Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 30 November 2023 [1]

Case C-181/22 P

Nemea Bank plc
v

European Central Bank (ECB)

(Appeal – Single Supervisory Mechanism – Regulation (EU) No 1024/2013 – Specific supervisory tasks conferred on the ECB – Decision to withdraw Nemea Bank plc's authorisation to take up the business of a credit institution – Article 24 – Internal administrative review procedure – Replacement by a decision of identical content – Action for annulment – Action which has become devoid of purpose and loss of interest in bringing proceedings – No need to adjudicate – Action for damages – Manifest inadmissibility – Effective legal protection – Article 47 of the Charter of Fundamental Rights of the European Union)

I. Introduction

1. By its appeal, the Maltese Nemea Bank plc seeks to have the order of the General Court of the European Union of 20 December 2021, *Niemelä and Others* v *ECB* (T-321/17, EU:T:2021:942, 'the order under appeal'), set aside. By the order under appeal, the General Court had, first, held that there was no need to adjudicate on Nemea Bank's action for the annulment of the decision [2] of the European Central Bank (ECB) of 23 March 2017 ('the contested decision' or 'the first decision'). Secondly, it had dismissed Nemea Bank's claim for damages as manifestly inadmissible. By its own contested decision, the ECB had decided to withdraw Nemea Bank's authorisation to operate as a credit institution ('the withdrawal of authorisation').

2. As regards the legal questions raised by the second and third grounds of appeal, I have already answered these in my Opinion in *Pilatus Bank* v *ECB* (C-750/21 P and C-256/22 P), still pending, which also concerns the Maltese banking sector. Those questions relate to 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. [3] In that Opinion, I concluded that the authority to represent the rights and interests of that bank in the administrative proceedings leading to the withdrawal of its

1 Original language: German.

2 ECB/SSM/2017 – 213800JENPXTUY75VSO/1 WHD-2017-0003.

3 Opinion in *Pilatus Bank* v *ECB* (C-750/21 P and C-256/22 P, EU:C:2023:431, point 59 et seq.).

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.

3. Not yet answered is the legal question underlying the first ground of appeal: under what conditions must the bank concerned bring an action for annulment before the General Court in the case where it exercises its right under Article 24(5) of Regulation (EU) No 1024/2013 [4] to request that the decision to withdraw authorisation be subjected to an internal administrative review by the ECB's Administrative Board of Review. In the present case, after all, 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 decision of identical content [5] adopted by the ECB on 30 June 2017 in response to the opinion of the Administrative Board of Review ('the second decision'), which replaced the first decision. 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. 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, at least not in the context of annulment proceedings.

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 appeal procedure 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. [6] 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.

5. This Opinion is primarily concerned with the question, forming the subject of the first ground of appeal, as to the contested finding that there is no need to adjudicate on the action for annulment because Nemea Bank no longer has an interest in bringing proceedings. Should the Court of Justice concur with my proposed answer to the first ground of appeal 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, [7] since these too are directed against the General Court's finding that there is no need to adjudicate.

[4] Council Regulation 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).

[5] ECB/SSM/2017 – 213800JENPXTUY75VS 07/2.

[6] Some of the legal questions to be addressed in this case were also raised in the case forming the subject of the judgment of 7 September 2023, *Versobank* v *ECB* (C-803/21 P, EU:C:2023:630). In that case, however, the bank concerned also challenged the second decision in due time and form before the General Court. For a similar situation, see the final judgment of the General Court of 7 September 2022, *BNetzA* v *ACER* (T-631/19, EU:T:2022:509, paragraphs 16 to 28). See also judgments of 25 June 2020, *SatCen* v *KF* (C-14/19 P, EU:C:2020:492, paragraph 58 et seq.), and of 27 April 2016, *European Dynamics Luxembourg and Others* v *EUIPO* (T-556/11, EU:T:2016:248) (which is also final).

[7] See, in this regard, my Opinion in *Pilatus Bank* v *ECB* (C-750/21 P and C-256/22 P, EU:C:2023:431, paragraph 59 et seq.).

II. Legal framework

6. Recital 64 of Regulation No 1024/2013 reads, inter alia:

'The ECB should provide natural and legal persons with the possibility to request a review of decisions taken under the powers conferred on it by this Regulation and addressed to them, or which are of direct and individual concern to them. The scope of the review should pertain to the procedural and substantive conformity with this regulation of such decisions while respecting the margin of discretion left to the ECB to decide on the opportunity to take those decisions. For that purpose, and for reasons of procedural economy, the ECB should establish an administrative board of review to carry out such internal review. … The procedure laid down for the review should provide for the Supervisory Board to reconsider its former draft decision as appropriate.'

7. Under the heading 'Tasks conferred on the ECB', Article 4(1)(a) of that regulation states:

'Within the framework of Article 6, the ECB shall, in accordance with paragraph 3 of this Article, 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:

(a) to authorise credit institutions and to withdraw authorisations of credit institutions subject to Article 14;

…'

8. The second subparagraph of Article 14(5) of that regulation provides:

'Where the national competent authority which has proposed the authorisation in accordance with paragraph 1 considers that the authorisation must be withdrawn in accordance with the relevant national law, it shall submit a proposal to the ECB to that end. In that case, the ECB shall take a decision on the proposed withdrawal taking full account of the justification for withdrawal put forward by the national competent authority'.

9. Article 24 of Regulation No 1024/2013, with the heading 'Administrative Board of Review', provides, inter alia:

'1. The ECB shall establish an Administrative Board of Review for the purposes of carrying out an internal administrative review of the decisions taken by the ECB in the exercise of the powers conferred on it by this Regulation after a request for review submitted in accordance with paragraph 5. The scope of the internal administrative review shall pertain to the procedural and substantive conformity with this Regulation of such decisions.

…

5. Any natural or legal person may in the cases referred to in paragraph 1 request a review of a decision of the ECB under this Regulation which is addressed to that person, or is of a direct and individual concern to that person. A request for a review against a decision of the Governing Council as referred to in paragraph 7 shall not be admissible.

6. Any request for review shall be made in writing, including a statement of grounds, and shall be lodged at the ECB within one month of the date of notification of the decision to the person

requesting the review, or, in the absence thereof, of the day on which it came to the knowledge of the latter as the case may be.

7. 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.

8. A request for review pursuant to paragraph 5 shall not have suspensory effect. However, the Governing Council, on a proposal by the Administrative Board of Review may, if it considers that circumstances so require, suspend the application of the contested decision.

9. The opinion expressed by the Administrative Board of Review, the new draft decision submitted by the Supervisory Board and the decision adopted by the Governing Council pursuant to this Article shall be reasoned and notified to the parties.

…

11. 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'.

III. Facts and the contested decision

10. The facts and the contested decision are reproduced in paragraphs 1 to 8 of the order under appeal and can be summarised as follows.

11. The fifth applicant at first instance and appellant, Nemea Bank, is a less significant Maltese credit institution established in Malta which is subject to direct supervision by the Maltese Financial Services Authority (MFSA). The third and fourth applicants at first instance, Nemea plc and Nevestor SA, are direct shareholders of Nemea Bank. The first and second applicants at first instance, Mr H. Niemelä and Mr M. Lehto, through their participation in the third and fourth applicants, are only indirect shareholders and members of the Board of Directors of Nemea Bank.

12. On 25 January 2017, after obtaining the opinion of the national resolution authority, the MFSA submitted to the ECB a proposal to withdraw Nemea Bank's authorisation to operate as a credit institution.

13. On 13 March 2017, the Governing Council of the ECB approved the draft of a decision to withdraw authorisation and requested Nemea Bank to comment on that draft within three days. Nemea Bank complied with that request on 15 March 2017.

14. On 23 March 2017, the ECB adopted its contested decision in accordance with Article 4(1)(a) and Article 14(5) of Regulation No 1024/2013.

15. On 22 April 2022, Nemea Bank and the other applicants at first instance requested that the ECB's Administrative Board of Review conduct an internal administrative review of the contested decision, in accordance with the first sentence of Article 24(5) of Regulation No 1024/2013.

16. On 22 May 2017, the applicants at first instance brought an action against the contested decision before the General Court.

17. 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.

18. On 30 June 2017, the Governing Council of the ECB, following the opinion of the Administrative Board of Review and on the basis of a proposal from the Supervisory Board, adopted the second decision, which, according to its wording, replaces the first decision, in accordance with Article 24(7) of Regulation No 1024/2013.

19. The applicants at first instance failed to bring an action for annulment in due time and form against the second decision.

IV. Procedure before the General Court and the order under appeal

20. 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 (see point 16 above). This 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.

21. By order of 13 July 2018, the General Court reserved its decision on a plea of inadmissibility raised by the ECB until final judgment, in accordance with Article 130(7) of its Rules of Procedure.

22. By decision of 23 July 2018, the President of the competent Chamber of the General Court granted the European Commission's application for leave to intervene in support of the form of order sought by the ECB.

23. 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 dispensed with an oral hearing which had originally been scheduled but was then postponed. Instead, by measure of organisation of procedure of 2 July 2021, it 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.

24. 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 (point 1 of the operative part), and dismissed the claim for compensation as manifestly inadmissible (point 2 of the operative part). It further ordered the applicants and the ECB each to bear their own costs in

relation to the application for annulment (point 3 of the operative part), ordered the applicants to bear their own costs and pay those incurred by the ECB in relation to the claim for compensation (point 4 of the operative part) and ordered the Commission to bear its own costs (point 5 of the operative part).

25. By way of grounds for its finding 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 with retroactive effect to the time at which the latter decision took effect and had therefore removed it completely and with *ex tunc* effect from the legal order of the European Union, with the result that a judgment annulling it would no longer entail any additional legal consequences. [8]

V. Procedure before the Court of Justice and forms of order sought by the parties

26. By application lodged at the Court Registry on 7 April 2022, Nemea Bank brought the present appeal.

27. The appellant claims that the Court should:

– set aside the order under appeal;

– refer the case back to the General Court, sitting in a chamber with an entirely different composition of judges, for judgment; and

– order the ECB to pay the costs.

28. The ECB contends that the Court should:

– dismiss the appeal; and

– order the appellant to pay the costs, including those incurred by the ECB.

29. The Commission contends that the Court should:

– dismiss the appeal; and

– order the appellant to pay the costs.

30. In accordance with Article 76(2) of the Rules of Procedure of the Court of Justice, the Court decided not to hold a hearing on the ground that it has sufficient information to give a ruling.

[8] Paragraphs 45 and 51 of the order under appeal. See also the General Court's reasoning in its judgment of 6 October 2021, *Ukrselhosprom PCF and Versobank v ECB* (T-351/18 and T-584/18, EU:T:2021:669, paragraphs 80 to 92). That reasoning was not called into question by the Court of Justice in the judgment of 7 September 2023, *Versobank* v *ECB* (C-803/21 P, EU:C:2023:630, paragraph 159 et seq.) because it was not relevant to the decision.

VI. Assessment

A. Subject matter of the first ground of appeal

31. By the first ground of appeal, the appellant alleges an infringement of the first paragraph of Article 263 TFEU. In its submission, 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. 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, is incompatible with that article. According to the appellant, 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.

32. In rebuttal of that claim, the ECB contends inter alia that the applicants at first instance should also have challenged the second decision before the General Court. The operative part of that decision now requires with final effect that Nemea Bank's authorisation be withdrawn. What is more, the applicants could bring an action for damages even without a prior action for annulment.

33. The Commission does not challenge the first ground of appeal.

34. So far as concerns the first ground of appeal, it falls to be examined, first, 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 (Section B). Secondly, it falls to be clarified 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 that connection, it must be examined 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 (Section C).

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

35. 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, the 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.

36. The provisions contained in Article 24 of Regulation No 1024/2013 must therefore be interpreted 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.

1. Optional internal administrative review procedure and the possibility of challenging the first or second decision

37. In accordance with Article 24(1) and (5) of Regulation No 1024/2013, an internal administrative review before the Administrative Board of Review of the ECB may be carried out only on request by a natural or legal person who is the addressee of a decision of the ECB or to whom such a decision is of a direct and individual concern. [9] Accordingly, as happened in the present case, a bank may request that a decision addressed to it to withdraw its authorisation be reviewed by the Administrative Board of Review. The scope of that review must pertain to the procedural and substantive conformity of such a decision with that regulation.

38. It follows that the internal administrative review is, on the one hand, *optional* and, on the other, intended to afford legal protection to the bank concerned.

39. 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. [10]

40. In this regard, the scheme of rules chosen in Article 24 of Regulation No 1024/2013 differs in particular from that contained in Articles 28 and 29 of Regulation (EU) 2019/942 establishing a European Union Agency for the Cooperation of Energy Regulators (ACER), [11] which is also based on the fifth paragraph of Article 263 TFEU. It is true that Article 28 of that regulation provides for a similar right of appeal for individually and directly concerned natural and legal persons before the Board of Appeal of ACER. In accordance with Article 29 of that regulation, however, 'actions for the annulment of a decision issued by ACER pursuant to this Regulation … may be brought before the Court of Justice [of the European Union] only after the exhaustion of the appeal procedure referred to in Article 28 [thereof]'. [12]

41. The EU legislature did not lay down in Article 24 of Regulation No 1024/2013 a similar rule for the ECB, which is an independent institution of the Union within the meaning of Article 13(1) TEU. Instead, 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 particular, therefore, the right of action provided for in Article 263 TFEU.

42. A bank whose authorisation is withdrawn by decision of the ECB therefore 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.

43. 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 Regulation No 1024/2013. It is true that, in accordance with the first sentence of Article 24(8) of that

9 See also the similar wording of recital 64 of Regulation No 1024/2013.

10 See, in particular, the appeal procedures of the independent offices and agencies of the Union having their own boards of appeal that are listed in Article 58a of the Statute of the Court of Justice of the European Union (the European Union Intellectual Property Office, the Community Plant Variety Office, the European Chemicals Agency and the European Union Aviation Safety Agency).

11 Regulation of the European Parliament and of the Council of 5 June 2019 (OJ 2019 L 158, p. 22).

12 See, in this regard, the final judgment of the General Court of 7 September 2022, *BNetzA* v *ACER* (T-631/19, EU:T:2022:509, paragraphs 16 to 28).

regulation, such a request does not have suspensory effect,[13] and cannot delay the expiry of the time limit for bringing an action laid down in the sixth paragraph of Article 263 TFEU. At the end of the review procedure, however, 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, after all, can itself form the subject of an action for annulment provided that it produces independent legal effects (see point 47 et seq. below).

44. What is 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.

45. Neither the third sentence of Article 24(7) of Regulation No 1024/2013, 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. The potential legal effects of that second decision must therefore be examined in more detail.

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

46. It is true that, in principle, the second decision – in much the same way as the first decision – fulfils the conditions for being a decision binding on the person to whom it is addressed, within the meaning of the fourth paragraph of Article 288 TFEU. The question is, however, whether, because of its purely repetitive or confirmatory nature, it too 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 (see (a)). If that is the case, it may be that the applicants at first instance failed to challenge the second decision within the prescribed time limit before the courts (see (b)). If, on the other hand, the second decision is to be regarded as a purely confirmatory legal act, an action for annulment challenging it would not have been admissible (see (c)).

(a) Second decision as a legal act in principle open to challenge?

47. 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. Whether an act produces such effects and may therefore 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.[14]

[13] In accordance with the first sentence of Article 278 TFEU, an action for the annulment of the first decision would not have suspensory effect either. In principle, therefore, the first decision produces its legal effects immediately upon being notified to the addressee, whether or not it is challenged before the courts, unless the applicants successfully request a suspension of those legal effects, as provided for in the second sentence of Article 278 TFEU or the second sentence of Article 24(8) of Regulation No 1024/2013.

[14] See, to that effect, judgments of 3 June 2021, *Hungary* v *Parliament* (C-650/18, EU:C:2021:426, paragraphs 37 and 38 and the case-law cited), and of 12 July 2022, *Nord Stream 2* v *Parliament and Council* (C-348/20 P, EU:C:2022:548, paragraphs 62 and 63). See also my Opinion in Joined Cases *EIB* v *ClientEarth* and *Commission* v *EIB* (C-212/21 P and C-223/21 P, EU:C:2022:1003, point 47).

48. In the light of the replacement effect which the third sentence of Article 24(7) of Regulation No 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* (see point 66 et seq. below) – 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.

49. The second decision is therefore, in principle, a suitable subject for an action for annulment under the first paragraph of Article 263 TFEU. It 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.

(b) Failure to bring an action against the second decision

50. However, the applicants at first instance failed to bring an action for the annulment of the second decision in due time and form.[15] That decision therefore became unchallengeable and final.

51. After all, 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. This would on the contrary 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.[16] In the present case, however, the time limit for bringing proceedings – which, in accordance with settled case-law, is indispensable and cannot be extended[17] – has expired. In the absence of any unforeseeable circumstances or *force majeure* within the meaning of Article 45(2) of the Statute of the Court of Justice of the European Union, *restitutio in integrum* is not a conceivable option either.[18]

52. 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

15 As is apparent from the answer given by the applicants at first instance to the General Court's written question referred to in point 23 of the present Opinion, the applicants had submitted an application for the annulment of the second decision to the General Court Registry by way of an informal email (and, consequently, not in a formally correct manner), but the General Court did not respond to this.

16 In legal systems such as the German one, in which the second decision effectively 'absorbs' the first decision (see footnote 32 below), this is not necessarily the case. The judgment of the Bundesverwaltungsgericht (Federal Administrative Court, Germany) (BVerwG) of 11 November 2020 – 8 C 22/19, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2021, p. 564, with commentary by Alexander Milstein – is very informative in this regard. According to that judgment, the time limit for bringing proceedings laid down in the first sentence of Paragraph 74(1) of the Verwaltungsgerichtsordnung (Code of Procedure of the Administrative Court) (VwGO) must in principle be observed even in the event of a modification of the application in relation to an amending decision replacing the decision originally challenged. For, other than as provided for in the special provisions contained in Paragraph 96(1) of the Sozialgesetzbuch (Social Security Code) (SGG) and Paragraph 68 of the Finanzgerichtsordnung (Code of Procedure of the Finance Court) (FGO), there is no modification of the application by operation of law where the original decision is supplemented or replaced by a new decision (paragraphs 21 to 23 of the judgment). This, however, does not apply to the inclusion of a decision amending or replacing the contested decision if the prescriptive elements still contested after the amendment or replacement has taken place are *indivisible* under substantive law. If the foregoing is transposed to a situation (such as that in the present case) where the first decision is replaced by a second decision of identical content, such indivisibility might be assumed to be present for the purposes of German law, in which case the requirement to observe the time limit for bringing proceedings would not apply to the modification of the application.

17 See Article 61(1) of the Rules of Procedure of the General Court and Article 52(1) of the Rules of Procedure of the Court of Justice.

18 See the orders of 16 November 2010, *Internationale Fruchtimport Gesellschaft Weichert* v *Commission* (C-73/10 P, EU:C:2010:684, paragraph 41), and of 20 October 2022, *Mendes de Almeida* v *Council* (C-576/21 P, EU:C:2022:826, paragraph 52 and the case-law cited).

pleadings so as to seek an order against that decision too, as is provided for in Article 86 of the Rules of Procedure of the General Court.[19] 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.

53. Such an approach is not readily compatible with the principle of the sound administration of justice and the duty of care and the duty to inform which the General Court owes to parties.[20] This notwithstanding, the failure to bring an action against the second decision is primarily attributable to the applicants at first instance acting under legal representation. It was the applicants' own decision to initiate the internal administrative review procedure in parallel with bringing their action for the annulment of the first decision. It was therefore reasonable to expect that they would obtain the necessary information about their legal position and take the requisite steps to ensure that the second decision did not become final in relation to them.

54. It may therefore 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.

(c) Second decision as a confirmatory legal act not open to challenge?

55. In my view, the case-law on the inadmissibility of actions against purely confirmatory acts does not support any other conclusion.

56. It is true that, in accordance with that 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.[21] This is subject to the condition, however, 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. For reasons of legal certainty, after all, it must be ensured that an action against the confirmatory act does not have the effect of circumventing the expired time limit for bringing an action against the confirmed legal act, thereby undermining the finality of the latter act.[22] In the present case, however, since the applicants at first instance brought an action against the first decision within the prescribed time limit, that decision has not become final.

[19] See, to that effect, judgment of 31 May 2017, *DEI* v *Commission* (C-228/16 P, EU:C:2017:409, paragraph 42).

[20] See not least footnote 15 above. In paragraph 32 of the order under appeal, the General Court itself notes that those applicants complained that it had not informed them of the requirement to bring an action against the second decision. For a similar case of an allegedly formally defective application to alter the forms of order sought at the hearing, see the judgment of 9 November 2017, *HX* v *Council* (C-423/16 P, EU:C:2017:848, paragraph 18 et seq.).

[21] Judgment of 31 January 2019, *International Management Group* v *Commission* (C-183/17 P and C-184/17 P, EU:C:2019:78, paragraph 67 and the case-law cited); see, similarly, judgments of 3 April 2014, *Commission v Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213, paragraph 69), and of 31 May 2017, *DEI* v *Commission*, C-228/16 P, EU:C:2017:409, paragraph 33).

[22] See, to that effect, judgment of 20 May 2021, *Dickmanns* v *EUIPO* (C-63/20 P, EU:C:2021:406, paragraph 30 and the case-law cited).

57. 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. [23]

58. In order to eliminate the legal effects of the withdrawal of authorisation *completely*, therefore, it was not sufficient for the applicants at first instance to challenge only the first decision before the General Court.

59. 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 legal proceedings against the first decision must, however, be dismissed. It is true that the second decision now prescribes with final effect the withdrawal of the appellant's authorisation. This does not necessarily mean, however, that the appellant no longer has an interest in seeking the annulment of the first decision. 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. [24]

60. I shall therefore turn now to examining whether the General Court erred in law in assessing the conditions governing a loss of interest in bringing proceedings in the light of the possible legal effects of the first decision.

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

1. Criteria for the continued existence of an interest in bringing proceedings

61. 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, that interest in bringing proceedings must continue in existence until judgment on that action is delivered. Otherwise, there will be no need to adjudicate on the dispute as to the substance of the case. [25]

62. 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. However, 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.

[23] Judgment of 31 May 2017, *DEI* v *Commission* (C-228/16 P, EU:C:2017:409, paragraph 35 and the case-law cited). This would be the case, moreover, even if the first decision had become final in the absence of any action having been brought against it within the prescribed time limit. After all, before adopting a second decision, the Administrative Board of Review must carry out a re-examination of the situation of the bank concerned, in accordance with the third sentence of Article 24(1) of Regulation No 1024/2013. In such circumstances, an action against the confirmatory legal act is admissible; see judgment of 20 May 2021, *Dickmanns* v *EUIPO* (C-63/20 P, EU:C:2021:406, paragraph 34 and the case-law cited).

[24] See paragraphs 45 and 51 of the order under appeal.

[25] See, to that effect, judgment of 17 September 2015, *Mory and Others v Commission* (C-33/14 P, EU:C:2015:609, paragraphs 55 to 58 and the case-law cited).

On the contrary, 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. [26]

63. It must therefore be examined whether the contested decision produced adverse legal effects on the appellant up until the entry into force of the second decision (see Section 2). Finally, I shall examine whether and, if so, to what extent the annulment of the first decision is capable of procuring an advantage for the appellant and thus justifies the continued existence of its interest in bringing proceedings (see Section 3).

2. Ex tunc *effect of the replacement of the first decision by the second decision?*

64. 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.

65. It is common ground that the contested decision withdrew Nemea Banks's authorisation with immediate effect upon its notification to the applicants at first instance.

66. 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 of Article 24(7) of Regulation No 1024/2013, depends in turn on the legal effects of that 'replacement'.

67. The General Court's assessment to the effect that the replacement had retroactive effect and, in the manner of an annulment judgment under the first paragraph of Article 264 TFEU, removed the first decision with *ex tunc* effect from the legal order of the European Union, does not follow either from the wording of the provisions of Article 24 of Regulation No 1024/2013 or from the objectives or the scheme of those provisions.

68. The third sentence of Article 24(7) of Regulation No 1024/2013 states only that '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 wording does not therefore indicate any *retroactive* replacement or amendment.

69. Furthermore, it is not clear why a second decision would have different temporal effects depending on whether it either abrogates the first decision or replaces it by confirming or amending its content. After all, not even an abrogation or amending replacement would be capable of undoing the already activated withdrawal of authorisation in its original form, let alone its adverse consequences for the bank concerned, in particular the loss of confidence on the part of customers and investors.

70. If the second decision were to have *ex tunc* effect, the bank concerned, having no interest in bringing legal proceedings, would no longer be able to challenge the adverse legal effects of the first decision which it would have already sustained in all of these situations by bringing an action for annulment. It would have to rely on an action for damages, in the context of which the

[26] See, to that effect, judgments of 7 November 2018, *BPC Lux 2 and Others* v *Commission* (C-544/17 P, EU:C:2018:880, paragraph 42 and the case-law cited), and of 6 May 2021, *Bayer CropScience and Bayer* v *Commission* (C-499/18 P, EU:C:2021:367, paragraph 40); see, similarly, judgment of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609, paragraphs 69 and 70).

review of legality is subject to a stricter standard.[27] After all, an action for annulment directed only against the amending second decision would be ineffective in so far as the bank in question wished to challenge the amended parts of the first decision. Such a loophole in the relief available under the law would be incompatible with the requirements of the right to effective legal protection provided for in the first paragraph of Article 47 of the Charter.

71. What is more, Article 24(11) of Regulation No 1024/2013 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'. As the appellant submits, the ultimately binding review as to the legality of ECB decisions to withdraw a bank's authorisation is reserved for the Courts of the European Union under Article 263 TFEU. However, recognising the second decision as having *ex tunc* effect would allow the ECB to restrict the first decision's amenability to judicial review by replacing it. This would be incompatible with the fundamental idea that the internal administrative review procedure is intended to afford legal protection (see point 37 et seq. above). In the absence of an express provision to this effect, it must therefore be assumed[28] that the Courts of the European Union alone are empowered to declare the first decision void *with retroactive effect*, in accordance with the first paragraph of Article 264 TFEU.[29]

72. The replacement provided for in the third sentence of Article 24(7) of Regulation No 1024/2013 can therefore have only *ex nunc* effect. The first decision is not removed with retroactive effect from the legal order of the European Union by the adoption of the replacement second decision of identical content, but confirmed and effectively 'absorbed' by the latter with only prospective effect.

73. The above scheme of rules is consistent with that applicable in the EU Staff Regulations to the dismissal of an appeal against a decision by the employer that is unfavourable to the official,[30] and with that applicable to the processing of appeals by the ACER Board of Appeal (see point 40

[27] In particular, in the light of the ECB's discretionary decision to withdraw authorisation (see, in this regard, my Opinion in *Pilatus Bank* v *ECB*, C-750/21 P and C-256/22 P, EU:C:2023:431, point 106 et seq.), it would have to prove the existence of 'a sufficiently serious breach of a rule of EU law intended to confer rights on individuals'; see judgments of 4 April 2017, *Bürgerbeauftragter* v *Staelen* (C-337/15 P, EU:C:2017:256, paragraph 31 et seq.); of 27 April 2023, *Fondazione Cassa di Risparmio di Pesaro and Others* v *Commission* (C-549/21 P, EU:C:2023:340, paragraph 113); and of 6 July 2023, *RQ* v *Council and Commission* (C-7/22 P, EU:C:2023:541, paragraph 55 et seq.).

[28] Such an express provision *is* contained, however, in Article 27(3) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1; 'the Customs Code'), which allows the retroactive annulment of decisions, whereas revocation under Article 28 of the Customs Code applies only prospectively, and in the legal systems of the Member States. So it is that Article 240-1 of the French Code des relations entre le public et l'administration (Code governing relations between the public and the administrative authorities) draws an explicit distinction between the revocation (abrogation) of a legal act, which has prospective effect, on the one hand, and the withdrawal (retrait) of a legal act, which has retroactive effect too, on the other. In accordance with Paragraph 48(1) and Paragraph 49(1) to (3) of the German Bundesverwaltungsverfahrensgesetzes (Federal Law on Administrative Procedure) (VwVfG), both unlawful and lawful administrative acts may, under certain conditions, be withdrawn or revoked with either prospective or retrospective effect.

[29] In other contexts too, such as in State aid law, the Court of Justice has not so far recognised the revocation of a decision by the Commission as having *retroactive effect*; see judgment of 31 May 2017, *DEI* v *Commission* (C-228/16 P, EU:C:2017:409, paragraph 32 et seq.). The case-law cited by the General Court in paragraph 50 of the order under appeal in support of its view to the contrary has no indicative value in this regard.

[30] See, for example, judgments of 20 May 2021, *Dickmanns* v *EUIPO* (C-63/20 P, EU:C:2021:406, paragraph 29 et seq.), and of 3 March 2022, *WV* v *EAD* (C-162/20 P, EU:C:2022:153).

above),[31] the difference being that, in both these cases, the appeal procedure must be completed before an action may be brought, as well as with that governing certain administrative-law remedies in the Member States.[32]

74. Consequently, 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.

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

75. I shall now look, finally, at whether the General Court was nonetheless entitled to conclude that the applicants at first instance can no longer assert an interest in bringing proceedings against the first decision.

76. To my mind, however, this is clearly not the case.

77. First, it is not inconceivable that a review as to the legality of the first decision in the context of the action brought by the applicants at first instance might lead to the annulment of that decision. 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, it is my view 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), notwithstanding its status as not being open to challenge and the absence of any legal basis for doing so in Regulation No 1024/2013, and to adopt a new decision on the withdrawal of authorisation.[33] Consequently, the annulment of the first decision is indeed capable of producing legal effects and of procuring an advantage for the appellant.

78. Secondly, 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.[34] According to that case-law, 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.[35]

[31] See Articles 28 and 29 of Regulation 2019/942.

[32] See, for example, Paragraph 79(1), point 1, of the VwGO, according to which the original administrative act in the form given it by the decision on the appeal brought against that act [before the administrative authority] is to form the subject of the action challenging it before the Administrative Court. See, similarly, Paragraph 66(4) of the Austrian Allgemeines Verwaltungsverfahrensgesetz 1991 (General Law on Administrative Procedure 1991) (AVG), according to which the appellate authority is to decide itself on the substance of the case and is entitled to substitute its opinion for that of the lower authority both in the ruling and in respect of the grounds for the ruling, and to amend the contested decision in any way.

[33] On the general admissibility of revoking unlawful legal acts in EU law, see Opinion of Advocate General Campos Sánchez-Bordona in *Repower* v *EUIPO* (C-281/18 P, EU:C:2019:426, point 28 et seq. and the case-law cited). In point 32, he notes, inter alia, that the conflicting principles of legal certainty and administrative legality must be weighed against each other. In the present case, however, there is no indication as to why the second decision would have to be kept in force on grounds of legal certainty following the annulment of the first decision of identical content. On the possibility of revoking unchallengeable unlawful administrative acts, see also, for example, Paragraph 48 of the VwVfG.

[34] Judgments of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609, paragraphs 69 and 70); of 7 November 2018, *BPC Lux 2 and Others* v *Commission* (C-544/17 P, EU:C:2018:880, paragraph 42); and of 6 May 2021, *Bayer CropScience and Bayer* v *Commission* (C-499/18 P, EU:C:2021:367, paragraph 40).

[35] See judgments of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609, paragraph 79), and of 7 November 2018, *BPC Lux 2 and Others* v *Commission* (C-544/17 P, EU:C:2018:880, paragraph 43).

79. In the present case, it is true that the applicants at first instance brought an action for damages in parallel with bringing their action for annulment. However, the General Court dismissed that action for damages as manifestly inadmissible on the ground that the formal conditions for such an action as recognised in case-law were not met. Regardless of whether the General Court was entitled to arrive at that conclusion, a question which forms the subject of the fourth and fifth grounds of appeal (points 87 to 89 below), it nonetheless does not seem inconceivable that the appellant will bring a new action for damages before the General Court for the alleged unlawfulness of the contested decision. 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.

80. 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. A further action for damages is therefore still a possibility.

81. Consequently, the annulment of the contested decision would procure an advantage for the appellant.

D. Interim conclusion on the first ground of appeal

82. In the light of all the foregoing, it is my conclusion 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. The General Court failed to recognise this. 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 instance did not bring an action for the annulment of the second decision in due time and form is insignificant in this regard.

83. The first ground of appeal must therefore be upheld, without it being necessary to examine the second and third grounds of appeal, which are also directed against the General Court's finding that there is no need to adjudicate, in point 1 of the operative part of the order under appeal (see points 2 and 5 above).

84. The case must therefore be referred back to the General Court [36] for a decision on the substance of the action for annulment and the pleas in law put forward in support of that action.

85. However, the appellant's request that the case be referred back to the General Court sitting in a chamber with a different composition of judges cannot be granted, as there is no evidence of bias on the part of the previous chamber. [37] The breach of the duty of care and the duty to inform which

[36] Article 61 of the Statute of the Court of Justice of the European Union.

[37] See judgments of 1 July 2008, *Chronopost* v *UFEX and Others* (C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 44 et seq.), and of 19 February 2009, *Gorostiaga Atxalandabaso* v *Parliament* (C-308/07 P, EU:C:2009:103, paragraph 41 et seq.).

the General Court owes to the applicants at first instance, referred to in points 52 and 53 above, is not sufficient to raise serious doubts as to the Court's impartiality and to undermine the confidence of the litigants in this regard. [38]

86. Finally, the decision on the costs of the action for annulment, contained in point 3 of the operative part of the order under appeal, must be set aside. Since the question of whether there is still any need to adjudicate on the action for annulment is a separable part of the dispute that must be the subject of a final decision, I propose that the ECB be ordered to bear its own costs and pay those incurred by the appellant in this regard.

E. Fourth and fifth grounds of appeal on the claim for damages

87. As regards the fourth and fifth grounds of appeal, it is sufficient to note that the General Court was right to dismiss the claim for damages raised by the applicants at first instance as manifestly inadmissible, in accordance with Article 126 of its Rules of Procedure. [39]

88. Contrary to the formal requirements recognised in settled case-law, the application lodged with the General Court contains only a claim for damages in the amount of EUR 10 million, which the applicants even increased to EUR 100 million in the reply. However, as the General Court found without erring in law, [40] the application does not contain sufficient reasoning, let alone any evidence to show that 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 – namely, 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 – were met. [41]

89. The fourth and fifth grounds of appeal must therefore be dismissed as manifestly unfounded.

VII. Conclusion

90. I propose that the Court uphold the first ground of appeal and set aside the order under appeal in so far as it declared there to be no need to adjudicate on the action for annulment and apportioned the associated costs between the appellant and the European Central Bank (ECB) (points 1 and 3 of the operative part), 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 and, in any event, 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.

[38] See, to that effect, judgment of 26 March 2020, *Réexamen Simpson* v *Council* and *HG* v *Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 57 and the case-law cited).

[39] Point 3 of the operative part and paragraph 59 et seq. of the order under appeal.

[40] Paragraph 62 of the order under appeal.

[41] See, to that effect, judgment of 3 May 2018, *EUIPO* v *European Dynamics Belgium and Others* (C-376/16 P, EU:C:2018:299, paragraphs 91 and 92 and the case-law cited); see also the case-law cited in footnote 27.