

THE INTERPLAY BETWEEN THE ECB AND NCAs IN THE  
“COMMON PROCEDURES” UNDER THE SSM REGULATION:  
ARE THERE GAPS IN LEGAL PROTECTION?

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\* The opinions expressed in this presentation are solely those of the author and do not represent the official policy or position of the ABoR

# OUTLINE

1. Division of competence between the CJEU and national courts in the review of the decision taken within the SSM: a general approach
2. The “common procedures” and the judicial review
3. Some cases
4. Conclusions

## The judicial review of the decision taken within the SSM

- The Single Supervisory Mechanism (SSM) does not have legal personality
- SSM is merely a mechanism, not an institution
- In the light of the above, the supervisory decisions cannot be ascribed to the SSM but **have to be ascribed to the ECB or to the NCAs** according to the rules on the distribution of competences contained in the SSM Regulation.

## Establishing which court has jurisdiction

- according to Article 163 TFUE, the Court of Justice is competent to assess the legality of ECB acts.
- according to general principles, national courts and tribunals are competent to assess the legality of the acts of National Competent Authorities.

## Division of competence between the CJEU and national courts in the review of the decision taken within the SSM

- **With respect to “banks of significant relevance”, supervisory decisions will be taken by the ECB.**
  - *National competent authorities shall be responsible for assisting the ECB with the preparation and implementation of any acts relating to the ECB tasks (in “close cooperation”), but in this role they are considered as an “integral part of the SSM” then **the decision is taken by the ECB and the CJEU is competent***
- **With respect to “less significant banks”, supervisory decisions will be taken by national competent authorities (NCAs).**
  - *The ECB shall issue regulations, guidelines or general instructions to national competent authorities for the purposes of ensuring consistency of supervisory outcomes within the SSM, but **the decision is taken by the NCA, then national courts have competence***

## The case of acts carried out by a national authority implementing a decision of the ECB

- when the ECB has no powers to implement its decision (because there is no legal basis for this in the Union Law) but the NCAs have powers to implement the ECB decision according to national law, the decision is ascribed to the NCA...therefore National Courts are competent
- For instance, concerning administrative penalties “... the ECB may require national competent authorities to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed...when any relevant national law confers specific powers which are currently not required by Union law”. In the latter case **penalties are applied by NCAs**. (Article 18(5)).
- **Can the person affected by the NCA’s decision bring a case before the CJEU to challenge the ECB request to the NCA?**

## The CJEU could play an important role in the judicial review of a decision by national courts

- According to Article 267 of TFEU, the CJEU has jurisdiction to give **preliminary rulings** concerning the **validity** and **interpretation** of acts of the institutions, bodies, offices or agencies of the Union
- For instance, where an act has been taken by a national competent authority, on instructions of the ECB a national court may request the Court of Justice for a preliminary ruling on the validity or on the interpretation of the ECB decision
- This a way to avoid possible cases of conflicting jurisdiction

## The common procedures and the judicial review

### Is the general approach a good fit to “common procedures”?

- the authorisation to take up the business of credit institutions
- the withdrawal of an authorisation
- the decision whether or not to oppose the acquisition of a qualifying holding



# Cooperation with regard to “common procedures”

## Granting an authorisation to take up the business of a credit institutions:

- The NCA receives the application
- The NCA assesses whether the applicant complies with all the conditions for authorisation
- The NCA shall reject applications that do not comply with the condition for authorisation laid down by the relevant national law and send a copy of its decision to the ECB
- The NCA shall prepare a draft decision if satisfied that the application complies with all the conditions for the authorisation
- The ECB shall decide on the basis of its own assessment **and** the NCA’s draft decision

# Cooperation with regard to “common procedures”

## Decision on acquisition of a qualifying holding

- The NCA receives the notification of an intention
- The NCA assesses whether the potential acquisition complies with all the conditions
- The NCA shall prepare a draft decision
- The ECB shall decide on the basis of its own assessment **and** the NCA’s draft decision

# Is it possible to appeal before national courts the NCA's assessment?

- **Yes in case of rejection of the application** to obtain the authorisation: this is a NCA's decision
- **What about a final decision refusing the authorization or opposing an acquisition based on the NCA's assessment?**
  - If we consider that:
    - “common procedures” **are ultimately decided on by the ECB**
    - any substantial legal flaw in the NCA's assessment **becomes a flaw of the ECB final decision**
    - there is **no “interest” of the parties affected by the final decision to obtain the annulment of the “proposal” of the NCA before a national court**
  - we should conclude that there is only one option: **the appeal of the final decision before the CJEU**
  - What about **a procedural legal flaw in the NCA phase of the procedure?**
    - according to a few precedents of the CJEU in cases of Union's exclusive competences, the Union Court would be competent to assess whether proved flaws of national preparatory acts affect the final decisions adopted by Union Institutions (T-346/94 France Aviation; T-290/97 Mehibas Dordtselaan; C-64/05 Sweden vs EC).

# Some cases: Fininvest v ECB

**Three pending cases** to challenge the ECB decision to oppose the acquisition, by Fininvest, of a qualifying holding in a credit institution (Mediolanum bank):

1. An appeal to obtain a declaration of invalidity before the Italian National Court (Consiglio di Stato) of the **measures of inquiry and non-binding proposals adopted by the Bank of Italy**
2. An appeal before the CJEU (Case T-913/2016) for the **annulment of the ECB decision to oppose the acquisition**
3. A request for a preliminary ruling from Consiglio di Stato before the CJEU (Case C-219/17) **on the interpretation of Article 263(1),(2),(5) and Article 256(1) about the Jurisdiction of CJEU**

# Some cases: Fininvest v ECB

According to Consiglio di Stato, considering the lack of a precedent in the case law of CJEU it is questionable whether:

“**Common procedures**” could be interpreted as

- a plurality of proceedings carried out by the National authorities and by the ECB or
- only one proceeding composed of different stages; the first ends with an act from the **NCA non binding on the final decision of the ECB**

# Some cases: Fininvest v ECB

The request for a preliminary ruling it is crucial to avoid possible conflicts of jurisdiction:

- in case that **both the national court and the Union court deny their jurisdiction with a prejudice to the principle of effective legal protection**
- in case that **the national court declares the invalidity of the (national) contested decision on the grounds of breach or circumvention of the ruling in Judgement No 882/2016 of 3 March 2016 of the Consiglio di Stato and the Court of Justice rejects the appeal against the final decision of the ECB**

# Order of the General Court

## 12 September 2017 (Case T-247/16)

- On 3 March 2016 the ECB, following a proposal by the Latvian NCA, adopted a decision to withdraw the authorization for taking take up the business of credit institution to *Trasta Komerbanka (TKB)*, a Latvian bank;
- On 14 March 2016 a **liquidation proceeding started** under Latvian law and on 17 March the liquidator revoked all powers of attorneys
- On 3 April the bank and its shareholders **applied for an ABoR review**
- On 13 May the lawyers representing the bank brought **an action for annulment of the contested decision before the CJEU** on behalf of Trasta and on behalf of six of its direct and indirect shareholders

# Order of the General Court

## 12 September 2017 (Case T-247/16)

- The CJEU in its order of 12 September 2017 tested the interest of **the bank itself** and **its shareholders** to challenge the ECB decision.
- The Court concluded that, notwithstanding both have an interest:
  - the **bank could not be validly represented by the lawyers of the bank** because the power of attorney, granted by TKB bank to its lawyers, had been withdrawn complying with the Latvian Law
  - the **appeal was admissible on behalf of the shareholders**



# Order of the General Court

## 12 September 2017 (Case T-247/16)

- The Order of the Courts, as regards the powers of the liquidator to revoke the power of attorney, states that:
  - The Vidzeme District Court of Riga rejected the TKB's application to maintain its directors power of attorney for the purpose of **adopting decision relating to the administrative proceedings before the ECB and the judicial proceedings before the CJEU**

then

- considering the District Court of Riga “final” rejected the argument raised by the bank on the former management bodies retaining their powers of representation “**which it justifies referring to a conflict of interest concerning the liquidator and his inability to bring an action on behalf of TKB bank**”.

# Order of the General Court

## 12 September 2017 (Case T-247/16)

- The Court concluded that :
  - Contrary to what TKB claims, the application of the Latvian Law does not **lead to a breach of EU law and in particular, of the right to effective judicial protection**
  - “The **application of Latvian Law** does not lead to all banks whose approval was withdrawn being deprived of a remedy, but to **the responsibility for seeking that remedy being entrusted to the liquidator**”

# Niemelä and Others v ECB (case T-321/17)

The main shareholders lodged an action of annulment of the **ECB decision to withdraw the authorization of Nemea Bank plc** (a Maltese bank)

- The **appellant argued** (pleas in law in Curia website), that:
  - the ECB erred in law in so far as it relied on the directives of the Malta FSA as being final and conclusive notwithstanding that the latter remain subjected to confirmation, reversal or variation by the Maltese Financial Tribunal
  - The ECB misused its powers in such a way as to deprive the supervised entity and other applicants of their rights of appeal under national law

# Conclusions

- “Common procedures” represent interesting cases to understand what are the legal implications of entrusting banking supervision task to a “single mechanism”, composed of the ECB, a European Institution, and National Competent Authorities
- The interplay between the ECB and NCAs **may lead to conflicts of jurisdiction and gaps in legal protection**
- To mitigate these problems an **extensive use of the request for preliminary rulings of the CJEU** is very important but the Court interpretative position will be crucial on:
  - the standing to bring proceedings against ECB’s decisions in the supervisory field and
  - jurisdiction to rule on the legality of the preparatory acts of the NCAs