Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber, Extended Composition)

22 March 2023 *

(Economic and monetary policy – Prudential supervision of credit institutions – Regulation (EU) No 1024/2013 – Regulation (EU) No 468/2014 – Supervised entity – Composite administrative procedure – Denial of access to the file – Directive 2004/258/EC – Access to ECB documents)

In Case T-72/20,

Satabank plc, established in St Julian's (Malta), represented by O. Behrends, lawyer,

applicant,

v

European Central Bank (ECB), represented by G. Buono, A. Lefterov and E. Koupepidou, acting as Agents,

defendant,

THE GENERAL COURT (First Chamber, Extended Composition),

composed, at the time of the deliberations, of H. Kanninen, President, M. Jaeger, N. Półtorak (Rapporteur), O. Porchia and M. Stancu, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure, in particular the order of 9 March 2021 reserving the plea of inadmissibility until the Court rules on the substance of the case,

further to the hearing on 7 June 2022,

gives the following

Judgment

1 By its action pursuant to Article 263 TFUE, the applicant, Satabank plc, seeks annulment of the decision of the European Central Bank (ECB) of 26 November 2019 by which it rejected its request for access to the file concerning it ('the contested decision').

* Language of the case: English.

Background to the dispute and events subsequent to the bringing of the action

2 At the time the present action was brought, the applicant was a credit institution under Maltese law, which had been classified as a less significant institution for the purposes of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63; 'the SSM Regulation'), and was directly supervised by the Malta Financial Services Authority (MFSA).

3 On 16 November 2019, the applicant's lawyer, instructed by the applicant's shareholders on the ground that the applicant no longer had a board of directors, requested access to the file concerning it from the ECB ('the request for access').

4 By the contested decision, the ECB refused the request for access, stating that the applicant was not the subject of proceedings within the meaning of Article 22 of the SSM Regulation and that, as a consequence, no access to any file could be granted to it pursuant to Article 32(1) of Regulation (EU) No 468/2014 of the European Central Bank 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 (OJ 2014 L 141, p. 1; 'the SSM Framework Regulation').

5 On 12 February 2020, pursuant to Article 14(5) of the SSM Regulation and Article 80 of the SSM Framework Regulation, the MFSA submitted to the ECB a draft decision proposing the withdrawal of the applicant's authorisation and, on 17 February 2020, it submitted a revised draft to the ECB.

6 On 16 March 2020, the ECB notified the applicant's lawyer and the competent person, designated by the MFSA to advise and supervise the applicant in the proper conduct of its activities, of a draft decision withdrawing its authorisation and gave them the opportunity to comment in writing on that draft.

7 On 24 March 2020, the applicant's lawyer requested access to the file.

8 The ECB granted access to the file on 30 April, 4 May and 3 June 2020.

9 On 30 June 2020, the ECB adopted a decision withdrawing the applicant's authorisation as a credit institution ('the withdrawal decision'), the receipt of which was acknowledged by the applicant on 1 July 2020. The applicant's lawyer sought annulment of the withdrawal decision by action brought on 9 September 2020 and registered as Case T-563/20. By document lodged at the Court Registry on 18 February 2020, the applicant informed the Court in accordance with Article 125 of the Rules of Procedure of the General Court that it was discontinuing those proceedings. By order of 8 April 2022, *Satabank* v *ECB* (T-563/20, not published, EU:T:2022:240), that case was removed from the Court's register.

Forms of order sought

10 The applicant claims that the Court should:

– annul the contested decision;

– order the ECB to pay the costs.

11 The ECB contends that the Court should:

– dismiss the application;

– order the applicant to pay the costs.

Law

Admissibility of the action and the applicant's interest in bringing proceedings

12 First, the ECB raised, by a separate document, a plea of inadmissibility in respect of the present action.

13 In the first place, the ECB considers that the contested decision does not affect the applicant's legal position. The ECB states in that regard that in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is in principle only those measures which definitively determine the position of the institution upon the conclusion of that procedure which are open to challenge and not intermediate measures whose purpose is to prepare the final decision. Therefore, the ECB's response to a request for access to a supervisory file does not have an independent impact on the legal position of the persons concerned.

14 In the second place, the ECB claims that the applicant has not shown that it has an interest in bringing proceedings in the present action. As regards the withdrawal procedure initiated by the ECB, the applicant was given the opportunity to submit its comments on the ECB's draft decision. In those circumstances, any interest in bringing an action for annulment arising from the claims set out in the application would be hypothetical and, in any event, devoid of any connection with the applicant's rights of defence. Consequently, the ECB suggests that the present action will procure no advantage to the applicant.

15 The applicant disputes that line of argument.

16 As regards the ECB's first argument, that the contested decision is a preparatory act which does not affect the applicant's legal position, it must be recalled at the outset that measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in its legal position are acts which may be the subject of an action for annulment under Article 263 TFEU (see judgment of 26 January 2010, *Internationaler Hilfsfonds eV* v *Commission*, C-362/08 P, ECLI:EU:C:2010:40, paragraph 51 and the case-law cited).

17 When an act is adopted by a procedure involving several stages, and particularly where it is the culmination of an internal procedure, it is, in principle, only a measure which definitively determines the position of the institution upon the conclusion of that procedure that is open to challenge, and not intermediate measures the purpose of which are to prepare the final decision. Acts preparatory to a decision do not adversely affect a person and an applicant may rely on defects in acts prior to the decision and closely linked to it only in the context of an action challenging the decision adopted at the end of the procedure (see order of 31 March 2020, *ZU* v *EEAS*, T-499/19, not published, EU:T:2020:134, paragraph 33 and the case-law cited).

18 In that regard, it should be borne in mind, as is apparent from the contested decision, that the ECB noted that it was not involved in any specific supervisory procedure relating to the applicant at the time when the request for access was made.

19 The ECB cannot claim, first, that it refuses access to the applicant's file because there are no pending proceedings and, second, that such a refusal, as a preparatory act, can be challenged only in the context of an action against a decision closing those non-existent proceedings. Since the ECB took the view in the contested decision that there were no proceedings against the applicant, that decision could not be followed by any subsequent act putting an end to a supervisory procedure against which the applicant could have acted, thereby challenging that decision.

20 Thus, the contested decision must be regarded as definitively determining the ECB's position.

21 As regards the ECB's second argument, that the applicant's interest in bringing proceedings is hypothetical and without connection to its rights of defence, it must be borne in mind at the outset 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. Such an interest requires that the annulment of that act must be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage to the party which brought it (see judgment of 20 December 2017, *Binca Seafoods* v *Commission*, C-268/16 P, EU:C:2017:1001, paragraph 44). It should also be borne in mind that the assessment of the admissibility of the action in the light of the interest in bringing proceedings is assessed at the time when the action is brought (see, to that effect, judgment of 16 December 1963, *Forges de Clabecq* v *High Authority*, 14/63, EU:C:1963:60, paragraph 719, and order of 30 November 1998, *N* v *Commission*, T-97/94, EU:T:1998:270, paragraph 23).

22 Therefore, the plea of inadmissibility raised by the ECB must be rejected given that, on the date on which the action was brought, the annulment of the contested decision was capable of procuring an advantage to the applicant, consisting in the access to certain documents which had been denied by the ECB.

23 Second, the ECB is of the view that the Court could rule that there is no need to adjudicate on the present action, in accordance with Article 131(1) of the Rules of Procedure, in so far as the application has become devoid of purpose as a result of the subsequent granting of access to the file in the context of the supervisory procedure relating to the withdrawal decision.

24 It should be recalled that an applicant's legal interest in bringing proceedings must continue until the final decision, failing which there will be no need to adjudicate (see judgment of 19 March 2010, *Gollnisch* v *Parliament*, T-42/06, EU:T:2010:102, paragraph 60 and the case-law cited).

25 In the present case, the ECB itself acknowledges that, when it subsequently granted access to the file in the context of the supervisory procedure, it did not send the applicant all the documents concerning the latter.

26 It is clear that the applicant retains an interest in bringing proceedings in the present case in so far as, by the contested decision, the ECB refused to disclose certain documents concerning it which are not in the file relating to the procedure for withdrawing its authorisation as a credit institution

(see, by analogy, judgments of 9 September 2011, *LPN* v *Commission*, T-29/08, EU:T:2011:448, paragraph 55 et seq., and of 23 September 2015, *ClientEarth and International Chemical Secretariat* v *ECHA*, T-245/11, EU:T:2015:675, paragraph 119 et seq.).

27 Thus, the ECB's claims that there is no need to adjudicate must be rejected.

28 Third, it should be noted that, without formally raising a plea of inadmissibility, the ECB questions the admissibility of the application in the light of Article 76(d) of the Rules of Procedure. The ECB argues that although, on its face, the application in the present case contains a statement of eight pleas in law, the information which is meant to support them is too brief to enable the ECB to prepare its defence and the General Court to rule on the action. In particular, the fourth, fifth, sixth, seventh and eighth pleas are not supported by any precise or structured arguments.

29 In that regard, it should be borne in mind that, pursuant to the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, applicable to the proceedings before the General Court by virtue of the first paragraph of Article 53 of that Statute, and to Article 76(d) of the Rules of Procedure, the application must, inter alia, contain the subject matter of the dispute and a brief statement of the pleas in law on which the application is based.

30 It should also be recalled that, according to the case-law, the application must be interpreted with a view to giving it practical effect by carrying out an overall assessment of the application. The application satisfies the requirements laid down in the Rules of Procedure, provided that the basic legal and factual particulars on which an action is based are indicated, at least in summary form, but coherently and intelligibly, in the application itself and that it enables both the Court and the defendant to identify the conduct alleged against the defendant and the facts and circumstances which gave rise to the dispute. The pleas in law on which the application is based, for the purposes of the Rules of Procedure, need not be set out in a particular way. The pleas may be expressed in terms of their substance rather than their legal classification provided that the application sets them out with sufficient clarity (judgment of 29 April 2020, *Intercontact Budapest* v *CdT*, T-640/18, not published, EU:T:2020:167, paragraph 25).

31 In the present case, it must be held, contrary to the ECB's contention, that the application makes it possible to identify without difficulty the subject matter of the dispute as well as the pleas in law, which are put forward in a sufficiently coherent and intelligible manner to enable the ECB to prepare its defence and the Court to exercise its power of review.

32 Therefore, the ECB's claims relating to the lack of clarity of the application must be rejected.

Admissibility of the plea of illegality in respect of Article 22 of the SSM Regulation and Articles 31 and 32 of the SSM Framework Regulation

33 The ECB claims that the applicant puts forward new pleas in law at the reply stage alleging that Article 22 of the SSM Regulation and Articles 31 and 32 of the SSM Framework Regulation are illegal, which are both inadmissible and completely unsubstantiated.

34 It should be pointed out that the applicant did not explicitly raise a plea of illegality in its application. However, in its reply, it submits that Article 22 of the SSM Regulation and Articles 31 and 32 of the SSM Framework Regulation would be illegal if they were to be interpreted in accordance with the ECB's position, since they would then be inconsistent with Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter').

35 At the hearing, the applicant confirmed that it was raising a plea of illegality in respect of Article 22 of the SSM Regulation and Articles 31 and 32 of the SSM Framework Regulation.

36 It follows from Article 84(1) of the Rules of Procedure that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a submission or argument which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (judgment of 26 June 2008, *Alferink and Others* v *Commission*, T-94/98, EU:T:2008:226, paragraph 38).

37 To be regarded as an amplification of a plea, a new line of argumentation must present a sufficiently close connection with the plea put forward initially in the originating application to be considered as forming part of the normal evolution of debate in proceedings before the Court (see, to that effect, judgment of 26 November 2013, *Groupe Gascogne* v *Commission*, C-58/12 P, EU:C:2013:770, paragraph 31).

38 In that regard, it must be held that the applicant's allegedly new claims concerning Article 22 of the SSM Regulation and Articles 31 and 32 of the SSM Framework Regulation must be considered to be an amplification of its claims set out in the second plea of the application relating to an unduly narrow interpretation of the right of access to the file under Article 32(1) of the SSM Framework Regulation. By that plea, the applicant disputes the ECB's restrictive position regarding the processing of its request for access and challenges the legality of such an interpretation. In that regard, first, the interpretation of Article 32 of the SSM Framework Regulation is directly covered by the second plea of the application. Second, by the plea of illegality set out in the reply, the applicant merely adds that Article 22 of the SSM Regulation and Articles 31 and 32 of the SSM Framework Regulation, as interpreted by the ECB, are unlawful in the light of Article 41 of the Charter.

39 Therefore, the ECB's claims relating to the inadmissibility of the allegations that Article 22 of the SSM Regulation and Articles 31 and 32 of the SSM Framework Regulation are unlawful must be rejected.

Substance

40 In support of its action, the applicant relies on eight pleas in law, alleging (i) failure to take into account the existence of a primary substantive right of access to the file; (ii) unduly narrow interpretation of the right of access to the file under Article 32(1) of the SSM Framework Regulation; (iii) in two parts, insufficient reasoning in the contested decision as regards the application of Article 32(1) of the SSM Framework Regulation and insufficient reasoning in the contested decision as regards the right of access to the file enshrined in Article 15(3) TFEU, Article 42 of the Charter, Article 2 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) and Article 2 of Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (OJ 2004 L 80, p. 42), as amended by Decision (EU) 2015/529 of the European Central Bank of 21 January 2015 (OJ 2015 L 84, p. 64) (as amended, 'Decision 2004/258'); (iv) infringement of the right to be heard; (v) infringement of the principle of legal certainty; (vi) infringement of the principle of proportionality; (vii) infringement of the *nemo auditur* principle and (viii) infringement of the right to an effective remedy.

41 The Court considers it appropriate to begin by analysing the first part of the third plea and the second, fifth, sixth, seventh and eighth pleas.

The first part of the third plea in law and the second, fifth, sixth, seventh and eighth pleas in law

42 In the first part of the third plea, the applicant alleges a failure to state reasons concerning the application of Article 32(1) of the SSM Framework Regulation in the present case. By the second, fifth, sixth, seventh and eighth pleas, the applicant claims, in essence, that the ECB refused access to its file on the basis of a misinterpretation of Article 32(1) of the SSM Framework Regulation.

– *First part of the third plea in law*

43 In the first part of the third plea, the applicant claims that the refusal to grant access to the file under Article 32(1) of the SSM Framework Regulation is insufficiently reasoned. In its view, the ECB does not explain its extremely restrictive position and how it can be justified based on Article 32(1) of the SSM Framework Regulation.

44 The ECB disputes this argument.

45 In accordance with Article 41(2)(c) of the Charter, the administration has an obligation to give reasons for its decisions. That obligation to state reasons means that, pursuant to the second paragraph of Article 296 TFEU, the authority which adopted the measure must disclose in a clear and unequivocal fashion the reasons underlying that measure in such a way as, on the one hand, to enable the persons concerned to ascertain the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the court to exercise its power of review (see judgment of 4 July 2017, *Systema Teknolotzis* v *Commission*, T-234/15, EU:T:2017:461, paragraph 126 (not published), and the case-law cited).

46 In the present case, the statement of reasons for the contested decision consists in stating that the applicant was not the subject of any proceedings within the meaning of Article 22 of the SSM Regulation and that, as a consequence, it was covered by the rule that no access to any ECB file could be granted pursuant to Article 32(1) of the SSM Framework Regulation.

47 Thus, it must be held that the wording of the unequivocal ground for the ECB's denial of access was sufficient to enable the applicant to understand the contested decision, as demonstrated by the arguments set out in the present action, and to enable the Court to exercise its power of review.

48 Therefore, the first part of the third plea must be rejected.

– *The second plea in law*

49 By its second plea, the applicant submits, in essence, that the contested decision is based on an unduly narrow interpretation of Article 32(1) of the SSM Framework Regulation.

50 The ECB disputes this argument.

51 In the first place, the applicant asserts that the ECB maintains a constant supervisory relationship with all banks in the Eurozone and that these banks are all subject to constant supervision, meaning that there is a continuing supervisory procedure carried out by the ECB.

52 The applicant claims that Article 32(1) of the SSM Framework Regulation has to be interpreted as giving each bank a right of access to its file simply based on the ongoing supervisory relationship with the ECB.

53 It adds that it is not necessary that the ECB is currently considering a specific step for access to the file to be granted.

54 At the reply stage, first, the applicant argues that there is an ongoing supervisory procedure from the point in time at which a licence is granted until it is revoked. Banking supervision is thus an ongoing administrative procedure in which an authority reviews whether an entity complies with the licence requirements or whether this is not the case, so that the licence must be revoked.

55 In addition, the applicant claims that a supervisory procedure must be assumed to exist whenever the ECB is objectively faced with the need to consider and prepare a decision. Irrespective of the precise point in time at which the procedure for withdrawing the authorisation began, there can be no reasonable doubt that that procedure began long before the contested decision was adopted.

56 The applicant submits that Article 22 of the SSM Regulation and Articles 31 and 32 of the SSM Framework Regulation would be illegal if they were to be interpreted as proposed by the ECB.

57 First, it should be borne in mind that Article 4 of the SSM Regulation, entitled 'Tasks conferred on the ECB', provides in paragraph 1 that 'within the framework of Article 6, the ECB shall … be exclusively competent to carry out, for prudential supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States'. This is followed by a list of nine tasks.

58 Article 6 of the SSM Regulation, entitled 'Cooperation within the SSM', points out in paragraph 1 that 'the ECB shall carry out its tasks within a single supervisory mechanism composed of the ECB and national competent authorities' and that 'the ECB shall be responsible for the effective and consistent functioning of the SSM'. The overall scheme of Article 6(4) to (6) of the SSM Regulation establishes a differentiation between prudential supervision of 'significant' entities and that of entities classified as 'less significant' in relation to seven of the nine tasks listed in Article 4(1) of that regulation (judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg* v *ECB*, T-122/15, EU:T:2017:337, paragraph 21).

59 It follows therefrom that the exclusive competence for the prudential supervision of 'significant' entities falls to the ECB. The same holds true for the prudential supervision of 'less significant' entities in relation to the tasks listed in Article 4(1)(a) and (c) of the SSM Regulation (judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg* v *ECB*, T-122/15, EU:T:2017:337, paragraph 22).

60 Moreover, regarding 'less significant' entities and the other tasks listed in Article 4(1) of the SSM Regulation, it is apparent from a combined reading of Article 6(5) and (6) of that regulation that their implementation is conferred under the ECB's control on the national authorities, who thus carry out the direct prudential supervision of those entities. Under Article 6(6) of the SSM Regulation, 'without prejudice to paragraph 5 of this Article, national competent authorities shall

carry out and be responsible for the tasks … and adopting all relevant supervisory decisions with regard to the credit institutions referred to in the first subparagraph of paragraph 4 of this Article, within the framework and subject to the procedures referred to in paragraph 7 of this Article' (judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg* v *ECB*, T-122/15, EU:T:2017:337, paragraph 23).

61 Second, it is apparent from Article 22(2) of the SSM Regulation that 'the rights of defence of the persons concerned shall be fully respected in the proceedings' and that they 'shall be entitled to have access to the ECB's file'. That provision is clarified by the SSM Framework Regulation.

62 It should be recalled that the first and second sentences of Article 32(1) of the SSM Framework Regulation provide that 'the rights of defence of the parties concerned shall be fully respected in ECB supervisory procedures' and that, 'for this purpose, and after the opening of the ECB supervisory procedure, the parties shall be entitled to have access to the ECB's file, subject to the legitimate interest of legal or natural persons other than the relevant party, in the protection of business secrets'.

63 A request for access to a file is based on the exercise of the rights of the defence (see, to that effect, judgments of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraphs 98 and 99; of 15 September 2016, *Yanukovych* v *Council*, T-348/14, EU:T:2016:508, paragraph 68; and of 2 December 2020, *Kalai* v *Council*, T-178/19, not published, EU:T:2020:580, paragraph 73). Such a request has no purpose in the absence of an administrative procedure affecting the legal interests of the applicant for access and, consequently, in the absence of a file concerning that person (judgment of 6 October 2021, *OCU* v *ECB*, T-15/18, not published, EU:T:2021:661, paragraph 94).

64 Accordingly, Article 32(1) of the SSM Framework Regulation expressly uses the expression 'supervisory procedure' and not 'prudential supervision'. Article 2(24) of the SSM Framework Regulation defines the 'ECB supervisory procedure' as 'any ECB activity directed towards preparing the issue of an ECB supervisory decision, including common procedures and the imposition of administrative pecuniary penalties' and specifies that 'all ECB supervisory procedures are subject to Part III'.

65 Consequently, prudential supervision with regard to the ECB's tasks cannot be equated with a supervisory procedure, aimed at performing a specific supervisory task and taking a decision thereon. If the scope of prudential supervision were identical to that of the supervisory procedure, then Title 2 of the SSM Framework Regulation, entitled 'General provisions relating to due process for adopting ECB supervisory decisions', Chapter 1 of which (including Article 32), entitled 'ECB supervisory procedures', lays down steps for the supervisory procedure, would become redundant. Indeed, in such a context, there would never be a supervisory procedure, as it would necessarily always be pending in the context of ongoing prudential supervision.

66 The mere persistence of prudential supervision, without a specific pending supervisory procedure, cannot be regarded as justifying access to the file under Article 32 of the SSM Framework Regulation.

67 Furthermore, it cannot be assumed, as the applicant claims, that the authorisation withdrawal procedure is already pending after the authorisation has been granted, given that Article 14(5) of the SSM Regulation clearly states that such a procedure may be initiated by the ECB on its own initiative or on a proposal from a national competent authority.

68 In the present case, there is nothing to suggest that, on the date on which the applicant lodged its request for access, namely on 16 November 2019, a supervisory procedure before the ECB was pending in respect of the applicant. It should be noted that, at that stage, the ECB had not taken any supervisory measure concerning the applicant and that the draft decision proposing the withdrawal of the applicant's authorisation was submitted to the ECB by the MFSA on 12 February 2020. The applicant was informed by the ECB of its intention to take a decision withdrawing that authorisation on 16 March 2020.

69 Moreover, the applicant wrongly claims that, at the time of its request for access, the procedure for the withdrawal of its authorisation as a credit institution was already pending at national level, namely before the MFSA, which meant that a supervisory procedure had been initiated before the ECB.

70 In that regard, it should be noted that the procedure for withdrawal of authorisation is a composite administrative procedure which takes place first before the competent national authority and then before the ECB.

71 It is true that the case-law shows that any involvement of the national authorities in the course of the procedure leading to the adoption of acts adopted by the EU bodies, offices or agencies cannot affect their classification as Union acts, where the acts of the national authorities constitute a stage of a procedure in which an EU body, office or agency exercises, alone, the final decision-making power without being bound by the preparatory acts or the proposals of the national authorities (see, to that effect, judgments of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, paragraphs 42 and 43, and of 3 December 2019, *Iccrea Banca*, C-414/18, EU:C:2019:1036, paragraphs 37 and 38).

72 In such a situation, where EU law prescribes that an EU body, office or agency is to have an exclusive decision-making power, it falls to the EU Courts, by virtue of their exclusive jurisdiction to review the legality of Union acts on the basis of Article 263 TFEU, to rule on the legality of the final decision adopted by the EU body, office or agency concerned and to examine, in order to ensure effective judicial protection of the persons concerned, any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision (see, to that effect, judgments of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, paragraph 44, and of 3 December 2019, *Iccrea Banca*, C-414/18, EU:C:2019:1036, paragraph 39).

73 However, first, that case-law does not concern the question of which stage of the composite administrative procedure gives rise to the right of access to the file of credit institutions before the ECB.

74 Second, in the present case, it should be noted that it is not apparent from Article 14(5) of the SSM Regulation that the procedure for withdrawal of authorisation before the ECB is initiated as a result of the adoption by a national competent authority of a decision ordering a credit institution to discontinue any activity. Accordingly, the fact mentioned by the applicant that, in

October 2018, the MFSA took a decision requiring it to discontinue any activity could not have had the effect of opening, on that date, the procedure for the withdrawal of its authorisation before the ECB.

75 Moreover, the draft decision proposing the withdrawal of the applicant's authorisation was not sent to the ECB by the MFSA until 12 February 2020, that is to say after the request for access and after the contested decision. That factor therefore cannot be taken into account, in the present case, in order to determine whether a procedure for withdrawal of authorisation had already been initiated on the day on which the contested decision was adopted.

76 It follows that the applicant has not established that the ECB made an error of assessment in finding, in the contested decision, that no supervisory procedure had been initiated on the date the contested decision was adopted.

77 Furthermore, the applicant submits that Article 22 of the SSM Regulation and Articles 31 and 32 of the SSM Framework Regulation confer a right of access to the file which is narrower than that granted by Article 41 of the Charter and that they are therefore unlawful.

78 The applicant adds that Article 31 of the SSM Framework Regulation contains an obviously arbitrary, disproportionate and therefore illegal rule that the time limit for a supervised entity's right to be heard is to be shortened to three working days in the situations covered by Articles 14 and 15 of the SSM Regulation.

79 In that regard, it should be noted from the outset that Article 41(1) of the Charter, that article being entitled 'Right to good administration', provides that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the European Union. In Article 41(2) of the Charter, it is stated that that right includes the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.

80 It should be noted that Article 41(2) of the Charter provides for a right of access to the file which is associated with the right of a person to have his or her affairs handled impartially, fairly and within a reasonable time by the administration. This right applies to access to the file of the person concerned by such cases, and not to all documents held by a given institution. It is therefore distinct from the right laid down in Article 42 of the Charter, which provides for access to any document of an institution, irrespective of the existence of the file of a person concerned and of his or her legal interest.

81 Furthermore, the content of the fundamental right of access to the file, enshrined in Article 41(2)(b) of the Charter, implies that the person concerned has the possibility of influencing the decision-making process at issue (see, to that effect, judgment of 25 October 2018, *KF* v *EUSC*, T-286/15, EU:T:2018:718, paragraph 230). In accordance with the case-law cited in paragraph 63 above, a request for access to a file is based on the exercise of the rights of the defence and such a request has no purpose in the absence of an administrative procedure affecting the legal interests of the applicant for access and, consequently, in the absence of a file concerning that person.

82 Article 22 of the SSM Regulation and Article 32 of the SSM Framework Regulation, in so far as they make access to the file subject to the opening by the ECB of an administrative supervisory procedure, give credit institutions the opportunity to express their views during the

decision-making process at issue, which affects their legal interests, by acquainting themselves with the file compiled for the purposes of that procedure including the documents referred to in Article 32(2) of the SSM Framework Regulation.

83 Thus, the applicant's claims relating to the illegality of the provisions on access to the file during a supervisory procedure in the light of Article 41 of the Charter must be rejected.

84 As regards the applicant's argument that the illegality of Article 31 of the SSM Framework Regulation is also apparent from the fact that the right established therein may be reduced to three working days in the situations referred to in Articles 14 and 15 of the SSM Regulation, it is settled case-law that a plea of illegality covering an act of general application in respect of which the contested individual decision being challenged does not constitute an implementing measure is inadmissible (see, to that effect, judgment of 8 September 2020, *Commission* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraphs 68 to 70 and the case-law cited).

85 In the present case, it should be noted that Articles 14 and 15 of the SSM Regulation were not applicable when the contested decision was adopted. They have no direct legal relationship with the contested decision and, consequently, the applicant cannot plead their illegality in the present action.

86 In the second place, the applicant claims that the ECB's interpretation means that a bank is able to review its file only if a concrete decision by the ECB is expected. In its view, constant access to the file is necessary to allow the applicant to review its file and to submit appropriate comments or ask the ECB to take certain decisions or to refrain from certain actions.

87 In that regard, Article 32 of the SSM Framework Regulation ensures access to the file before a measure is adopted following a supervisory procedure by the ECB and thus allows comments to be submitted on whether to take certain decisions or to refrain from certain actions.

88 Moreover, it should be noted that it is as a result only of the examination of the present plea that the applicant was unable to obtain access to the file under the provisions concerning the supervisory procedure, since no specific supervisory procedure was pending in its respect. However, that does not mean that access to the documents relating to the applicant and held by the ECB is not possible under the general provisions laying down the right of access to documents. That aspect will be examined in the context of the first plea.

89 In the third place, the applicant submits that it is in the ECB's interest that the accuracy of the information in its file is at all times subject to review by the relevant bank and constant access to a file improves the quality of the ECB's files and thereby the quality of the supervision.

90 In that regard, it is sufficient to note, as is clear from the analysis above, that, in the absence of a specific pending supervisory procedure, access to the file under the SSM Framework Regulation was not justified. Moreover, as regards the argument that such access would improve the quality of the ECB's files, it must be observed that that argument is purely speculative since the applicant has not adduced any evidence to support that claim.

91 In the fourth place, the applicant asserts that the concept of 'file' has no independent relevance for present purposes. In its view, a file is defined by Article 32(2) of the SSM Framework Regulation as the entirety of all documents pertaining to the relevant matter. The ECB is therefore required, in

response to a request for access to the file, to compile all relevant documents even if such documents have not been previously compiled by the ECB and are stored physically or electronically in different places.

92 It should be pointed out, in that respect, that the concept of 'file', as used in Article 32(2) of the SSM Framework Regulation, refers directly to the documents collected by the ECB in the context of the supervisory procedure. According to that provision, the files consist of all documents obtained, produced or assembled by the ECB during the supervisory procedure. Therefore, the absence of an ongoing supervisory procedure means that the documents relating to the applicant in the ECB's possession cannot be equated with its 'file' within the meaning of Article 32 of the SSM Framework Regulation.

93 Accordingly, the second plea must be rejected in its entirety.

– *The fifth plea in law*

94 By its fifth plea, the applicant maintains that the position adopted by the ECB in the contested decision infringes the principle of legal certainty because it is impossible for supervised institutions to determine at what point in time the ECB is actively considering a potential decision so that access to the file should be obtained. Moreover, it argues that supervision means that the supervisor constantly monitors compliance with regulatory requirements and therefore constantly considers potential measures that are intended to address such shortcomings.

95 The ECB disputes this line of argument.

96 In that regard, it should be borne in mind that the principle of legal certainty requires that rules of law be clear, precise and predictable in their effects, in particular where they may have negative consequences on individuals and undertakings (judgment of 22 April 2015, *Poland* v *Commission*, T-290/12, EU:T:2015:221, paragraph 50).

97 Article 32 of the SSM Framework Regulation clearly and precisely provides for access to the file after the opening of a specific supervisory procedure. That provision therefore does not provide for the possibility of having such access where the ECB 'constantly monitors compliance with regulatory requirements'.

98 In the present case, given that the applicant is a less significant institution, the ECB did not exercise constant supervision, which was the responsibility of the national competent authorities. By contrast, the decision to withdraw the applicant's authorisation falls within the ECB's tasks, which, moreover, initiated the corresponding procedure in respect of the applicant after receiving the draft decision proposing the withdrawal of the MFSA's authorisation.

99 It cannot therefore be considered that the refusal of access to the file before the opening of that procedure by the ECB can constitute an infringement of the principle of legal certainty.

100 Consequently, the fifth plea must be rejected.

– *The sixth plea in law*

101 By its sixth plea, the applicant claims that the contested decision infringes the principle of proportionality by placing an undue burden on it that is not justified by any legitimate prudential objective. The ECB's position has the effect, in practice, of leading to a relatively non-transparent administration. According to the ECB, there is only a very limited right of access to the file, namely only within a relatively short window of time between a communication by the ECB to the supervised entity that the ECB is considering a specific measure and the adoption of the measure itself.

102 The ECB disputes this line of argument.

103 It should also be borne in mind that, according to the settled case-law, in accordance with the principle of proportionality, which is one of the general principles of EU law, the acts adopted by EU institutions must be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not exceed the limits of what is necessary in order to achieve those objectives; where there is a choice between several appropriate measures, recourse must be had to the least onerous; and the disadvantages caused must not be disproportionate to the aims pursued (see judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg* v *ECB*, T-122/15, EU:T:2017:337, paragraph 67 and the case-law cited).

104 In the present case, it is sufficient to note that the sixth plea, although its heading alleges infringement of the principle of proportionality, relates, in essence, to the merits of the ECB's application of Article 32 of the SSM Framework Regulation. As is clear from the analysis of the second plea above, such an argument cannot succeed.

105 Consequently, the sixth plea must be rejected.

– *The seventh plea in law*

106 By its seventh plea, the applicant maintains that the contested decision infringes the *nemo auditur* principle, in other words the principle that a party is not allowed to rely on its own wrongful conduct. The applicant claims that the ECB has overall responsibility for the Single Supervisory Mechanism. It can intervene at any time even with respect to the supervision of a less significant institution. The ECB cannot rely on the argument that there is no pending procedure before the ECB when there should be one before the ECB since the actions by the national competent authority constitute de facto an authorisation withdrawal and therefore a measure which falls into the exclusive competence of the ECB.

107 The ECB disputes this line of argument.

108 In the present case, first, the applicant raises allegations of a speculative nature concerning the nature of the ECB's direct supervision of less significant entities, without any explanation as to the impact that those alleged breaches might have on the present case. Second, the claims put forward in support of the seventh plea concerning the merits of the application of Article 32 of the SSM Framework Regulation by the ECB have already been rejected in the context of the analysis of the second plea.

109 Consequently, the seventh plea must be rejected.

– *The eighth plea in law*

110 The applicant asserts that the contested decision infringes the right to an effective remedy pursuant to Article 47 of the Charter. It claims that German administrative law recognises a general right to a proper exercise of the discretion in response to any request for access to the file. Access necessarily has to be granted if it is necessary or even just expedient and potentially helpful in order for a person to defend and assert its rights.

111 The ECB disputes this line of argument.

112 It should be borne in mind 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 FEU Treaty and the general principles of law, that treaty having established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of acts of the EU institutions (see 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, paragraph 54 and the case-law cited).

113 In addition, 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 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 (see 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, paragraph 55 and the case-law cited).

114 In the present case, the contested decision is an act of an EU institution subject to judicial review by the EU judicature, so that any reference to German law is irrelevant, as it does not apply to the present dispute.

115 Furthermore, the claims made in the context of the present plea concern, in essence, the merits of the ECB's application of Article 32 of the SSM Framework Regulation and have already been rejected in the context of the analysis of the second plea.

116 Consequently, the eighth plea must be rejected.

The first plea in law

117 By its first plea, the applicant claims, in essence, that the ECB was required to process its request for access on the basis of the general principles relating to access to documents. It maintains that the ECB failed to take into account its primary substantive right of access to the documents pursuant to Article 15(3) TFEU, Article 42 of the Charter, Article 2 of Regulation No 1049/2001 and Article 2(1) of Decision 2004/258 and the fact that a request for access cannot be rejected pursuant to specific provisions if it would have to be granted under other provisions.

118 Thus, the applicant submits that the existence of a supervisory procedure is not relevant because access in any case needed to be granted on grounds of public access to documents, irrespective of the existence of any supervisory procedure, and that this aspect needed to be taken into consideration.

119 The ECB disputes that line of argument, relying on the case-law establishing the differences between the general regime for access to documents, the purpose of which is to ensure transparency, and the possibility of having access to the file of an ongoing administrative procedure, which is intended to preserve the rights of the defence and due process.

120 According to the ECB, the applicant based its request for access on Article 32 of the SSM Framework Regulation in so far as it used the terms 'access to the file'. Accordingly, it claims that the applicant's request therefore cannot be examined in terms of the general regime for access to documents.

121 It should be noted at the outset that the applicant's claim concerning the infringement of Regulation No 1049/2001 is irrelevant, given that the rules applicable to requests from the public relating to access to ECB documents are laid down by Decision 2004/258, the provisions of which are, moreover, similar to those of Regulation No 1049/2001. In any event, the applicant does not make any specific claim as to a possible infringement of Regulation No 1049/2001.

122 It must be borne in mind, as a preliminary point, that the right to consult the administrative file in the context of an administrative procedure and the right of access to documents of the institutions are legally distinct, but the fact remains that they lead to a comparable situation from a functional point of view. Whatever the legal basis on which it is granted, access to the file enables the interested parties to obtain all the observations and documents submitted to an institution by the parties concerned and third parties (see, to that effect and by analogy, judgment of 28 June 2012, *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 120).

123 Access to a file pursues different objectives from those pursued by the general access regime, since they are designed to ensure that the rights of defence of the parties concerned are respected and complaints dealt with diligently, while at the same time ensuring compliance with the duty of professional secrecy in administrative procedures, and not to facilitate as far as possible the exercise of the right of access to documents or to promote good administrative practice by guaranteeing the greatest possible transparency in the decision-making process of public authorities and the information on which they base their decisions (see, to that effect and by analogy, judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 83).

124 It must also be noted that Article 2(1) of Decision 2004/258 gives any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, a right of access to ECB documents, subject to the conditions and limits defined in that decision (judgment of 29 November 2012, *Thesing and Bloomberg Finance* v *ECB*, T-590/10, not published, EU:T:2012:635, paragraph 40).

125 According to Article 6(1) of Decision 2004/258, a person requesting access is not required to justify his or her request and therefore does not have to demonstrate any interest in having access to the documents requested. It follows that a request for access which falls within the scope of Decision 2004/258 and which is made by a person who relies on certain specific circumstances which distinguish him or her from any other Union citizen must nevertheless be examined in the same way as an application from any other person (judgment of 6 October 2021, *OCU* v *ECB*, T-15/18, not published, EU:T:2021:661, paragraph 105).

126 In the present case, by the request for access, the applicant requested access to the 'file' concerning it without making reference to any legal basis for its request.

127 It is common ground that no provision of Regulation No 2004/258 requires the applicant for access to specify the legal basis of his or her request. The absence of an obligation to make express reference to Regulation No 1049/2001 or to Decision 2004/258 in a request for access to documents is, moreover, consistent with the objective pursued by those acts whose purpose is to ensure the widest possible access to documents (see, to that effect, judgment of 13 January 2022, *Dragnea* v *Commission*, C-351/20 P, EU:C:2022:8, paragraph 71).

128 The fact that an applicant for access has referred, in a request for access, to access to its file is irrelevant in that context (see, to that effect, judgment of 13 January 2022, *Dragnea* v *Commission*, C-351/20 P, EU:C:2022:8, paragraph 74).

129 Consequently, even though the applicant did use the term 'file' in its request, the ECB could not conclude that the request for access was based solely on Article 32 of the SSM Framework Regulation.

130 Moreover, it is clear from the case-law that the fact that the request for access concerned a 'file' of the ECB relating to a credit institution, that is to say a field governed by the SSM Regulation and the SSM Framework Regulation, does not preclude that request from being based, at the outset, on the access to documents general provisions, since it is common ground that the latter may serve as the legal basis for a request for access to documents relating to an administrative procedure governed by another EU act (see, to that effect, judgment of 13 January 2022, *Dragnea* v *Commission*, C-351/20 P, EU:C:2022:8, paragraph 75).

131 In the present case, since no supervisory procedure was pending in respect of the applicant at the time of its request for access, and therefore no 'file' within the meaning of Article 32 of the SSM Framework Regulation exists, that request should be examined as a request for access to documents concerning it on the basis of the general provisions, in particular Decision 2004/258.

132 The ECB also puts forward arguments to the effect that the request for access, in any event, failed to satisfy the requirements of a request for access to documents. In that regard, it claims that the request for access was very general in nature and did not even specify the specific documents covered by its content. In addition, in its view, it is evident that the request for access does not comply even with the most basic requirements of Article 6(1) of Decision 2004/258.

133 In the present case, given that the ECB did not analyse the request for access on the basis of Decision 2004/258, it cannot validly claim that that request, on the basis of that decision, was not precise.

134 It follows from the foregoing that the ECB erred in law in failing to examine the applicant's request on the basis of the provisions on access to documents laid down in Decision 2004/258.

135 In the light of those considerations, the first plea must be upheld and the contested decision must be annulled, without there being any need to address either the alleged infringement of Article 15(3) TFEU and Article 42 of the Charter or the second part of the third plea or the fourth plea.

Costs

136 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the ECB has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby:

1. **Annuls the decision of the European Central Bank (ECB) of 26 November 2019 by which it rejected Satabank plc's request for access to the file concerning it;**

2. **Orders the ECB to pay the costs.**

Kanninen Jaeger Półtorak

Porchia Stancu

Delivered in open court in Luxembourg on 22 March 2023.

E. Coulon M. van der Woude
Registrar President