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Legal Standing in Annulment Actions for the Withdrawal of the Banking License

ECJ 5 November 2019, *ECB v Trasta Komercbanka and Others*, joined cases C-663/17 P, C-665/17 P and C-669/17 P

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1. Introduction

On 5 November 2019, the Grand Chamber of the European Court of Justice ('ECJ') rendered its judgment in *Trasta Komercbanka*.[1] It is the first time the Court has dealt with the question of legal standing of a bank and its shareholders to bring an action for the annulment of withdrawal of the banking license by the European Central Bank ('ECB'). The judgment raises questions about judicial protection of a bank in liquidation and its shareholders, and will set a standard for future judicial review within the Single Supervisory Mechanism ('SSM').

The Banking Union was created as response to the financial crisis with a view to ensure a stronger system of bank supervision and resolution and the stability of the euro area banking system.[2] From the 4th November 2014, the supervision of the euro-area banks has taken place within the SSM, which together with the Single Resolution Mechanism ('SRM') form the main pillars of the Banking Union. The SSM is an integrated institutional and regulatory framework composed of the ECB and national competent authorities ('NCA'). The ECB, which is exclusively competent for carrying out listed supervisory tasks in respect to all the banks established in the eurozone,[3] is at the core of the system. It is responsible for the granting and withdrawal of banking licenses and for assessing the suitability of bank owners in relation to all the banks es-

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1 Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *ECB v Trasta Komercbanka and Others*, EU:C:2019:923 [*Trasta Komercbanka*].

2 E Ferran, 'European Banking Union: Imperfect, But It can Work' in D Busch and G Ferrarini (eds), *European Banking Union* (Oxford University Press 2015) 57 and 63.

3 Case C-450/17 P *Landeskreditbank Baden-Württemberg v ECB*, EU:C:2019:372, paras 37-38.

tablished in eurozone.[4] However, the exercise of day-to-day supervision is based on allocation of responsibilities between the ECB and the NCAs, depending on the classification of a bank as 'significant' or 'less significant'.[5]

The ECB decisions adopted within the SSM can be challenged before the EU Courts under Article 263(4) TFEU by the credit institution itself or third parties which are directly and individually concerned by that decision. In that regard, the ECJ has attracted a constant criticism for its restrictive interpretation of the legal standing conditions in direct actions and the resulting tension with the right to effective judicial protection.[6] This controversy is also at the core of the present case. Although the Banking Union marks an increasing 'subjectivation' of the EU legal order[7] by conferring rights and obligations on the shareholders and creditors of the banks, their access to the EU Courts remains limited. Indeed, in most cases they will be denied access to the EU Courts, since the effect of the ECB decision on their legal position will not surmount the admissibility barrier of direct and individual concern.[8]

Moreover, additional complexity is arising from the multi-layered legal framework of the Banking Union: although the prudential rules of bank supervision are harmonised at the EU level, Member States remain free to regulate the liquidation of the bank.[9] This is the issue in *Trasta Komercbanka*, where the ECB decision regarding the withdrawal of the banking license triggers the winding-up of the bank under national law and the replacement of its management board with a liquidator. The risk is, however, that entrusting the liquidator with the responsibility of deciding on whether to challenge the withdrawal of the banking license may deny the bank of the right to an effective remedy – if such challenge would conflict with the mandate of the liquidator to bring about a total cession of the bank's activities. Can the recourse to the principle of effec-

4 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 [2013] OJ L287/63 [SSM Regulation], arts 4(1)(a) and (c).

5 SSM Regulation, arts 4(1) and 6.

6 A Albros-Llorens, 'The Standing of Private Parties to Challenge the Community Measures: Has the European Court Missed the Boat?' (2003) 62 Cambridge Law Journal 72; P Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018) 441 and G De Burca, 'Fundamental Rights and Citizenship' in B De Witte (ed), *Ten Reflections on the Constitutional Treaty for Europe* (RSCAS and Academy of European Law 2003) 26.

7 See, generally about the 'subjectivation': MP Maduro, *We the Court. The European Court of Justice and the European Economic Constitution* (Hart 1998) 9 and M Klamert, 'Commentary on Article 1 of TEU' in M Klamert, M Kellerbauer and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (Oxford University Press 2019) 11.

8 L Wissink, T Duijkersloot and R Widdershoven, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection' (2014) 10 Utrecht Law Review 92, 100.

9 JJP Deslandes and M Magnus, 'Further harmonising EU insolvency law from a banking resolution perspective?'(*European Parliament Think Tank*, April 2018) <www.europarl.europa.eu/RegData/etudes/BRIE/2018/614514/IPOL_BRI(2018)614514_EN.pdf> accessed 4 September 2020.

tive judicial protection ensure, in such cases, an impaired access of the bank and its shareholders to the EU Courts?

This contribution argues that the *Trasta Komercbanka* ruling seeks to strike a balance between an effective judicial protection and the concern that lowering the admissibility threshold could result in excessive caseload. On the one hand the ECJ is upholding the right to an effective remedy, as it accepts the admissibility of an annulment action brought by the bank in liquidation acting through its former management board. On the other hand, it remains committed to strict interpretation of the legal standing conditions for third parties by employing a rather formalistic distinction between the economic and legal effects of the withdrawal of the banking license on the shareholders. The solution is nonetheless justified, since the bank can exercise the right of action both in its own interests and – indirectly – in the interests of its shareholders.

2. Facts of the Case[10]

On 3 March 2016, the ECB withdrew the banking license of Trasta Komercbanka AS ('TKB') after it had allegedly infringed anti-money laundering and terrorism financing rules. The ECB decision was adopted according to the common procedure, on the basis of the proposal of the Latvian financial supervisory authority ('Latvian FSA').[11] A Latvian court subsequently adopted a decision initiating liquidation procedure and appointed a liquidator on the proposal of the Latvian FSA.

The liquidator revoked all the powers of attorney ('PoA') issued by the bank's management board, including the PoA authorising an attorney-at-law to represent the bank before the ECB and the EU Courts. The ECB's Administrative Board of Review ('ABoR') considered nonetheless that the review request of the bank – represented by the attorney-at-law acting on the basis of the revoked PoA – was admissible. As regards the substantive review of the ECB decision, the ABoR considered that the allegations of procedural and substantive breaches by the appellant were unfounded while recommending that the governing body of the ECB should clarify certain elements of the decision.[12] Subsequently, on 11 July 2016, the ECB adopted a new decision replacing its original decision.

TKB, represented by the same attorney-at-law, brought an annulment action before the General Court ('GC') pursuant to Article 263(4) TFEU against both

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10 See *Trasta Komercbanka*, paras 13-51.

11 SSM Regulation, art 14(5); 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 [2014] OJ L141/1, arts 80 and 83.

12 *Trasta Komercbanka*, para 19.

the original and the final ECB decisions. By way of precaution, the attorney-at-law also introduced an annulment action against these decisions in the name of the bank's direct and indirect shareholders.

In response to the plea of inadmissibility raised by the ECB, the GC issued an order[13] holding that there was no need to adjudicate on the TKB action since the attorney-at-law did not have, under national law, an effective authorisation to represent the bank. In doing so, it relied on the decision of a Latvian court rejecting the request of TKB to maintain the powers of representation of its management board for the purposes of filing a request for review with the ABoR, and bringing an action for annulment. On the other hand, the GC declared that the application of shareholders was admissible, since the shareholders were directly and individually concerned by the ECB decision and had an interest in bringing an action on behalf of TKB.

The order of the GC was appealed by the ECB[14] and the European Commission ('Commission'),[15] on the one hand, and by TKB and its shareholders,[16] on the other hand. The two EU institutions contested the legal standing of the shareholders, while the bank and its shareholders claimed that the inadmissibility of the TKB's action violated their right to an effective judicial protection under Article 47 of the Charter of Fundamental Rights of the EU ('Charter'). The ECJ was thus asked to adjudicate on whether the bank and its shareholders had a legal standing to challenge the withdrawal of the banking license after the powers of the bank's management board had been assumed by a liquidator.

3. Judgment of the Court[17]

The ECJ overruled the order of the GC by adopting a reasoning in two stages. First, it held that the TKB action was admissible, considering that the bank's right to effective judicial protection would be compromised were the effects of revoking the PoA under national law to be considered for the purposes of determining the admissibility of the annulment action before the EU Courts.

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13 Case T-247/16 *Fursin and Others v ECB*, EU:T:2017:623.

14 Case C-663/17 P: Appeal brought on 24 November 2017 by European Central Bank against the order of the General Court (Second Chamber) delivered on 12 September 2017 in Case T-247/16: *Fursin and others v European Central Bank* [2018] OJ C32/16.

15 Case C-665/17 P: Appeal brought on 27 November 2017 by the European Commission against the order of the General Court (Second Chamber) delivered on 12 September 2017 in Case T-247/16: *Trasta Komercbanka AS and Others v European Central Bank* [2018] OJ C42/6.

16 Case C-669/17 P: Appeal brought on 28 November 2017 by Trasta Komercbanka AS, Ivan Fursin, Igors Buimisters, C & R Invest SIA, Figon Co. Ltd, GCK Holding Netherlands BV, Rikam Holding SA against the order of the General Court (Second Chamber) delivered on 12 September 2017 in Case T-247/16: *Trasta Komercbanka AS and Others v European Central Bank* [2018] OJ C42/8.

17 See *Trasta Komercbanka*, paras 52-119.

Second, it rejected the admissibility of the action brought by the shareholders, concluding that they were not directly concerned by the ECB decision. The judgment thus opens the way for the assessment of substantive issues on the lawfulness of the withdrawal of TKB's license.

3.1. Admissibility of the action brought by the bank in liquidation

The ECJ first dealt with the question of the admissibility of the annulment action brought by TKB, represented by its former management board. It reiterated that effective judicial protection of individuals' rights under EU law[18] is ensured by the right of the bank, pursuant to Article 263(4) TFEU, to bring an action for annulment of the ECB decision regarding the revocation of its license before the EU Courts. For such an action to be admissible, it is necessary to show that the person concerned has made the decision to bring the action, and that the lawyers who claim to represent that person have in fact been authorised to do so.[19]

In the absence of EU rules regarding the representation of legal persons, the national law of the Member State under which the legal person is constituted determines, in principle, the bodies authorised to instigate legal proceedings on its behalf. Nonetheless, the autonomy of the Member States is restricted by their obligation to respect the right to effective judicial protection.[20] The appreciation of the ECJ and of the GC differs, however, on whether the possibility for the liquidator of the bank to bring an action for annulment constitutes an effective legal remedy.

According to the GC, the application of Latvian law did not deprive the bank of a remedy, but merely resulted in the transfer to a liquidator of the responsibility for deciding to bring or maintain an action against the ECB decision.[21] Although the ECJ agreed that such transfer of responsibility to a liquidator does not, in principle, entail an infringement of the right to effective judicial protection, the situation is different where the liquidator has a conflict of interests as regards the decision to bring or maintain an action before the GC.[22] Indeed, given the relationship of mutual trust that exists between the Latvian FSA and the liquidator – vesting the liquidator, under Latvian law, with the right to introduce or maintain an action against a decision to withdraw the bank's license – does not constitute an effective remedy.

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18 Case C-222/84 *Johnston*, EU:C:1986:206, paras 18 and 19.
19 Rules of Procedure of the General Court of 23 April 2015 [2015] OJ L105/1, art 51(3)
20 *Trasta Komercbanka*, paras 58 and 59.
21 Case T-247/16 *Fursin and Others v ECB*, EU:T:2017:623, para 36.
22 *Trasta Komercbanka*, para 77.

The potential conflict of interest arises: on the one hand, from the involvement of the Latvian FSA in the decision-making procedure leading to the withdrawal of the TKB's banking license and; on the other hand, from the specific links between the Latvian FSA and the liquidator. The ECJ first observed that the appointment and removal procedure of a liquidator implies a relationship of mutual trust between the Latvian FSA and the liquidator. In particular, the liquidator is appointed by the court on the proposal of the Latvian FSA, and may also be discharged from his duties if the Latvian FSA no longer has confidence in him.[23] Thus, there is a risk that the liquidator would not exercise the right to bring or to maintain an action against the ECB decision adopted upon the proposal of the Latvian FSA if the latter could request the court to discharge the liquidator from his functions. Furthermore, the liquidator's challenge of the withdrawal of the banking license could deprive the liquidation procedure of any legal basis. This would conflict with his mandate to bring about total cession of the bank's activities.[24]

3.2. Rejection of the legal standing of the shareholders

The ECJ further examined the admissibility of the action brought by the bank's shareholders. According to Article 263(4) TFEU, a private party may institute proceedings against an EU act that is addressed to another party only if that act is of direct and individual concern to him. As regards the first condition, the ECJ accepted the arguments of the ECB and the Commission that the withdrawal of the banking license does not directly affect the legal position of the shareholders. Their action is therefore declared to be inadmissible, without the need to consider whether they are individually concerned by the ECB decision.

The requirement that the ECB decision regarding the withdrawal of the banking license must be of direct concern to the bank's shareholders would be satisfied only if the ECB decision would bring about automatic and immediate change to the legal position of the shareholders.[25] The GC had applied, however, an incorrect criterion of 'intensity' of the effects of the contested decision, which led it to assess whether the decision had economic rather than direct legal effect on the shareholders.[26] According to the ECJ, the withdrawal of the banking license does not, as a matter of EU law, prevent TKB from continuing its activity as a non-licensed company and, consequently, does not directly affect the right of shareholders to receive dividends and to participate in the management of

23 Latvian Civil Procedure Law, arts 377(2) and 387(2).
24 Latvian Commercial Law, art 322 and *Trasta Komercbanka*, paras 70-76.
25 *Trasta Komercbanka*, para 103.
26 ibid, para 106.

that company.[27] The ECJ conceded that the liquidation of TKB following the adoption of the ECB decision regarding the withdrawal of the bank's license had directly affected the right of the TKB shareholders to participate in the management of that company. Nonetheless, such effect was only indirect, since the commencement of liquidation procedure was based on Latvian law.[28] Thus, the condition that the effects on the legal position of shareholders should be an automatic and direct consequence of the ECB decision was not fulfilled.

4. Comments

4.1. The failure to ensure an effective legal remedy through the liquidator

The *Trasta Komercbanka* ruling manifests the willingness of the ECJ to give full effect to the right of TKB to an effective legal remedy by setting aside the effects of the national law impeding its access to the EU Courts. Yet, this implies a reduced national autonomy in defining the scope of the power of representation of a bank in liquidation.

According to the principle of procedural autonomy,[29] in the absence of common rules at the EU level on the representation of legal persons, national law of the Member State under which the legal person is constituted determines, in principle, the bodies authorised to instigate legal proceedings on its behalf. The exercise of the national autonomy is, however, conditioned by the principle of equivalence and the principle of effectiveness.[30] While the first principle could be seen as an extension of the general principle of non-discrimination to the law of remedies, the second requires that the enforcement of EU rights at national level must not be 'virtually impossible or excessively difficult'.[31] These principles have been used by the ECJ alongside the principle of effective judicial protection, first recognised in *Johnston*[32] and more recently reaffirmed by Article

27 ibid, paras 110 and 111.
28 ibid, paras 113 and 114.
29 Case C-33/76 *Rewe v Landwirtschaftskammer für das Saarland*, EU:C:1976:188 and Case C-93/12 *ET Agrokonsulting-04*, EU:C:2013:432, para 35.
30 Case *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, EU:C:1976:188, para 5 and Case C-45/76 *Come*t EU:C:1976:191, para 13.
31 K Lenaerts, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness' (2011) 46 Irish Jurist 13, 14.
32 Case C-222/84 *Johnston*, EU:C:1986:206, paras 18 and 19.

47 of the Charter.[33] These three principles operate as a framework which limits and directs the exercise of procedural autonomy by the Member States.[34]

The particularity of *Trasta Komercbanka* relates to the fact that national procedural rules conditioned access of the bank to the EU Courts. It is settled case-law that national legislation may not impair the right to effective judicial protection before the EU Courts if and in so far as national law determines certain procedural requirements.[35] In *Groupement des Agences de voyages*,[36] the ECJ accepted the admissibility of the action for annulment brought by a company in the course of formation which did not have legal personality under national law, even though the capacity of a company was a question of national company law. The crucial factor from the point of view of effective judicial protection was that an association which is the addressee of an EU act must be able to bring proceedings against that act. Similarly, the ECJ held in *PKK* that an organisation must still be considered to have legal standing in annulment action – irrespective of its dissolution and the loss of its legal personality – if judicial protection cannot be otherwise ensured.[37] While these cases concerned the retention of legal personality for the purposes of bringing an action before the EU Courts, in the present case the same approach was applied to the retention of the power of representation of the former management board of a company. The ECJ did not, however, go as far as Advocate General Kokott, who suggested that the right of representation before the EU Courts is solely a matter of EU law.[38] The Court adopted instead a more traditional reasoning: it placed trust in national procedural provisions while at the same time subjecting the latter to the standard of effective judicial protection.

The reasoning in *Trasta Komercbanka* illustrates the ECJ's increasing tendency of assessing the application of national procedural law in light of the principle of effective judicial protection, at the same time reducing the importance of the principles of equivalence and effectiveness.[39] The relationship

33 *Trasta Komercbanka*, paras 58 and 59.

34 K Lenaerts, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness' (2011) 46 Irish Jurist 13, 14.

35 Case C-87/90 to C-89/90 *Verholen and Others*, EU:C:1991:314, para 24; ECJ C-13/01 *Safalero*, EU:C:2003:447, para 50 and Case C-432/05 *Unibet*, EU:C:2007:163, para 42.

36 Case C-135/81 *Groupement des Agences de voyages v Commission*, EU:C:1982:371, paras 10-12.

37 Case C-229/05 P *PKK and KNK v Council*, EU:C:2007:32, paras 110-112.

38 Case C-663/17 P, C-665/17 P and C-669/17 P *ECB v Trasta Komercbanka*, EU:C:2019:323, Opinion of AG Kokott [Opinion of AG Kokott in *Trasta Komercbanka*], para 35.

39 cf R Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019/2) 12 Review of European Administrative Law 5 and P van Cleynenbreugel, 'Transforming Shields Into Swords: the VEBIC Judgment, Adequate Judicial Protection Standards and the Emergence of Procedural Heteronomy in EU Law' (2011) 18 Maastricht Journal of European and Comparative Law 511.

between the three principles has never been entirely clear.[40] It has been argued, however, that the reliance on the principle of effective judicial protection allows the court to intervene more directly in national procedural settings than the principles of equivalence and effectiveness. While the principle of effectiveness brings about a negative obligation, the principle of effective judicial protection implies both a negative and a positive obligation. The latter principle may require the Member States not only to set aside national procedural rules contravening EU law, but also to take positive action to ensure minimum effectiveness requirements.[41] The biggest difference might be that the right to effective legal remedy may oblige the Member States go beyond simple equivalence and make available a particular remedy or procedure not existing under national law.[42]

In *Trasta Komercbanka*, the bank and its shareholders relied only on Article 47 of the Charter to contest the conclusions of the GC. The preference given to this provision might be explained by the fact that it offers a more specific and robust legal framework for assessing the access of individuals to justice than the principles of equivalence and effectiveness. Indeed, these principles were primarily designed as a framework for limiting national autonomy when designing national procedural rules that can be exercised before national courts.[43] In cases where the procedure takes place before the EU Courts, Article 47 of the Charter provides a more appropriate methodological framework for assessing national procedural rules conditioning access to these courts. The increasing reliance of the ECJ on this article also contributes to the convergence of its case-law with the case-law of the ECtHR regarding Article 6 of the European Convention of Human Rights ('ECHR').[44]

Apart from the considerations relating to the respect of TKB's right to effective legal remedy, the ECJ's reasoning seems to be motivated by the need to preserve unimpeded access to the EU Courts. If the ECJ had followed the approach of the GC – that only national law should be followed in determining

40 M Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in P Craig and G De Búrca, *The Evolution of EU Law* (Oxford University Press 2011).

41 P van Cleynenbreugel, 'Transforming Shields Into Swords: the VEBIC Judgment, Adequate Judicial Protection Standards and the Emergence of Procedural Heteronomy in EU Law' (2011) 18 Maastricht Journal of European and Comparative Law 511, 538-539; M Bonelli, 'Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature' (2019/2) 12 Review of European Administrative Law 35, 38-40.

42 See, for instance, Case C-97/91 *Oleificio Borelli SpA v Commission*, EU:C:1992:491; Case C-432/05 *Unibet*, EU:C:2007:163; Case C-562/12 *Liivimaa Lihaveis MTÜ v Eesti-Läti programmi 2007-2013 Seirekomitee*, EU:C:2014:2229; S Prechal and R Widdershowen 'Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection' (2011/2) 5 Review of European Administrative Law 31, 41 and A Arnull, 'The principle of effective judicial protection in EU law: an unruly horse' [2011] European Law Review 51.

43 cf R Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019/2) 12 Review of European Administrative Law 5, 8.

44 Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 52(3).

the authorisation of the former management board to bring an action on behalf of the bank – the access to the EU Courts would be made dependent on national law. This would be problematic, considering the central role they should play in reviewing the legality of ECB decisions adopted within the framework of the SSM. Indeed, the EU Courts alone have jurisdiction to review the legality of ECB decisions regarding the withdrawal of the banking license; this excludes the jurisdiction of national courts.[45] Furthermore, the liquidation order of a bank under Latvian law cannot be challenged, and hence could never lead to a substantive review of the withdrawal of the licence by means of a preliminary reference to the ECJ.[46] In these circumstances, it would be difficult to reconcile the unavailability of a legal review with the principle that the EU is 'a union based on the rule of law'.[47]

As regards the standard of effective judicial protection, the ECJ's reasoning displays an interpretational convergence with that of the ECtHR. In *Capital Bank AD v Bulgaria*,[48] the ECtHR held that that the former management of the bank had to be recognised as having the right to bring an individual petition under Article 34 of the ECHR in a situation where the liquidator of the bank had a conflict of interests which rendered the exercise of that right by the bank in liquidation theoretical and illusory. This argument equally applies to the admissibility of the action brought by TKB. The action before the GC did not concern a matter in respect of which the liquidators would be expected to act in the protection of the bank's interests, such as challenging the validity of a fraudulent transaction causing losses to the bank and its creditors. On the contrary, the action sought annulment of the withdrawal of the banking license which, if satisfied, could result in reversal of the liquidation procedure.

4.2. A formal distinction of economic and legal effects of the withdrawal of the banking license on the shareholders

The ECJ has attracted criticism regarding its restrictive interpretation of the legal standing conditions applicable to private parties to whom an act is not addressed. The invitation of the GC to shift the focus to a more qualitative assessment of the effect of the contested act on the legal position of third parties provided an occasion for the ECJ to make the test more inclusive;

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45 Case C-219/17 *Berlusconi and Fininvest*, EU:C:2018:1023, para 57, regarding the exclusive jurisdiction of the EU Courts to review the acts adopted in a composite procedure where the decision-making power belongs to the ECB.

46 cf Opinion of AG Kokott in *Trasta Komercbanka*, para 54.

47 Case C-64/16 *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, para 31 and Case C-294/83 *Les Verts*, EU:C:1986:166, para 23.

48 *Capital Bank AD v Bulgaria* App no 49429/99 (ECtHR, 9 September 2004). See also, similarly, *Credit and Industrial Bank v Czech Republic* App no 29010/95 (ECtHR, 21 October 2003) paras 71-73.

this is relevant in particular as regards the legal standing of shareholders to bring an action against the acts addressed to their company. However, the ECJ remains committed to a strict interpretation of the direct concern condition.

Although the reasoning of the ECJ in distinguishing economic and legal effects of an EU act is consistent with the case-law of the EU Courts,[49] it suffers from formalism. It might be true that EU law does not prevent TKB from changing its objective and continuing to carry out a different economic activity after the withdrawal of its banking license. Nevertheless, in practice this is a very theoretical possibility. Under Latvian law, the withdrawal of the banking license triggers the commencement of the liquidation procedure of the respective bank.[50] In these circumstances, the shareholders have effectively forgone the right to receive any dividend or to participate in the management of the company. The combined effect of the ECB decision and the national law prescribing the liquidation of TKB was to deprive the shareholders from the rights pertaining to this status.

The ECJ case-law has shown a slight relaxation of the legal standing requirements in the area of state aid[51] and mergers.[52] However, in *Trasta Komercbanka*, the ECJ does not accept the analogy between the position of bank shareholders and that of the competitors which, in some cases, have a legal standing to challenge a decision of the Commission authorising a merger or declaring state aid compatible with the internal market. According to the Court, the recognition that some competitors of the addressees of an EU legal act may be directly affected by that act is justified not by the purely economic effects of the act in question on their situation, but by the fact that that act affects their right under the TFEU not to be subject to distorted competition.[53] In that regard, the applicants had argued that the withdrawal of the banking license affected the shareholders' right to decide on the provision of banking services in other Member State,[54] and to commence a voluntary liquidation of the bank and its branch in Cyprus. Indeed, the freedom of establishment not only protects the right to provide services through an establishment in another Member State,

49 cf CaseT-83/92 *Zunis Holdings and Others v Commission*, EU:T:1993:93, para 35 and Case T-223/01 *Japan Tobacco and JT International v European Parliament and Council*, EU:T:2002:205, para 50.

50 Latvian Law on Credit Institutions, art 129.

51 Case C-169/84 *Cofaz v Commission*, EU:C:1986:42, paras 22-25.

52 Case C-68/94 and 30/95 *France and Others v Commission*, EU:C:1998:148, paras 54-58.

53 *Trasta Komercbanka*, para 112 and Case C-622/16 P to C-624/16 P *Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori and Commission v Ferracci*, EU:C:2018:873, para 43.

54 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L176/338, art 35.

but also the right to give up activity or an establishment of an undertaking.[55] The ECJ fails, however, to draw a clear line between the situation of competitors in the state aid and merger cases and that of shareholders.

Although a relaxation of the admissibility test in third party actions would constitute a welcome development, it will be further argued that the solution adopted by the ECJ in the present case is justified. In the normal course of business, the only remedy available to the shareholders lies in exercising their rights as members of the company.

4.3. An indirect protection of the shareholders as members of company

Contrary to the GC, the ECJ has not addressed the question of the shareholders' interest in bringing proceedings before the GC. Still, this question might explain the differences in the appreciation of the legal standing of shareholders by the two EU Courts. There are indeed conceptual links between the legal interest and direct concern requirements, which explain that their appreciation by the EU Courts are often overlapping.[56]

As regards the legal interest of shareholders to institute legal proceedings, it is settled case-law that

> [A]n applicant must show that it has an interest in bringing proceedings separate from that possessed by an undertaking which it partly controls and which is concerned by an EU measure. Otherwise, in order to defend its interests in relation to that measure, its only remedy lies in the exercise of its rights as a member of the undertaking which itself has a right of action.[57]

This rule reflects the idea that company laws are founded on the concept of a separate legal personality and on a corresponding distinction between the rights of the company and those of its shareholders.[58] Where the interests of shareholders are harmed by measures directed against the company, it is in principle for the latter to take appropriate action. The underlying rationale is that the company is normally acting not only in its own interest, but also – indirectly – in the interest of its shareholders.

In *Trasta Komercbanka*, Advocate General Kokott concludes that the action of shareholders would be admissible only in two cases. The first is where the

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55 Case C-201/15 *AGET Iraklis*, EU:C:2016:972, para 53.

56 See, regarding the overlapping of the legal interest and direct concern requirements, Case C-463/10 P and C-475/10 P *Deutsche Post and Germany v* Commission, EU:C:2011:656, para 38.

57 Case T-457/09 *Westfälisch-Lippischer Sparkassen- und Giroverband v Commission*, EU:T:2014:683 [*WestLB*], para 112 and Case T-499/12 *HSH Investment Holdings Coinvest-C et HSH Investment Holdings FSO v Commission*, EU:T:2015:840 [*HSH Investment Holdings*], para 31.

58 Opinion of AG Kokott in *Trasta Komercbanka*, para 126.

shareholders have an interest distinct from the one which the bank itself has in the annulment of the ECB decision. The second is where the shareholders bring an action in the interests of the bank where the latter cannot itself bring an action.[59] This line of reasoning is consistent with the case-law of the ECtHR, which considers that the shareholder cannot be generally identified with his company for the purposes of assessing his interest in bringing an action against an act directed against his company.[60] In *Agrotexim*,[61] the ECtHR set the standard that largely follows the case-law of the International Court of Justice in *Barcelona Traction*:

[T]he piercing of corporate veil or the disregarding of a company's legal personality will be justified only in exceptional circumstances, in particular where it is impossible for the company to apply to the Convention institution through the organs set up under its articles of incorporation or – in the event of liquidation - through its liquidators.[62]

It follows that the identification of the interests of the shareholder and his company is allowed only in 'exceptional circumstances', where the company cannot itself exercise the right of action. This condition is not fulfilled in the present case, since TKB can itself pursue an action against the ECB decision. Thus, the solution adopted in *Trasta Komercbanka* is consistent with the judicial protection standard in actions brought by shareholders against acts directed against their company.

5. Concluding remarks

Trasta Komercbanka will set a standard for other cases of revocation of banking licenses currently pending before the GC in which banks and their shareholders have brought an action for annulment of ECB decisions.[63] Similar questions may arise within the framework of the SRM, under which the Single Resolution Board ('SRB') may take a resolution action in respect to 'significant' banks that are failing or likely to fail.[64] There is some uncertainty

59 ibid, para 104.

60 M Emberland, 'The Corporate Veil in the Case Law of the European Court of Human Rights' (2003) 63 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 945, 962-964 and SC Tishler, 'A New Approach to Shareholder Standing Before the European Court of Human Rights' (2015) 25 Duke Journal of Comparative and International Law 259.

61 *Agrotexim and Others v Greece* App no 14807/89 (ECtHR, 24 October 1995) paras 66-71 and *Olczak v Poland* App no 30417/96 (ECtHR, 7 November 2002) paras 57-59. See also *Barcelona Traction, Light and Power Company Ltd* (Judgment) [1970] ICJ Rep 3, paras 56-58, 66.

62 *Agrotexim and Others v Greece* App no 14807/89 (ECtHR, 24 October 1995) para 66.

63 Case T-321/17 *Niemelä e.a. v ECB*; Case T-351/18 *Ukrselhosprom PCF and Versobank v ECB*; Case T-584/18 *Ukrselhosprom PCF and Versobank v ECB* and Case T-27/19 *Pilatus Bank and Pilatus Holding v ECB*.

64 Case T-564/18 *Bernis and Others v ECB*, EU:T:2020:73 and Case T-280/18 *ABLV Bank v CRU*.

about the legal standing of the shareholders in cases where the resolution measures are directed against the assets of their bank (e.g. the transfer of the performing assets to a bridge bank). Although the shareholders do not have a right to the assets of the company, the implementation of such resolution measures could deplete the value of their shares by leaving them with an empty shell.[65] All these cases have in common the fact that the supervisory and resolution decisions are taken in complex administrative procedures, where the banks and their shareholders may find themselves in a situation where they cannot effectively exercise their rights. This requires paying particular attention to the respect of the right of these financial market participants to an effective remedy, in order to avoid erosion of their legal protection due to the transfer of supervisory and resolution powers to the EU authorities.

65 cf *WestLB*, paras 112-120; *HSH Investment Holdings*, paras 57-59 and M Schillig, *Resolution and Insolvency of Banks and Financial Institutions* (Oxford University Press 2016) 119-120.