In the ***Ukrselhosprom*** and ***Versobank*** judgment[1], the General Court decides, and pedagogically explains, a number of issues relating to (review of) supervisory decision by the SSM. They concern:

1. The incidence of ABoR review on challenging an ECB decision

In Case T-351/18, *Versobank* and its main shareholder *Ukrselhosprom* contested the validity of the ECB's decision of 26 March 2018 to withdraw the banking license of *Versobank.*

The General Court raised the question whether **the 'interest' requirement for an applicant in an action for annulment** was satisfied (para 72): such an action is "admissible only in so far as that person has an interest in having the contested act annulled" (para 70), and this interest "must (…) exist at the stage of lodging the action" (para 71).

The ECB's decision had been the subject of review by the Administrative Board of Review (ABoR) in whose Opinion of 22 June 2018 "AB/2018/03 (…) it proposed that the Supervisory Board take the view that the substantive and procedural infringements relied on [by the applicant] were unfounded and that [the ECB[2]] adopt a decision identical in content to the decision of 26 March 2018" (para 20). The ECB adopted an identical decision to the one subject to administrative review, withdrawing the authorisation as a credit institution, on 17 July 2018 (paras 21-22). This new decision repealed and replaced the previous decision of 26 March 2018 (para 22). The question thus is **whether challenging the original decision, replaced post ABoR review, is still possible**.

After elaborating on the role of the ABoR (paras 76-78), the Court concludes that, while the ABoR can only rely on the grounds adduced by the applicant in administrative review, the Supervisory Board is not bound thereby, so that **administrative review "consists, taken as a whole, of a complete reassessment of the case**, which is not limited to the grounds relied on in support of the request for review." (para 79).

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Administrative review may lead to "**three outcomes**. The first consists in the simple abrogation of the initial decision. The second consists in replacing the initial decision with an identical decision. The third consists in replacing the initial decision with an amended decision." (para 80).

The SSM Regulation "establishes an obligation on the part of the ECB to adopt a decision, following the review, that is **retroactive to the time at which the original decision took effect, whatever the outcome of that review**." (para 81). Administrative review does not lead to rejection or adoption of the grounds of review but to a new decision, either way: "if the Supervisory Board and the Governing Council consider that the initial decision, pursuant to which the credit institution's authorisation was withdrawn, is valid, the Governing Council does not simply reject the request for review on the merits, but rather, in accordance with Article 24(7) of the [SSM Regulation], adopts a decision that is identical to the one subject to that review." (para 82). Yet, also in a different setting, a new decision always follows: "That interpretation, which results from the nature of the measures at issue, is also valid where the Supervisory Board and the Governing Council consider that withdrawal of authorisation is not justified or that the shortcomings identified can be remedied by less onerous measures. In such a situation, the act repealing the withdrawal of authorisation or imposing those measures must have retroactive effect so as to cancel *ex tunc* the withdrawal of the credit institution's authorisation and, where appropriate, replace it with the measure considered to be the most appropriate." Explaining

[1] Judgment of the General Court (Ninth Chamber, Extended Composition), of 6 October 2021 in" Cases T-351/18 and T-584/18 (**Ukrselhosprom PCF LLC** and **Versobank AS v ECB**); ECLI:EU:T:2021:669.

[2] The text of the paragraph uses the word 'it', apparently referring to the Supervisory Board. However, in the SSM context, decisions of the ECB are prepared and implemented by the Supervisory Board but these decisions are taken by the ECB's Governing Council: Article 26(1) and 8 SSM Regulation.

why this is so, the Court adds: "In the absence of such retroactive effect, the review decision could only have effect if a new authorisation was granted in accordance with the procedure laid down in Article 14 of the [SSM Regulation]." (para 83).

Since "the replacement of the initial decision by an identical or amended decision at the end of the review procedure results in the definitive disappearance of the original decision from the legal order" (para 85), the original decision no longer exists: "(…) by virtue of the decision of 17 July 2018, the ECB, in accordance with the legal framework governing the administrative review procedure (see paragraphs 76 to 81 above), replaced the decision of 26 March 2018 with retroactive effect to the time at which the latter took effect and did not, as the applicants appear to maintain, merely abrogate that decision for the future." (para 88). The "disappearance of the subject matter of the proceedings" (para 89), implying that "[a]n act which is withdrawn and replaced disappears completely and with *ex tunc* effect from the legal order of the European Union and therefore a judgment annulling a withdrawn act would not entail any additional legal consequences by comparison with that withdrawal" (para 90), leads to the conclusion of 'no interest': "in the event of withdrawal of the contested act, the applicant retains no interest in obtaining its annulment and the action against it becomes devoid of purpose, with the result that there is no longer any need to adjudicate" (para 91). "That conclusion is even more evident where, as in the present case, the contested act has been replaced, with retroactive effect, by an identical act, which would not be affected by the potential annulment of the first act." (para 92). Thus: no interest, no case (para 95).

2 The Court sums it up as follows: "in a legal context which organises an administrative review giving rise to the adoption of acts intended to replace, with retroactive effect, the acts which were the subject of that review, **the interests of the affected parties are fully protected by the possibility of seeking annulment of the act adopted following the review in question and compensation for any damage caused by the adoption of that [*act after administrative*] review**." (para 94).[3]

2. Shareholders have no standing to contest the withdrawal of a banking licence (paras 33-34; 100; 231; 286; 311; 341)

[summary to follow]

3. **Division of powers between ECB and NCAs when withdrawing a license for infringement of AML/CFT rules** (paras 114-144; notably para 131; 137; 139)

[summary to follow]

4. **ECB license withdrawal after an NCA had issued a FOLTF declaration** (paras 157-160; 168-169; 181)

[summary to follow]

5. ECB competence to assess matters relating to AML/CFT

The applicants' claim that the ECB is not competent to withdraw a banking license on the grounds of AML/CTF concerns is methodically contradicted by the Court. Pursuant to Article 67 CRD[4], withdrawal

[3] The italicised words have been inserted as the French text makes clear that it is the post-ABoR decision that is meant, not the review: *"grâce à la possibilité de demander l'annulation de l'acte adopté à l'issue du réexamen en question ainsi que la réparation de tout préjudice occasionné par l'adoption de celui-ci".*

[4] "1. This Article shall apply at least in any of the following circumstances: (…) (o) an institution is found liable for a serious breach of the national provisions adopted pursuant to Directive 2005/60/EC"; "2. Member States shall ensure that in the cases referred to in paragraph 1, the administrative penalties and other administrative

of the authorisation is possible for non-compliance with provisions implementing the Second AML Directive, now replaced by the Fourth AML Directive, as amended by the Fifth AML Directive[5]. The Court notes that revocation of the authorisation is possible, under Article 18 (e) and (f) CRD, in cases provided for by national law or when one of the breaches of Article 67 has been committed. In the case of *Versobank* the circumstances identified in items (d), (e) and (o) of Article 68 CRD had been found to apply: concerning failings in governance arrangements, irregularities in reporting own funds to the supervisor and a serious breach of national AML/CTF provisions (paras 185-189). The Court therefore rejects the argument that the ECB "lacks [the] competence to withdraw an authorisation on grounds of AML/CFT infringements" (para 190).

The Court goes on to reject the applicants' argument that the division of competences within the SSM (between the NCAs and the ECB) and the proportionality principle require exhaustion of lesser remedies before a banking license is withdrawn on AML/CTF grounds (paras 191 *ff.*). Recalling the powers on these matters in the applicable legislation, the Court concludes: "It was therefore without disregarding the division of powers between the NCAs of the participating Member States and the ECB under the SSM that, in the present case, the facts constituting breaches of the AML/CFT legislation were established by the FSA, whereas the legal assessment of whether those facts justified withdrawal of authorisation and the assessment of proportionality were reserved for the ECB" (para 197).

6. ECB power in respect of self-liquidation or sale instead of license revocation (paras 200-204)

[summary to follow]

3 **7. The principle of proportionality** (paras 306-344)

[summary to follow]

8. Essential procedural requirements: RTHB, rights of defence, the duty to state reasons (paras 367-389)

The Court did not address the alleged irregularities in the ABoR proceedings that, according to the applicant vitiated the post-ABoR review decision of 17 July 2018 (para 391) and which can be summarized as follows:

(para 392) the ECB's pre-ABoR decision had indicated that *Versobank* was entitled to request review whereas the ABoR held that the shareholders, the applicants in the review case, were so entitled (para 19);
(para 393) the ECB had not granted the shareholders access to the file, thereby hindering its arguments in the review proceedings;
(para 394) the right to be heard (RTBH) granted by the ABoR was limited because of the very short period between access to the file and the making of additional observations in the ABoR proceedings;
(para 395) the ECB had not given the ABoR full access to the withdrawal decision; the ABoR could only take cognizance of the redacted version which it found on the website of the Estonian NCA;
(para 396) the ECB [meant must be: the ABoR] did not allow the former directors or the liquidators of *Versobank* in the review proceedings;
(para 397) the ECB did not adequately reason its post-ABoR decision as it did not include the reasons for rejecting the request for review.

measures that can be applied include at least the following: (c) in the case of an institution, withdrawal of the authorisation of the institution in accordance with Article 18;"

[5] Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, OJ L 141 5.6.2015, p. 73; consolidated version here.

The General Court begins by asserting that "the rights of defence of the persons concerned are to be fully respected in the procedure. They are entitled to have access to the ECB's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file does not extend to confidential information" (para 399) and recalls that "under Article 24(5) of the [SSM Regulation], any natural or legal person may request a review of a decision of the ECB which is addressed to that person, or is of a direct and individual concern to that person." (para 400)

The General Court then notes that *Versobank* did not request administrative review while being entitled to do so (para 401) and recalls that the shareholders were ultimately not entitled to challenge the withdrawal of the license pursuant to the *Trasta* case law, on appeal (para 402). It therefore accepts that the ECB did not grant access to the file to the shareholder (para 403): "the ECB did not err in not granting access to the file to the [***Ukrselhosprom***], which was not a party concerned, for the purposes of Article 22(2) of the [SSM Regulation] and Articles 26 and 32 of the SSM Framework Regulation, at the time of submitting its first application". The General Court concludes (para 405) that the shareholders had been granted possibilities (such as ABoR Review) which they should not have had, taking the subsequent *Trasta* appeal judgment into account (EU:C:2019:923)[6], which reversed the law on admissibility: shareholders do not, the bank in liquidation does have standing. The Court states that the circumstances of the case are unlikely to occur again (in between a General Court Order giving the shareholders standing and its reversal by the CJEU) and holds the pleas on irregularity inadmissible (para 406). Moreover, the outcome of the case would not have been different, referring to the Court's substantive analysis (para 407, referring to paras 105-389).

9. Access to the file (paras 394-407)

[summary to follow]

10. Rejecting measures of inquiry (paras 412-421)

[summary to follow]

RS, 301221

[6] On the judgment on the three appeal cases concerning *Trasta Comercbanka*, see my **Shareholder standing when a bank license is withdrawn** on these webpages.