Summary of the Advocate General Kokott's Opinion in *Nemea Bank plc v ECB* (Case C-181/22 P) delivered on 30 November 2023

Summary

When challenging an ECB decision, stakeholders are often confronted with the alternative paths of bringing an action before European Union ('EU') Courts, submitting the matter to the internal review of the Administrative Board of Review of the European Central Bank (the 'ABoR'), going to the court after administrative review, or going both ways simultaneously. A consequence of the ABoR's review is the replacement of the contested European Central Bank ('ECB') act with a new decision. Should stakeholders then bring a new action before Courts to challenge the second decision? What happens if they fail to do so, having already challenged the first decision? These are some of the problems raised in *Nemea.*

The *Nemea Bank* case is yet another example of recent EU jurisprudence arising from challenges to the withdrawal of a banking license by an ECB decision, following milestone judgments such as *Trasta Komercbanka*[1] and *Pilatus Bank*[2].

In this context, the recently published Opinion by Advocate General ('AG') Juliane Kokott sheds light upon a legal issue that is commonly seen in cases of actions for annulment against ECB decisions, which is the *rapport* between internal administrative review and judicial proceedings. More generally, the Opinion touches upon fundamental questions as to the availability of effective judicial protection against measures adopted by EU institutions, bodies, offices or agencies in respect of which secondary law provides for an administrative review or appeal procedure prior to or in parallel with the conduct of contentious judicial proceedings.

The most significant novelty contained in the Opinion, deviating from recent case law, consists of the acknowledgment of the procedural right to challenge the first decision issued by the ECB in cases where it is replaced by a second decision of similar content after review by the ABoR. While the AG's arguments will still have to be judged by the Court of Justice in the pending appeal, the Opinion raises important considerations that directly affect the reality of judicial review for stakeholders in the banking sector and that are likely reappear in future cases.

Background

Nemea Bank plc, is a less significant Maltese credit institution providing financial services pursuant to an authorisation granted to it by the Maltese Financial Services Authority ('the MFSA') and, as such, subject to direct supervision by the Maltese national competent authority, namely the MFSA.

On 25 January 2017, after consulting the national resolution authority, the MFSA submitted a draft decision to the European Central Bank ('ECB') to withdraw the bank's[3] authorisation to operate as a credit institution, pursuant to Article 80 of Regulation (EU) No 468/2014 of the ECB of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities ('the SSM Framework Regulation')[4].

On 13 March 2017 the Supervisory Board of the ECB approved the draft decision to withdraw authorisation from the bank and set a time limit of three days for it to comment on that draft, in accordance with Article 31 of the SSM Framework Regulation. Subsequently, on 15 March 2017, Nemea Bank submitted its observations on the draft decision to withdraw its authorisation to operate as a credit institution. On 23 March 2017, the ECB adopted Decision ECB/SSM/2017 – 213800JENPXTUY75VSO/1 WHD-2017-0003, by which it withdrew the bank's authorisation to operate as a credit institution ('the contested decision') pursuant to Article 4(1)(a) and Article 14(5) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions ('the SSM Regulation')[5].

Later, on 22 April 2017, the ABoR received a request from the applicants for a review of the contested decision, in accordance with the first sentence of Article 24(5) of the SSM Regulation.

While the internal administrative review was still being carried out, the applicants at first instance, by application lodged at the General Court Registry on 22 May 2017, brought an action against the contested decision -

[1] C-663/17 P, ECLI:EU:C:2019:923.
[2] T-27/19, ECLI:EU:T:2022:46.
[3] For ease of reference, the terms bank and credit institution will be used interchangeably herein.
[4] (OJ 2014 L 141, p. 1).
[5] (OJ 2013 L 287, p. 63).

Niemelä and Others v ECB (T-321/17, EU:T:2021:942). The applicants at first instance were Nemea Bank, Nemea plc and NevestorSA, direct shareholders of Nemea Bank, and Mr H. Niemelä and Mr M. Lehto, indirect shareholders and members of the Board of Directors of Nemea Bank. The applicants sought, first, the annulment of that decision and, secondly, compensation for the damage allegedly suffered by the applicants at first instance as a result of that decision.

On 19 June 2017, the Administrative Board of Review adopted an opinion in which it proposed that the contested decision be replaced by a decision of identical content. Following the ABoR opinion, the Governing Council of the ECB adopted a second decision on 30 June 2017, which, according to its wording, replaces the first decision, pursuant to Article 24(7) of the SSM Regulation[6]. It is important to note that the applicants at first instance did not bring an action before the Court in due time and form against such second decision.

By decision of the President of the competent Chamber of the General Court of 29 March 2019,the proceedings were stayed pending delivery of the judgment of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923). Following the resumption of the proceedings, the General Court invited the parties, inter alia, to submit their observations on the question whether, in the light of the replacement of the contested decision by the second decision, the application for annulment had become devoid of purpose and there was no longer any need to adjudicate on it, within the meaning of Article 131(1) of the Rules of Procedure of the General Court.

By the order under appeal, the General Court held that there was no longer any need to adjudicate on the application for annulment of the contested decision because it had become devoid of purpose and the applicants had lost their interest in bringing proceedings, and dismissed the claim for compensation as manifestly inadmissible. It further ordered the applicants and the ECB each to bear their own costs in relation to the application for annulment and ordered the applicants to bear their own costs and pay those incurred by the ECB in relation to the claim for compensation.

To justify that there was no need to adjudicate, the General Court held, in essence, that the second decision not challenged by the applicants had replaced the contested decision. Such replacement had retroactive effect to the time at which the latter decision took effect and had therefore removed it completely from the EU legal order with so-called *ex tunc* effect[7]. As a result,that the General Court held thata judgment annulling the first decision would no longer entail any additional legal consequences.

By application lodged on 7 April 2022 (Case C-181/22 P, *Nemea Bank plc v European Central Bank (ECB)*), Nemea Bank brought an appeal to the Court of Justice of the European Union, claiming that the Court should (i) set aside the order under appeal; (ii) refer the case back to the General Court, sitting in a chamber with an entirely different composition of judges, for judgment; and (iii) order the ECB to pay the costs.

The AG's Opinion in brief

On 30 November 2023, AG Kokott published her Opinion (ECLI:EU:C:2023:935) in *Nemea Bank plc v ECB*. In short, the AG advised the Court of Justice to (i) uphold the first ground of appeal and set aside the order under appeal, (ii) refer the case back to the General Court in accordance with Article 61 of the Statute of the Court of Justice of the European Union for a decision on the substance of the action for annulment and the pleas in law put forward in support of that action and (iii) order the ECB to bear the costs connected with the action for annulment on which the General Court found there to be no need to adjudicate.

The AG's reasoning

The Opinion is primarily concerned with the question, forming the subject of the first ground of appeal, as to whether there is no need to adjudicate on the action for annulment because Nemea Bank no longer has an interest in bringing proceedings. According to the AG, the legal question underlying the first ground of appeal is the following: under what conditions must the bank concerned bring an action for annulment before the General Court in the case where it requests administrative review by the ABoR?

[6] "After ruling on the admissibility of the review, the Administrative Board of Review shall express an opinion within a period appropriate to the urgency of the matter and no later than two months from the receipt of the request and remit the case for preparation of a new draft decision to the Supervisory Board. The Supervisory Board shall take into account the opinion of the Administrative Board of Review and shall promptly submit a new draft decision to the Governing Council. The new draft decision shall abrogate the initial decision, replace it with a decision of identical content, or replace it with an amended decision. The new draft decision shall be deemed adopted unless the Governing Council objects within a maximum period of ten working days."

[7] *Ex tunc* is a legal term that means "from the outset". It can be contrasted with *ex nunc*, which means "from now on".

The AG noted that, in the present case, Nemea Bank had made such a request shortly before it brought its action for the annulment of the contested decision. However, it later failed also to challenge in due time and form before the General Court the second decision adopted by the ECB, which replaced the first decision, of identical content. Consequently, the second decision possibly became unchallengeable and final. According to the General Court, this caused Nemea Bank to lose its interest in bringing proceedings and rendered its claim for the annulment of the first decision devoid of purpose, because the second decision had replaced the first with retroactive effect. As argued by the AG, if the view taken by the General Court were correct, it would no longer be possible to review the legality of the withdrawal of authorisation in the present case in the context of annulment proceedings.

It is worth highlighting that such position expressed by the AG marks a deviation from the judgments of the General Court in *Versobank*[8], where it was established that an applicant no longer has interest in contesting an ECB decision once it has been replaced with a second decision. More specifically, the court held that the replacement of the initial decision entailed that it disappeared from the EU legal order, with the consequence that the applicants no longer had an interest in its annulment. Contrary to the proposal suggested by the AG, in *Versobank* the General Court adopted a stance where an applicant that has sought the ABoR's review should challenge the *second* decision, issued after the administrative review. This has been subsequently confirmed by the Court of Justice in the judgment of the appeal, which was dismissed in its entirety[9]. In particular, the AG explained the relevance of the case in the wider context of EU banking law jurisprudence (para. 4):

> "The present proceedings therefore raise fundamental questions as to the availability of effective judicial protection against measures adopted by the institutions, bodies, offices or agencies of the European Union in respect of which secondary law provides for an administrative review or appealprocedure prior to or in parallel with the conduct of contentious judicial proceedings. The Courts of the European Union have already ruled on a number of occasions in their case-law on such secondary legislation and its relationship with Article 263 TFEU. To date, however, there has been no coherent cross-scheme explanation of that relationship that would apply to all internal administrative review or appeal procedures. In particular, it is important to ensure that such procedures, rather than improve the legal protection available, do not create loopholes in it. That would be incompatible with the fundamental right to effective judicial protection provided for in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and with Article 263 TFEU".

The first ground of appeal

By the first ground of appeal, the appellant alleged an infringement of the first paragraph of Article 263 TFEU, arguing that the General Court erred in law in finding that there was no need to adjudicate on the action for annulment, instead of discharging its duty to review the contested decision. Moreover, in accordance with Article 263 TFEU, the Courts of the European Union alone have jurisdiction to rule on the lawfulness of measures adopted by other bodies of the Union. The *ex-tunc* effect, recognised by the General Court, with which the second decision is said to have replaced the first decision, would be, in the applicant's view, incompatible with that article. According to the appellant, therefore, the effect of such a replacement without a judicial review of legality cannot be considered to be the same as that of a judgment of annulment delivered by the Courts of the European Union. Since its adoption, there has been no change in the adverse legal effects produced by the first decision on Nemea Bank, with the result that there continues to be an interest in its annulment.

So far as concerns the first ground of appeal, the AG divided the analysis in three blocks (para. 34): first, she aimed to verify whether a bank concerned, following the (optional) conduct of an internal administrative review leading to the adoption of a second decision of identical content which replaces the first decision, may refrain from challenging that second decision before the General Court if it has already previously challenged the first decision. Secondly, she sought to investigate whether the adoption of the second decision and the failure to challenge it may call into question the continued existence of that bank's interest in bringing proceedings against the first decision. In this regard, she then proceeded to clarify whether the second decision replaces the first decision with retroactive effect, as the General Court found in the order under appeal, or does so with prospective effect only.

[8] See Joined Cases T-351/18 and T-584/18, *Ukrselhosprom PCF and Versobank v ECB* (ECLI:EU:T:2021:669), para 80-92. In that case, however, the credit institution concerned also challenged the second decision in due time and form before the General Court.
[9] See Case C-803/21 P, *Versobank v ECB* (ECLI:EU:C:2023:630), para 159-171. It should be noted, however, that the specific reasoning of the General Court was not called into question because it was not precisely relevant in the context of the appeal.

Obligation to bring an additional action for annulment against the second decision?

Regarding the first sub-question, the AG observed that in the order under appeal, the General Court was only entitled to assume that the applicants at first instance no longer had an interest in bringing proceedings against the contested decision if they were also required to challenge the second decision of identical content. However, as noted by the AG, that second decision could be regarded as being a purely repetitive or confirmatory act without any independent legal effects, and, as such, not properly open to challenge at all (para. 35).

By analysing the provisions contained in Article 24 of the SSM Regulation in the light of their wording, their objectives and their schematic classification, in particular in relation to the right to bring an action for annulment under Article 263 TFEU, the AG found that "the internal administrative review is, on the one hand, *optional* and, on the other, intended to afford legal protection to the bank concerned" (para. 38). Thus, she argued that, unlike the internal procedures for reviewing or appealing against the decisions of many bodies, offices or agencies of the Union, therefore, the conduct of an internal administrative review is not a condition for the admissibility of bringing an action before the Courts of the European Union within the meaning of the fifth paragraph of Article 263 TFEU. To that effect, she highlighted that Article 24(11) of Regulation No 1024/2013 expressly provides that 'this Article is without prejudice to the right to bring proceedings before the [Court of Justice of the European Union] in accordance with the Treaties'.

In this sense, the AG found that a bank whose authorisation is withdrawn by decision of the ECB has, *in principle*, *a choice* between challenging that decision directly before the General Court or waiving that right and instead asking the ECB to carry out an internal administrative review, with a view thereafter to challenging the second ECB decision before the courts, or doing both.

According to the AG, the possibility of waiving the right to challenge the first decision in the event of a request for an internal administrative review is confirmed by the third sentence of Article 24(7) of the SSM Regulation. At the end of the review procedure, the ECB *must* adopt a second decision which either *abrogates* or *replaces* the first decision. Consequently, even if the first decision has since become unchallengeable before the courts, the ECB has an obligation to abrogate or replace it. The bank affected by the withdrawal of authorisation can therefore simply challenge the second decision. The second decision, in this sense, can itself form the subject of an action for annulment provided that it produces independent legal effects.

Having reached such conclusions, the AG clarifies that what remains unclear, however, is whether, "even after having requested an internal administrative review, the bank concerned *must* challenge the second decision adopted following that review before the courts in order to eliminate the legal effects of the withdrawal of authorisation, where (as in the present case) the content of the second decision is identical to that of the first and the latter is already the subject of an action for annulment brought by that bank" (para. 44).

According to her, neither the third sentence of Article 24(7) of the SSM Regulation, according to which a second decision 'of identical content' adopted following the conclusion of an internal administrative review procedure 'replaces' the first decision, nor any other provisions of that regulation furnish any information in this regard, reason for which further examination is justified.

Obligation to challenge the second decision notwithstanding a challenge to the first decision?

The AG proceeded to investigate whether, because of its purely repetitive or confirmatory nature, the second decision is capable of producing independent binding legal effects vis-à-vis the bank concerned, where that bank's authorisation has already been withdrawn pursuant to the first decision of identical content. To such question, the AG argued that there are two possible outcomes: (i) in case the answer is positive, it may be that the applicants at first instance indeed failed to challenge the second decision within the prescribed time limit before the courts; (ii) however, if the second decision is to be regarded as a purely confirmatory legal act, an action for annulment challenging it would not have been admissible.

The AG then recalled, by making reference to the relevant case law[10], that only an act the legal effects of which are binding on, and affect the interests of, the applicant by bringing about a distinct change in his or her legal position is open to challenge before the courts. She argued, therefore, that whether an act produces such effects and may be the subject of an action for annulment is to be assessed in the light of objective criteria and its content. Such an assessment must take into account, inter alia, the circumstances in which it was adopted and the powers of the institution which adopted it.

[10] See, *inter alia*, *Hungary* v *Parliament* (EU:C:2021:426), para 37 and 38; and Case C-348/20 P, *Nord Stream 2* v *Parliament and Council* (EU:C:2022:548), para 62 and 63.

On this topic, she considered that:

> "In the light of the replacement effect which the third sentence of Article 24(7) of RegulationNo 1024/2013 confers on the second decision, there is no doubt in my mind that that decision produces independent legal effects. After all, the consequence of the replacement expressly prescribed by the EU legislature – irrespective of whether that replacement applies retroactively or ex nunc – is that the legal effects of the withdrawal of authorisation prescribed by the (replaced) first decision continue to exist. Because replaced, the first decision can itself produce such legal effects at most up until the second decision enters into force, but no further into the future. This brings about a distinct change in the legal position of the bank concerned even if the content of the first and the second decisions is identical". (para. 48)

By reaching the foregoing conclusion, the AG then concluded that the second decision is therefore, at least in principle, a suitable subject for an action for annulment under the first paragraph of Article 263 TFEU. Therefore, she argued, the decision may thus become unchallengeable following the expiry of the time limit for bringing an action laid down in the sixth paragraph of Article 263 TFEU. The matter, however, is not yet solved and the analysis continues.

Failure to bring an action against the second decision?

In the case at hand, the applicants at first instance failed to bring an action for the annulment of the second decision in due time and form. According to the AG, that decision, therefore, became unchallengeable and final, as there is nothing in the provisions of Regulation No 1024/2013 or in the case-law to indicate that the action for annulment of the first decision automatically extends to the replacement second decision of identical content. On the contrary, she argued, the new decision would have required a modification of the application (as provided for in Article 86 of the Rules of Procedure of the General Court) or the bringing of a new action by the applicants.

The AG then recalled that in the context of the withdrawal and replacement of a legal act, the Court of Justice has already held that, in order to ensure sound administration of justice, it is open to the General Court to ask the applicant whether, following the replacement legal act, it intends to amend its pleadings so as to seek an order against that decision too, as is provided for in Article 86[11] of the Rules of Procedure of the General Court[12]. In the present case, however, the General Court chose not to do this and asked the parties only after the time limit for bringing an action against the second decision had expired whether the applicants at first instance still had an interest in bringing proceedings against the first decision and,if not, whether there was any further need to adjudicate on the action for annulment.

In the AG's view, therefore (para. 54), it may be concluded that, at least as far as concerns the period from the entry into force of the second decision, the appellant can no longer remedy the withdrawal of its authorisation by bringing an action for the annulment of that decision.

However, according to the AG, there exists an important caveat to be noticed. Accordingly, pursuant to the relevant case law, an action against a confirmatory act is inadmissible where that act contains no new factual or legal elements as compared with the confirmed legal act[13].This is subject to the condition, nonetheless, that the confirmed legal act has become final in relation to the person concerned because no action has been brought against it within the prescribed time limit. And this is where the AG points to the fact that in the present

[11] The provision reads as follows:
"1. Where a measure the annulment of which is sought is replaced or amended by another measure with the same subject-matter, the applicant may, before the oral part of the procedure is closed, or before the decision of the General Court to rule without an oral part of the procedure, modify the application to take account of that new factor.
2. The modification of the application must be made by a separate document within the time limit laid down in the sixth paragraph of Article 263 TFEU within which the annulment of the measure justifying the modification of the application may be sought.
3. The statement of modification shall contain:
(a) the modified form of order sought;
(b) where appropriate, the modified pleas in law and arguments;
(c) where appropriate, the evidence produced and offered in connection with the modification of the form of order sought.
4. The statement of modification must be accompanied by the measure justifying the modification of the application. If that measure is not produced, the Registrar shall prescribe a reasonable time limit within which the applicant is to produce it. If the applicant fails to produce the measure within the time limit prescribed, the General Court shall decide whether the non-compliance with that requirement renders the statement modifying the application inadmissible.
5. Without prejudice to the decision to be taken by the General Court on the admissibility of the statement modifying the application, the President shall prescribe a time limit within which the defendant may respond to the statement of modification.
6. The President shall, where appropriate, prescribe a time limit within which any interveners may supplement their statements in intervention in the light of the statement modifying the application and the statement in response. Those statements shall be served simultaneously on the interveners for that purpose".
[12] See, to that effect, Case C-228/16 P, *DEI v Commission* (EU:C:2017:409), para 42.
[13] See, for instance, Cases C-183/17 P and C-184/17 P, *International Management Group* v *Commission* (EU:C:2019:78), para 67; Case C-224/12 P , *Commission v Netherlands and ING Groep* (EU:C:2014:213), para 69.

case, since the applicants at first instance brought an action against the first decision within the prescribed time limit, that decision has not become final. She then proceeded to conclude that "an action against the second decision of identical content is therefore admissible. In such circumstances, after all, an applicant may bring legal proceedings against the confirmed legal act, against the confirmatory legal act or against both" (para. 57).

From such a conclusion, the AG recognised that in order to eliminate the legal effects of the withdrawal of authorisation *completely*, therefore, it was indeed not sufficient for the applicants at first instance to challenge only the first decision before the General Court. Nonetheless, in her view, the ECB's argument that the applicants should have challenged the second decision in order also to justify the continued existence of its interest in bringing proceedings against the first decision should be dismissed. The key to understand the AG's rationale in this point lies on understanding whether the applicants' interest existed at the stage of the lodging of the action[14]. In this sense, whereas she acknowledged that the second decision prescribed with final effect the withdrawal of the bank's license, this does not necessarily mean, in her view, that the appellant no longer had an interest in seeking annulment of the first decision. As stated in para 59:

"Contrary to the view expressed by the General Court, after all, the first decision may have adversely affected the appellant up until the entry into force of the second decision. This would be the case if the second decision replaced the first decision only *ex nunc*. The General Court, however, held that this was not so".

Loss of interest in bringing proceedings against the first decision?

The AG subsequently turns her attention to the examination of whether there has been lost of interest in bringing proceedings against the first decision. At first, she recalled that it is settled case-law that an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in having the contested act annulled. That is the case where the annulment of that act is capable of procuring an advantage for the person concerned. As an essential condition of the admissibility of the action, according to her, that interest in bringing proceedings must continue in existence until judgment on that action is delivered.

The AG then acknowledged that while it is true that the contested decision was replaced by the second decision of identical content, in accordance with the third sentence of Article 24(7) of Regulation No 1024/2013, an applicant's interest in bringing proceedings does not necessarily disappear by reason of the fact that the act contested by him or her has ceased to have effect in the course of the proceedings. On the contrary, she held, "an applicant may retain an interest in obtaining a declaration that the act in question is unlawful for the period during which it was applicable and had effect. Such an interest may continue to exist in the light, inter alia, of a possible action for damages" (para. 62).

To conclude the analysis, the AG decided to break the final argumentation into two separate inquiries: (i) first, to investigate whether the contested decision produced adverse legal effects on the appellant up until the entry into force of the second decision; and (ii) to examine whether and, if so, to what extent the annulment of the first decision is capable of procuring anadvantage for the appellant and thus justifies the continued existence of its interest in bringingproceedings.

Ex tunc effect of the replacement of the first decision by the second decision

The AG recalled that the appellant may continue to assert an interest in bringing proceedings against the first decision only if that decision produced adverse legal effects on the appellant up until its replacement by the second decision.

In this sense, she argued that it is common ground that the contested decision withdrew Nemea's authorisation with immediate effect upon its notification to the applicants at first instance. Whether, and, if so, to what extent, the first decision produced legal effects up until the adoption of the replacement second decision of identical content, in accordance with the third sentence ofArticle 24(7) of the SSM Regulation, depends in turn on the legal effects of that 'replacement', according to her. Consequently, she argued that the replacement provided for in the third sentence of Article 24(7) of the SSM Regulation can only have an *ex nunc* effect. To support such claim, the AG clarified that the first decision is not removed with retroactive effect from the EU's legal order by the adoption of the replacement second decision of identical content, but rather confirmed and effectively 'absorbed' by the latter with only prospective effect. Therefore, she concluded that:

[14] This requirement has been explicitly referred to in other cases, such as *Versobank* (Joined Cases T-351/18 and T-584/18), para 71.

"[…], the General Court erred in law in finding that the second decision replaced the first decision with retroactive effect and removed it from the EU legal order, with the result that an annulment is not capable of producing any additional legal consequences". (para. 73)

This diverges from the findings of the General Court in *Versobank,* where it was established that "Article 24(7) of the Basic 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"[15]. The court's rationale resulted from the nature of the measures at issue: in particular, the court considered that since it is not possible to withdraw the same authorisation a second time, a decision identical in content to the reviewed decision can thus only replace the latter with retroactive effect to the time at which the first decision took effect, i.e. *ex tunc.*

Continued existence of an interest in bringing proceedings against the first decision

Finally, the AG analysed whether the General Court was entitled to conclude that the applicants at first instance could no longer assert an interest in bringing proceedings against the first decision.

The analysis conducted was supported by two main arguments. First, she held that a review as to the legality of the first decision under the action brought by the applicants at first instance could in fact lead to the annulment of that decision. According to the AG, this would not only have the effect of retroactively annulling the first decision, in accordance with the first paragraph of Article 264 TFEU but would also compel the ECB to 'take the necessary measures' to comply with the judgment declaring that decision void, in accordance with the first paragraph of Article 266 TFEU. Since the second decision has the same content as the first decision, the AG sustained that such an annulment would even require the ECB, in accordance with the first paragraph of Article 266 TFEU, to revoke the second decision (vitiated by the same legal errors), and to adopt a new decision on the withdrawal of authorisation. Consequently, in a remarkable reversal from the *Versobank* precedent[16], she concluded that the annulment of the first decision is indeed capable of producing legal effects and of procuring an advantage for the appellant. Secondly, she recalled that it is settled case-law that the continued existence of an interest in bringing proceedings may be based on the fact that a judgment annulling the measure in question would support the preparation of an action for damages[17]. Pursuant to that case-law, she explained that the possibility of bringing an action for damages suffices to justify such an interest in bringing proceedings, in so far as that interest is not hypothetical.

In the case at hand, the AG argued that whereas the applicants at first instance brought an action for damages in parallel with bringing their action for annulment, it nonetheless does not seem inconceivable that the appellant could bring a new action for damages before the General Court for the alleged unlawfulness of the contested decision. According to her, this is all the more likely given that the appellant attributes the damage it has sustained largely to the adoption of the first decision, which withdrew its authorisation with immediate effect and made it impossible for it to carry on its economic activity from that point onwards. Considering that the bringing of the action before the General Court also interrupted the five-year limitation period laid down in the second sentence of Article 46(1) of the Statute of the Court of Justice of the European Union for actions for a declaration of non-contractual liability until at least the conclusion of the present appeal proceedings, she recalled therefore that further action for damages is therefore still a possibility.

The AG then concluded by recognising that the annulment of the contested decision would indeed procure an advantage for the appellant (para. 81).

In the light of all the foregoing, the AG concluded that the appellant's interest in obtaining the elimination of the immediate adverse legal effects of the contested decision, in having the ECB take the measures necessary to comply with a judgment annulling that decision, in accordance with the first paragraph of Article 266 TFEU, and in using that judgment as the basis for an action for damages, continued to exist. Moreover, she claimed that "the General Court failed to recognise this" (para. 82). It follows that it should not have found that there was no need to adjudicate on the action for the annulment of that decision. The fact that the applicants at first

[15] See Joined Cases T-351/18 and T-584/18, para 81-85.

[16] See Joined Cases T-351/18 and T-584/18, para 91.

[17] See, in this sense, Case C-544/17 P *BPC, Lux 2 and Others* v *Commission* (EU:C:2018:880), para 42. See also Case C-499/18 P, *Bayer CropScience and Bayer* v *Commission* (EU:C:2021:367), para 40, where it was held that: "In that respect, the Court has recognised that an applicant's interest in bringing proceedings does not necessarily disappear by reason of the fact that the act contested by him or her has ceased to have effect in the course of the proceedings (judgment of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 62). An applicant may retain an interest in obtaining a declaration that the act in question is unlawful for the period during which it was applicable and had effect, and such a declaration continues to be at least of interest as a basis for a possible action for damages (judgments of 27 June 2013, *Xeda International and Pace International* v *Commission*, C-149/12 P, not published, EU:C:2013:433, paragraph 32, and of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 69 and the case-law cited)."

instance did not bring an action for the annulment of the second decision in due time and form is insignificant in this regard.

Considering the above, the AG reached the outcome that the first ground of appeal must therefore be upheld.

The second and third grounds of appeal

The second and third grounds of appeal concern the effective exercise of the rights of defence and the right to effective legal protection enjoyed by the bank concerned, by its appointed legal adviser. To address these grounds, the AG made reference to her Opinion in *Pilatus Bank v ECB* (C-750/21 P and C-256/22 P), still pending, where she concluded that the authority to represent the rights and interests of that bank in the administrative proceedings leading to the withdrawal of its authorisation, and in the subsequent contentious proceedings before the Courts of the European Union, lies with that legal adviser alone, not with the bank administrator appointed by the national supervisory authorities. It should be noted, in this regard, that the same view has been established by the Court of Justice in *Trasta Komercbanka* following a thorough analysis of the issue of the right to representation of a credit institution under resolution whose license has been revoked[18].

The AG argued that should the Court of Justice concur with her proposed answer to the first ground of appeal above and set aside the order under appeal on the ground that Nemea Bank retains its interest in bringing proceedings, it would no longer be necessary to address the second and third grounds of appeal, concerning the effective exercise of the rights of defence, since these too are directed against the General Court's finding that there is no need to adjudicate.

The fourth and fifth grounds of appeal on the claim for damages

Finally, as regards the fourth and fifth grounds of appeal, the AG agreed with the General Court's dismissal of the claim for damages raised by the applicants at first instance, in accordance with Article 126 of its Rules of Procedure.

In this sense, the AG explained that the application does not contain sufficient reasoning or evidence demonstrating the presence of the cumulative conditions for the ECB's non-contractual liability under the third paragraph of Article 340 TFEU for its discretionary decision to withdraw Nemea Bank's authorisation. According to the relevant case law[19], this would involve, in her words:

> "unlawfulness in the form of a sufficiently serious breach of a rule of law intended to confer rights on individuals, the extent of the damage claimed and the existence of a sufficiently direct causal nexus between the unlawfulness and the damage […]".

Based on the above, the AG argued that the fourth and fifth grounds of appeal should therefore be dismissed as manifestly unfounded.

Thomaz de Arruda

7 January 2023

[18] See Joined Cases C-663/17 P, C-665/17 P and C-669/17 P, *ECB v Trasta Komercbanka and Others (*ECLI:EU:C:2019:923), para 53-79. The rationale for is clearly explained in para 60: "The right of a legal person, such as Trasta Komercbanka, 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."

[19] See, inter alia, Case C-376/16 P, *EUIPO* v *European Dynamics Belgium and Others* (EU:C:2018:299), para 91-92; Case C-337/15 P, *Bürgerbeauftragter* v *Staelen* (EU:C:2017:256), para 31 et seq.; and Case C-7/22 P, *RQ v Council and Commission* (EU:C:2023:541), para 55 et seq.