Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

13 September 2018 (*)

(Reference for a preliminary ruling — Approximation of laws — Directive 2013/36/EU — Article 53(1) — Obligation of professional secrecy on national authorities charged with prudential supervision of credit institutions — Credit institution which is being compulsorily wound up — Disclosure of confidential information in civil or commercial proceedings)

In Case C−594/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 29 September 2016, received at the Court on 23 November 2016, in the proceedings

Enzo Buccioni

v

Banca d'Italia,

interveners:

Banca Network Investimenti SpA, in liquidation,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça (Rapporteur), President of the Chamber, E. Levits, A. Borg Barthet, M. Berger and F. Biltgen, Judges,

Advocate General: M. Bobek,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 21 March 2018,

after considering the observations submitted on behalf of:

– Mr Buccioni, by N. Paoletti, A. Mari and G. Paoletti, avvocati,

– Banca d'Italia, by S. Ceci, M. Marcucci, and N. de Giorgi, avvocati,

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

– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and L. Barroso, acting as Agents,

– the European Commission, by V. Di Bucci, J. Baquero Cruz and K.-P. Wojcik and A. Steiblytė, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 June 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 53(1) 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).

2 This request was made in the course of proceedings between Mr Enzo Buccioni and the Banca d'Italia ('the BdI'), concerning the latter's decision refusing to grant the applicant access to certain documents regarding Banca Network Investimenti SpA ('BNI').

Legal context

European Union law

3 Recitals 2, 5, 6 and 15 of Directive 2013/36 state:

'(2) ... The main objective and subject matter of this Directive is to coordinate national provisions concerning access to the activity of credit institutions and investment firms, the modalities for their governance, and their supervisory framework. ...

...

(5) This Directive should constitute the essential instrument for the achievement of the internal market from the point of view of both the freedom of establishment and the freedom to provide financial services in the field of credit institutions.

(6) The smooth operation of the internal market requires not only legal rules but also close and regular cooperation and significantly enhanced convergence of regulatory and supervisory practices between the competent authorities of the Member States.

...

(15) It is appropriate to effect harmonisation which is necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the granting of a single licence recognised throughout the Union and the application of the principle of home Member State prudential supervision.'

4 Article 4 of that directive, entitled 'Designation and powers of the competent authorities' provides as follows:

'…

2. Member States shall ensure that the competent authorities monitor the activities of institutions ... so as to assess compliance with the requirements of this Directive and 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)].

3. Member States shall ensure that appropriate measures are in place to enable the competent authorities to obtain the information needed to assess the compliance of institutions ... with the requirements referred to in paragraph 2 and to investigate possible breaches of those requirements.

...

5. Member States shall require that institutions provide the competent authorities of their home Member States with all the information necessary for the assessment of their compliance with the rules adopted in accordance with this Directive and Regulation (EU) No 575/2013. Member States shall also ensure that internal control mechanisms and administrative and accounting procedures of the institutions permit the checking of their compliance with such rules at all times.

...'

5 Article 6 of that directive, entitled 'Cooperation within the European System of Financial Supervision' provides as follows:

'In the exercise of their duties, the competent authorities shall take into account the convergence in respect of supervisory tools and supervisory practices in the application of the laws, regulations and administrative requirements adopted pursuant to this Directive and to Regulation [No 575/2013]. For that purpose, Member States shall ensure that:

(a) the competent authorities, as parties to the European System of Financial Supervision (ESFS), cooperate with trust and full mutual respect, in particular when ensuring the flow of appropriate and reliable information between them and other parties to the ESFS, in accordance with the principle of sincere cooperation set out in Article 4(3) of the Treaty on European Union;

...'

6 Article 50 of that directive, entitled 'Collaboration concerning supervision', provides, in paragraph 1 thereof:

'The competent authorities of the Member States concerned shall collaborate closely in order to supervise the activities of institutions operating, in particular through a branch, in one or more Member States other than that in which their head offices are situated. They shall supply one another with all information concerning the management and ownership of such institutions that is likely to facilitate their supervision and the examination of the conditions for their authorisation, and all information likely to facilitate the monitoring of institutions, in particular with regard to liquidity, solvency, deposit guarantee, the limiting of large exposures, other factors that may influence the systemic risk posed by the institution, administrative and accounting procedures and internal control mechanisms.'

7 Article 53 of Directive 2013/36, entitled 'Professional secrecy', provides in paragraph 1:

'Member States shall provide that all persons working for or who have worked for the competent authorities and auditors or experts acting on behalf of the competent authorities shall be bound by the obligation of professional secrecy.

Confidential information which such persons, auditors or experts receive in the course of their duties may be disclosed only in summary or aggregate form, such that individual credit institutions cannot be identified, without prejudice to cases covered by criminal law.

Nevertheless, where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be disclosed in civil or commercial proceedings.'

8 Article 54 of that directive concerns 'Use of confidential information'.

9 Article 22 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), concerns the due process for adopting European Central Bank (ECB) supervisory

decisions, while Article 27 of that regulation relates to the obligation of professional secrecy which is incumbent on the members of the Supervisory Board, on staff of the ECB and on staff seconded by participating Member States carrying out supervisory duties, and to the exchange of information between the ECB and national or European Union authorities and bodies.

Italian law

10 Article 22 of legge n. 241 — recante nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (Law No 241 concerning new provisions on administrative procedure and the right to access administrative documents) of 7 August 1990, as amended, entitled 'Definitions and principles concerning access', provides, in paragraphs 2 and 3:

'2. In view of its important public interest objectives, the right of access to administrative documents constitutes a general principle underlying the activities of administrative authorities in order to promote participation and to ensure that such activities are impartial and transparent.

3. Access to all administrative documents shall be granted, with the exception of those referred to in Article 24(1), (2), (3), (5) and (6).'

11 Article 24 of that law, as amended, entitled 'Exclusion from the right of access' provides:

'1. The right of access shall not be granted:

(a) in respect of documents covered by state secrets within the meaning of Law No 801 of 24 October 1977, as subsequently amended, and in respect of secrets or prohibitions on disclosure expressly provided for by law, by the government regulation referred to in paragraph 6, and by the public authorities, as provided for in paragraph 2 of this article.

...

3. Requests for access aimed at general control of the activity of public administrations shall not be admissible.

...

7. However, applicants must be granted access to administrative documents where knowledge of such documents is necessary to safeguard or defend their own legal interests ...'

12 Article 7 of decreto legislativo n. 385 — recante il testo unico delle leggi in materia bancaria e creditizia (Legislative Decree No 385 concerning the consolidated law on banking and credit services) of 1 September 1993, as amended, entitled 'Professional secrecy and cooperation between authorities' provides, in paragraph 1:

'All information and data in the possession of the [BdI] by reason of its supervision activities shall be covered by official secret, including vis-à-vis public authorities, with the exception of the Minister for the Economy and Finance, who presides over the CICR [Comitato interministeriale per il credito e il risparmio (Interministerial Committee for Credit and Savings)]. Disclosure cannot be denied to judicial authorities on grounds of official secret where the information requested is necessary for preliminary investigations or proceedings relating to infringements for which criminal penalties may be imposed.'

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

13 It is apparent from the information available to the Court that Mr Buccioni has held a current account with a credit institution, BNI, since 2004. On 5 August 2012, the balance of that account was EUR 181 325.31. The referring court states that, since that institution went into a compulsory liquidation procedure, only

EUR 100 000 was reimbursed to that depositor by the Fondo Interbancario di Tutela dei Depositi (Interbank Deposit Protection Fund).

14 Mr Buccioni considers that there are facts that are likely to entail the responsibility of both the BdI and BNI for the financial losses incurred. With the aim of obtaining additional information in order to assess whether it is appropriate to bring legal proceedings, Mr Buccioni requested the BdI, on 3 April 2015, to disclose several documents relating to the supervision of BNI.

15 By decision of 20 May 2015, the BdI partially refused that request on the grounds, inter alia, that certain documents whose disclosure was requested contained confidential information covered by its obligation of professional secrecy, that the request was not sufficiently precise or that it concerned documents of no relevance to the applicant.

16 Mr Buccioni brought an action before the Tribunale amministrativo regionale del Lazio (Lazio Regional Administrative Court, Italy) seeking annulment of that decision. By judgment of 2 December 2015, the court hearing the case dismissed the action.

17 Mr Buccioni brought an appeal against that judgment before the Consiglio di Stato (Council of State, Italy). In that regard, he argues, in particular, that the court of first instance infringed Article 53(1) of Directive 2013/36 to the extent that, since BNI had been placed in compulsory liquidation, the obligation of professional secrecy incumbent on the BdI no longer applied. However, the BdI contends that, under that provision, the disclosure of confidential information concerning a credit institution subject to compulsory liquidation proceedings presupposes that the applicant has first initiated civil or commercial proceedings.

18 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is the principle of transparency, which is clearly set out in Article 15 of the TFEU, with its binding general objective, if construed as meaning that that principle may be regulated by the sources of law or equivalent provided for in Article 15(3), the content of which could suggest an excessively broad discretion that lacks foundation in a higher source of European law as regards the need to predetermine minimum principles from which there is no derogation, not at variance with the restrictive objective in European legislation concerning the supervision of credit institutions, to such a degree that the principle of transparency itself is rendered ineffective, including in circumstances in which the interest in access is founded on vital interests of the applicant that are clearly comparable to the interests that constitute exceptions, in his favour, to the restrictions in the sector?

(2) As a result of this, must Article 22(2) and Article 27(1) of Regulation No 1024/2013 be interpreted not as non-exceptional cases in which derogations from the non-accessibility of documents are permitted, but as provisions to be interpreted in the light of the broader objectives of Article 15 of the TFEU and, as such, founded on a general legislative principle of European law according to which access cannot be restricted, following a reasonable and proportionate balancing of the needs of the credit institutions with the fundamental interests of a saver caught up in a case of burden sharing, depending on the relevant circumstances established by a supervisory authority with organisational tasks and responsibilities in the sector comparable to those of the ECB?

(3) Consequently, must not Article 53 of Directive 2013/36 and the provisions of national law that reflect it, be reconciled with the remaining rules and principles of European law, as set out in the first question, to the effect that access may be granted, where requested after the banking institution has been placed in compulsory liquidation, including where the request for access is not made exclusively in the context of civil or commercial proceedings that have actually been brought to protect the financial interests that have been prejudiced because the banking institution has been placed in compulsory liquidation, but also where the request is addressed to a judicial body authorised by the national State to safeguard the right of access and transparency, specifically in

order to determine the actual possibility of bringing such civil or commercial proceedings, before they are in fact instituted, with a view to protecting in full the rights of defence and the right to bring proceedings, with specific reference to the request of a saver who has already suffered the effects of burden sharing in connection with the winding up of the credit institution with which he deposited his savings?'

Consideration of the questions referred

19 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 53(1) of Directive 2013/36, read in conjunction with both Article 15 TFEU and Article 22(2) and Article 27(1) of Regulation No 1024/2013, must be interpreted as precluding the competent authorities of the Member States from disclosing confidential information to a person who so requests in order to be able to institute civil or commercial proceedings with a view to protecting proprietary interests which were prejudiced as a result of the compulsory liquidation of a credit institution.

20 It is important to note, in so far as the referring court refers to both Article 15 TFEU and to Article 22(2) and Article 27(1) of Regulation No 1024/2013, that the interpretation of those provisions, which as the wording clearly states are not addressed to the competent authorities of the Member States (see, to that effect, judgment of 18 July 2017, *Commission* v *Breyer*, C−213/15 P, EU:C:2017:563, paragraphs 51 and 52), is irrelevant in the main proceedings, which concern a request for access to documents in the possession of the BdI.

21 In order to answer the questions raised, it should first be noted that it is apparent from recital 2 of Directive 2013/36 that its main objective is to coordinate national provisions concerning access to the activity of credit institutions and investment firms, the modalities for their governance, and their supervisory framework.

22 Furthermore, Directive 2013/36, as set out in recitals 5 and 6 thereof, should constitute the essential instrument for the achievement of the internal market in the field of credit institutions, the smooth operation of which requires not only legal rules but also close and regular cooperation and significantly enhanced convergence of regulatory and supervisory practices between the competent authorities.

23 It also follows from recital 15 of that directive that it seeks to achieve the necessary and sufficient degree of harmonisation to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the granting of a single licence recognised throughout the European Union and the application of the principle of home Member State prudential supervision.

24 To that end, Article 4(2) and (3) of Directive 2013/36 provides that Member States are to ensure both that the competent authorities monitor the activities of credit institutions so as to assess compliance with the requirements of that directive and that appropriate measures are in place to enable the competent authorities to obtain the information necessary to assess whether those institutions comply with those requirements. According to Article 4(5), the Member States are to require, inter alia, that credit institutions provide the competent authorities of their home Member State with all the information necessary for the assessment of their compliance with the rules adopted in accordance with Directive 2013/36.

25 Furthermore, Article 6(a) of that directive provides that Member States shall ensure that the competent authorities cooperate with trust and full mutual respect, in particular when ensuring the flow of appropriate and reliable information between them and other parties to the ESFS, in accordance with the principle of sincere cooperation set out in Article 4(3) TEU.

26 Moreover, under Article 50(1) of that directive, the competent authorities of the Member States concerned shall collaborate closely in order to supervise the activities of credit institutions operating, in particular through a branch, in one or more Member States other than that in which their head offices are situated. They are to supply one another with all information concerning the management and ownership of such

institutions that is likely to facilitate their supervision and the examination of the conditions for their authorisation, and all information likely to facilitate the monitoring of institutions, in particular with regard to liquidity, solvency, deposit guarantee, the limiting of large exposures, other factors that may influence the systemic risk posed by the institution, administrative and accounting procedures and internal control mechanisms.

27 The effective implementation of the prudential supervision regime for credit institutions that the EU legislature established by adopting Directive 2013/36, through supervision within a Member State and the exchanging of information by the competent authorities of several Member States, as briefly described in the preceding paragraphs, requires that both the supervised credit institutions and the competent authorities can have confidence that the confidential information provided will, in principle, remain confidential (see, by analogy, judgment of 19 June 2018, *Baumeister*, C−15/16, EU:C:2018:464, paragraph 31).

28 The absence of such confidence is liable to compromise the smooth transmission of the confidential information that is necessary for prudential monitoring (see, by analogy, judgment of 19 June 2018, *Baumeister*, C−15/16, EU:C:2018:464, paragraph 32).

29 Therefore, in order to protect not only the specific interests of the credit institutions directly concerned, but also the public interest linked, in particular, to the stability of the financial system within the European Union, Article 53(1) of Directive 2013/36 imposes, as a general rule, the obligation to maintain professional secrecy (see, by analogy, judgment of 19 June 2018, *Baumeister*, C−15/16, EU:C:2018:464, paragraph 33).

30 Finally, the specific cases in which the general rule that disclosure of confidential information held by the competent authorities is prohibited, laid down in Article 53(1) of Directive 2013/36, does not, exceptionally, preclude their communication or use, are exhaustively set out in that directive (see, by analogy, judgment of 19 June 2018, *Baumeister*, C−15/16, EU:C:2018:464, paragraph 38).

31 In the present case, it must be noted that the third subparagraph of Article 53(1) of Directive 2013/36 provides that ‘where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be disclosed in civil or commercial proceedings’.

32 As the Advocate General pointed out, in essence, in points 79 to 81 of his Opinion, by that provision the EU legislature sought to allow the competent authority to disclose confidential information not concerning third parties involved in attempts to rescue the credit institution, for use in civil or commercial proceedings, only to persons directly concerned by the bankruptcy or compulsory liquidation of the credit institution, under the supervision of the competent courts.

33 In the light of all the above considerations, it cannot be inferred from the wording of the third subparagraph of Article 53(1) of Directive 2013/36 or from the context of that provision, nor from the objectives pursued by the rules on professional secrecy contained in that directive, that confidential information relating to a credit institution which has been declared bankrupt or put into compulsory liquidation may be disclosed only in the context of civil or commercial proceedings which have already been initiated.

34 In a case such as the present one in the main proceedings, disclosure of that information in proceedings of an administrative nature under national law, even before civil or commercial proceedings have been initiated, can ensure compliance with the requirements set out in paragraph 32 of the present judgment and thus the effectiveness of the obligation of professional secrecy laid down in Article 53(1) of Directive 2013/36.

35 In that context, the needs of the proper administration of justice would be undermined if the applicant were obliged to bring civil or commercial proceedings in order to obtain access to confidential information in the possession of the competent authorities.

36 Moreover, that interpretation is not called into question by the considerations set out in paragraph 39 of the judgment of 12 November 2014, *Altmann and Others* (C−140/13, EU:C:2014:2362), according to which the dispute in the main proceedings in that case did not fall within the scope of the civil or commercial proceedings brought by the persons who had requested access to confidential information concerning an investment firm that was in compulsory liquidation. In the judgment of 12 November 2014, *Altmann and Others* (C−140/13, EU:C:2014:2362), the Court was not asked to address the issue which is the subject of the present proceedings, since that judgment sought to interpret Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1), in factual and procedural circumstances that differ, at national level, from those of the case at issue in the main proceedings. It is therefore not possible to draw from paragraph 39 of that judgment any indication as to the interpretation to be given to Article 53(1) of Directive 2013/36, as the Advocate General noted, in essence, in points 50 and 52 of his Opinion.

37 However, in accordance with well-established case-law, it is appropriate to strictly interpret the derogations, provided for in Directive 2013/36, from the general prohibition on the disclosure of confidential information (see, to that effect, judgment of 22 April 2010, *Commission* v *United Kingdom*, C−346/08, EU:C:2010:213, paragraph 39 and the case-law cited).

38 Consequently, it must be considered that the possibility of excluding the obligation of professional secrecy, pursuant to the third subparagraph of Article 53(1) of that directive, requires that the request for disclosure must relate to information in respect of which the applicant puts forward precise and consistent evidence plausibly suggesting that it is relevant for the purposes of civil or commercial proceedings which are under way or to be initiated, the subject matter of which must be specifically identified by the applicant and without which the information in question cannot be used.

39 In any event, it is for the competent authorities and courts to weigh up the interest of the applicant in having the information in question and the interests connected with maintaining the confidentiality of the information covered by the obligation of professional secrecy, before disclosing each piece of confidential information requested (see, to that effect, judgment of 14 February 2008, *Varec*, C−450/06, EU:C:2008:91, paragraphs 51 and 52 and the case-law cited).

40 In the light of the above, the answer to the questions referred is that Article 53(1) of Directive 2013/36 must be interpreted as not precluding the competent authorities of the Member States from disclosing confidential information to a person who so requests in order to be able to institute civil or commercial proceedings with a view to protecting proprietary interests which were prejudiced as a result of the compulsory liquidation of a credit institution. However, the request for disclosure must relate to information in respect of which the applicant puts forward precise and consistent evidence plausibly suggesting that it is relevant for the purposes of civil or commercial proceedings, the subject matter of which must be specifically identified by the applicant and without which the information in question cannot be used. It is for the competent authorities and courts to weigh up the interest of the applicant in having the information in question and the interests connected with maintaining the confidentiality of the information covered by the obligation of professional secrecy, before disclosing each piece of confidential information requested.

Costs

41 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 (Fifth Chamber) hereby rules:

Article 53(1) 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, must be interpreted as not precluding the competent authorities of the Member States from disclosing confidential information to a person who so requests in order to be able to institute civil or commercial proceedings with a view to protecting proprietary interests which were prejudiced as a result of the compulsory liquidation of a credit institution. However, the request for disclosure must relate to information in respect of which the applicant puts forward precise and consistent evidence plausibly suggesting that it is relevant for the purposes of civil or commercial proceedings, the subject matter of which must be specifically identified by the applicant and without which the information in question cannot be used. It is for the competent authorities and courts to weigh up the interest of the applicant in having the information in question and the interests connected with maintaining the confidentiality of the information covered by the obligation of professional secrecy, before disclosing each piece of confidential information requested.

[Signatures]

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* Language of the case: Italian.