam*." [para 104].

The General Court's finding of direct concern was based "on the 'intensity' of the effects of the decision at issue", namely that the shareholders' right to receive dividend 'necessarily becomes illusory' once the company can no longer carry out its business activities, whilst the exercise of shareholder rights 'becomes

essentially formal' once the withdrawal of the license 'prohibit[s] [Trasta Komercbanka] from achieving its objects'. [para 106]

These grounds for the General Court's Order are also vitiated by errors of law [para 107]. Applying "an incorrect criterion, based on the 'intensity' of the effects of the decision at issue", the General Court had not determined whether the withdrawal of the bank's license might have had a direct effect on the legal situation of its shareholders [para 108]. What is more,

"the General Court was wrong to take account of the non-legal, economic effects of the decision at issue on the situation of the shareholders of Trasta Komercbanka" [para 109]

The ECJ has several arguments for this reasoning. First, under national law, the shareholders still had rights to exercise:

"The right of shareholders to receive dividends and to participate in the management of Trasta Komercbanka, as a company constituted under Latvian law, has not been affected by the decision at issue." [para 110]

The withdrawal of the license may make "questionable" Trasta's ability to distribute dividends but is *economic* in nature, not *legal*:

"(...) the negative effect of that withdrawal is economic in nature; the right of shareholders to receive dividends, just like their right to participate in the management of that company, if necessary by changing its object, has in no way been affected by the decision at issue." [para 111]

Case-law of the Courts of the European Union in the area of State aid and in the area of mergers do not constitute valid reasons to find otherwise [para 112]:

"Thus, the recognition that some competitors of the addressees of an act of the European Union relating to those areas may be directly affected by that act is justified, not by the purely economic effects of the act in question on their situation, but by the fact that that act affects the legal situation of those competitors, in particular their right under the Treaty on the Functioning of the European Union not to be subject to distorted competition."

Whilst the liquidation following the withdrawal of the license "has directly affected the right of the shareholders of Trasta Komercbanka to participate in the management of that company, as that management was entrusted, by the decision ordering the liquidation, to a liquidator", this consequence was a result of Latvian law which prescribes immediate liquidation of a bank upon withdrawal

of the bank's license. Thus, the second requirement for direct effect, namely that there is "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" does not apply: the liquidation is no automatic implementation of the license withdrawal; it was effected "on the basis of 'other intermediate rules' for the purposes of [the case law on direct effect]". [para 113-114]

The general Court was thus wrong to declare the shareholders admissible and its Order must be set aside [para 115-116]. The ECJ decides [para 117-119] that

"the decision at issue does not directly concern the shareholders of Trasta Komerbanka. Consequently, the ECB's plea of inadmissibility must be upheld in so far as it concerns the action brought by those shareholders and, accordingly, that action must be dismissed as being inadmissible."

René Smits, 19 January 2020