Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

3 December 2019 *

(Reference for a preliminary ruling — Directive 2014/59/EU — Banking Union — Recovery and resolution of credit institutions and investment firms — Annual contributions — Calculation — Regulation (EU) No 806/2014 — Implementing Regulation (EU) 2015/81 — Uniform procedure for the resolution of credit institutions and investment firms — Administrative procedure involving national authorities and an EU body — Exclusive decision-making power of the Single Resolution Board — Procedure before the national courts — Failure to bring an action for annulment before the EU Courts in due time — Delegated Regulation (EU) 2015/63 — Exclusion of certain liabilities from the calculation of contributions — Interconnectedness of a number of banks)

In Case C-414/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decision of 23 January 2018, received at the Court on 22 June 2018, in the proceedings

**Iccrea Banca SpA Istituto Centrale del Credito Cooperativo**

v

**Banca d'Italia,**

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, E. Regan, P.G. Xuereb and L.S. Rossi, Presidents of Chambers, M. Ilešič, J. Malenovský, L. Bay Larsen (Rapporteur), T. von Danwitz, F. Biltgen, K. Jürimäe, C. Lycourgos and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 30 April 2019,

after considering the observations submitted on behalf of:

– Iccrea Banca SpA Istituto Centrale del Credito Cooperativo, by P. Messina, A. Gemma, F. Isgrò and A. Dentoni Litta, avvocati,

– the Banca d'Italia, by M. Mancini, D. Messineo and L. Sciotto, avvocati,

* Language of the case: Italian.

– the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili and G. Rocchitta, avvocati dello Stato,

– the Spanish Government, by S. Centeno Huerta and M.A. Sampol Pucurull, acting as Agents,

– the European Commission, by V. Di Bucci and A. Steiblytė, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 July 2019,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(1)(a) and (f) of Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to *ex ante* contributions to resolution financing arrangements (OJ 2015 L 11, p. 44).

2 The request has been made in proceedings between Iccrea Banca SpA Istituto Centrale del Credito Cooperativo ('Iccrea Banca') and the Banca d'Italia (Bank of Italy), concerning a number of decisions and communications of the latter in relation to the payment of contributions to the Italian national resolution fund and to the Single Resolution Fund ('the SRF').

### Legal context

#### *The Seventh Directive 83/349/EEC*

3 Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (OJ 1983 L 193, p. 1) was repealed by Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ 2013 L 182, p. 19).

4 Article 1 of Seventh Directive 83/349, as amended by Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 (OJ 2003 L 178, p. 16; 'Directive 83/349') provided:

'1. A Member State shall require any undertaking governed by its national law to draw up consolidated accounts and a consolidated annual report if that undertaking (a parent undertaking):

(a) has a majority of the shareholders' or members' voting rights in another undertaking (a subsidiary undertaking);

or

(b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another undertaking (a subsidiary undertaking) and is at the same time a shareholder in or member of that undertaking;

or

(c) has the right to exercise a dominant influence over an undertaking (a subsidiary undertaking) of which it is a shareholder or member, pursuant to a contract entered into with that undertaking or to a provision in its memorandum or articles of association …

or

(d) is a shareholder in or member of an undertaking, and:
(aa) a majority of the members of the administrative, management or supervisory bodies of that undertaking (a subsidiary undertaking). … have been appointed solely as a result of the exercise of its voting rights;

or
(bb) controls alone, pursuant to an agreement with other shareholders in or members of that undertaking (a subsidiary undertaking), a majority of shareholders' or members' voting rights in that undertaking …

…

2. Apart from the cases mentioned in paragraph 1, the Member States may require any undertaking governed by their national law to draw up consolidated accounts and a consolidated annual report if:

(a) that undertaking (a parent undertaking) has the power to exercise, or actually exercises, dominant influence or control over another undertaking (the subsidiary undertaking); or

(b) that undertaking (a parent undertaking) and another undertaking (the subsidiary undertaking) are managed on a unified basis by the parent undertaking.'

5 Article 2 of Directive 83/349 provided:

'1. For the purposes of Article 1(1)(a), (b) and (d), the voting rights and the rights of appointment and removal of any other subsidiary undertaking as well as those of any person acting in his own name but on behalf of the parent undertaking or of another subsidiary undertaking must be added to those of the parent undertaking.

2. For the purposes of Article 1(1)(a), (b) and (d), the rights mentioned in paragraph 1 above must be reduced by the rights:

(a) attaching to shares held on behalf of a person who is neither the parent undertaking nor a subsidiary thereof;

or

(b) attaching to shares held by way of security, provided that the rights in question are exercised in accordance with the instructions received, or held in connection with the granting of loans as part of normal business activities, provided that the voting rights are exercised in the interests of the person providing the security.

3. For the purposes of Article 1(1)(a) and (d), the total of the shareholders' or members' voting rights in the subsidiary undertaking must be reduced by the voting rights attaching to the shares held by that undertaking itself, by a subsidiary undertaking of that undertaking, or by a person acting in his own name but on behalf of those undertakings.'

### *Regulation (EU) No 575/2013*

6 Article 4(1) of 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), states:

‘For the purposes of this Regulation, the following definitions shall apply:

…

(15) “parent undertaking” means:
(a) a parent undertaking within the meaning of Articles 1 and 2 of Directive 83/349/EEC;

…

(16) “subsidiary” means:
(a) a subsidiary undertaking within the meaning of Articles 1 and 2 of Directive 83/349/EEC;
(b) a subsidiary undertaking within the meaning of Article 1(1) of Directive 83/349/EEC and any undertaking over which a parent undertaking effectively exercises a dominant influence;

Subsidiaries of subsidiaries shall also be considered to be subsidiaries of the undertaking that is their original parent undertaking;

…’

### *Directive 2014/59/EU*

7 Article 2(1) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190) is worded as follows:

‘For the purpose of this Directive the following definitions apply:

…

(5) “subsidiary” means a subsidiary as defined in point (16) of Article 4(1) of Regulation (EU) No 575/2013;

(6) “parent undertaking” means a parent undertaking as defined in point (15)(a) of Article 4(1) of Regulation (EU) No 575/2013;

…

(26) “group” means a parent undertaking and its subsidiaries;

…’

8 Article 102(1) of Directive 2014/59 provides:

'Member States shall ensure that, by 31 December 2024, the available financial means of their financing arrangements reach at least 1% of the amount of covered deposits of all the institutions authorised in their territory. Member States may set target levels in excess of that amount.'

9 Article 103(1), (2) and (7) of that directive state:

'1. In order to reach the target level specified in Article 102, Member States shall ensure that contributions are raised at least annually from the institutions authorised in their territory including Union branches.

2. The contribution of each institution shall be pro rata to the amount of its liabilities (excluding own funds) less covered deposits, with respect to the aggregate liabilities (excluding own funds) less covered deposits of all the institutions authorised in the territory of the Member State.

Those contributions shall be adjusted in proportion to the risk profile of institutions, in accordance with the criteria adopted under paragraph 7.

…

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 115 in order to specify the notion of adjusting contributions in proportion to the risk profile of institutions as referred to in paragraph 2 of this Article, taking into account all of the following …'

***Regulation (EU) No 806/2014***

10 Recital 120 of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1) states:

'The SRM [Single Resolution Mechanism] brings together the [Single Resolution Board; 'the Board'], the Council, the Commission and the resolution authorities of the participating Member States. The Court of Justice has jurisdiction to review the legality of decisions adopted by the Board, the Council and the Commission, in accordance with Article 263 TFEU, as well as for determining their non-contractual liability. Furthermore, the Court of Justice has, in accordance with Article 267 TFEU, competence to give preliminary rulings upon request of national judicial authorities on the validity and interpretation of acts of the institutions, bodies or agencies of the Union. National judicial authorities should be competent, in accordance with their national law, to review the legality of decisions adopted by the resolution authorities of the participating Member States in the exercise of the powers conferred on them by this Regulation, as well as to determine their non-contractual liability.'

11 Article 54(1) of Regulation No 806/2014 provides:

'The Board, in its executive session, shall:

…

(b) take all of the decisions to implement this Regulation, unless this Regulation provides otherwise.'

12 Article 70(2) and (6) of that regulation provides:

‘2. Each year, the Board shall, after consulting the ECB [European Central Bank] or the national competent authority and in close cooperation with the national resolution authorities, calculate the individual contributions to ensure that the contributions due by all of the institutions authorised in the territories of all of the participating Member States shall not exceed 12.5% of the target level.

…

6. The delegated acts specifying the notion of adjusting contributions in proportion to the risk profile of institutions, adopted by the Commission under Article 103(7) of Directive 2014/59/EU, shall be applied.’

***Delegated Regulation 2015/63***

13 Recitals 8 and 9 of Delegated Regulation 2015/63 are worded as follows:

‘(8) The calculation of contributions at individual level would lead, in case of groups, to the double counting of certain liabilities when determining the basic annual contribution of the different group entities, since the liabilities related to the agreements that the entities of the same group conclude with each other would be part of the total liabilities to be considered to determine the basic annual contribution of each entity of the group. Therefore, the determination of the basic annual contribution should be further specified in case of groups to reflect the interconnectedness of the group entities and avoid double counting intragroup exposures. …

(9) For the purpose of calculating the basic annual contribution of a group entity, the total liabilities to be considered should not include the liabilities arisen from any contract which that group entity concluded with any other entity which is part of the same group. However, such exclusion should only be possible where each group entity is established in the Union, is included in the same consolidation on a full basis, is subject to an appropriate centralised risk evaluation, measurement and control procedures, and if there are no current or foreseen material practical or legal impediments to the prompt repayment of the relevant liabilities when due. This should prevent liabilities from being excluded from the basis of calculation of the contributions if there are no guarantees that intragroup lending exposures would be covered where the financial health of the group deteriorates. …’

14 Article 3 of that delegated regulation states:

‘For the purposes of this Regulation, the definitions contained in … and Directive 2014/59/EU shall apply. For the purpose of this Regulation, the following definitions shall also apply:

…

(28) “promotional loan” means a loan granted by a promotional bank or through an intermediate bank on a non-competitive, non for profit basis, in order to promote the public policy objectives of central or regional governments in a Member State;

…’

15 Article 5(1) of that delegated regulation provides:

'The contributions referred to in Article 103(2) of Directive 2014/59/EU shall be calculated by excluding the following liabilities:

(a) the intragroup liabilities arising from transactions entered into by an institution with an institution which is part of the same group, provided that all the following conditions are met:
   (i) each institution is established in the Union;
   (ii) each institution is included in the same consolidated supervision in accordance with Articles 6 to 17 of Regulation (EU) No 575/2013 on a full basis and is subject to an appropriate centralised risk evaluation, measurement and control procedures; and
   (iii) there is no current or foreseen material practical or legal impediment to the prompt repayment of the liability when due;

…

(f) in case of institutions operating promotional loans, the liabilities of the intermediary institution towards the originating or another promotional bank or another intermediary institution and the liabilities of the original promotional bank towards its funding parties in so far as the amount of these liabilities is matched by the promotional loans of that institution.'

### *Implementing Regulation (EU) 2015/81*

16 Article 4 of Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 (OJ 2015 L 15, p. 1) states:

'For each contribution period, the Board shall calculate the annual contribution due from each institution, on the basis of the annual target level of the Fund, after consulting the ECB or the national competent authorities and in close cooperation with the national resolution authorities. …'

17 Article 5 of that implementing regulation provides:

'1. The Board shall communicate to the relevant national resolution authorities its decisions on calculation of annual contributions of the institutions authorised in their respective territories.

2. After receiving the communication referred to in paragraph 1, each national resolution authority shall notify each institution authorised in its Member State of the Board's decision on calculation of the annual contribution due from that institution.'

18 Article 6 of that implementing regulation provides:

'The Board shall set out the data formats and representations to be used by the institutions to report the information required for the purpose of calculating the annual contributions in order to enhance the comparability of the reported information and the effectiveness of processing the information received.'

## The dispute in the main proceedings and the question referred for a preliminary ruling

19 Iccrea Banca is a bank which heads a network of credit institutions and whose object is to support the operations, inter alia, of cooperative credit banks in Italy.

20 To that end, Iccrea Banca provides those banks with payment services, automated payment services, securities settlement and safekeeping as well as services of a financial nature, and acts as a central funder for the cooperative credit system. In that latter capacity, Iccrea Banca supplies, in particular, to those banks a range of services for structured access to collateralised funding available from the ECB and on the market. Against that background, Iccrea Banca formed a group of which around 190 cooperative credit banks became members, with the sole aim of participating in targeted long-term refinancing operations, established by the ECB.

21 By decisions adopted between 2015 and 2017, the Bank of Italy sought from Iccrea Banca the payment of ordinary, extraordinary and additional contributions to the Italian national resolution fund. Further, by a communication of 3 May 2016, the Bank of Italy sought from Iccrea Banca, for the year 2016, payment to the SRF of an *ex ante* contribution determined by a decision of the Board of 15 April 2016. By a communication of 27 May 2016, the Bank of Italy corrected the amount of the latter contribution, following a decision of the Board of 20 May 2016.

22 Iccrea Banca brought an action against those decisions and those communications of the Bank of Italy before the referring court. In that action Iccrea Banca also seeks a determination of the appropriate means of calculating the sums actually payable by Iccrea Banca and repayment of sums which it considers to have been wrongly paid.

23 In support of that action, Iccrea Banca claims, in essence, that the Bank of Italy misinterpreted Article 5(1) of Delegated Regulation 2015/63. It claims that the Bank of Italy took into account, in order to calculate the contributions at issue in the main proceedings, the liabilities linked to the relationships between Iccrea Banca and the cooperative credit banks, although those liabilities ought to have been excluded from that calculation by an application, by analogy, of the provisions of that same regulation on intragroup liabilities or on institutions which operate promotional loans. Iccrea Banca claims that that misinterpretation also led the Bank of Italy to fail, in the communication of data to the Board, to identify the particular features of the integrated system in which Iccrea Banca operated and thus led to an error in the calculation of the *ex ante* contribution to the SRF for the year 2016.

24 The referring court dismissed an objection as to lack of jurisdiction made by the Bank of Italy with respect to the claims concerning the acts of the Bank of Italy relating to the *ex ante* contributions to the SRF for the year 2016. The referring court concluded that it had jurisdiction to give a ruling in that regard on the ground that the Bank of Italy did not act as a mere intermediary between the Board and the credit institutions. The Bank of Italy rather played, in accordance with the choices made by the EU legislature, an active and decisive role both during the stage of determining the amount of those contributions and during the stage of raising those contributions. Against that background, Iccrea Banca could obtain real benefit from a review and a fresh definition of the information that the Bank of Italy has to send to the Board for the purposes of calculation of the contribution which it owes.

25 In those circumstances, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court for Lazio, Italy) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do Article 5(1), in particular subparagraphs (a) and (f), of Delegated Regulation 2015/63, interpreted in the light of the principles referred to in that regulation, in Directive 2014/59, Regulation No 806/2014 and Article 120 TFEU, the fundamental rules of equal treatment, non-discrimination and proportionality laid down in Article 21 of the Charter of Fundamental Rights of the European Union, and the prohibition on levying double contributions, preclude, for the purpose of calculating the contributions that are the subject of Article 103(2) of Directive 2014/59, the rules laid down for intragroup liabilities from also applying in the case of a ‘de facto’ group or, in any event, in the case of interconnectedness between an institution and other banks forming part of the same system?

Alternatively, in the light of the abovementioned principles, may the preferential treatment reserved for liabilities [arising in respect of promotional loans] in Article 5 of Delegated Regulation 2015/63 also be applied, by analogy, to the liabilities of a 'second-tier' bank vis-à-vis other banks in the (cooperative credit) system, or should that characteristic of an institution, in fact operating as a lead bank within an interconnected and integrated group of small banks, including in its relations with the European Central Bank and the financial markets, give rise, under existing rules, to some form of adjustment to the financial data submitted by the national resolution authority to the relevant Community bodies and to the determination of the contributions payable by the institution to the resolution fund in respect of its actual liabilities and risk profile?'

**Admissibility of the request for a preliminary ruling**

26 The Italian Government maintains that the request for a preliminary ruling is entirely inadmissible, on the ground that the order for reference does not contain an account of the facts explaining why Iccrea Banca could be considered to be controlling a group or to be granting promotional loans, within the meaning of the applicable EU legislation. The Commission considers, for its part, that the request is inadmissible only in so far as it concerns the *ex ante* contributions to the SRF for the year 2016.

27 It should be recalled that, according to the Court's settled case-law, in the context of the cooperation between the Court of Justice and the national courts, the need to provide an interpretation of EU law which will be of use to the national court means that the national court is bound to observe scrupulously the requirements concerning the content of a request for a preliminary ruling, expressly set out in Article 94 of the Court's Rules of Procedure (judgment of 19 April 2018, *Consorzio Italian Management and Catania Multiservizi*, C-152/17, EU:C:2018:264, paragraph 21 and the case-law cited).

28 Accordingly, it is, in particular, essential, as stated in Article 94(a) of the Rules of Procedure, that the order for reference contains a summary of the relevant findings of fact made by the referring court or, or at least, an account of the facts on which the questions are based (see, to that effect, judgment of 19 April 2018, *Consorzio Italian Management and Catania Multiservizi*, C-152/17, EU:C:2018:264, paragraph 22 and the case-law cited).

29 In this case, the order for reference contains an account of the facts that is sufficient to ensure that both the question referred and the scope of that question can be understood. The order for reference sets out, in particular, the nature of the relationships that connect Iccrea Banca to a range of cooperative credit banks, which have led the referring court to submit a question to the Court.

30 As regards the arguments of the Italian government seeking to demonstrate that the information thus set out is not such as to establish that Iccrea Banca satisfies the conditions for the exclusion of certain liabilities, laid down in Article 5(1) of Delegated Regulation 2015/63, it is clear that the assessment of those arguments is inextricably linked to the answer to be given to the request for a preliminary ruling and that those arguments again cannot therefore entail the inadmissibility of that request (see, by analogy, judgment of 17 January 2019, *KPMG Baltics*, C-639/17, EU:C:2019:31, paragraph 11).

31 The Commission submits, for its part, that the EU Courts alone have jurisdiction to give a ruling on how contributions to the SRF are to be calculated and that the request for a preliminary ruling should therefore be declared to be partly inadmissible, in accordance with the case-law stemming from the judgment of 9 March 1994, *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90), since Iccrea Banca did not bring, in good time, an action for the annulment of the decisions of the Board on the calculation of its *ex ante* contribution to the SRF for the year 2016.

32 In accordance with the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, provided that the questions referred concern the interpretation of EU law, the Court is in principle required to give a ruling (judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána*, C-378/17, EU:C:2018:979, paragraph 26 and the case-law cited).

33 However, a question that is referred for a preliminary ruling seeking interpretation cannot be held to be admissible when it is plain that the sole purpose of that question is to enable the referring court to give a ruling on an issue which, under EU law, falls outside the jurisdiction of the national courts.

34 In that regard, it must be observed that while the question referred concerns the interpretation of Article 5(1) of Delegated Regulation 2015/63, in the light of, in particular, Directive 2014/59, which, like that delegated regulation, establishes certain rules that are relevant both for the calculation of the contributions to the national resolution funds and for the calculation of the contributions to the SRF, that question also refers to Regulation No 806/2014, which solely establishes rules relating to the single resolution mechanism of which the SRF forms part. Further, that question concerns in part the submission of financial data by the national resolution authority to the 'Community bodies'.

35 It is therefore apparent that certain aspects of that question relate specifically to the calculation of the contributions to the SRF.

36 It is stated in the order for reference that the interpretation sought of the rules applicable to that calculation is considered to be necessary by the referring court in order to clarify the precise rules governing how the Bank of Italy ought to have acted in the procedure of determining and raising the *ex ante* contributions to the SRF for the year 2016. That court considers, accordingly, that it has to give a ruling on such action both in the stage of the procedure preceding the adoption of the decisions of the Board on the calculation of those contributions, by determining, inter alia, what information ought to have been sent to the Board by the Bank of Italy, and in the stage of the procedure, following the adoption of those decisions of the Board, when the raising of those contributions is to take place, in so far as the answer of the Court to the question referred might, in particular cases, lead to a finding that decisions adopted by the Bank of Italy to implement decisions of the Board were invalid.

37 As regards, first, the aspects of the request for a preliminary ruling intended to enable the referring court to give a ruling on the intervention of the Bank of Italy in the stage of the procedure preceding the adoption of the decisions of the Board on the calculation of the *ex ante* contributions to the SRF, it must be recalled that Article 263 TFEU confers upon the Court of Justice of the European Union exclusive jurisdiction to review the legality of acts adopted by the EU bodies, offices or agencies, one of which is the Single Resolution Board (see, to that effect, judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, paragraph 42).

38 Any involvement of the national authorities in the course of the procedure leading to the adoption of such acts cannot affect their classification as EU acts, where the acts of the national authorities constitute a stage of a procedure in which an EU body, office or agency exercises, alone, the final decision-making power without being bound by the preparatory acts or the proposals of the national authorities (see, to that effect, judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, paragraph 43).

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

40 It follows, moreover, from reading Article 263 TFEU in the light of the principle of sincere cooperation between the European Union and the Member States enshrined in Article 4(3) TEU that acts adopted by national authorities in a procedure such as that referred to in the preceding paragraphs of the present judgment cannot be subject to review by the courts of the Member States (see, to that effect, judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, paragraph 47).

41 In that regard, the Court has held that, where the EU legislature opts for an administrative procedure under which the national authorities adopt acts that are preparatory to a final decision of an EU institution which produces legal effects and is capable of adversely affecting a person, it seeks to establish between the EU institution and the national authorities a specific cooperation mechanism which is based on the exclusive decision-making power of the EU institution (judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, paragraph 48).

42 In order for such a decision-making process to be effective, there must necessarily be a single judicial review, which is conducted, by the EU Courts alone, only once the decision of the EU institution bringing the administrative procedure to an end has been adopted, a decision which is, alone, capable of producing binding legal effects such as to affect the applicant's interests by bringing about a distinct change in his legal position (judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, paragraph 49).

43 As regards, more specifically, acts of the national resolution authorities preceding the calculation of the *ex ante* contributions to the SRF, it must be observed that those contributions are calculated and raised as part of the procedure established by Regulation No 806/2014 and Implementing Regulation 2015/81.

44 Article 54(1) of Regulation No 806/2014 provides that the Board is to take, in its executive session, all the decisions to implement that regulation, save where that regulation provides otherwise.

45 It is apparent from Article 70(2) of Regulation No 806/2014 and from Article 4 of Implementing Regulation 2015/81 that it is the exclusive responsibility of the Board, after consulting the ECB or the competent national authority and in close cooperation with the national resolution authorities, to calculate each year the individual *ex ante* contributions of all the institutions authorised in the territories of all the participating Member States.

46 It is clear, moreover, from Article 6 of that implementing regulation that the information required for the purposes of calculating those contributions is to be obtained by the use of data formats and representations defined by the Board and supplemented by the institutions concerned.

47 In the light of the foregoing, it is plain that, with respect to the calculation of the *ex ante* contributions to the SRF, the Board exclusively exercises the final decision-making power and that the role of the national resolution authorities is confined, as stated by the Advocate General in points 40 and 41 of his Opinion, to providing operational support to the Board. While those authorities may, accordingly, be consulted by the Board in order to facilitate the determination of the amount of the *ex ante* contribution payable by an institution and while they must, in any event, cooperate with the Board to that end, the findings that they might, in particular cases, make at that time on the situation of an institution cannot in any way be binding on the Board.

48 Consequently, the EU Courts alone have jurisdiction to determine, when reviewing the legality of a decision of the Board setting the amount of the individual *ex ante* contribution to the SRF of an institution, whether an act adopted by a national resolution authority that is preparatory of such a decision is vitiated by defects capable of affecting that decision of the Board, and no national court can review that national act (see, by analogy, judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, paragraph 57).

49 That conclusion cannot be called into question by the statement, in recital 120 of Regulation No 806/2014, that national judicial authorities should be competent to review the legality of decisions adopted by the resolution authorities of the Member States in the exercise of the powers conferred on them by that regulation.

50 That statement must be understood, as observed by the Advocate General in point 54 of his Opinion, having regard to the division of jurisdiction arising from primary law, to which moreover recital 120 of that regulation refers in mentioning the exclusive jurisdiction of the Court of Justice of the European Union to review the legality of the decisions adopted by the Board, as pertaining only to national acts that are adopted as part of a procedure in which that regulation has conferred on the national resolution authorities a specific decision-making power.

51 Further, a national court cannot properly issue to the national resolution authority any order as to how it is to act prior to the adoption of a decision of the Board on the calculation of the *ex ante* contributions to the SRF.

52 In that regard, it must be recalled that, given the need for a single judicial review of such decisions of the Board, both the type of national legal procedure employed in order to subject preparatory acts adopted by the national authorities to review by a court of a Member State and the nature of the heads of claim or pleas in law put forward for that purpose have no bearing on the exclusive nature of the jurisdiction vested in the EU Courts (see, to that effect, judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, paragraph 51).

53 If a national court were to issue an order obliging a national resolution authority to behave in a particular way when intervening prior to the adoption of a decision of the Board on the calculation of the *ex ante* contributions to the SRF, that would undermine that concept of a single judicial review while creating a risk that findings, in one and the same procedure, of that national court might diverge from those of the EU Courts which might, subsequently, be called upon to assess, as an ancillary matter, the legality of that intervention when examining an action for annulment, under Article 263 TFEU, brought against that decision of the Board (see, to that effect, judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, paragraph 50).

54 EU law precludes, accordingly, the referring court from giving a ruling on the legality of the action of the Bank of Italy in the stage of the procedure preceding the adoption of the decisions of the Board on the calculation of the *ex ante* contributions to the SRF for the year 2016.

55 As regards, second, the aspects of the request for a preliminary ruling intended to enable the referring court to give a ruling on the intervention of the Bank of Italy in the stage of the procedure following the adoption of the decisions of the Board on the calculation of the *ex ante* contributions to the SRF for the year 2016, it is clear from Article 5 of Implementing Regulation 2015/81 that the decisions of the Board on the calculation of the *ex ante* contributions to the SRF of institutions authorised in the territory of a Member State are to be communicated to the national resolution authority of that Member State, and that authority must, thereafter, notify each of those institutions of the decision of the Board on the calculation of its contribution.

56 It is also the responsibility of that national resolution authority to raise from those institutions, pursuant to Article 67(4) of Regulation No 806/2014, the contributions determined by the Board.

57 It follows from the foregoing that, after the adoption of a decision of the Board on the calculation of the *ex ante* contributions to the SRF, the task of the national resolution authorities is solely to notify and give effect to that decision.

58 In that context, having regard to the specific powers of the Board, mentioned in paragraphs 44 and 45 of the present judgment, those authorities do not have the power to re-examine the calculations made by the Board in order to alter the amount of those contributions and they cannot therefore, after the adoption of a decision of the Board, review, to that end, the extent to which an institution is exposed to risk.

59 Likewise, if a national court were to be able, as envisaged by the referring court, to annul the notification, by a national resolution authority, of a decision of the Board on the calculation of the *ex ante* contribution of an institution to the SRF, on the ground of an error in the evaluation of that institution's exposure to risk on which that calculation was based, that would call into question a finding made by the Board and would ultimately impede the execution of that decision of the Board in Italy.

60 The national resolution authorities, and the national courts called upon to review the actions of those authorities, cannot properly take decisions which conflict with decisions of the Board on the calculation of the *ex ante* contributions to the SRF and which, in practice, deprive the latter decisions of their effects, by impeding the raising of those contributions (see, by analogy, judgments of 14 December 2000, *Masterfoods and HB*, C-344/98, EU:C:2000:689, paragraph 52; of 20 November 2008, *Heuschen & Schrouff Oriëntal Foods Trading*, C-375/07, EU:C:2008:645, paragraph 66, and of 6 November 2012, *Otis and Others*, C-199/11, EU:C:2012:684, paragraphs 50 and 51).

61 However, where the outcome of proceedings pending before a national court depends on the validity of a decision of the Board, that court may, as a general rule, refer to the Court a question for a preliminary ruling on the validity of that decision (see, by analogy, judgments of 14 December 2000, *Masterfoods and HB*, C-344/98, EU:C:2000:689, paragraph 57, and of 20 November 2008, *Heuschen & Schrouff Oriëntal Foods Trading*, C-375/07, EU:C:2008:645, paragraph 68).

62 In that regard, it is clear that, although certain aspects of the question referred for a preliminary ruling relate specifically to the calculation of the *ex ante* contributions to the SRF, the referring court has not asked the Court to give a ruling on the validity of the decisions of the Board on the calculations of those contributions for the year 2016. It is apparent, moreover, from the order for reference that Iccrea Banca has not claimed, before the referring court, that those decisions are invalid and that that court has not expressed any doubt as to their validity.

63 It must be recalled that, in any event, the possibility for a person to rely, in an action brought before a national court, on the invalidity of provisions contained in a measure of the European Union, which constitutes the basis of a national decision taken concerning him, presupposes either that that person has also brought, pursuant to the fourth paragraph of Article 263 TFEU, an action for annulment of that EU measure within the prescribed time limits, or that that person has not done so, as a result of not having an undoubted right to bring such an action (judgment of 25 July 2018, *Georgsmarienhütte and Others*, C-135/16, EU:C:2018:582, paragraph 17 and the case-law cited).

64 In that context, the admissibility of an action brought by a natural or legal person against an act which is not addressed to that person, in accordance with the fourth paragraph of Article 263 TFEU, is subject, inter alia, to the condition that that act is of direct and individual concern to that person (see, to that effect, judgment of 13 March 2018, *European Union Copper Task Force* v *Commission*, C-384/16 P, EU:C:2018:176, paragraph 32 and the case-law cited).

65 In this case, although the decisions of the Board on the calculation of the *ex ante* contributions to the SRF for the year 2016 may have been addressed, in accordance with Article 5(1) of Implementing Regulation 2015/81, to the Bank of Italy, those decisions were, unquestionably, of direct and individual concern to Iccrea Banca.

66 It must, in the first place, be recalled that, in accordance with the Court's settled case-law, the condition that the decision forming the subject matter of the proceedings must be of direct concern to a natural or legal person, as laid down in the fourth paragraph of Article 263 TFEU, requires the fulfilment of two cumulative criteria, namely that the contested measure must, first, directly affect the legal situation of the individual and, secondly, leave no discretion to the addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules (judgments of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commissio*n v *Scuola Elementare Maria Montessori* and *Commissio*n v *Ferracc*i, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 42, and of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others*, C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraph 103).

67 The decisions of the Board on the calculation of the *ex ante* contributions to the SRF for the year 2016 directly produce effects on the legal situation of Iccrea Banca in that they determine the amount of the *ex ante* contribution to the SRF that Iccrea Banca is required to pay. Further, those decisions do not, as is clear from paragraphs 55 to 58 of the present judgment, leave any discretion to the Bank of Italy, which must raise, from Iccrea Banca, a contribution corresponding to the amount determined by those decisions with respect to that institution, and which therefore has no power to alter that amount.

68 In the second place, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by virtue of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and thus distinguishes them individually just as in the case of the person to whom the decision is addressed (judgment of 25 July 2018, *Georgsmarienhütte and Others*, C-135/16, EU:C:2018:582, paragraph 31 and the case-law cited).

69 That is true, in this case, of Iccrea Banca, in that it is specifically named in the annex to the decisions of the Board on the calculation of the *ex ante* contributions to the SRF for the year 2016.

70 In those circumstances, in accordance with the principle mentioned in paragraph 63 of the present judgment, it would have been open to Iccrea Banca to claim, before a national court, that the decisions of the Board on the calculation of the *ex ante* contributions to the SRF for the year 2016 were illegal only if it had also brought, under the fourth paragraph of Article 263 TFEU, an action for annulment of those decisions, within the time limits prescribed.

71 In that regard, by order of the General Court of 19 November 2018, *Iccrea Banca* v *Commission and Single Resolution Board* (T-494/17, EU:T:2018:804), which has become final, that court held that Iccrea Banca had been notified, on 3 May 2016, by the Bank of Italy, of the amount of its *ex ante* contribution to the SRF for the year 2016, as calculated by the Board, and that it had brought out of time an action for annulment of the decision of the Board of 15 April 2016.

72 As regards the decision of the Board of 20 May 2016, since Iccrea Banca has not brought an action for the annulment of that decision before the General Court, it cannot claim, before a national court, that that decision is invalid (see, to that effect, judgment of 25 July 2018, *Georgsmarienhütte and Others*, C-135/16, EU:C:2018:582, paragraph 43).

73 It follows from the foregoing that it is not for the referring court to assess, in the main proceedings, the compatibility of decisions of the Bank of Italy with the rules governing the calculation of the *ex ante* contributions to the SRF, since that court cannot, under EU law, either give a ruling on acts of the Bank of Italy preparatory to that calculation, nor impede the raising, from Iccrea Banca, of a contribution corresponding to the amount determined by acts of the Board which have not been found to be invalid.

74 Therefore, it is clear that the aspects of the question referred which relate specifically to the calculation of the *ex ante* contributions to the SRF must be held to be inadmissible.

75 On the other hand, that question is admissible in so far as it relates to the calculation of ordinary, extraordinary and additional contributions to the Italian national resolution fund.

**Consideration of the question referred**

76 By its question, the referring court seeks, in essence, to ascertain whether Article 103(2) of Directive 2014/59 and Article 5(1)(a) and (f) of Delegated Regulation 2015/63 must be interpreted as meaning that the liabilities arising from transactions between a second-tier bank and the members of a grouping which consists of it and the cooperative banks to which it supplies various services are excluded from the calculation of the contributions to a national resolution fund that are the subject of Article 103(2) of that directive.

77 Article 102(1) of Directive 2014/59 provides that the Member States are to ensure that, no later than 31 December 2024, the available financial means of their financing arrangements reach at least 1% of the amount of covered deposits of all the institutions authorised in their territory.

78 It is clear from Article 103(1) and (2) of that directive that, in order to achieve that target level, a Member State must ensure that it raises, from every institution authorised in its territory, a contribution that is pro rata to the amount of that institution's liabilities (excluding own funds) less covered deposits, with respect to the aggregate liabilities (excluding own funds) less covered deposits of all the institutions authorised in the territory of that Member State.

79 The second subparagraph of Article 103(2) of that directive states that those contributions are to be adjusted in proportion to the risk profile of institutions.

80 The notion of adjusting contributions in proportion to the risk profile of institutions may be specified by the Commission, pursuant to Article 103(7) of the same directive, by means of delegated acts taking into account a number of factors listed in that provision.

81 That power was exercised by the adoption, by the Commission, of Article 5 of Delegated Regulation 2015/63, which, under the heading 'Risk adjustment of the basic annual contribution', provides for the exclusion of certain liabilities from the calculation of the contributions referred to in Article 103(2) of Directive 2014/59.

82 First, Article 5(1)(a) of that delegated regulation states that that exclusion must be applied to the intragroup liabilities arising from transactions entered into by an institution with an institution which is part of the same group, provided that certain additional conditions are met.

83 It is apparent from the very wording of that provision that it can be applicable only to transactions between two institutions that are part of one and the same group.

84 While Delegated Regulation 2015/63 does not directly define the concept of a 'group', Article 3 of that delegated regulation states that, for the purposes of that regulation, the definitions contained in Directive 2014/59 are to apply.

85 The concept of a 'group' is defined in Article 2(1)(26) of that directive as meaning 'a parent undertaking and its subsidiaries'. The latter two concepts are, in turn, defined in Article 2(1)(5) and (6) of that directive, by reference to Article 4 of Regulation No 575/2013, which itself refers to Articles 1 and 2 of Directive 83/349, provisions which correspond, in essence, to Article 22(1) to (5) of Directive 2013/34.

86 It follows from those definitions that the relationship of parent undertaking and subsidiary presupposes a form of control that involves the parent undertaking holding a majority of voting rights within the subsidiary, a right to appoint or remove some of the directors or senior managers of that subsidiary or alternatively a dominant influence over that subsidiary.

87 That being the case, such a relationship cannot be held to be demonstrated by the existence of economic interactions which reflect a partnership between a number of institutions, where one of them does not control the other members of the grouping that comprises it and those institutions.

88 Consequently, relationships between institutions such as those described by the referring court, which connect a second-tier bank to its partners and consist in the supply of various services by that second-tier bank, cannot be held to be sufficient evidence of the existence of a group within which there might exist 'intragroup liabilities', within the meaning of Article 5(1)(a) of Delegated Regulation 2015/63.

89 Second, Article 5(1)(f) of that delegated regulation refers to certain liabilities 'in case of institutions operating promotional loans'.

90 The concept of a 'promotional loan' is defined in Article 3(28) of that delegated regulation as comprising loans granted by a promotional bank or through an intermediate bank on a non-competitive, not for profit basis, in order to promote the public policy objectives of central or regional governments in a Member State.

91 Since those criteria refer both to specific operating conditions and to the pursuit of certain predetermined objectives, the mere fact that the cooperative banks are linked together as a grouping, such as that at issue in the main proceedings, cannot be an adequate basis for considering that a second-tier bank that is part of that grouping is an institution that operates promotional loans, which suffices to preclude part of its liabilities from satisfying the conditions set out in Article 5(1)(f) of Delegated Regulation 2015/63.

92 Third, while the referring court envisages that Article 5(1)(a) and (f) of that delegated regulation should be interpreted as being capable of application to situations that are comparable to those specified in that article, even though those situations do not satisfy all the conditions laid down in those provisions, it is clear that such an interpretation is incompatible with the wording of those provisions.

93 Article 5(1) of that delegated regulation does not confer any discretion on the competent authorities to exclude certain liabilities when adjusting the contributions that are the subject of Article 103(2) of Directive 2014/59 in proportion to risk, but rather lists precisely the conditions governing whether a liability can be so excluded.

94 While that interpretation of Article 5(1)(a) of Delegated Regulation 2015/63 might lead to a double counting of some liabilities, that cannot justify any other conclusion, given that, as stated in recital (9) of that delegated regulation, the Commission did not seek to eliminate entirely any form of double counting of liabilities and ruled out such a practice only in so far as there exist sufficient guarantees that intragroup lending exposures will be covered where the financial health of the group deteriorates.

95 Likewise, an analysis that takes account of the principles of equal treatment, non-discrimination and proportionality, which the referring court mentions, cannot justify any other outcome, since Delegated Regulation 2015/63 distinguished situations that have significant and specific features, directly linked to the risks inherent in the liabilities at issue.

96 In the light of all the foregoing, the answer to the question referred is that Article 103(2) of Directive 2014/59 and Article 5(1)(a) and (f) of Delegated Regulation 2015/63 must be interpreted as meaning that liabilities that arise from transactions between a second-tier bank and the members of a grouping that comprises it and the cooperative banks to which it supplies various services, but where it does not control those banks, and that do not match loans granted on a non-competitive, not for profit basis, in order to promote the public policy objectives of central or regional governments in a Member State, are not excluded from the calculation of the contributions to a national resolution fund that are the subject of Article 103(2) of that directive.

## Costs

97 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

**Article 103(2) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012 of the European Parliament and of the Council, and Article 5(1)(a) and (f) of Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to *ex ante* contributions to resolution financing arrangements must be interpreted as meaning that liabilities that arise from transactions between a second-tier bank and the members of a grouping that comprises it and the cooperative banks to which it supplies various services, but where it does not control those banks, and that do not match loans granted on a non-competitive, not for profit basis, in order to promote the public policy objectives of central or regional governments in a Member State, are not excluded from the calculation of the contributions to a national resolution fund that are the subject of Article 103(2) of Directive 2014/59/EU.**

[Signatures]