

FINANCIAL SERVICES TRIBUNAL

Pierre Lofaro LL.D – Chairman

Joseph Azzopardi FCCA, FIA, CPA, MBA(Warwick) – Member

Ivan Sammut Dip.Bus.Law & Acc., Adv. Trib. Eccl (Melit.), M.A. (Fin. Serv.), LL.D – Member

FST 01/17

Heikki Niemelä, Mika Lehto each in their personal capacity as directors of Nemea Bank plc (C 45025);
Nevestor SA (890.311.134); and
Nemea Bank plc (C 45026)

Vs

Malta Financial Services Authority

Today 9 October 2019

The Tribunal,

Saw the application of the company Nemea Bank plc (C 450260) (“the Bank”) filed on the 27 March 2019 in virtue of which it requested a stay of these proceedings until such time as the directors of the Bank are granted access to the Bank, its information, files, information, IT systems, information about its financial situation as well as access to the Bank’s financial resources in order for the bank to be able to pay for representation by external legal counsel and generally until such time as the effective representation by its directors is effectively restored.



Saw the reply of the respondent Authority filed on the 17 April 2019 in virtue of which it opposed to the Bank’s request for stay of proceedings for the reasons therein mentioned.

Saw that this appeal was left for decision on this request.

Saw appellant’s replies and annexed documentation following the Tribunal’s request for additional information dated 2 July 2019 and the Authority’s replies thereto.

Considered:

That first of all, it is being noted that the appellant Bank has deduced this request both in these proceedings as well as in the other proceedings which are being heard concurrently with this appeal, namely appeal numbers FST 4/16 and FST 10/16 both in the same names “Heikki Niemelä, Mika Lehto each in their personal capacity as directors of Nemea Bank plc (C 45025); Nevestor SA (890.311.134); and Nemea Bank plc (C 45026) (vs) Malta Financial Services Authority”.

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The main contention of appellant Bank in this application is that, following the judgement of the Court of Appeal of 5 November 2018 confirming the decision of this Tribunal of 16 January 2017 that the Bank's directors had the required juridical interest to institute proceedings before the Tribunal, both in their personal capacity as well as on behalf of appellant Bank, the effective transfer of the control of the Bank and its representation to the competent persons has to be partially reversed now. Appellant Bank contends at paragraph 11 of its application that "*the directors have to be reinstated in their positions to the extent that this is necessary in order for them to be able to discharge their responsibility pursuant to the decision of the Court of Appeal*".

In their application, appellant Bank also informs this Tribunal at paragraphs 3 and 29 *et sequitur* that the appellants have also instituted proceedings before the General Court of the European Union (reference T-321/17 in the names "*Heikki Niemelä and others versus the European Central Bank*" in order to contest the revocation of the Bank's licence as a European credit institution by the European Central Bank on 23 March 2017, and that a request for stay of proceedings on similar grounds – namely pending the restoration of the effective representation of the Bank by its directors in accordance with the decision of the Maltese Court of Appeal dated 5 November 2018 – has already been made by the Bank before the General Court of the European Union in the context of the mentioned proceedings.

Following the sitting held on 8 May 2019 and from Exhibit B annexed to appellant's Note submitted on 12 July 2019 it resulted that the President of the Chamber of the General Court of the European Union had decided to stay proceedings in the said case T-321/17 "*until the decision of the Court of Justice in Joined Cases C-663/17P ECB v Trasta Komerbankasa and Others, C-665/17P Commission v Trasta Komerbankasa and Others and C-669/17P Trasta Komerbankasa and Others v ECB*".

Consequently, appellant Bank is requesting this Tribunal to stay proceedings until a decision of the General Court of the European Union on the restoration of the effective representation of the Bank by its directors in accordance with the decision of the Maltese Court of Appeal dated 5 November 2018.

The Respondent Authority rebuts this request mainly on the following grounds:

- a) the Court of Appeal judgement of 5 November 2018 was specifically limited to the *locus standi* of the directors of Nemea Bank plc to bring proceedings on behalf of the Bank, and, consequently, does not in any way impact the continuation of these proceedings. The judgement goes no further and any attempt by appellants to broaden the remit of that judgement is merely an inference not found in said judgement.
- b) the Court of Appeal judgement of 5 November 2018 does not conclude that the MFSA in any manner disrupted the effective representation of such directors.
- c) should the appellants insist on their conviction that the MFSA acted in breach of their basic rights, then they should seek redress in the appropriate forum, without the need to disrupt the appeal proceedings.

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- d) the allegations raised by appellants fall outside the scope of the proceedings and outside the scope of the competence of the Tribunal. The foundation on which the application is based and the appeal proceedings are unrelated and thus the application cannot be acceded to. During the sitting of 8 May 2019, the Authority's able legal counsel amplified the point that the issues being debated at ECB and/or the General Court of the European Union deal with matters which are not the decisions being appealed from in this forum.
- e) the appellants have not clarified why their allegations should result in a stay of proceedings and have not given a realistic timeframe as to when they expect to be in a position to proceed with these proceedings.
- f) during the sitting of 8 May 2019 the Authority's legal counsel contended that the European Central Bank does not have the power, legally, to order the MFSA to grant funding to the Bank, or to allow funding to be granted to the Bank, or to allow documents to be disclosed to the other side¹. The Authority basically contends that the merit of these proceedings is different to the merit of what is being debated with the ECB (although they admit that "they might have some marginal issues").

Considered:

In their appeal application, the merit of these proceedings, appellants are contesting the directive of the Authority of 6 December 2016 varying the Authority's Directive of 17 October 2016 and *inter alia* directing the Bank to apply the necessary measures to inject Common Tier I capital and thereby increase the capital position of the Bank to a total of €8,000,000.

Now the basis of appellant's request to this Tribunal to stay proceedings depends on a decision of the General Court of the European Union which is examining a decision of the European Central Bank to revoke the licence of appellant Bank and which General Court has also been asked by appellants to restore the effective representation of the Bank to its directors pursuant to the decision of the Maltese Court of Appeal. During the submissions on the current application, it also resulted that the General Court of the European Union had ordered a stay of proceedings pending this decision.

It is to be noted that on 8 May 2019 this Tribunal, in similar though not identical circumstances, had decided in a request for stay of proceedings in the appeal *Pilatu00s Holdings Limited (vs) L-Awtorita' ghas-Servizzi Finanzjarji ta' Malta* that:

"Illi l-fatt li r-revoka definitiva tal-licenza bankarja ta' l-appellanti, in virtu' tad-decizjoni tal-Bank Centrali Ewropew, tista' tolqot jew addirittura testingwi l-interess ta' l-appellanti fl-appell odjerni hija materja irrilevanti f'dan l-istadju. La darba sallum l-appellanti ghad ghandha interess f'dan l-appell, allura hija mistennija li tmexxi 'l quddiem l-istess appell, u l-qaghda taghha fid-dawl tal-provvediment finali mill-organi kompetenti Ewropej ghandha tigi meqjusa fil-mument opportun, u cioe' meta jinghata tali provvediment finali.

¹ This is contested by appellant Bank which holds that within the Single Supervisory Mechanism of the European Union ("SSM"), the ECB is the authority with the overall responsibility for the SSM.

Illi l-fatt li kemm il-provvediment tal-Bank Centrali Ewropew u kemm id-direttivi appellati f'dawn il-proceduri ghandhom l-istess effett huwa wkoll irrilevanti. Il-validita' o meno taz-zewg sensiela ta' direttivi jridu ta' bilfors jitqiesu b'mod indipendenti minn xulxin, b'mod li t-thassir jew il-konferma ta' direttiva wahda mhux necessarjament tinfluwixxi fuq it-thassir jew il-konferma tad-direttiva l-ohra".

This Tribunal is of the opinion that the present appeal proceedings and those before the General Court of the European Union are different and the proceedings before the General Court are outside the scope of the competence of the Tribunal. The Tribunal notes that appellants, through legal counsel Mr. Otto Hendrick Behrends, had written to the Authority² - vide Annex F attached to the application – in order to restore the effective representation of the Bank by the directors. The Authority rejected appellants' request by letter from its legal counsel dated 7 February 2019 (Annex E attached to this application). Appellant Bank contends that “In the view of the Bank the MFSA’s response has no basis at law and is plainly unlawful” and sustains this contention by various arguments at paragraphs 23-28 of the application.

However, the Tribunal notes that the proper legal procedure that appellant Bank should have adopted in this forum was to call upon this Tribunal following the Authority’s decision dated 7 February 2019 in terms of law and not to request a stay of proceedings made dependent on a decision of a different forum.

As Maltese jurisprudence holds “*Is-sopprassjoni hija, minnha nnifisha mizura eccezzjonlissima ghaliex tiffrena l-andament normali ta' kawza b'mod billi twaqqaf ghalhekk dik l-ispeditezza li tesigi l-gustizzja biex kull kawza tingata' fi zmien ragjonevoli*” – Dottor Alfred Mifsud (vs) Onorevoli Prim Ministru, 20 July 1994 (Constitutional Court).

For these reasons, the Tribunal is rejecting the request for a stay in these proceedings, and orders the continuation of the hearing of this appeal.

Costs are to be borne by appellant Bank.



² copied to the European Central Bank, and appellant states also in its application that the request had also been sent to the competent person.