



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

25 June 2020*

(Access to documents — Decision of the ECB to place Banca Carige SpA under temporary administration — Refusal to grant access — Default procedure)

In Case T-552/19,

Malacalza Investimenti Srl, established in Genoa (Italy), represented by P. Ghiglione, E. De Giorgi and L. Amicarelli, lawyers,

applicant,

v

European Central Bank (ECB), represented by F. von Lindeiner and M. Van Hoecke, acting as Agents, assisted by D. Sarmiento Ramírez-Escudero, lawyer,

defendant,

APPLICATION under Article 263 TFEU for annulment of ECB Decision LS/LdG/19/185 of 12 June 2019 refusing access to several documents relating to Decision ECB-SSM-2019-ITCAR-11 of the Governing Council of the ECB of 1 January 2019 placing Banca Carige SpA under temporary administration,

THE GENERAL COURT (Fourth Chamber),

composed of S. Gervasoni, President, P. Nihoul (Rapporteur) and J. Martín y Pérez de Nanclares, Judges,

Registrar: E. Coulon,

gives the following

Judgment

Background to the dispute

- 1 The applicant, Malacalza Investimenti Srl, is a company incorporated under Italian law. It is the main shareholder of Banca Carige SpA, of which it directly holds 27.555% of the share capital.

* Language of the case: Italian.

- 2 On 20 September 2018, Banca Carige's board of directors was renewed by the general meeting of the shareholders. On the basis of its shareholding in that company, the applicant appointed the majority of the members of the board of directors.
- 3 On 22 December 2018, following a new general meeting of Banca Carige's shareholders at which the proposal to increase the share capital to EUR 400 million was rejected, a number of members of the board of directors resigned.
- 4 By decision of 1 January 2019 ('the decision of 1 January 2019'), the European Central Bank (ECB) placed Banca Carige under temporary administration in accordance with the Italian law implementing Article 29 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). It thus ordered the dissolution of the administrative and supervisory bodies of that company and appointed three temporary administrators and a three-member supervisory committee.
- 5 The decision of 1 January 2019 was not published and the reasons underlying it are not known to the applicant. The only form of publicity adopted by the ECB is a press release of 2 January 2019 announcing the names of Banca Carige's temporary administrators and the members of its supervisory committee and describing in general terms the concept of temporary administration and the duties of the temporary administrators.
- 6 On 15 January 2019, the applicant submitted to the ECB a request for access under Article 6 of Decision 2004/258/EC of the ECB of 4 March 2004 on public access to ECB documents (OJ 2004 L 80, p. 42), concerning:
 - the decision of 1 January 2019 and its annexes;
 - the documents, relating to the period from 30 November 2018 to 2 January 2019, containing other decisions taken by the ECB in relation to Banca Carige, including the draft decision on the capital conversion plan with its tables and annexes, communications between the ECB and the board of directors of that company or one or more of its members, and the minutes of meetings between the ECB and the board of directors of that company or one or more of its members.
- 7 On 14 February 2019, the ECB informed the applicant that the period for replying to the request for access to documents had been extended by 20 working days, in accordance with Article 7(3) of Decision 2004/258, because of an increased workload.
- 8 On 17 February 2019, the applicant replied to the ECB, disputing the compatibility of the extension of the period for processing its application with Article 7(3) of Decision 2004/258.
- 9 On 19 February 2019, the ECB replied to the applicant, stating that Article 7(3) of Decision 2004/258 had been invoked to extend the period for processing the applicant's request for access to documents in view of the receipt of numerous requests concerning Banca Carige and consultations with the Bank of Italy on the same issue.
- 10 By decision of 13 March 2019, the ECB rejected the request for access in its entirety.

- 11 On 8 April 2019, the applicant submitted a confirmatory application to the Executive Board of the ECB pursuant to Article 7(2) of Decision 2004/258, requesting a review of the ECB's decision of 13 March 2019. In that confirmatory application, however, it excluded from its request for access the capital conversion plan with its tables and annexes, which it had received in the meantime from the temporary administrators of Banca Carige.
- 12 The applicant pointed out that extracts from a document presented as the decision of 1 January 2019 had been published, in the form of photographs, on the website of an Italian daily newspaper. It submitted that, if those photographs did indeed reproduce that decision, the extracts contained in them could no longer be regarded as confidential since, having been published, they were now in the public domain. The applicant argued that, in any event, those extracts did not contain any confidential information, since all the data contained therein appeared on the information documents that Banca Carige publishes in accordance with the legislation applicable to credit institutions listed on regulated markets.
- 13 The applicant also reiterated its request for access to the full version of the documents requested or, in the alternative, to a non-confidential version taking into account the extracts of the decision of 1 January 2019 already published on the Internet and the time that had elapsed since that request, by reason of which the confidentiality of certain information was no longer required. With regard to the written communications between the ECB and Banca Carige's board of directors and the minutes of the meetings between those parties, the applicant requested a list of the communications and meetings, the names of the participants and a general description of the content of those communications and meetings.
- 14 On 3 May 2019, the ECB informed the applicant that, in accordance with Article 8(2) of Decision 2004/258, it had decided to extend the period for replying to the confirmatory application by 20 working days due to an exceptional workload.
- 15 By letter dated 29 May 2019, the ECB announced that the new due date set for 4 June 2019 would not be met.
- 16 On 12 June 2019, the ECB decided to reject the confirmatory application in its entirety ('the contested decision'). That decision reproduces, essentially, the reasons given in the ECB's decision of 13 March 2019.

Contested decision

- 17 In the contested decision, the ECB identified eight documents in relation to the applicant's request for access and classified them into four categories:
 - the decision of 1 January 2019;
 - the capital conversion plan and any other written decision concerning Banca Carige adopted during the period from 30 November 2018 to 2 January 2019;
 - written communications between the ECB and Banca Carige's board of directors or one or more of its members during that same period;
 - the minutes of the meetings between the ECB and Banca Carige's board of directors or one or more of its members during that same period.

- 18 The refusal to grant access to the document coming within the first category, namely the decision of 1 January 2019, is based on the exception under Article 4(1)(c) of Decision 2004/258, which provides that ‘the ECB shall refuse access to a document where disclosure would undermine the protection of ... the confidentiality of information that is protected as such under Union law’.
- 19 The ECB took the view that Article 4(1)(c) of Decision 2004/258 contained a general presumption of confidentiality covering all cases coming within the scope of the prudential supervision task entrusted to it.
- 20 The ECB inferred the existence of that general presumption of confidentiality from the fact that the EU legislature had laid down rules which, first, impose professional secrecy on all persons working or having worked for the prudential supervisory authorities and, secondly, require that confidential information which those persons receive in the exercise of their functions may be disclosed only in summary or aggregated form, in such a way that credit institutions cannot be identified. In that context, it referred to Article 27 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), to Article 53 et seq. of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338), and to Article 84 of Directive 2014/59.
- 21 Invoking the judgment of 19 June 2018, *Baumeister* (C-15/16, EU:C:2018:464, paragraphs 35 to 43), the ECB stated that, in the field of prudential supervision, the obligation to protect confidential information should not be conceived as an exception to the general principle of transparency, but rather as a general rule in itself. In its view, those rules and the resultant general presumption of confidentiality ensured the effective conduct of supervisory activities, since both the bodies being supervised and the competent authorities could rely on the fact that, in principle, confidential information which had been provided would not be disclosed. According to the ECB, that confidence is essential for an effective exchange of information, which in turn is crucial for the proper conduct of prudential supervision.
- 22 Lastly, the ECB observed that the rules referred to in paragraph 20 above allowed the disclosure of confidential information only in certain cases expressly provided for, which did not feature in the present context.
- 23 For the other three categories of documents requested, the refusal to grant access is based on the exception under Article 4(1)(c) of Decision 2004/258, in conjunction with that under the first indent of Article 4(2) of that decision, which states that ‘the ECB shall refuse access to a document where disclosure would undermine the protection of ... the commercial interests of a natural or legal person, including intellectual property’.
- 24 So far as the first indent of Article 4(2) of Decision 2004/258 is concerned, the ECB stated that disclosure to the applicant of the documents obtained or prepared in the context of the ongoing supervision of Banca Carige could harm the commercial interests of that company, since the information contained therein was not publicly known and reflected an essential element of that company’s current commercial position.
- 25 Having identified no overriding public interest justifying disclosure of the documents in question, the ECB also took the view that the request for access to those documents should be rejected without carrying out a concrete and individual examination of each of them.

Procedure

- 26 By application lodged at the Court Registry on 7 August 2019, the applicant brought the present action.
- 27 By separate document lodged at the Court Registry on the same day, the applicant requested that the present action be dealt with under an expedited procedure in accordance with Article 152 of the Rules of Procedure of the General Court. The application and the request for an expedited procedure were served on the ECB on 20 August 2019. On 3 September 2019, the ECB lodged its observations on that request.
- 28 By decision of 18 September 2019, the General Court (First Chamber) rejected the application for an expedited procedure. The ECB was informed that, in accordance with Article 154(2) of the Rules of Procedure, the period for lodging the defence, to which the 10-day extension on account of distance is added, had been extended by a further month.
- 29 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Fourth Chamber and the present case was re-assigned to that Chamber.
- 30 The ECB lodged its defence on 6 November 2019.
- 31 By letter of 8 November 2019, in view of the late lodging of the defence, the Registrar of the Court requested the applicant to submit its observations on the further course of the proceedings.
- 32 On 20 November 2019, the applicant lodged its observations on the further course of the proceedings and, pursuant to Article 123(1) of the Rules of Procedure, applied to the Court for judgment by default.

Form of order sought by the applicant

- 33 The applicant claims that the Court should:
- annul the contested decision;
 - order the ECB to pay the costs.
- 34 The applicant also requests the Court to take, pursuant to Article 88 of the Rules of Procedure, a measure of inquiry concerning the production of the documents to which access was refused in the contested decision.

Law

- 35 Under Article 123(1) of the Rules of Procedure, where the Court finds that a defendant on whom an application initiating proceedings has been duly served has failed to respond to the application within the time limit, the applicant may apply to the Court for judgment by default.
- 36 In the present case, the ECB lodged the defence on 6 November 2019, that is to say, seven days after the expiry of the period provided for in Article 154(2) of the Rules of Procedure.
- 37 The period for lodging the defence, which, if the Court had granted the application for an expedited procedure, would have expired on 30 September 2019, expired on 30 October 2019, since a single extension on account of distance is applied for the purposes of calculating the period for lodging the

defence when an application for an expedited procedure is rejected (see, to that effect, order of 7 June 2017, *De Masi v Commission*, T-11/16, not published, EU:T:2017:385, paragraphs 17 to 20 and paragraph 22).

- 38 Thus, the ECB did not reply to the application within the prescribed period.
- 39 Since, as stated in paragraph 32 above, the applicant has applied to the Court for judgment by default, Article 123(3) of the Rules of Procedure must be applied.
- 40 In accordance with Article 123(3) of the Rules of Procedure, the Court is to give judgment in favour of the applicant in the judgment by default, unless it is clear that the Court has no jurisdiction to hear and determine the action or that the action is manifestly inadmissible or manifestly lacking any foundation in law.
- 41 In the first place, it should be noted that, as is apparent from the application, the applicant is requesting the Court to annul a decision of the ECB's Executive Board addressed to it, confirming the refusal to grant access to the documents requested by the applicant.
- 42 Under the first paragraph of Article 263 TFEU, the Court of Justice of the European Union is to review the legality of acts of the ECB intended to produce legal effects vis-à-vis third parties. Pursuant to the fourth paragraph of that article, any legal person may institute proceedings before the Court of Justice against an act addressed to it.
- 43 Furthermore, Article 8(1) of Decision 2004/258 confirms that, in the event of a total or partial refusal to grant access, the applicant has a legal remedy laid down under Article 263 TFEU.
- 44 In addition, under the first subparagraph of Article 256(1) TFEU, the General Court has jurisdiction, in particular, to hear and determine at first instance actions or proceedings referred to in Article 263 TFEU, with the exception of those reserved to the Court of Justice by the Statute of the Court of Justice of the European Union. Article 51 of that statute lists the categories of actions which, by way of derogation from the rule laid down in Article 256(1) TFEU, are reserved to the Court of Justice. It should be noted that the present action does not belong to any of those categories.
- 45 In those circumstances, it must be held that the Court does not manifestly lack jurisdiction to rule on the present action.
- 46 In the second place, it should be noted that the applicant is the addressee of the contested decision, which rejects a confirmatory application submitted by it in accordance with Article 7(2) of Decision 2004/258.
- 47 Under the fourth paragraph of Article 263 TFEU, any person may appeal against acts addressed to him or her. The applicant therefore has standing and, in addition, can assert an interest in bringing proceedings against the contested decision (see, to that effect, order of 30 April 2001, *British American Tobacco International (Holdings) v Commission*, T-41/00, EU:T:2001:125, paragraph 20).
- 48 In those circumstances, the action, which was brought, moreover, within the period laid down in the sixth paragraph of Article 263 TFEU, cannot be regarded as manifestly inadmissible.
- 49 In the third place, it must be noted that, in support of the action, the applicant puts forward two pleas in law, each of which has several parts, the examination of which does not enable the Court to take the view that the action is manifestly unfounded.

- 50 The applicant challenges, *inter alia*, in the context of the first part of the first plea in law, the existence of a general presumption arising from Article 4(1)(c) of Decision 2004/258 allowing the ECB to keep confidential the decisions by which it places a credit institution under temporary administration.
- 51 In that regard, the applicant rightly submits that the existence of such a general presumption of confidentiality, derived from Article 4(1)(c) of Decision 2004/258, has not hitherto been recognised or established by the case-law.
- 52 The applicant also challenges, in the context of the second part of the second plea, the consequences which the ECB drew, in the contested decision, from the provisions on professional secrecy and confidentiality referred to in paragraph 20 above.
- 53 Invoking the judgment of 19 June 2018, *Baumeister* (C-15/16, EU:C:2018:464, paragraph 46), the applicant submits that the provisions referred to in paragraph 20 above cannot be interpreted as imposing an absolute obligation of confidentiality on the ECB. On the contrary, according to those provisions, in certain situations the provision of information could be justified.
- 54 Finally, the applicant submits, in the context of the second part of the first plea in law, that the decision of 1 January 2019, which, according to the ECB, could not be communicated to it due to its sensitive nature, was the subject of publication, no doubt unauthorised, in the form of extracts, reproduced on the website of an Italian daily newspaper.
- 55 The applicant submits that an examination of the extracts of the decision of 1 January 2019 which were published makes it possible to establish that the content of that decision is not confidential, since it concerns information which Banca Carige, as a company listed on the regulated markets, was required to publish.
- 56 According to the applicant, that fact has an impact on the assessment of the risks presented by disclosure, pursuant to the case-law (judgment of 3 July 2014, *Council v In 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 60).
- 57 In the light of those factors, it appears that several of the objections submitted by the applicant cannot be considered to be manifestly lacking any foundation in law.
- 58 Thus, the Court finds, in view of the evidence on the file and in the light of the foregoing considerations, first, that it does not manifestly lack jurisdiction to hear the action and, second, that the action is neither manifestly inadmissible nor manifestly lacking any foundation in law.
- 59 Accordingly, it is appropriate to grant to the applicant the form of order which it seeks without it being necessary to adopt the measure of inquiry requested.

Costs

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

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

- 1. Annuls European Central Bank (ECB) Decision LS/LdG/19/185 of 12 June 2019 refusing access to several documents relating to Decision ECB-SSM-2019-ITCAR-11 of the Governing Council of the ECB of 1 January 2019 placing Banca Carige SpA under temporary administration;**
- 2. Orders the ECB to pay the costs.**

Gervasoni

Nihoul

Martín y Pérez de Nanclares

Delivered in open court in Luxembourg on 25 June 2020.

[Signatures]