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Judgment of the Court in Case C-45/21 | Banka Slovenije

Monetary policy and bank resolution in the Eurozone: the Court sets out the limits of the liability of a central bank in respect of damage incurred by holders of financial instruments cancelled by that bank pursuant to reorganisation measures

In 2016, the Slovenian Constitutional Court held that national legislation authorising the Central Bank of Slovenia to cancel certain financial instruments when a credit institution is likely to become insolvent and threaten the financial system as a whole was compatible with the Slovenian Constitution. By contrast, it noted the absence, in the legislation at issue, of special procedural rules concerning actions for damages that may be brought by former holders of cancelled financial instruments.

In order to remedy that deficiency, the National Assembly of the Republic of Slovenia adopted a law ('the ZPSVIKOB'), which lays down rules for the effective judicial protection of former holders of financial instruments cancelled by the Central Bank of Slovenia.

The Central Bank of Slovenia made an application for review of the constitutionality of several provisions of the ZPSVIKOB, arguing, *inter alia*, that the rules laid down in those provisions as regards the incurring of its liability and access to information which it holds were incompatible with EU law.

The Slovenian Constitutional Court asks the Court of Justice to specify the limits imposed by EU law on the liability of a national central bank belonging to the ESCB, from its own funds, for damage suffered by former holders of financial instruments cancelled by it pursuant to reorganisation measures ordered by that central bank.

By today's judgment, the Court notes first of all that the implementation of reorganisation measures for credit institutions such as those to which the liability regime relates, does not constitute a task incumbent on national central banks, since the Member States have the power to choose the competent authority to decide on their implementation. Where a Member State assigns such a function to the central bank of that Member State, that function must be performed under the responsibility and liability of that central bank.

As regards the specific rules governing the liability of a national central bank, it is for the Member State concerned to define the conditions under which the liability of its national central bank may be incurred as a result of the implementation by that bank of a reorganisation measure. Nevertheless, those conditions must be compatible with the prohibition on monetary financing set out in Article 123 TFEU.

In that regard, the incurring of liability manifestly cannot be classified as the direct acquisition of debt instruments of a public body.

By contrast, it cannot be ruled out that establishment of that liability may be regarded as entailing the financing of a public sector obligation vis-à-vis third parties, which would constitute monetary financing.

However, a regime under which a national central bank incurs liability where that bank or the persons it has authorised to act on its behalf have not complied with the duty to exercise due care imposed on them by national law, in the exercise of a function conferred on that central bank by that law, cannot, in principle, be regarded as involving financing of public sector obligations vis-à-vis third parties.

The Court therefore finds that **EU law¹ does not preclude national legislation providing that a national central bank belonging to the ESCB is liable, from its own funds, for damage suffered by former holders of financial instruments cancelled by it pursuant to reorganisation measures ordered by that central bank**, where it appears, during subsequent court proceedings, that either that cancellation was not necessary in order to ensure the stability of the financial system, or those former holders of financial instruments suffered greater losses as a result of that cancellation than they would have suffered in the event of the insolvency of the financial institution concerned, **to the extent that the central bank in question is held liable only where it or the persons whom it authorised to act on its behalf acted in serious breach of their duty to exercise due care.**

As regards the obligation on the part of the national central bank concerned to compensate certain former holders of financial instruments cancelled by it solely on account of that cancellation, the payment, from its own funds, of such compensation by the national central bank must therefore be regarded as leading it to be responsible, in place of the other public authorities of the Member State concerned, for the financing of public sector obligations under the national legislation of that Member State.

The Court therefore finds that **EU law² precludes national legislation which provides that a national central bank belonging to the ESCB is liable, from its own funds, within predetermined limits, for damage suffered by former holders of financial instruments cancelled by it pursuant to reorganisation measures, only on condition that, first, those former holders are natural persons whose annual income is below a threshold defined by that legislation and, second, the former holders waive entitlement to compensation for that damage by means of another legal remedy.**

As regards the financing of the costs entailed in the liability regime at issue, the Court finds that the basic tasks of the ESCB, which include the definition and implementation of the EU monetary policy, fall also on the national central banks. In order to participate in the implementation of the European Union's monetary policy, the establishment of reserves by the national central banks appears essential, in particular in order to be able to offset any losses resulting from monetary policy operations and to finance open market operations.

In that context, a levy on the general reserves of a national central bank, in an amount likely to affect its ability to carry out its tasks effectively under the ESCB, combined with an inability to restore those reserves independently, because all its profits are systematically allocated to reimbursement of damage which it has caused, is liable to place that central bank in a situation of dependence with regard to the political authorities of the Member State to which it belongs.

The Court concludes that **EU law³ precludes national legislation which provides that a national central bank belonging to the ESCB is liable for damage caused by the cancellation of financial instruments, pursuant to reorganisation measures ordered by that central bank, in such sums as might impair the bank's ability to perform its tasks effectively and financed, in order of priority, by the allocation to special reserves of all the profits made by that central bank as from a specified date, a levy on the general reserves of that central bank not exceeding 50% of those reserves, and a loan, together with interest, from the Member State**

¹ Article 123(1) TFEU and Article 21.1 of the Protocol on the ESBC and the ECB

² Article 123(1) TFEU and Article 21.1 of the Protocol on the ESBC and the ECB

³ Article 130 TFEU and Article 7 of the Protocol on the ESBC and the ECB

concerned.

As regards information obtained or generated during the implementation of reorganisation measures, the Court finds that **the obligations of professional secrecy and confidentiality apply to authorities responsible, under national law, for the function of supervising credit institutions** but they may not be imposed on information which has been obtained or generated in the exercise of other functions.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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