GIURISPRUDENZA COMMERCIALE
ISSN 0390-2269
Anno XLIV Fasc. 4 - 2017

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LA « PRIMA VOLTA » DEL TRIBUNALE DELL'UNIONE EUROPEA IN MATERIA DI MECCANISMO DI VIGILANZA UNICO

Estratto

Milano • Giuffrè Editore

TRIBUNALE DELL'UNIONE EUROPEA, sentenza 16 maggio 2017, causa T-122/15, IV camera in composizione allargata — M. Prek *Presidente Estensore.*

Riparto di competenza per la vigilanza prudenziale di enti creditizi significativi - Artt. 4 e 6 regolamento MVU - Competenza esclusiva della BCE ai sensi dell'art. 4(1) regolamento MVU - Significato.

Possibilità di derogare alla competenza esclusiva della BCE in relazione ad un ente di credito che, pur superando le soglie di significatività, possa essere qualificato come non significativo - Art. 70 regolamento quadro - Esistenza di circostanze particolari - Natura pubblica dell'ente creditizio e conseguente attenuato profilo di rischio quale ragione giustificativa dell'attrazione alla competenza dell'autorità nazionale - Insussistenza - Onere della prova a carico dell'ente creditizio circa la ricorrenza delle circostanze particolari di cui all'art. 70 regolamento quadro.

Obbligo di motivazione della decisione della BCE - Possibilità di valutare congiuntamente la motivazione della decisione e la motivazione del parere della Commissione amministrativa di riesame - Sussiste.

Spetta alla BCE la competenza esclusiva in tema di vigilanza (micro) prudenziale degli enti creditizi in relazione a tutti i compiti elencati nell'art. 4 del regolamento MVU; tuttavia l'esecuzione di tali compiti — ad eccezione di quelli di cui all'art. 4(1)(a) e (c) del regolamento MVU — in relazione agli enti creditizi meno significativi è demandata all'autorità competente nazionale in un quadro di decentramento attuativo, che non vale tuttavia a configurare le autorità nazionali quali titolari originari di competenze. Ciò discende dall'articolo 4(1) del regolamento MVU e consegue ad una precisa volontà legislativa diretta a configurare le autorità nazionali nel quadro del MVU quali parti di un meccanismo di assistenza alla BCE nell'esercizio delle competenze (micro) prudenziali attribuite alla stessa piuttosto che non quali destinatarie di autonome competenze (1).

Spetta esclusivamente alla BCE la competenza a precisare le «particolari circostanze» ai sensi dell'art. 6(4) del regolamento MVU in presenza delle quali è possibile qualificare come non significativo e sottrarre alla vigilanza della BCE un ente creditizio che supera le soglie di significatività, per delegarne la vigilanza all'autorità nazionale. Spetta inoltre al singolo ente creditizio significativo che intenda far valere tali «particolari circostanze» dimostrare che la vigilanza da parte dell'autorità nazionale consente, nel singolo caso concreto, di conseguire più alti standard di vigilanza rispetto a quelli della vigilanza della BCE (2).

Al fine di valutare il rispetto da parte della BCE dell'obbligo di adeguata motivazione di cui all'art. 296 TFEU può tenersi conto della motivazione data, nel corso del procedimento che ha condotto all'adozione della decisione della BCE, dalla Commissione amministrativa di riesame (massime non ufficiali) (3).

I. Background to the dispute

1 The applicant, the Landeskreditbank Baden-Württemberg - Förderbank, is the investment and development bank (Förderbank) of Baden-Württemberg (Germany). Created by Paragraph 1(1) of the Law on the Baden-Württemberg regional credit bank, it is a legal person governed by public law and wholly owned by the *Land* (State) of Baden-Württemberg.

2 On 25 June 2014, the European Central Bank (ECB) informed the applicant, in essence, that on account of its size it was subject solely to its supervision rather than shared supervision under the single supervisory mechanism (SSM), pursuant to Article 6(4) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63) ('the Basic Regulation') and invited it to submit its observations.

3 On 10 July 2014, the applicant disputed that analysis, arguing inter alia the presence of particular circumstances within the meaning of Article 6(4) of the Basic Regulation and Articles 70 and 71 of Regulation (EU) No 468/2014 of the ECB of 16 April 2014 establishing the framework for SSM cooperation between the ECB, the national competent authorities and the national designated authorities (OJ 2014 L 141, p. 1) ('the SSM Framework Regulation').

4 On 1 September 2014, the ECB adopted a decision classifying the applicant as a significant entity within the meaning of Article 6(4) of the Basic Regulation.

5 On 6 October 2014, the applicant requested review of that decision pursuant to Article 24(1), (5) and (6) of the Basic Regulation, read in conjunction with Article 7 of Decision [2014/360/EU of the European Central Bank] of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (OJ 2014 L 175, p. 47). A hearing was held on 23 October 2014 before the Administrative Board of Review.

6 On 20 November 2014, the Administrative Board of Review gave an Opinion finding the ECB's decision to be lawful.

7 On 5 January 2015, the ECB adopted Decision ECB/SSM/15/1 ('the contested decision'), which repealed and replaced the decision of 1 September 2014, whilst maintaining the applicant's classification as a significant entity. The ECB emphasised, in essence, the following:

- the applicant's classification as a significant entity was not in contradiction with the objectives of the Basic Regulation;

- an entity's risk profile was not a relevant question at the stage of its classification and Article 70 of the SSM Framework Regulation could not be interpreted as including criteria that had no basis in the Basic Regulation;

- even if it did take the view that there were particular circumstances in the applicant's case, it would also have to ascertain whether such circumstances justified reclassifying the applicant as a less significant entity;

- under Article 70(2) of the SSM Framework Regulation, the concept of 'particular circumstances' had to be interpreted restrictively and, therefore, it was only when direct supervision by the ECB was inappropriate that a 'significant' entity could be reclassified as 'less significant';

- taking into account the principle of proportionality for the purpose of interpretation does not require it to ascertain whether the application of the criteria laid down in Article 6(4) of the Basic Regulation to an entity was proportionate and the examination whether it was 'inappropriate' to classify an entity as significant did not amount to conducting such an examination of proportionality;

- the adequacy of national supervisory frameworks and their ability to apply a high supervisory standard did not lead to a finding that the exercise of direct prudential supervision by the ECB was inappropriate, since the Basic Regulation did not make it subject to proof that the national supervisory frameworks or national supervisory standards were inadequate.

II. Procedure and forms of order sought

8 By application lodged at the Registry of the General Court on 12 March 2015 the applicant brought the present action.

9 By document lodged at the Registry of the Court on 23 July 2015, the European Commission applied for leave to intervene in support of the form of order sought by the ECB.

10 By decision of 27 August 2015 the President of the Fourth Chamber granted the Commission leave to intervene in support of the form of order sought by the ECB.

11 On 9 October 2015, the Commission lodged its statement in defence.

12 Acting upon a proposal of the Fourth Chamber, the Court decided, pursuant to Article 28 of the Court's Rules of Procedure, to refer the case to a formation sitting with a greater number of Judges.

13 Acting upon a proposal of the Judge-Rapporteur, the General Court (Fourth Chamber, Extended Composition) decided to open the oral part of the procedure.

14 The parties presented oral argument and replied to questions put by the Court at the hearing on 28 September 2016.

15 The applicant claims that the Court should:

- annul the contested decision whilst ordering the maintenance of the effects attaching to the replacement of the decision of 1 September 2014;

- order the ECB to pay the costs.

16 The ECB and the Commission contend that the Court should:

- dismiss the application;

- order the applicant to pay the costs.

III. Law

17 In support of its application for annulment of the contested decision, the applicant puts forward five pleas in law: (i) infringement of Article 6(4) of the Basic Regulation and Article 70 of the SSM Framework Regulation in the choice of criteria applied by the ECB; (ii) manifest errors of assessment of the facts; (iii) infringement of the obligation to state reasons; (iv) misuse of powers arising from the ECB's failure to exercise its discretion; and (v) infringement by the ECB of its obligation to take into consideration all the relevant circumstances of the case.

A. The first plea: incorrect legal criteria applied by the ECB

18 Under the present plea, the applicant puts forward, in essence, three complaints.

19 The first complaint alleges incorrect interpretation of the condition of what makes the classification of an entity as significant 'inappropriate' under Article 70(1) of the SSM Framework Regulation. By its second complaint, the applicant criticises the ECB for having found that its classification as significant entity was appropriate, irrespective of the examination of the specific factual circumstances and without account being taken of the objectives and principles of the Basic Regulation. By its third complaint, the applicant criticises the ECB for having erred in law in its interpretation of the concept of 'particular circumstances' in Article 70(1) of the SSM Framework Regulation.

1. *Relevant provisions of the Basic Regulation and of the SSM Framework Regulation*

20 Article 4 of the Basic Regulation, entitled 'Tasks conferred on the ECB', states in paragraph 1 that, '[w]ithin the framework of Article 6, the ECB shall [...] be exclusively competent to carry out, for prudential supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States', followed by a list of nine tasks.

21 Article 6 of the Basic Regulation, entitled 'Cooperation within the SSM', states in paragraph 1 that '[t]he ECB shall carry out its tasks within a single supervisory mechanism composed of the ECB and national competent authorities' and that '[t]he ECB shall be responsible for the effective and consistent functioning of the SSM'. Within the SSM, the overall scheme of Article 6(4) to (6) of the Basic Regulation establishes a differentiation between prudential supervision of 'significant' entities and that of entities classified as 'less significant' in relation to seven of the nine tasks listed in Article 4(1) of that regulation.

22 It follows therefrom, firstly, that the exclusive competence for the prudential supervision of 'significant' entities falls to the ECB. The same holds true for the prudential supervision of 'less significant' entities in relation to the tasks listed in Article 4(1)(a) and (c) of the Basic Regulation.

23 Secondly, regarding 'less significant' entities and the other tasks listed in Article 4(1) of the Basic Regulation, it is apparent from a combined reading of Article 6(5) and (6) of that regulation that their implementation is conferred under the ECB's control on the national authorities, who thus carry out the direct prudential supervision of those entities. Under Article 6(6) of the Basic Regulation, '[w]ithout prejudice to paragraph 5 of this Article, national competent authorities shall carry out and be responsible for the tasks [...] and adopting all relevant supervisory decisions with regard to the credit institutions referred to in the first subparagraph of paragraph 4 of this Article, within the framework and subject to the procedures referred to in paragraph 7 of this Article'.

24 However, the exercise of that direct prudential supervision is overseen by the ECB, which, under Article 6(5)(a) and (b) of the Basic Regulation, has the competence to communicate to those authorities 'regulations, guidelines or general instructions to national competent

authorities, according to which the tasks defined in Article 4 [of that regulation] [...] are performed' and, moreover, to remove authority from a national authority and to 'decide to exercise directly itself all the relevant powers for one or more credit institutions'.

25 Under Article 6(7) of the Basic Regulation the ECB is empowered to adopt a framework aimed at organising the detailed practical rules for cooperation under the SSM. It was on that basis that the ECB adopted the SSM Framework Regulation.

26 Thirdly, it should be noted that the first subparagraph of Article 6(4) of the Basic Regulation uses as a criterion for distribution of the roles within the SSM the significance of the supervised entity. On that basis, a distinction is drawn between the 'less significant' and 'significant' entities. Three criteria are used: size (Article 6(4), first subparagraph, (i) of the Basic Regulation), importance for the economy of the Union or any participating Member State (Article 6(4), first subparagraph, (ii) of the Basic Regulation) and significance of cross-border activities (Article 6(4), first subparagraph, (iii) of the Basic Regulation).

27 Those criteria are specified in Article 6(4) second subparagraph, of the Basic Regulation, under which 'a credit institution or financial holding company or mixed financial holding company shall not be considered less significant, unless justified by particular circumstances to be specified in the methodology, if any of the following conditions is met'. Under Article 6(4), second subparagraph, (i) of that regulation, those conditions include where the total value of its assets exceeds EUR 30 billion.

28 Lastly and fourthly, Article 6(4), second subparagraph, of the Basic Regulation provides that an institution need not be classified as 'significant' in 'particular circumstances' which the ECB is entrusted with specifying.

29 That specification of 'particular circumstances' allowing for the declassification of a credit institution as 'significant' is given in Articles 70 and 71 of the SSM Framework Regulation, the interpretation of which is at issue in the present plea. Under Article 70(1) of that regulation, they must be 'specific and factual circumstances that make the classification of a supervised entity as significant inappropriate, taking into account the objectives and principles of [the Basic Regulation] and, in particular, the need to ensure the consistent application of high supervisory standards'. Article 70(2) of the same regulation states that the expression 'particular circumstances' is to be interpreted strictly. Lastly, Article 71(1) of the SSM Framework Regulation highlights the need for an examination of those particular circumstances made on a case-by-case basis and specific to each supervised entity.

2. *Content of the contested decision*

30 In the contested decision, the ECB observed that the value of the applicant's assets exceeded EUR 30 billion and refused to uphold the applicant's arguments alleging that there were 'particular circumstances' for it within the meaning of Article 6(4) of the Basic Regulation justifying its continuing to come under direct prudential supervision by the German authorities.

31 In the contested decision, the ECB found that it had not been demonstrated that its direct supervision of the applicant was 'contrary to the objectives of the Basic Regulation' and that, therefore, it was not inappropriate within the meaning of Article 70(1) of the SSM Framework Regulation. In that regard, in the Administrative Board of Review's Opinion, of which the contested decision is an extension, it is stated inter alia that the significance-related criteria set out in Article 6(4) of the Basic Regulation could be disapplied through the use of the 'particular circumstances' option only if that meant that the objectives of the Basic Regulation, including the need to guarantee consistent application of high prudential supervisory standards, were better safeguarded through direct supervision by national authorities, which the applicant had failed to demonstrate.

32 Regarding the applicant's line of argument alleging, in essence, that the prudential supervision conducted by the national authorities given its particularly weak risk profile was sufficient, the ECB, in essence, found it to be entirely irrelevant, since the risk assessment put forward by an institution for the stability of the financial system or its creditors need not be taken into account at the stage of classification of an entity. It also took the view that it was not required to carry out an examination of whether the classification of a significant institution was

proportionate. Under Article 6(4) of the Basic Regulation and Article 70(1) of the SSM Framework Regulation, it considered that it was required only to examine whether direct supervision by the ECB was inappropriate.

33 Lastly, the ECB also stated that, in the event that it found that there were particular circumstances for the supervised entity within the meaning of Article 6(4) of the Basic Regulation, it would still have to determine whether those particular circumstances were such as to justify the classification of a 'significant' credit institution as 'less significant'.

3. *The complaint alleging error of law in the interpretation of the condition relating to the inappropriateness of the classification of a supervised entity as 'significant'.*

34 As stated in paragraph 31 above, a reading of the contested decision, read in the light of the Administrative Board of Review's Opinion, shows that the ECB considered that the application of Article 70(1) of the SSM Framework Regulation could lead to the applicant's not being classified as a significant entity only if direct prudential supervision by the German authorities was better able to safeguard the objectives of the Basic Regulation than supervision by the ECB.

35 The applicant submits, in essence, that such an analysis is vitiated by an error of law. It submits that the reference to the inappropriateness of the classification of a supervised entity as 'significant', laid down in Article 70(1) of the SSM Framework Regulation, is an indeterminate legal concept that must be interpreted in the light of the principle of proportionality enshrined in Article 5(4) TEU, which governs the manner in which the EU institutions are to exercise their competences. It follows that classification of an entity as 'significant' on the basis of the size criterion does not justify direct prudential supervision by the ECB and is, accordingly, 'inappropriate' because it is not necessary, where monitoring by the national competent authority under the macroprudential supervision of the ECB would be sufficient for achieving the objectives of the Basic Regulation. Moreover, the wording of those two provisions does not preclude an examination of the proportionality of the classification of an entity as significant. The same holds true for a systematic and teleological interpretation of those two provisions. The applicant also denies that there has been a transfer of competence in favour of the ECB with regard to all of the tasks listed in Article 4(1) of the Basic Regulation and in respect of all entities. On the contrary, a reading of that provision, combined with Article 6(4) thereof, leads to the conclusion that, in conformity with the principle of subsidiarity, the transfer of competence was made only in respect of significant entities, with the direct prudential supervision of less significant entities remaining within the remit of the national authorities.

36 Thus, it is clear that the applicant proposes an interpretation of Article 70(1) of the SSM Framework Regulation in the light of a requirement that direct prudential supervision by the ECB must be necessary, which is implied by the principle of proportionality — and the principle of subsidiarity — enshrined in Article 5 TEU. It follows that the ECB ought to have ascertained whether prudential supervision by the German authorities afforded achievement of the objectives of the Basic Regulation. Therefore, in so far as the applicant did demonstrate that its profile showed a low degree of risk, the objective of protection of financial stability pursued by the Basic Regulation will be sufficiently achieved by the German authorities' exercising their supervision. In that light, there was justification for reclassifying the applicant as a 'less significant' entity under Article 70(1) of the SSM Framework Regulation.

37 The ECB and the Commission dispute the merits of that interpretation. They submit inter alia, in essence, that the principles of proportionality and subsidiarity have already been taken into account by the legislature when the Basic Regulation was drafted, by allowing for decentralised implementation of certain of the tasks listed in Article 4(1) of the Basic Regulation by the national authorities in respect of those entities classified as 'less significant'.

38 It should be noted at the outset that the applicant's written pleadings do not contain, either explicitly or implicitly, any plea of illegality of Article 70(1) of the SSM Framework Regulation, alleging that it is contrary to the principles of proportionality or subsidiarity or Article 6 of the Basic Regulation. Thus, in its written pleadings, the applicant opted to direct

its line of argument solely at the interpretation of that provision, without questioning its validity.

39 In order to respond to the questions of interpretation thus raised and determine the exact scope of Article 70(1) of the SSM Framework Regulation, account must be taken not only of its wording but also of its context and of the objectives pursued by the set of rules of which it forms a part (see, to that effect, judgment of 7 June 2005, *VEMW and Others*, C-17/03, EU:C:2005:362, paragraph 41 and the case-law cited).

40 Moreover, where the textual and historical interpretations of a regulation, in particular of one of its provisions, do not permit its precise scope to be assessed, the legislation in question must be interpreted by reference to both its purpose and general structure (see, to that effect, judgments of 31 March 1998, *France and Others* v *Commission*, C-68/94 and C-30/95, EU:C:1998:148, paragraph 168, and of 25 March 1999, *Gencor* v *Commission*, T-102/96, EU:T:1999:65, paragraph 148).

41 Moreover, it is equally settled case-law that where it is necessary to interpret a provision of secondary EU law, preference should as far as possible be given to the interpretation which renders the provision consistent with the Treaty and the general principles of EU law (judgments of 4 October 2007, *Schutzverband der Spirituosen-Industrie*, C-457/05, EU:C:2007:576, paragraph 22; of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 174; and of 25 November 2009, *Germany* v *Commission*, T-376/07, EU:T:2009:467, paragraph 22).

(a) *The literal interpretation of Article 70(1) of the SSM Framework Regulation*

42 As regards the literal interpretation of Article 70(1) of the SSM Framework Regulation, it should be remembered that it is worded as follows:

'Particular circumstances, as referred to in the second and fifth subparagraphs of Article 6(4) of [the Basic Regulation] [...] exist where there are specific and factual circumstances that make the classification of a supervised entity as significant inappropriate, taking into account the objectives and principles of [the Basic Regulation] and, in particular, the need to ensure the consistent application of high supervisory standards.'

43 It is clear that the literal interpretation of the provisions of Article 70(1) of the SSM Framework Regulation confirm the position favoured by the ECB in the contested decision.

44 The wording of Article 70(1) of the SSM Framework Regulation focuses solely on the examination of whether or not the classification of an entity as significant is appropriate and, therefore, its supervision by the ECB alone, in relation to the objectives of the Basic Regulation. No reference is made to an examination of the need for direct supervision of a significant entity by the ECB.

45 Whilst generally the examination of whether an EU act is appropriate focuses on whether it is suitable for attaining the legitimate objectives pursued by the legislation at issue, the assessment of whether it is necessary consists in ascertaining whether or not it goes beyond what is necessary in order to achieve those objectives (see, to that effect, judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 67 and the case-law cited).

46 Therefore, Article 70(1) of the SSM Framework Regulation, referring as it does to 'specific and factual circumstances that make the classification of a supervised entity as significant inappropriate, taking into account the objectives and principles of [the Basic Regulation]', must necessarily be understood as suggesting that direct prudential supervision by the ECB, implied by the classification of an entity as 'significant', is less able to ensure achievement of the objectives of the Basic Regulation than direct prudential supervision of that entity by the national authorities. On the other hand, a literal interpretation of Article 70(1) of the SSM Framework Regulation does not suggest reclassification of a 'significant entity' as 'less significant' on the ground that direct supervision by the national authorities under the SSM is just as able to achieve the objectives of the Basic Regulation than supervision by the ECB alone.

(b) *Interpretation of Article 70(1) of the SSM Framework Regulation in conformity with superior norms of law, including the principles of proportionality and subsidiarity*

47 In arguing against that literal interpretation of Article 70(1) of the SSM Framework

Regulation, the applicant submits, in essence, that, on the one hand, as Article 6(4) of the Basic Regulation confers on national authorities the competence to carry out prudential supervision in respect of certain of the tasks listed in Article 4(1) of the Basic Regulation whilst, on the other, Article 70(1) of the SSM Framework Regulation serves to distribute the exercise of competences delegated to the ECB and held by the national authorities, it should be interpreted in conformity with the principles of subsidiarity and proportionality laid down in Article 5(3) and (4) TEU.

48 It follows that the term 'inappropriate' laid down in Article 70(1) of the SSM Framework Regulation should be construed as excluding prudential supervision by the ECB alone when the objectives of the Basic Regulation may be sufficiently achieved through supervision by the national authorities. In other words, the derogation provided for in that provision applies not only when the objectives of the Basic Regulation would be better achieved through direct prudential supervision by the national authorities, but also when such supervision would be sufficient to achieve them.

49 As the applicant's argument is based on the postulate that the national authorities retain their competence under Article 6(4) of the Basic Regulation in respect of the tasks listed in Article 4(1)(b) and (d) to (i) thereof, as regards those entities classified as 'less significant', it is appropriate to consider the scope of the competence transferred to the ECB by the Basic Regulation before examining the possibility of interpreting Article 70(1) of the SSM Framework Regulation, as highlighted by the applicant.

(1) *The scope of the competences transferred to the ECB by the Basic Regulation*

50 The applicant disputes that there has been a transfer of competence to the ECB with respect to all of the tasks referred to in Article 4(1) of the Basic Regulation and in respect of all entities. It is apparent from a reading of that provision, combined with Article 6(4) of that same regulation, that there was a transfer of competence only with respect to 'significant' entities, with the direct prudential supervision of 'less significant' entities remaining within the competence of the national authorities, with the exception of the tasks listed in Article 4(1)(a) and (c) of the Basic Regulation. That distribution of competences complies with the principle of implementation of EU law by the Member States as expressed in Article 291(1) TFEU.

51 The applicant further observes that its analysis of the scope of the competences transferred to the ECB is not only favoured in the doctrine, but is also consistent with the historical background to the adoption of the Basic Regulation. The legislature knowingly dismissed the Commission's initial proposition — which was based on a transfer of competence to the ECB in regards to prudential supervision of all credit institutions — preferring a solution more in conformity with the principles of subsidiarity and proportionality.

52 In essence, the applicant submits that as regards, first of all, the issue of the ECB having powers of indirect prudential supervision over less significant entities, including inter alia the possibility of adopting regulations and general guidelines, followed by direct supervision of those entities in respect of the tasks listed in Article 4(1)(a) and (c) of the Basic Regulation and, lastly, the prerogative to exercise direct supervision over certain less significant entities under Article 6(5)(b) of that regulation does not prevent Article 6(4) and (6) thereof from attributing competence for direct supervision of less significant entities to the national authorities.

53 On the contrary, the ECB, supported by the Commission, takes the view that exclusive competence was transferred to it so that it could carry out all of the prudential tasks referred to in Article 4(1) of the Basic Regulation, with only the implementation of the tasks referred to in Article 4(1)(b) and (d) to (i) of the Basic Regulation in respect of less significant entities being delegated to the national authorities under the supervision of the ECB.

54 The Court notes, firstly, that it is apparent from the examination of the interaction between Article 4(1) and Article 6 of the Basic Regulation, as discussed in paragraphs 20 to 28 above, that the logic of the relationship between them consists in allowing the exclusive competences delegated to the ECB to be implemented within a decentralised framework, rather than having a distribution of competences between the ECB and the national authorities in the performance of the tasks referred to in Article 4(1) of that regulation. Similarly, under Article

6(4), second subparagraph, of that same regulation the ECB has exclusive competence for determining the 'particular circumstances' in which direct supervision of an entity which should fall solely under its supervision might instead be under the supervision of a national authority.

55 That finding is supported by a reading of the recitals in the preamble to the Basic Regulation.

56 Firstly, it is apparent from recitals 15 and 28 of the Basic Regulation that only those tasks explicitly entrusted to the ECB fall outside the competence of the Member States and that prudential supervision of financial institutions on grounds other than those listed in Article 4(1) of that regulation continues to fall within the competence of the Member States. It necessarily follows that it is at the stage of the definition of the tasks entrusted to the ECB by Article 4(1) of the Basic Regulation that the competences between the ECB and the national authorities were distributed.

57 It should further be noted that although recital 28 in the preamble to the Basic Regulation provides a list of the supervisory tasks that are to remain within the remit of the national authorities, it does not include any of the tasks listed in Article 4(1) of the Basic Regulation. Nor does that recital present direct supervision of less significant entities as constituting the exercise of a competence falling within the remit of the national authorities.

58 Secondly, it should be noted that the supervision of institutions classified as 'less significant' is referred to in recitals 38 to 40 in the preamble to the Basic Regulation, more specifically directly after recital 37 therein, which states that 'national competent authorities should be responsible for assisting the ECB in the preparation and implementation of any acts relating to the exercise of the ECB supervisory tasks' and that '[t]his should include, in particular, the ongoing day-to-day assessment of a credit institution's situation and related on-site verifications'. The arrangement of the recitals of the Basic Regulation suggests that direct prudential supervision by the national authorities under the SSM was envisaged by the Council of the European Union as a mechanism of assistance to the ECB rather than the exercise of autonomous competence.

59 Secondly, it should also be noted that the ECB retains important prerogatives even when the national authorities performs the supervisory tasks laid down in Article 4(1)(b) and (d) to (i) of the Basic Regulation, and that the existence of such prerogatives is indicative of the subordinate nature of the intervention by the national authorities in the performance of those tasks.

60 Thus, under Article 6(5)(a) of the Basic Regulation, the ECB is to issue 'regulations, guidelines or general instructions to national competent authorities, according to which the tasks defined in Article 4 excluding points (a) and (c) of paragraph 1 thereof are performed and supervisory decisions are adopted by national competent authorities'.

61 Although it is true that that subordination does not include the possibility for the ECB to issue individual guidelines to a national authority, that is compensated for by the possibility offered by Article 6(5)(b) of the Basic Regulation to remove direct prudential supervision of an entity from the competence of a national authority. It should be noted in that regard that the terms employed in that provision that the exercise of that prerogative calls for broad discretion conferred on the ECB, stating as it does that 'when necessary to ensure consistent application of high supervisory standards, the ECB may at any time, on its own initiative after consulting with national competent authorities or upon request by a national competent authority, decide to exercise directly itself all the relevant powers for one or more credit institutions referred to in paragraph 4 [...]'.

62 Thirdly, the competences conferred on the ECB are also evident from the comparison of the provisions allowing for adjustments to the criterion for distribution of the roles between the ECB and the national authorities relating to the size of the supervised entity. Whereas, for the reasons set out in paragraph 61 above, Article 6(5)(b) of the Basic Regulation provides broadly for the possibility for the ECB to remove competence from a national authority, Article 6(4), second subparagraph, of that same regulation uses, on the contrary, the more restrictive

formulation of 'particular circumstances' for the purposes of envisaging the possibility of direct supervision of an entity which should be classified as 'significant' being entrusted to a national authority and entrusts the ECB with exclusive competence to determine the content.

63 It follows from all the foregoing that the Council has delegated to the ECB exclusive competence in respect of the tasks laid down in Article 4(1) of the Basic Regulation and that the sole purpose of Article 6 of that same regulation is to enable decentralised implementation under the SSM of that competence by the national authorities, under the control of the ECB, in respect of the less significant entities and in respect of the tasks listed in Article 4(1)(b) and (d) to (i) of the Basic Regulation, whilst conferring on the ECB exclusive competence for determining the content of the concept of 'particular circumstances' within the meaning of Article 6(4), second subparagraph, of that same regulation, which was implemented through the adoption of Articles 70 and 71 of the SSM Framework Regulation.

64 That conclusion cannot be invalidated by the arguments put forward by the applicant, inter alia the fact that the insertion of Article 6 into the Basic Regulation was due to an amendment made by the Council to the Commission's initial proposal. Although such an amendment may be indicative of the Council's willingness to associate the national authorities with the implementation of those tasks, it does not allow any conclusions to be drawn as to maintaining prudential supervisory competence for the national authorities with regards to certain of the tasks referred to in Article 4(1) of the Basic Regulation. Moreover, the various statements made by politicians and administrative managers referred to by the applicant merely reflect expressions of personal opinions.

(2) *Interpretation of Article 70(1) of the SSM Framework Regulation in conformity with the principle of subsidiarity*

65 It follows from the examination of the competences transferred to the ECB by the Basic Regulation that, should the applicant's argument be construed as being based on an interpretation of Article 70(1) of the SSM Framework Regulation in conformity with the principle of subsidiarity, it cannot be upheld. Although, when it does apply, the principle of subsidiarity involves inter alia a determination of whether the proposed action can be better achieved by the European Union or whether it can be achieved just as effectively by the Member States, it must be borne in mind that under Article 5(3) TEU it applies only in areas which do not fall within exclusive EU competence (see, to that effect, judgment of 18 June 2015, *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 44 and the case-law cited). Accordingly, it is irrelevant for the interpretation of Article 70(1) of the SSM Framework Regulation or Article 6(4) of the Basic Regulation, which, for the reasons set out in paragraphs 50 to 63 above, concern solely the detailed rules for the decentralised exercise of the ECB's exclusive competence.

(3) *Interpretation of Article 70(1) of the SSM Framework Regulation in conformity with the principle of proportionality*

66 According to Article 5(4) TEU, under the principle of proportionality, the content and form of Union action is not to exceed what is necessary to attain the objectives of the Treaties. The EU institutions are to apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on the Functioning of the European Union.

67 It should also be borne in mind that, according to the settled case-law, in accordance with the principle of proportionality, which is one of the general principles of EU law, the acts adopted by EU institutions must be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not exceed the limits of what is necessary in order to achieve those objectives; where there is a choice between several appropriate measures, recourse must be had to the least onerous; and the disadvantages caused must not be disproportionate to the aims pursued (see judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 165 and the case-law cited).

68 It must also be borne in mind that the assessment of the proportionality of a measure must be reconciled with compliance with the discretion that may have been conferred on the

EU institutions at the time it was adopted (see judgment of 12 December 2006, *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 145 and the case-law cited).

69 The applicant submits, in essence, that the requirement of necessity of the Union action arising from the principle of proportionality entails that the implementation of the Union's exclusive competences be done in a manner that leaves the broadest possible latitude to the exercise of national competences.

70 In support of its argument, it refers to the Opinion of Advocate General Kokott in *Toshiba Corporation and Others* (C-17/10, EU:C:2011:552, paragraph 90), in which the fundamental and constitutional importance of the principle of proportionality in the Treaty system was highlighted in support of the conclusion that the uniform application of EU competition law did not require that the competition authorities of the Member States not be allowed to apply their national 'antitrust' legislation permanently and definitively, as it was sufficient to withdraw that competence from them for the duration of a procedure initiated by the Commission and to require them to comply with the Commission's decision once that procedure had been completed.

71 Suffice it to observe that that analysis was highlighted in a legal context that is not comparable to the one before the Court in the present case.

72 What was at issue in that case was the impact of the Commission's exercise of its competences to implement EU competition law on the national competition authorities' application of their national competition law. Yet in the present case, for the reasons set out in paragraphs 50 to 64 above, under the SSM the national authorities are acting within the scope of decentralised implementation of an exclusive competence of the Union, not the exercise of a national competence.

73 Therefore, the only competence liable to be affected by the exercise of direct prudential supervision by the ECB is the Member States' competence in principle for the implementation of EU law in their legal order, underscored in Article 291(1) TFEU. That provision states that, according to the institutional system of the Union and the rules governing between the Union and the Member States, it is for the latter, in the absence of any contrary provision of EU law, to ensure that EU law is implemented within their territory (see, to that effect and by analogy, judgment of 23 November 1995, *Nutral* v *Commission*, C-476/93 P, EU:C:1995:401, paragraph 14).

74 It is clear, however, that the preservation of that competence cannot involve an interpretation of Article 70(1) of the SSM Framework Regulation as advocated by the applicant, which would require ascertaining on a case-by-case basis in respect of an institution classified as significant under the criteria laid down in Article 6(4) of the Basic Regulation whether its objectives may be just as well attained through direct supervision by the national authorities.

75 That interpretation amounts to calling into question the balance provided for in the Basic Regulation, involving as it does a case-by-case determination of whether, despite the application of the criteria set out in Article 6(4) of the Basic Regulation, a significant institution should come under the direct supervision of the national authorities on the ground that they are better able to attain the objectives of the Basic Regulation.

76 It is clear that such an examination would run directly counter to two factors that play a fundamental role in the logic of Article 6(4) of the Basic Regulation, being, firstly, the principle that significant institutions come under the sole supervision of the ECB and, secondly, the existence of specific alternative criteria affording the classification of a financial institution. Under Article 6(4), second subparagraph, (i), they include the threshold of EUR 30 billion of total value of the assets of the financial institution considered, which criterion is fulfilled by the applicant.

77 In any event, it should be noted that the legislature reconciled the role of the Member States in the implementation of EU law with the fulfilment of the objectives of the Basic Regulation in Article 6 thereof by creating the SSM.

78 Firstly, as is apparent from recitals 13 and 15 of the Basic Regulation, it aims, inter alia,

at protecting the stability of the financial system of the Union through specific tasks concerning policies relating to the supervision of credit institutions, tasks that the ECB is well placed to perform as the euro area's central bank with extensive expertise in macroeconomic and financial stability issues.

79 Secondly, the Basic Regulation, far from excluding the Member States from the exercise of the prudential tasks devolved to the ECB, associates them with it by allowing, under the SSM and through Article 6(4) and (6), that most of the tasks referred to under Article 4(1) may be implemented on a decentralised basis in respect of less significant entities.

80 It follows from all the foregoing that Article 70(1) of the SSM Framework Regulation, in referring to 'specific and factual circumstances that make the classification of a supervised entity as significant inappropriate, taking into account the objectives and principles of [the Basic Regulation] and, in particular, the need to ensure the consistent application of high supervisory standards', must be understood as referring solely to specific factual circumstances entailing that direct prudential supervision by the national authorities is better able to attain the objectives and the principles of the Basic Regulation, in particular the need to guarantee consistent application of high prudential supervisory standards.

81 It follows that the ECB did not commit the error of law alleged in finding, in essence, that the application of Article 70(1) of the SSM Framework Regulation could rule out classification of the applicant as a significant entity only if it was demonstrated that direct prudential supervision by the German authorities would be better able to ensure attainment of the objectives of the Basic Regulation than supervision by the ECB.

82 This conclusion is not invalidated by the applicant's argument alleging that the ECB, in other decisions having led to reclassifications, did not apply the criteria to which it referred in the contested decision.

83 Should such an argument be relied on in order to demonstrate that the ECB was incorrect in refusing to examine whether direct prudential supervision by the national authorities was sufficient for attaining the objectives of the Basic Regulation, it should be rejected at the outset, since it has been found that the ECB did not err in law in its interpretation of Article 70(1) of the SSM Framework Regulation.

84 If the intention is that this argument must be understood as alleging, in essence, infringement of the principle of equal treatment to the applicant's detriment, it cannot be upheld. It is appropriate to recall that the principle of equal treatment must be reconciled with the principle of legality and thus a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (see, to that effect, judgment of 14 April 2011, *Visa Europe and Visa International Service* v *Commission*, T-461/07, EU:T:2011:181, paragraph 219 and the case-law cited). Thus, even if the ECB was incorrect in reclassifying the entities referred to by the applicant, such an error has no bearing on the merits of the contested decision to refuse reclassification of the applicant as a 'less significant' entity.

85 The present complaint must therefore be rejected.

(c) *The complaint alleging failure to examine the specific factual circumstances and the objectives of the Basic Regulation*

86 The applicant in essence criticises the ECB for having found that its classification as a significant entity was appropriate, irrespective of the examination of the specific factual circumstances and without taking account of the objectives and principles of the Basic Regulation.

87 It is sufficient to note in that regard that, for the purpose of requesting review of the decision of 1 September 2014, the applicant based its argument on the alleged adequacy of the exercise of prudential supervision by the German authorities in the light of its allegedly weak risk profile.

88 It is apparent from a reading the applicant's letters of 10 July 2014 and 6 October 2014 that its argument was based solely on the lack of need for prudential supervision by the ECB in order to ensure consistent application of high supervisory standards, without its being argued that national supervision would be better able to attain those objectives.

89 Therefore, having regard to the wording of Article 70(1) of the SSM Framework Regulation, the ECB could legitimately find that such a line of argument was irrelevant, without its being necessary to examine whether the factual circumstances alleged by the applicant were true or ascertaining whether supervision of the applicant by the German authorities was liable to fulfil the objectives of the Basic Regulation.

90 This complaint must therefore be rejected.

(d) *The complaint alleging error of law in the interpretation of the concept of 'particular circumstances'*

91 The applicant also criticises the ECB for having conducted a 'two-tier examination' in finding, first of all, that there were particular circumstances and, secondly, that they make the ECB's prudential supervision inappropriate, contrary to the wording of Article 70(1) of the SSM Framework Regulation.

92 It should be borne in mind that, under Article 70(1) of the SSM Framework Regulation, '[p]articular circumstances, as referred to in the second and fifth subparagraphs of Article 6(4) of [the Basic Regulation] [...] exist where there are specific and factual circumstances that make the classification of a supervised entity as significant inappropriate, taking into account the objectives and principles of the SSM Regulation and, in particular, the need to ensure the consistent application of high supervisory standards'.

93 Article 71(1) of the SSM Framework Regulation states that '[w]hether particular circumstances exist that justify classifying what would otherwise be a significant supervised entity as less significant shall be determined on a case-by-case basis and specifically for the supervised entity or supervised group concerned, but not for categories of supervised entities'.

94 The necessary reading from those two provisions is that the determination of whether there are particular circumstances must be made in the light of the factual circumstances specific to the supervised entity.

95 In the contested decision, the ECB found, 'even if the ECB should find that particular circumstances as referred to in Article 6(4) of the Basic Regulation were liable to be applied to the supervised entity, the ECB would still have to ascertain whether such particular circumstances are such as to justify its classification as a less significant entity'.

96 It is clear that should the passage of the contested decision referred to in paragraph 95 above have to be understood as confusing the concept of 'specific factual circumstances' found in Article 70(1) of the SSM Framework Regulation and applicable in order to consider whether or not the classification of an entity as significant is inappropriate, with that of 'particular circumstances', used in Article 6(4) of the Basic Regulation and which the purpose of Article 70(1) of the SSM Framework Regulation is to specify, then it is legally incorrect.

97 In so reasoning, the ECB establishes as separate conditions the demonstration of whether there are 'particular circumstances' and the application of Article 70(1) of the SSM Framework Regulation. It follows that particular circumstances within the meaning of Article 6(4) of the Basic Regulation do not in themselves afford justification of the reclassification of a 'significant' entity as 'less significant'. It is also necessary that the criteria of Article 70(1) of the SSM Framework Regulation be fulfilled.

98 That is not the logic inherent in the articulation of those two provisions. The presence of particular circumstances suffices to justify the reclassification of an entity. However, in order to verify their existence, Article 70(1) of the SSM Framework Regulation must be applied.

99 That passage of the contested decision is, therefore, vitiated by an error of law, which however has no bearing on its legality, as that passage must be viewed as having been put forward for the sake of completeness, as shown by the use of the conditional tense. The ECB does not acknowledge that there are 'particular circumstances', but merely gives its opinion on the potential impact of there being such circumstances, supposing they are present. This complaint must therefore be rejected in any event.

100 In the light of the foregoing, the first plea in law must be rejected.

B. Second plea: manifest errors of assessment

101 The applicant submits that the contested decision is vitiated by manifest errors of assessment.

102 Firstly, direct prudential supervision by the ECB is not necessary in order to attain the objectives of the Basic Regulation, consisting in ensuring the stability of financial markets, the safety and solidity of credit institutions and the protection of depositors. Secondly, direct prudential supervision by the ECB is not necessary in order to safeguard the objective of consistent application of high prudential supervisory standards. Thirdly, nor is direct prudential supervision by the ECB necessary in the light of other objectives of the Basic Regulation. Fourthly, direct prudential supervision of the applicant by the national authority complies with the principles of the Basic Regulation. Fifthly, even from the perspective of the incorrect assessment criterion employed by the ECB, the contested decision is vitiated by manifest errors of assessment.

103 The ECB, supported by the Commission, contends that the present plea should be rejected.

104 It should be noted at the outset that the essence of the line of argument put forward by the applicant under the present plea is based on the postulate that the objectives of the Basic Regulation and the consistent application of high prudential supervisory standards can be attained through direct supervision by the German authorities. The applicant insists in its written pleadings that it was manifestly incorrect to maintain the classification as a significant entity, given the lack of need for prudential supervision by the ECB.

105 It is clear that such a line of argument is completely irrelevant, given that, for the reasons set out in the examination of the first plea, Article 70(1) of the SSM Framework Regulation cannot be interpreted as including a condition of assessment of the need for direct prudential supervision of an entity to be classified as 'significant' under Article 6(4) of the Basic Regulation.

106 It is only in the alternative that the applicant submits that, 'even using the ECB's incorrect assessment criterion, the contested decision is vitiated by manifest errors of assessment'.

107 In support of that statement, the applicant refers, firstly, to the content of its letters of 10 July 2014 and 6 October 2014.

108 However, for the reasons set out in paragraphs 87 to 89 above, it is noteworthy that the applicant did not argue therein that national supervision would be better able to attain the objectives of the Basic Regulation than direct supervision by the ECB.

109 Secondly, in the reply the applicant submits, in essence, that prudential supervision by the German authorities would be better able to attain the objective of consistent application of high prudential supervisory standards referred to in Article 70(1) of the SSM Framework Regulation. It points out in that connection that it is subject to various regulatory instruments, being not only Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1), as rectified (OJ 2013 L 208, p. 68, and OJ 2013 L 321, p. 6), and the German law on the organisation of the banking sector, but also the Law on the regional credit bank of Baden-Württemberg, as well as multiple supervisory authorities, being not only the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) (Federal Financial Supervisory Authority, Germany), the Bundesbank (German Federal Bank) and the ECB, but also the Ministry of Finance, Baden-Württemberg.

110 Thus the applicant submits, in essence, that the diversity of legal frameworks and supervisory authorities forming the parameters of its activity means that the national authorities are better able to cooperate amongst themselves in order to ensure consistent application of prudential supervisory standards than with the ECB.

111 Suffice it to note in that regard that the applicant does not highlight any arrangement or collaboration between the authorities of Baden-Württemberg and the German authorities that might make cooperation easier with them than with the ECB.

112 The present appeal must therefore be rejected.

C. The third plea: infringement of the obligation to state reasons

113 The applicant submits that the ECB failed to fulfil its obligation to state reasons at the time of adoption of the contested decision. It observes that the obligation to state reasons for the contested decision is clearly stated in Article 33(2), Article 39(1) and Article 44(1) of the SSM Framework Regulation and in Article 22(2), second subparagraph, of the Basic Regulation and the second paragraph of Article 296 TFEU.

114 Firstly, the statement of reasons in the contested decision lacks consistency and is self-contradictory, which makes it impossible to infer which criterion was applied by the ECB. The interpretation of the concept of 'inappropriateness' favoured by the ECB in its written pleadings is not found in the contested decision and in any event is self-contradictory.

115 Secondly, the applicant submits that the statement of reasons in the contested decision merely sets out simple, unsubstantiated statements and negations. It criticises, inter alia, the ECB for having failed to provide reasons for its assertion that the absence of risk for the stability of the markets or creditors is not a particular circumstance. Similarly, the contested decision does not explain why supervision by the German authorities would not be better able to attain the objectives of the Basic Regulation.

116 Thirdly, the applicant criticises the ECB for having failed to examine the arguments put forward by it during the administrative procedure, alleging specific factual circumstances making its classification as a significant entity inappropriate. It submits that a detailed explanation of the reasons why the ECB did not find those arguments relevant was called for, especially since it has discretion in the application of Article 70(1) of the SSM Framework Regulation. No such explanation is apparent from either the contested decision or its surrounding context.

117 The ECB, supported by the Commission, contends that the present plea should be rejected.

118 Under Article 22(2), second subparagraph, of the Basic Regulation, decisions of the ECB are to state the reasons on which they are based.

119 Under Article 33(1) and (2) of the SSM Framework Regulation, an ECB supervisory decision is to be accompanied by a statement of the reasons for that decision. The statement of reasons is to contain the material facts and legal reasons on which the ECB prudential supervisory decision is based.

120 Article 39(1) of the same SSM Framework Regulation provides that '[a] supervised entity shall be considered a significant supervised entity if the ECB so determines in an ECB decision addressed to the relevant supervised entity [...], explaining the underlying reasons for such decision'.

121 Provisions such as this merely reiterate, in the body of the Basic Regulation and of the SSM Framework Regulation, the obligation to state reasons by which EU institutions and bodies are bound under the second paragraph of Article 296 TFEU.

122 The obligation to state reasons laid down in Article 296 TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (see judgment of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 113 and the case-law cited).

123 In that vein, first of all, the statement of reasons required under Article 296 TFEU must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which an individual decision is based is, therefore, in addition to permitting review by the Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged (see judgment of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 115 and the case-law cited).

124 Furthermore, the requirements to be satisfied by the statement of reasons depend on

the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 116 and the case-law cited).

125 In the present case, the Administrative Board of Review's Opinion is part of the context of which the contested decision forms a part and may, therefore, be taken into account for the purpose of determining whether that decision contained a sufficient statement of reasons as referred to in the case-law cited in paragraph 124 above.

126 Article 24 of the Basic Regulation, entitled 'Administrative Board of Review', states in paragraph 1 that '[t]he 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 [is made]' and that '[t]he scope of the internal administrative review shall pertain to the procedural and substantive conformity with this Regulation'. Paragraph 7 of that article provides:

'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.'

127 It necessarily follows that, in so far as the contested decision ruled in conformity with the proposal set out in the Administrative Board of Review's Opinion, it is an extension of that opinion and the explanations contained therein may be taken into account for the purpose of determining whether the contested decision contains a sufficient statement of reasons.

128 Firstly, for the reasons set out in paragraphs 31 to 32 above and contrary to the applicant's assertions, it is apparent from a combined reading of the contested decision and the Administrative Board of Review's Opinion that not only did the ECB consider that there could be 'particular circumstances' only if attainment of the objectives of the Basic Regulation could be better safeguarded through direct prudential supervision by the national authorities, it also found that the applicant had not demonstrated that that condition was fulfilled in respect of it. It should also be noted that both the Administrative Board of Review's Opinion and the contested decision contain a summary of the applicant's arguments.

129 It is also clear that the analysis of the first plea shows that the applicant was able to understand the ECB's reasoning, since it challenged it through that plea, and that the Court has been able to conduct judicial review of the merits of the reasons in the contested decision.

130 Secondly, regarding the applicant's assertion alleging insufficiency of the response to its argument put forward during the administrative procedure, it is apparent from paragraphs 87 to 89 and 107 to 108 above that during that procedure the applicant merely attempted to establish that direct prudential supervision by the ECB was not necessary on the ground that supervision by the German authorities would be sufficient in order to attain the objectives of the Basic Regulation, without attempting to show that it would be better able to attain those objectives. Therefore, since that argument is clearly irrelevant in the light of the interpretation favoured by the ECB, it cannot be held that the ECB was bound to provide a detailed statement of reasons for its refutation, as the applicant could easily infer them from the contested decision and the Administrative Board of Review's Opinion.

131 Thirdly, regarding the applicant's complaint alleging that the reasons in the contested decision were self-contradictory, it is true that the statement of the reasons for a measure must be logical and contain no internal inconsistency that would prevent a proper understanding of the reasons underlying the measure (judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 151).

132 However, it is clear that the statement of reasons in the contested decision is not self-contradictory as alleged.

133 For the reasons set out in paragraphs 31 to 34 above, and contrary to what the applicant appears to argue, there is no contradiction between, on the one hand, the reference in the Administrative Board of Review's Opinion to the fact that the presence of 'particular circumstances' means that the attainment of the objectives of the Basic Regulation, including the need to ensure the consistent application of high prudential supervisory standards, must be better ensured through direct supervision by the national authorities and, on the other, the reference in the contested decision to the fact that direct supervision of the applicant by the ECB must be contrary to the objectives of the Basic Regulation in order for Article 70(1) of the SSM Framework Regulation to apply.

134 Nor is the assertion that the reasons set out in the contested decision were self-contradictory in suggesting that the presence of particular circumstances was sufficient to justify application of Article 70(1) of the SSM Framework Regulation. It was noted in paragraph 99 above that that reason in the contested decision was included merely for the sake of completeness. That passage was therefore not liable to prevent a proper understanding of the criterion applied by the ECB in the contested decision.

135 It follows from the above that the contested decision contains a sufficient statement of reasons.

136 The third plea in law must therefore be rejected.

D. The fourth plea: misuse of powers by the ECB in unlawfully failing to exercise its discretion

137 The applicant criticises the ECB for having failed to exercise its discretion in the application of Article 70(1) of the SSM Framework Regulation in respect of it, which amounts to a misuse of powers. It observes that that provision does not contain an exhaustive list of the reasons which the ECB may take into consideration. It was therefore incorrect in finding in the contested decision that the arguments put forward by the applicant led to reasons not provided for in that regulation being taken into account.

138 The ECB, supported by the Commission, contends that this plea should be rejected.

139 Although it is settled case-law that when discretion is conferred on an institution, it must exercise that power fully (see, to that effect, judgments of 14 July 2011, *Freistaat Sachsen* v *Commission*, T-357/02 RENV, EU:T:2011:376, paragraph 45, and of 10 July 2012, *Smurfit Kappa Group* v *Commission*, T-304/08, EU:T:2012:351, paragraph 90). Thus, the Community institutions which have adopted the act in question must be able to show before the Court that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate (judgment of 7 September 2006, *Spain* v *Council*, C-310/04, EU:C:2006:521, paragraph 122).

140 However, it should be remembered here that, as pointed out in paragraphs 87 to 89 above, the argument put forward by the applicant during the administrative procedure was intended solely to establish that the objectives of the Basic Regulation could be attained through direct supervision of the applicant by the national authorities and that, for the reasons set out in connection with the analysis of the first plea, such an argument is irrelevant for the application of Article 70(1) of the SSM Framework Regulation.

141 The ECB cannot, therefore, be criticised for having failed to exercise its discretion by rejecting at the outset an argument that is completely irrelevant.

142 The fourth plea must therefore be rejected.

E. The fifth plea: infringement of the ECB's obligation to examine and take into consideration all relevant circumstances of the case

143 The applicant observes that, under Article 28(2) of the SSM Framework Regulation, the ECB must take account of all relevant circumstances. It also refers to the ECB's obligation to examine and take into consideration, carefully and impartially, all elements of fact and of law that are relevant to the case, which arises from the right to good administration enshrined in Article 41(1) of the Charter of Fundamental Rights of the European Union.

144 It criticises the ECB for having failed to take into account the circumstances alleging: (i) the practical impossibility in which it found itself in dealing with a situation of insolvency; (ii) that it did not meet any of the criteria of Article 6(4) of the Basic Regulation, apart from size; and (iii) that the prudential supervision by the German authorities had not been shown to have any shortcomings in the past.

145 The ECB, supported by the Commission, contends that this plea should be rejected.

146 It is clear from settled case-law that, where the institutions of the European Union have a power of appraisal, respect for the rights guaranteed by the legal order of the European Union in administrative procedures is of even more fundamental importance.

147 The guarantees afforded by EU law in administrative proceedings include, in particular, the principle of sound administration, which is enshrined in Article 41 of the Charter of Fundamental Rights, which entails the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 404).

148 That obligation is reiterated in Article 28(2) of the SSM Framework Regulation, which states that, '[i]n its assessment, the ECB shall take account of all relevant circumstances'.

149 However, for reasons similar to those set out in paragraph 140 above, it is sufficient to state that the circumstances which the ECB is criticised for having failed to take into account were irrelevant in the light of the wording of Article 70(1) of the SSM Framework Regulation and that, consequently, the ECB cannot be successfully criticised for having failed to take such circumstances into account in the application of that provision.

150 The fifth plea must therefore be rejected as unfounded and, accordingly, the action in its entirety must be dismissed.

IV. Costs

151 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those of the ECB in accordance with the latter's pleadings.

152 In accordance with Article 138(1) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs. The Commission must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber, Extended Composition)

hereby:

1. Dismisses the action.

2. Orders the Landeskreditbank Baden-Württemberg — Förderbank to bear its own costs and to pay those incurred by the European Central Bank.

3. Orders the European Commission to bear its own costs.

(1-3) **La «prima volta» del Tribunale dell'Unione europea in materia di Meccanismo di Vigilanza Unico.**

SOMMARIO: 1. Il *thema decidendum*. — 2. L'art. 70 del regolamento quadro. — 3. La decisione del Tribunale. — 4. La *vexata quaestio* della ripartizione di competenze tra BCE e autorità nazionali ai sensi degli articoli 4 e 6 regolamento MVU. — 5. Si affacciano all'orizzonte i contro limiti costituzionali? — 6. L'obbligo di motivazione della decisione e motivazione *per relationem*?

1. *Il thema decidendum.* — Con la sentenza in epigrafe, del 16 maggio 2017 (caso T-122/15) (1) il Tribunale dell'Unione europea ha rigettato il ricorso della *Landeskreditbank Baden-Württemberg - Förderbank* avverso la decisione della BCE che aveva qualificato la banca come significativa ai sensi dell'art. 6 del regolamento UE 1024/2013 sul Meccanismo di Vigilanza Unico (regolamento MVU) e perciò assoggettata alla vigilanza esclusiva della BCE. La banca in oggetto aveva proposto ricorso alla Commissione amministrativa per il riesame di cui all'art. 24 reg. MVU avverso una prima decisione della BCE che l'aveva qualificata come significativa, in quanto il valore totale delle sue attività superava i 30 miliardi di euro. La Commissione di riesame si era espressa per la legittimità della decisione della BCE, suggerendo tuttavia un'integrazione della motivazione per meglio dar conto delle ragioni che portavano a respingere le argomentazioni della banca. La BCE confermava quindi la decisione in precedenza adottata, integrandone la motivazione conformemente al parere della predetta Commissione.

La banca impugnava però la nuova decisione dinanzi al Tribunale, invocando, tra l'altro, la violazione dell'art. 6, paragrafo 4, regolamento MVU e dell'art. 70 del regolamento quadro (reg. BCE 468/2014). In sostanza, per la banca ricorrente, la vigilanza su di essa sarebbe dovuta spettare alla BaFin, invece che alla BCE, ricorrendo a suo avviso — per le ragioni che si vedranno brevemente nel seguito — le «particolari circostanze» di cui alle citate disposizioni, che avrebbero legittimato la sua qualificazione come banca meno significativa, nonostante il superamento della predetta soglia.

2. *L'art. 70 del regolamento quadro.* — Merita preliminarmente ricordare che ai sensi dell'art. 70 del regolamento quadro «ricorrono circostanze particolari, ai sensi dell'articolo 6, paragrafo 4[...], quando sussistono circostanze specifiche e fattuali che rendono inappropriata la classificazione di un soggetto come significativo, tenuto conto degli obiettivi e dei principi del regolamento sull'MVU e, in particolare, della necessità di garantire l'applicazione coerente di standard di vigilanza elevati». La banca invocava dinanzi al Tribunale una lettura dell'art. 70 ispirata al principio di sussidiarietà di cui all'art. 5 del Trattato sull'Unione Europea, in base al quale «nei settori che non sono di sua competenza esclusiva l'Unione interviene soltanto se e in quanto gli obiettivi dell'azione prevista non possono essere conseguiti in misura sufficiente dagli Stati membri, né a livello centrale né a livello regionale e locale, ma possono, a motivo della portata o degli effetti dell'azione in questione, essere conseguiti meglio a livello di Unione». In sostanza, essa sosteneva che, prima di assumere i compiti di vigilanza conferitile dal regolamento MVU, la BCE avrebbe dovuto verificare se — tenuto conto del basso profilo di rischio e della scarsa probabilità di fallimento dell'intermediario (2), ritenute circostanze sufficienti a giustificare una deroga ai criteri quantitativi indicati nel regolamento MVU — la

(1) Non essendo disponibile al momento una versione italiana della sentenza, se ne pubblica qui il testo inglese.

(2) La banca è stata costituita per legge, è interamente posseduta da un'autorità pubblica regionale — il Land del Baden-Württemberg — ed è qualificata come banca di sviluppo con garanzia pubblica.

vigilanza prudenziale da parte dell'autorità tedesca non fosse già di per sé sufficiente a perseguire l'obiettivo di stabilità finanziaria alla base del regolamento MVU.

3. *La decisione del Tribunale.* — Il Tribunale, con un'articolata decisione che offre spunti su di una molteplicità di questioni che attengono al sindacato della discrezionalità della BCE nell'esercizio delle sue funzioni prudenziali, ha rigettato tale ricostruzione, accogliendo, invece, le argomentazioni della BCE e della Commissione (intervenuta *ad adiuvandum*).

Secondo il Tribunale — il quale tuttavia opportunamente precisa, al punto 38 della sentenza, che nel caso in esame il ricorrente non aveva sollevato alcuna censura di illegittimità dell'art. 70 del regolamento quadro o dell'art. 6 del regolamento MVU, sicché le conclusioni cui il Tribunale perviene non affrontano la questione se l'assetto istituzionale voluto dal regolamento MVU nell'attuazione dei compiti di vigilanza (micro) prudenziale di cui agli articoli 4 e 6 del regolamento siano o meno conformi al Trattato — il riparto di competenze tra autorità unionali (BCE) e nazionali (autorità nazionali competenti) è stato effettuato, a monte, dall'art. 4 regolamento MVU, che ha attribuito alla competenza esclusiva della BCE alcuni compiti di vigilanza prudenziale su tutte le banche dell'euro area. Cosicché è in quell'occasione che il legislatore dell'Unione si è posto il problema del rispetto del principio di sussidiarietà. Di conseguenza, secondo il Tribunale non può porsi, a valle (vale a dire, successivamente alla definizione di questo riparto di competenze), men che meno ove non venga posta alcuna questione di illegittimità del regolamento MVU e del regolamento quadro, alcun problema di rispetto del principio di sussidiarietà, in quanto i predetti compiti sarebbero stati attribuiti alla BCE in via esclusiva, e dunque in un ambito (quello delle competenze esclusive unionali) in cui il predetto principio non opera (più) (cfr. punto 65 della sentenza).

Onde, in definitiva, il rigetto dell'interpretazione (correttiva) dell'art. 70 del regolamento quadro prospettato dalla banca e l'accoglimento dell'interpretazione letterale sostenuta dalla BCE. Secondo il Tribunale, infatti, le «circostanze specifiche e fattuali che rendono inappropriata la classificazione di un soggetto come significativo» sono soltanto quelle dalle quali risulti, secondo una valutazione caso per caso, che la vigilanza accentrata a livello europeo sarebbe meno efficace di quella decentrata a livello nazionale.

Nel caso di specie, il Tribunale conclude pertanto, a nostro giudizio condivisibilmente, che non era la BCE a dover «giustificare» la conformità della propria vigilanza sulla banca al rispetto del principio di sussidiarietà, bensì la banca a dover provare che la vigilanza dell'autorità tedesca avrebbe, nelle circostanze particolari del caso, condotto a un miglior perseguimento degli obiettivi del regolamento MVU.

4. *La* vexata quaestio *della ripartizione di competenze tra BCE e autorità nazionali ai sensi degli articoli 4 e 6 regolamento MVU.* — La sentenza del Tribunale affronta, pur nella apparente particolarità del caso, una questione generale di notevole rilevanza sistematica e offre una risposta piuttosto netta su di una questione che costituisce non solo l'architrave concettuale dal quale il Tribunale muove il proprio ragionamento ma anche uno degli assi portanti del Meccanismo di Vigilanza Unico: quello cioè della esatta natura del riparto di competenze tra BCE e autorità nazionali in relazione alle banche meno significative. Il tema è particolarmente insidioso e persino i due autori di questa nota — che pur convergono in molti esiti interpretativi relativi a così complessi aspetti del diritto bancario dell'Unione e che ritengono entrambi corrette le conclusioni raggiunte dal Tribunale nel caso — hanno, da tempo, su di esso preferenze interpretative non del tutto coincidenti. Proprio questo li induce a pensare che possa essere gradita al lettore una breve nota redatta insieme, con metodo dialogico. Ritengono del resto che la questione sia a tal punto di difficile soluzione e al tempo stesso «di vertice» che difficilmente la sentenza del Tribunale costituirà l'ultimo atto in materia, dovendosi viceversa attendere che sarà la Corte di Giustizia, probabilmente nella sua più allargata composizione, a dover dire l'ultima parola in materia. La sentenza del Tribunale non costituisce dunque occasione per l'uno o per l'altro dei due autori per rivendicare la fondatezza della propria

preferenza interpretativa, ma solo l'occasione per evidenziare la centralità istituzionale del tema e per rilevare come, opportunamente, sia stato tempestivamente richiesto l'intervento di chiarificazione del giudice europeo: ciò che conferma un principio in cui entrambi gli autori credono fermamente, e cioè la centralità dell'assetto giustiziale per un ordinato svolgimento del diritto bancario dell'unione.

a) Uno degli autori legge da tempo (3) il *proprium* del sistema di co-amministrazione posto alla base dell'Unione bancaria nell'euro area come connotato, nella sua specialità istituzionale (in relazione anche ai più consolidati modelli di agenzia di diritto europeo), prima di tutto dalla peculiare ripartizione di funzioni tra dimensione unionale e dimensione nazionale (seppur integrata in quella europea) e in questa prospettiva pone soprattutto in rilievo come la BCE sia destinataria di competenze «originarie» esclusive ai sensi dell'art. 4 del regolamento MVU, sia pure nei limiti degli «specifici compiti» di natura micro e macroprudenziale che l'art. 127(6) TFEU consentiva di attribuirle (peraltro ora intesi in senso estensivo, *ratione materiae*, dalla

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(3) Lamandini, *Il diritto bancario dell'Unione*, in *Banca, borsa e tit. cred.*, 2016, I, p. 423 e ora in Aa.Vv., *Scritti sull'Unione bancaria*, Quaderni di Ricerca Giuridica della Consulenza Legale, Banca d'Italia, Roma, n. 81, 2016, p. 22 ss.; Lamandini-Ramos Muñoz, *EU Financial Law. An Introduction*, Milano, Wolters Kluwer, 2016, p. 202; già prima Lamandini-Ramos Muñoz-Solana, *Depicting the Limits to the SSM's Supervisory Powers: the Role of Constitutional Mandates and of Fundametal Rights Protection*, in *Quaderni di Ricerca giuridica della Consulenza Legale*, Banca d'Italia, Roma, 2015, n. 79, in specie 34 s. e 21, nota 89 (e in particolare a 34 si legge quanto segue: «We note, however, that Article 4(1) stipulates that «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». This suggests that the attribution of competence to the ECB, whilst limited to the special tasks granted for prudential supervisory purposes, is *exclusive* and extends to *all* banks. The ECB could thus qualify as «competent authority» for the purposes of the exercise of competent authority options and discretions also for less significant banks. The basic principle of ECB exclusive responsibility for the tasks conferred on it was a cornerstone of the Commission proposal and was considered as such throughout the legislative process, although, as a compromise solution in the distribution of tasks within the SSM, the Regulation provides under Article 6(4) that responsibility for the direct exercise of some of the tasks conferred on the ECB are attributed to NCAs in the spirit of the subsidiarity principle. But also within this peculiar legislative allocation of (certain) responsibilities the ECB retains, in substance, a right of final say over the prudential tasks conferred on it by SSM Regulation also for less significant banks, as shown by the possibility granted to it to «issue regulations, guidelines or general instructions to NCAs» (Article 6(5)(a) of the SSM Regulation) and to «exercise directly itself all the relevant powers» for one or more less significant credit institutions «when necessary to ensure consistent application of high supervisory standards» (Article 6(5)(b) of the SSM Regulation). In other terms, it is certainly true that the attribution of exclusive competence set out in Article 4(1) must be read in conjunction with the provisions of Article 6, that stipulates that both NCAs and the ECB exercise competences with regard to less significant institutions. We note, nonetheless, that the cooperation framework set out by Article 6 was basically tailored as a *legislative* attribution to the NCAs of the direct exercise of (most *but not all*) prudential supervisory responsibilities of the ECB with regard to less significant banks. In this way, national supervisors are *also* made competent authorities to some effects, without depriving however the ECB of the role of *primary* competent authority also for less significant banks (as witnessed by Article 6(5) of the SSM Regulation). In conclusion, if one accepts that the exercise of competent authority options and discretions granted by the CRDIV/CRR compact (a) is essential for the performance of the prudential tasks conferred upon the ECB by Article 4(1) and strictly related thereto, (b) is expression of *regulatory* supervision consistent with the ECB rule making empowerment set out in Article 132 TFEU and (c) falls therefore within the ECB remit as competent authority for directly supervised significant bank in compliance with Article 9, expressly extending to the ECB «all the powers ([…]) which the competent authorities shall have under the relevant Union law, unless otherwise provided for by this Regulation», this could also support the conclusion that the same holds true also for less significant banks, because the ECB is also their *primary* competent authority. In this way the functional argument militating against the balkanization of the exercise of competent authority options and discretions for significant and less significant banks would fade away. In turn, this would make the best of the wording of recital (34) of the Regulation, because it would confirm that within the SSM competent authority options and discretion are no longer the remit of national supervisors»).

stessa BCE, allorché essa, facendo riferimento nella sostanza a competenze implicite ad essa derivanti dall'assimilazione funzionale all'autorità nazionale competente prevista dall'art. 9 del regolamento MVU, ha avocato a sé anche le ulteriori funzioni di vigilanza microprudenziale che, pur non previste dalla disciplina europea, sono previste dalla disciplina nazionale: tema questo che esula da quanto rileva ai fini del commento della sentenza in epigrafe ma che presenta più di un insidioso dilemma interpretativo, anche di complessiva conformità al Trattato). Sottolinea inoltre come, nel sistema del MVU, l'autorità nazionale è destinataria, rispetto ai compiti attribuiti in via esclusiva alla BCE, di una delega, che appare una vera e propria *delega legislativa di responsabilità* (e non già una semplice *delega amministrativa di funzioni*) ai sensi dell'art. 6 del regolamento MVU, con l'eccezione dei poteri decisori sull'accesso al mercato e la contendibilità del controllo di cui all'art. 4(1)(a) e (c) in relazione all'espletamento delle funzioni di vigilanza microprudenziale indicate nell'art. 4 rispetto alle banche non significative (a differenza di quanto avviene nel sistema del meccanismo unico di risoluzione, dove le competenze «originarie» in materia restano in capo alle autorità nazionali, salvo il potere di avocazione di competenza da parte del *Single Resolution Board).* Non si manca di osservare, naturalmente, che quale che sia l'allocazione del potere originario, l'articolazione organizzativa delle funzioni di vigilanza tra centro e periferia appare necessaria sia in ragione del principio generale di sussidiarità sia, con riguardo più specifico alle esigenze settoriali, per assicurare effettivo rispetto della diversità dell'industria bancaria (non a caso evocata dal considerando 17 del regolamento MVU). *A dimensioni diverse dell'intermediario corrispondono esigenze di vigilanza e gestione della crisi altamente differenziate.* L'applicazione di una «*one size fits all rule*» genererebbe infatti una molteplicità di falsi positivi e falsi negativi nella vigilanza e nella gestione della crisi. Ne deriva così, solo a fare un esempio sul piano della vigilanza prudenziale, che, fermo per tutti il principio di sana e prudente gestione, metodi e approcci valutativi della vigilanza diretta sviluppati dalla BCE, quando applicati in sede di vigilanza indiretta dall'autorità nazionale competente, devono tener conto della diversità dell'intermediario per dimensione, portata geografica, modello di *business* e rischiosità. Né ovviamente sfugge che, sempre in punto di vigilanza prudenziale, l'articolazione organizzativa e funzionale del sistema unico di vigilanza si esprime, a sua volta, in processi amministrativi differenziati, che in tutti i casi vedono la compartecipazione sia della BCE sia dell'autorità competente nazionale. Ove opera la vigilanza diretta, la compartecipazione dell'autorità nazionale si realizza a livello di struttura dei gruppi congiunti di vigilanza istituiti in seno alla BCE (art. 3 del regolamento quadro). Ove opera la vigilanza indiretta mediante ripartizione di competenza per soggetti, prevista dall'art. 6 al fine di realizzare un modello di vigilanza del tipo «*hub and spoke*», invece, la BCE finisce con il demandare alle autorità nazionali componenti del meccanismo di vigilanza, tramite delega di responsabilità, vere e proprie funzioni decisorie, salvo conservare tuttavia il potere di dettare linee guida e quello di avocare a sé la funzione ove necessario. Nei casi di competenza esclusiva per materia demandata dall'art. 4 (a) e (c) alla BCE, l'autorità nazionale è viceversa investita di funzioni che, nel caso del rilascio dell'autorizzazione all'esercizio dell'attività, danno luogo ad un sub-procedimento che configura talora (più raramente) un procedimento speciale, allorché si sostanzi nell'esercizio decentrato di funzioni decisorie, come accade ove si renda necessario verificare che siano rispettate le condizioni previste dalla disciplina nazionale e il provvedimento adottato dall'autorità nazionale sia finale o comunque vincolante e negli altri casi (più frequentemente) nel mero esercizio endo-procedimentale di funzioni istruttorie e preparatorie non vincolanti rispetto alla decisione finale della BCE (valutabili dunque solo con il sindacato di tale decisione e nella misura in cui abbiano concretamente inciso sulla legittimità di tale ultima decisione).

b) L'altro autore ritiene che la sentenza in commento, laddove fa riferimento ad un decentramento di funzioni di vigilanza attribuite dal regolamento MVU alla BCE, rispecchi semplicemente l'intenzione del legislatore storico, che nel corso del negoziato ha cercato una soluzione di compromesso tra la proposta originaria della Commissione (sostenuta anche dalla delegazione francese), secondo cui si sarebbe dovuto attribuire alla BCE una competenza in via esclusiva e diretta su tutte le banche dell'euro area, e la posizione sostenuta da altre delegazioni

nazionali (ad esempio quella tedesca), secondo cui il rispetto del principio di sussidiarietà avrebbe imposto di riservare invece alla competenza esclusiva della BCE la sola vigilanza sulle banche di maggiori dimensioni, rimanendo attribuita alla competenza nazionale la vigilanza sulle banche minori).

Tuttavia, detto medesimo autore solleva dei dubbi circa la rispondenza della *ratio legis* quale oggettivizzata nel regolamento MVU con la suddetta *ratio legislatoris*. Infatti, taluni considerando e disposizioni del regolamento MVU configurano taluni compiti di vigilanza anche prudenziale sulle banche come riservati alle autorità di vigilanza nazionali (4) e soprattutto subordinano il riparto finale delle competenze tra la BCE e tali autorità alla definizione di un *quadro* adottato con il coinvolgimento delle stesse (si vedano a tal riguardo l'art. 6(7) regolamento MVU). Circostanze entrambe che stridono con le affermazioni del Tribunale sulla competenza esclusiva BCE e il decentramento alle autorità nazionali. Sottolinea, ad ogni buon conto, che, poiché l'attribuzione alla BCE della vigilanza prudenziale sugli intermediari creditizi non è direttamente riconducibile a una norma del Trattato (né potrebbe esserlo, in quanto le competenze esclusive dell'Unione sono un *numerus clausus* in cui non rientra la vigilanza sulle banche), ma ad una fonte a esso subordinata (il regolamento MVU), la conformità di tale attribuzione di compiti al principio di sussidiarietà è tutta da dimostrare.

Questa premessa porta il medesimo autore a ritenere non condivisibile il ragionamento seguito nella motivazione della sentenza — che pare peraltro esorbitante rispetto a quanto necessario per la soluzione del caso — secondo cui il principio di sussidiarietà non sarebbe applicabile al regolamento MVU, che peraltro a esso fa espressamente rinvio (cfr. il considerando 87). In realtà, il problema a monte è proprio quello di stabilire se l'attribuzione in via esclusiva alla BCE dei compiti di vigilanza di cui all'art. 4 del regolamento MVU — in via diretta o decentrata a seconda della natura significativa o meno significativa delle banche vigilate — sia rispettoso del principio di sussidiarietà.

Non si vuole beninteso negare *a priori* e in radice un'interpretazione del regolamento MVU che «giustifichi» l'attribuzione in via esclusiva alla BCE di compiti di vigilanza prudenziale su tutte le banche (diretta o decentrata, a seconda della natura significativa o meno significativa di queste ultime), ma semplicemente sottolineare la complessità del problema e la necessità, ove si intenda percorrere l'impervia strada seguita dal Tribunale, di ricercare un fondamento robusto a siffatta ipotesi interpretativa tale da sopravanzare gli indici testuali sopra richiamati. Al riguardo potrebbe venire in soccorso la ricostruzione della *ratio* dell'attribuzione dei poteri di vigilanza alla BCE ai sensi del regolamento MVU. In estrema sintesi, il regolamento MVU (considerando 30) indica tra i propri obiettivi diretti la stabilità del sistema finanziario. La qualificazione della stabilità finanziaria quale obiettivo diretto della vigilanza è anzi la ragione stessa dell'istituzione del MVU (si veda il considerando 6 e la necessità ivi sottolineata di evitare il contagio tra banche e debito sovrano) e si lega all'art. 127(5) TFUE e alla configurazione della stabilità finanziaria medesima quale compito di banca centrale (considerando 13 del regolamento MVU). Soprattutto, ove si volesse venire in soccorso alla tesi del Tribunale, è proprio il perseguimento della stabilità finanziaria, quale *ratio* fondante dell'intero regolamento MVU, che può giustificare una lettura degli artt. 4 e 6 del regolamento MVU da cui ricavare anche una vigilanza BCE decentrata sulle banche meno significative (nell'assunto che anche le banche minori possano minacciare la stabilità finanziaria: si veda il considerando 16); attribuzione che potrebbe considerarsi anche in linea col principio di sussidiarietà, perché l'obiettivo della stabilità finanziaria a essa sotteso può essere perseguito efficientemente solo a livello di Unione. Nella motivazione della sentenza in commento non vi è però nessuno spunto in tal senso.

Ad ogni buon conto, è opinione del secondo autore, che il riconoscimento dell'attribuzione in via esclusiva alla BCE dei compiti di vigilanza prudenziale su tutte le banche dei Paesi partecipanti al MVU nulla dica circa il distinto problema del riparto dei poteri tra la BCE medesima e le autorità nazionali. Può esserci, infatti, un disallineamento tra compiti (della

(4) Si vedano, ad esempio, i considerando 28 e 37 del regolamento MVU.

BCE) e poteri (delle autorità di vigilanza nazionali), com'è la regola per la cooperazione stretta (art. 7 regolamento MVU), ma come può anche avvenire per la vigilanza delle banche dei Paesi dell'euroarea nei casi di cui all'art. 9(1), terzo sub-paragrafo, e 18(5) regolamento MVU. In tali casi la BCE, pur essendo investita di compiti di vigilanza prudenziale, non dispone (o almeno non dispone direttamente) di alcuni dei relativi poteri, laddove precisamente questi ultimi siano previsti da norme nazionali non traspositive di direttive [5].

5. *Si affacciano all'orizzonte i contro limiti costituzionali?* — Ma la sentenza in commento non si segnala solo per questo, pur centrale, aspetto della sua motivazione. Essa è ricca di spunti su di una molteplicità di temi — alcuni più consueti, anche se non meno interessanti, come quelli che attengono al ruolo del principio di proporzionalità e al sindacato giudiziale della discrezionalità nel contesto dell'esercizio di competenze di vigilanza micro prudenziale — ma due almeno dei quali meritano un breve richiamo di attenzione, anche per le implicazioni che potrebbero avere. La prima questione attiene al ruolo che previsioni nazionali, specialmente se di ordine costituzionale, potrebbero in futuro avere al fine di derogare alla competenza esclusiva della BCE (quanto alla vigilanza micro prudenziale). Alcuni punti della sentenza in commento, infatti (in particolare i punti 109-111) inducono a riflettere sull'eventualità che un uso delle competenze regionali in materia di credito possa condurre, tramite il «cavallo di Troia» dell'art. 6(4) del regolamento MVU e 70 del regolamento quadro, all'instaurazione di differenziati regime di vigilanza applicabili solo a certi enti creditizi, specie nei casi in cui vi sia il coinvolgimento di autorità pubbliche a carattere «regionale» (come, nel caso di specie, il Land del Baden-Württemberg). La pronuncia pare non escludere quest'eventualità in via generale, sebbene nel caso di specie mancasse la prova dell'esistenza che un simile regime giuridico «speciale» dimostrasse la possibilità di una vigilanza più efficace a livello nazionale. Ci si limita al riguardo a segnalare la complessità della questione nei suoi risvolti anche di diritto costituzionale. Ci si dovrebbe in altri termini porre il problema del rapporto tra le disposizioni del regolamento sul MVU ed eventuali competenze regionali in materia di vigilanza bancaria previste nelle costituzioni di taluni Stati Membri; in particolare se tali disposizioni costituzionali possano rappresentare controlimiti alle norme del regolamento MVU. Problema tanto più delicato ove le competenze regionali in materia bancaria configurino assetti decisionali non in linea con i requisiti di indipendenza richiesti alle autorità nazionali di vigilanza partecipanti al MVU (si veda a tal riguardo quanto richiesto dall'art. 19 del regolamento MVU).

6. *L'obbligo di motivazione della decisione e motivazione per relationem?* — La seconda questione attiene al ruolo che il Tribunale attribuisce al parere non vincolante della Commissione amministrativa del riesame. Si segnala, infatti, e conclusivamente, che la sentenza fa costante riferimento (si vedano ad esempio i punti 31 e 125) al parere della Commissione amministrativa del riesame, evidenziandone la relativa funzione di integrazione della motivazione del provvedimento della BCE, dalla quale il giudice dell'Unione non può prescindere in sede di vaglio di legittimità di quest'ultimo. E' un importante riconoscimento del ruolo delle commissioni interne di ricorso che sollecita riflessioni sulla natura composita del procedimento, non già — come si è soliti fare, in una proiezione verticale di relazione tra BCE e autorità nazionale competente per parte del procedimento — bensì orizzontale tra organi della stessa BCE. E che sembra definitivamente chiarire come la Commissione amministrativa del riesame — a dispetto di quanto talora sembra volersi sostenere da alcuno nella pratica — sia, a tutti gli effetti, un organo della BCE, non diversamente dal Consiglio di Vigilanza e dal Consiglio Direttivo (per quanto il suo ruolo procedimentale sia solo eventuale).

Raffaele D'Ambrosio - Marco Lamandini

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[5] D'Ambrosio, *Meccanismo di Vigilanza Unico,* in *Enciclopedia del Diritto, Annali IX,* 2016, 589 ss., ivi 600-602 ss.