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Law and Practice of the Banking Union and of its governing Institutions (Cases and Materials)

edited by Raffaele D'Ambrosio

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edited by Raffaele D'Ambrosio[*]

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Foreword

Marino Perassi

The book collects the Lectures notes on the law and practice of the Banking Union prepared by Lawyers of the Legal Department of Banca d'Italia to hold lessons at the Alma Mater University of Bologna, during the academic year 2018-2019.

The volume deals with the functional and organizational aspects of the first two pillars of the Banking Union, the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM), as the third pillar of the Banking Union has not been established yet.

The Lectures notes implement the agreement between Banca d'Italia and the Alma Mater University, by virtue of which lawyers of Banca d'Italia are called to hold a course on the "European financial supervision: administrative and judicial proceeding", aimed at offering an in-depth analysis of the SSM and SRM in action, as they work in the day-to-day practice.

The "Law and Practice of the Banking Union and of its governing Institutions (Cases and Materials)" is an attempt to connect students and practitioners with the legal sources of the Banking Union. Decisions of the SSM and the SRM authorities and their review panels as well as judgments of national and EU Courts are also taken into account.

Not surprisingly, it pretends to be a practitioners' guide to a vast array of cases and materials rather than an academic presentation of the main SSM and SRM topics. Therefore, each chapter gives a first overview of the legal references, official interpretations, case law and literature on the topic treated therein.

In addition to the lectures notes prepared for each of the ten lessons of the course, the book benefits from some contributions provided by experts from the Legal Department of Banca d'Italia and Academia on some SSM and SRM topics.

The volume consists of three main parts: a first one (from Chapter I.A to Chapter VI.C) is about the SSM; a second one (from Chapter VII.A to Chapter IX) deals with the SRM issues;[1] a third one (from Chapter X.A to Chapter X.F) touches upon the administrative and judicial review of the SSM and the SRM decisions).[2]

The first part gives a general description of the institutional and organizational aspects of the SSM (Chapter I.A) with specific focus on the SSM macro-prudential tasks (Chapter I.B), the involvement of the NCAs in the ECB's supervisory proceedings (Chapter IV.A) and the NCAs' supervision of the less significant credit institutions (Chapter V.A).

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[1] Chapter VII.A on recovery plans, early intervention measures and structural measures (together with Chapter VII.B focusing on the Italian case law on removal) is a link between the supervisory and the resolution topics.

[2] Chapter X.F on the SSM and SRM deals with liability issues.

This part also treats some issues characteristic of the SSM's current operation. They span from the application of national law by the ECB (Chapter II) to the ECB's internal delegation of powers (Chapter IV.C); from the distinction between supervisory decisions, administrative measures and administrative sanctions (Chapter III) to the safeguards applicable to the relevant ECB's supervisory and sanctioning procedures (chapter VI.A).

A special focus is devoted to some pivotal judgements of national and EU courts including: the ECJ's ruling on Fininvest (Chapter IV.B); the General Court's and ECJ's rulings on Landeskreditbank (Chapter V.B); the national and EU Courts' rulings on access to supervisory files (the Buccioni case, Chapter VI.B); the several judgments of the Court of Appeal of Rome on sanctions imposed by Banca d'Italia upon the ECB's request to individuals responsible for breaches by Banca Popolare di Vicenza (Chapter VI.C).

An illustration of the recovery plans, early intervention and other similar measures (Chapters VII.A and VII.B) leads into the second part. The core of this part is devoted to the allocation of the tasks and powers between the SRB and the NRAs and organizational issues (Chapter VIII.A), to the due process regime of prevention, early intervention and resolution phases of the banking crises management (Chapter IX).

A special attention is paid to a number of significant topics: the MREL (Chapter VIII.B); the relationship between the resolution procedure and the Italian regulation of the compulsory administrative liquidation (Chapter VIII.C on Veneto Banca and Banca Popolare di Vicenza cases); the State aids control in the banking sector and the SRM with a focus on the General Court's ruling on Tercas (Chapter VIII.D); the EU and the Italian case law on the ex-ante contribution to the SRF (Chapter VIII.E).

The third part is devoted to the administrative and judicial review of the SSM's and the SRM's decisions (Chapter X.A). Within this part, particular attention is addressed to the limits of the SSM's administrative review (Chapter X.B) and the case law of the SRM's Appeal Panel (Chapter X.C).

As regards the judicial review, a special focus on the shareholders locus standi within an ECB bank's license withdrawal may be found in Chapter X.D on the General Court's judgment on the Trasta case. The Livret A cases are illustrated in Chapter X.E, as examples of the extent of the control carried out by the CJEU on the ECB's supervisory technically complex decisions.

The part concludes with a deep analysis of the SSM and SRM's liability issues (Chapter X.F), where national legal regimes on the liability of the supervisory authority as well as the CJEU's sufficiently serious violation criterion are illustrated. The Chapter also deals with the problem of the multiplicity of the central banks and supervisors' mandates, the potential conflict of interests between them and the relevant liability side effects.

As the SSM and the SRM issues are addressed from a practical perspective, particular attention is paid to the interpretation of the relevant legal framework given in the first instance by the EU institutions (fundamentally the ECB, the SRB and the Commission).

As for the interpretation given by the Courts, not only the judgments of the CJEU and of the ECtHR but also those of the national courts are taken into account.

The judgments of the national constitutional courts are considered particularly noteworthy. Worth mentioning are, among others, the judgment of the Federal German Constitutional Court on the Banking Union and the judgement of the Constitutional Court of Austria on the application by the Courts or the administrative supervisory authorities of severe administrative pecuniary penalties.

Even though the volume collects to a large extent the Lectures delivered to university lessons and they were drafted with the aim of teaching and representing the current framework, the authors did not refrain from raising some criticism of the points of views expressed by the EU Institutions and Courts. You may see, among others, the authors' comments and reflections on the EU Institutions and Courts' stances on national powers, ECB's delegation framework or ECB's indirect supervision on the less significant institutions.

***

The Banking Union and its two main pillars, the SSM and the SRM, are a bold construction of an integrated system of supervisors, which relies upon two peculiar elements: multilevel source of rules and separate but sometimes overlapping judicial review systems.

This unique feature requires continuous and specific attention to the interferences that may arise in the field of banking supervision and financial crisis management due to the plurality of sources of law. The Banking Union was an extraordinary accomplishment, but the harmonization of the complex legal environment surrounding the matters related to prudential supervision.

The enabling clause under art. 127.6 of the TFUE provides for rules concerning prudential supervision of credit institutions only and it was enacted by adopting the SSM regulation No 1024/2013. No full harmonization was implemented in the fields of company law, taxation, contractual relations between banks and clients, money laundering. This is a challenge for the practitioners at present and the lawmakers in the years to come.

Moreover, the choice of the European legislators to establish a specific review system for the measures adopted by EU supervisory authorities beside the judicial review by the Court of Justice was a proper initiative to ensure a

specialised assessment of these matters. However, the roles of the review bodies are different. The adjudicatory system for the European Authorities and the single Resolution Board (Board of Appeal and Appeal Panel) plays a role, which is different from the advisory function of the Administrative Board of Review in the ECB proceedings.

Even though the Banking Union is still a patchwork in some aspects, it is a giant attempt to ensure a common set of rules in the field of banking supervision and offers a wide range of suggestions to scholars and practitioners involved in these matters.

This volume is an attempt to contribute to the debate to build a better system in the European scenario.

Marino Perassi

PART ONE

THE SINGLE SUPERVISORY MECHANISM

Chapter I.A

The SSM: allocation of tasks and powers between the ECB and the NCAs and organisational issue

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1. The rationale of the SSM and the conferral of supervisory tasks to the ECB

The establishment of the Single Supervisory Mechanism (SSM) is contingent upon two main reasons:

(i) enhancing the integration of supervisory responsibilities;

(ii) breaking the link between banks and public debt.

Indeed, while coordination between supervisors had to be considered vital, the crisis showed that mere coordination was not enough particularly in the context of a single currency (see Recital 5 SSM Regulation, hereinafter also SSMR).[1]

Moreover, the strict link between the stability of some credit institutions and the Member State in which they were established as well as doubts about the sustainability of the relevant national public debt created negative mutually reinforcing market trends, capable of leading to risks to the viability of said credit institutions and to the stability of the financial system (Recital 6 SSMR).

As a first step towards a Banking Union, the SSM was conceived to ensure that the Union's policy relating to the prudential supervision of credit institutions were implemented in a coherent and effective manner, that the single rulebook for financial services was applied in the same way to credit institutions in all Member States, and that those credit institutions were subject to supervision of the highest quality, unfettered by other, non-prudential considerations (Recital 12 SSMR).

The conferral on the ECB of specific supervisory tasks was deemed crucial to that aim (Recital 13 SSMR).

Moreover, as the euro area's central bank with extensive expertise in macroeconomic and financial stability issues, the ECB was considered as well placed to carry out clearly defined supervisory tasks with a focus in protecting financial stability of the financial system of the Union (Recital 13 SSMR).

In the view of the EU legislator, in order to ensure financial stability the ECB had to exercise supervisory tasks in relation to all credit institutions, in the assumption that even smaller credit institutions could pose a threat to the financial stability (Recital 16 SSMR).

This is the reason why the ECB is responsible for the smooth functioning of the SSM as a whole, irrespective of the dimension of the credit institutions having their business premises in the participating Member States.

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1 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.

2. *The SSM's legal basis: Article 127(6) TFEU*

2.1. *Whether Article 127(6) TFEU allows the conferral on the ECB of supervisory tasks only or of supervisory powers too*

Under Article 127(6) TFEU,

> the Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer *specific tasks* upon the European Central Bank *concerning policies relating to the prudential supervision* of credit institutions and other financial institutions with the exception of insurance undertakings.

As Article 127 TFEU only refers to supervisory *tasks*, a question arises as to whether it may be considered a sufficient legal basis for the SSMR.

Indeed, the SSMR confers on the ECB not only some supervisory *tasks* (see Article 4 SSMR) but also, as a rule, the corresponding relevant supervisory *powers* (see Articles 9 ff. SSMR).

Theoretically, the conferral on the ECB of supervisory powers would not be necessary for the ECB to carry out the tasks transferred by the basic regulation, as clearly shown by some cases of misalignment between the ECB's tasks and the NCAs' powers within the SSM (see below **Chapter IV.A. The involvement of the NCAs in the ECB's supervisory proceedings**).

More to the point, the provisions under Article 127(6) TFEU could have been considered fulfilled by conferring only supervisory tasks on the ECB, while the concrete exercise of these tasks could have been carried out by the NCAs on the basis of the ECB's general instructions.

Following a different line of reasoning one may say that the conferral of powers would be instrumental and therefore necessary to the performance of the supervisory tasks.

In the same vein seems to be read the interpretation of Article 127(6) TFEU followed by the German Federal Constitutional Court (BVerfG) in its judgement of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14. Indeed, § 165 of the judgment (available only in the German version) clarifies that the distinction between tasks and powers is unkonw under the EU law and that, in any event, the conferral on the ECB of supervisory tasks only would make Article 127(6) a useless duplicate of Article 127(5) TFEU:

> Aus dem in Art. 127 Abs. 6 AEUV ebenfalls enthaltenen Tatbestandsmerkmal „Aufgaben“ lassen sich hingegen keine weiteren Einsichten gewinnen. Soweit ihm im Schrifttum in Anlehnung an die verwaltungsrechtliche Unterscheidung von

Aufgaben und Befugnissen eine inhaltliche Beschränkung der Ermächtigung dergestalt entnommen wird, dass der EZB keine Eingriffs- und Sanktionskompetenzen übertragen werden dürften (vgl. Herdegen, WM 2012, S. 1889 <1891>; Lehmann/Manger-Nestler, ZBB 2014, S. 1 <6>), geht dies fehl. Zum einen kennt das final ausgerichtete Unionsrecht diese Unterscheidung nicht; zum anderen bestimmt bereits Art. 127 Abs. 5 AEUV, dass das ESZB, das die EZB gemeinsam mit den nationalen Zentralbanken bildet (Art. 282 Abs. 1 Satz 1 AEUV), zur reibungslosen Durchführung der von den zuständigen Behörden wahrgenommenen Aufsicht über die Kreditinstitute beiträgt. Beschränkte sich auch die Ermächtigung in Art. 127 Abs. 6 AEUV auf einen dermaßen dienenden Beitrag, wäre sie funktionslos (vgl. Ruthig, ZHR 178 <2014>, S. 443 <452>; Ohler, Bankenaufsicht und Geldpolitik in der Währungsunion, 2015, § 5 Rn. 23; Thiele, GewArch 2015, S. 111 <115>).

2.2. Whether the SSMR regulation exceeds the competences conferred on the European Union by the Treaties

In the judgment mentioned above, the BVerfG supports the thesis that the SSMR has to be interpreted strictly.

The Court held that the adoption of the SSMR does not manifestly exceed the competences conferred on the European Union by the Treaties, on the assumption that it does not confer a full banking supervision on the ECB.

The Court observes that Article 127(6) TFEU allows the conferral to the ECB only of specific tasks relating to the prudential supervision of credit and other financial institutions with the exception of insurance undertakings and that this results from the wording of Article 127(6),[2] its systematic

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[2] See, among others, § 161 of the judegment: "Soweit der Wortlaut von Art. 127 Abs. 6 AEUV in seiner deutschen Fassung dazu ermächtigt, der EZB „besondere Aufgaben im Zusammenhang mit der Aufsicht über Kreditinstitute“ zu übertragen, spricht dies gegen eine vollständige Übertragung der Bankenaufsicht. Andernfalls hätte es nahegelegen, von einer „Übertragung von Aufgaben der Bankenaufsicht“ oder von der „Übertragung der Bankenaufsicht“ zu sprechen oder im Zuge der Änderung, die Art. 127 Abs. 6 AEUV durch den Vertrag von Lissabon im Jahre 2009 erfahren hat – dort wurde das ursprüngliche Zustimmungserfordernis des Europäischen Parlaments auf ein Anhörungsrecht reduziert –, das restriktive Adjektiv „besondere“ zu streichen. Auch zeigt die ausdrückliche Ausnahme für die Versicherungsunternehmen, die bereits in der Ursprungsfassung des Maastrichter Vertrags enthalten war (Art. 105 EG a.F.), dass die Mitgliedstaaten sich gerade nicht auf eine pauschale Übertragung von Aufsichtskompetenzen im Bereich des Finanzmarktes einigen konnten".

position (in particular, the relationship between Article 127(6) TFEU and the principles of conferral, proportionality and subsidiarity; the inclusion of Article 127(6) TFEU in the context of a set of rules dedicated mainly to the monetary policy; the reading of its paragraph 6 in light of paragraph 5)[3] and its

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[3] See §§ 166-168 of the judgment:
"166. Auch die systematische Stellung von Art. 127 Abs. 6 AEUV spricht für ein enges Verständnis der Ermächtigung. Sie findet sich im 2. Kapitel des VIII. Titels des AEU-Vertrages und damit im Normkomplex der Währungspolitik, die der Europäischen Union, anders als die im 1. Kapitel geregelte Wirtschaftspolitik, zur ausschließlichen Zuständigkeit übertragen ist (vgl. Art. 3 Abs. 1 Buchstabe c, Art. 5 Abs. 1 Satz 1 und Abs. 2 AEUV). Die Bankenaufsicht ist jedoch auch unter dem Blickwinkel des Primärrechts kein Teil der Währungspolitik (vgl. Kämmerer, NVwZ 2013, S. 830 <833>), sondern eine im Kern gewerbepolizeiliche Aufgabe, die nicht notwendigerweise durch die EZB erfüllt werden muss und von ihr vor Erlass der SSM-Verordnung auch 15 Jahre lang nicht wahrgenommen wurde. Art. 127 Abs. 6 AEUV räumt dem Rat vielmehr ein freies politisches Ermessen ein, ob er von dieser Ermächtigung Gebrauch machen will, und beschränkt das Europäische Parlament – insoweit konsequent – auf ein bloßes Anhörungsrecht. Die Ermächtigung, besondere Aufgaben im Zusammenhang mit der Aufsicht über Kreditinstitute zu regeln, ist mithin ein Fremdkörper in dem der Währungspolitik gewidmeten 2. Kapitel. Das wird auch daran deutlich, dass Art. 127 Abs. 1 und Abs. 2 AEUV keinerlei inhaltliche Vorgaben für die Bankenaufsicht enthalten, obwohl sie doch die grundlegenden Ziele und Aufgaben des ESZB auflisten.
167. Für eine enge Auslegung von Art. 127 Abs. 6 AEUV streitet ferner, dass – wie bereits erwähnt – Art. 127 Abs. 5 AEUV und wortgleich Art. 3.3 ESZB-Satzung eine Mitwirkung des ESZB an der Gewährleistung einer reibungslosen Durchführung der von den zuständigen Behörden auf dem Gebiet der Aufsicht über die Kreditinstitute und der Stabilität des Finanzsystems ergriffenen Maßnahmen vorsehen. Nach diesen Vorschriften ist das ESZB gerade nicht zuständige Behörde auf dem Gebiet der Aufsicht über das Kreditwesen, sondern soll die Tätigkeit der nationalen Aufsichtsbehörden lediglich unterstützen, sie koordinieren und allenfalls punktuell harmonisieren (vgl. Sacarcelik, BKR 2013, S. 353 <356>; Wolfers/Voland, BKR 2014, S. 177 <179>). Dementsprechend hat die EZB ausweislich des Art. 25.1 ESZB-Satzung den EZB-Rat, die Kommission und die zuständigen Behörden der Mitgliedstaaten in Fragen der unionsrechtlichen Anforderungen an die Aufsicht über die Kreditinstitute und die Stabilität des Finanzsystems zu beraten und kann wiederum von diesen konsultiert werden (vgl. Potacs, in: Schwarze/Becker/Hatje/Schoo, EU-Kommentar, 3. Aufl. 2012, Art. 127 AEUV Rn. 10; Selmayr, in: v. der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7. Aufl. 2015, Art. 127 AEUV Rn. 41). Diese Aufgabe besteht auch nach Inanspruchnahme der in Art. 127 Abs. 6 AEUV enthaltenen Ermächtigung fort und setzt – wie sich aus dem Nebeneinander von Art. 25.1 ESZB-Satzung und Art. 25.2 ESZB-Satzung ergibt – voraus, dass Aufgaben der Bankenaufsicht auch von den nationalen Aufsichtsbehörden wahrgenommen werden.
168. Für eine enge Auslegung von Art. 127 Abs. 6 AEUV sprechen ferner die Grundsätze der begrenzten Einzelermächtigung (Art. 5 Abs. 1 Satz 1, Abs. 2 EUV), der Subsidiarität (Art. 5 Abs. 1 Satz 2, Abs. 3 EUV) und der Verhältnismäßigkeit (Art. 5 Abs. 1 Satz 2, Abs. 4 EUV). Schließlich spricht für die enge Auslegung der Umstand, dass jede weitere Übertragung von Aufgaben und Befugnissen auf die EZB angesichts ihrer Unabhängigkeit (Art. 130 AEUV) in einem Spannungsverhältnis zum Grundsatz der repräsentativen Demokratie gemäß Art. 10 Abs. 1 EUV (vgl. Pascher, Die Europäische Zentralbank in der Bankenunion, in: Korte/Ludwigs/Thiele/Wedemeyer, Energiewende und Finanzkrise als aktuelle Herausforderungen des Europarechts, 2016, S. 111 <134>) und dem über Art. 4 Abs. 2 EUV auch unionsrechtlich beachtlichen Demokratieprinzip in den Verfassungen der Mitgliedstaaten, für Deutschland aus Art. 20 Abs. 1 und Abs. 2 GG, steht (vgl. BVerfGE 89, 155 <208 f.>; 134, 366 <389 Rn. 32, 399 f. Rn. 58 f.>; 142, 123 <220 f. Rn. 188 f.>; 146, 216 <256 ff. Rn. 59 ff., 278 Rn. 103>; stRspr). Eine Auslegung von Art. 127 Abs. 6 AEUV muss daher sicherstellen, dass Maßnahmen der Bankenaufsicht so weit wie möglich demokratisch legitimiert und kontrollierbar bleiben".

goal,[4] whilst the historical interpretation of the norm does not contradict this conclusion.[5]

The SSMR is compliant with Article 127(6) as it provides for a division of supervisory tasks between the ECB and the national competent authorities. Indeed, the ECB is competent only for supervising significant credit institutions (SIs), while the national supervisory authorities remain competent for supervising less significant credit institutions (LSIs) in accordance with the regulations, guidelines and general instructions adopted by the ECB. In areas of banking

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[4] See § 169 of the judgment: "Teleologische Erwägungen stützen ebenfalls ein restriktives Verständnis von Art. 127 Abs. 6 AEUV. Vorrangige Aufgabe des ESZB und der es leitenden Beschlussorgane EZB-Rat und Direktorium (Art. 129 Abs. 1 AEUV) ist es, die Währungspolitik zu bestimmen (Art. 127 Abs. 1, Abs. 2 AEUV). Die Übertragung der Bankenaufsicht auf die EZB hat daneben eine lediglich ergänzende Funktion und ist deshalb nur insoweit gewollt, als sie zur Arrondierung des währungspolitischen Mandats erforderlich oder zumindest förderlich ist (vgl. Griller, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, Art. 127 AEUV Rn. 57 <August 2012>; Selmayr, in: v. der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7. Aufl. 2015, Art. 127 AEUV Rn. 41 ff.; Häde, in: Calliess/Ruffert, EUV/AEUV, 5. Aufl. 2016, Art. 127 AEUV Rn. 50; Manger-Nestler, in: Pechstein/Nowak/Häde, Frankfurter Kommentar EUV GRC AEUV, Bd. III, 2017, Art. 127 AEUV Rn. 49; Kempen, in: Streinz, EUV/AEUV, 3. Aufl. 2018, Art. 127 AEUV Rn. 18). Das ist umso eher gewährleistet, je begrenzter die von der EZB wahrzunehmenden Aufgaben der Bankenaufsicht ausfallen. Art. 25 SSM-VO dokumentiert das Spannungsverhältnis zwischen dem originär geldpolitischen Mandat und der Wahrnehmung von Aufgaben der Bankenaufsicht durch die EZB. Gemäß Art. 25 Abs. 4 SSM-VO soll durch die strikte Trennung der Sitzungen und Tagesordnungen sichergestellt werden, dass der EZB-Rat seine geldpolitischen und aufsichtlichen Funktionen in vollkommen getrennter Weise wahrnimmt. Zudem sieht Art. 25 Abs. 5 SSM-VO die Einrichtung einer Schlichtungsstelle vor, um die Trennung zwischen den geldpolitischen und aufsichtlichen Aufgaben sicherzustellen. Dies zeigt, dass es sich bei der Zuweisung von Aufgaben der Bankenaufsicht um einen Sondertatbestand außerhalb des geldpolitischen Mandats der EZB handelt. Als Ausnahmetatbestände sind aber die insoweit an die EZB übertragbaren Befugnisse grundsätzlich restriktiv zu bestimmen".

[5] See § 170 of the judgment: "Die historische Auslegung ist dagegen wenig aussagekräftig, widerspricht dem gefundenen Ergebnis aber nicht. So haben die Mitgliedstaaten bei den Verhandlungen über den Vertrag von Maastricht die Forderung der Notenbankgouverneure abgelehnt, die EZB an der Bankenaufsicht zu beteiligen. Als Kompromiss wurde eine künftige Beteiligung der EZB an der Bankenaufsicht nicht ausgeschlossen, jedoch an einen einstimmigen Beschluss des Rates gebunden (vgl. BTDrucks 12/3334, S. 91; Jörgens, Die koordinierte Aufsicht über europaweit tätige Bankengruppen, 2002, S. 120 ff.; Glatzl, Geldpolitik und Bankenaufsicht im Konflikt, 2009, S. 249 ff.). Dass der Vertrag von Lissabon die Vorläuferregelung in Art. 105 Abs. 6 EGV a.F. im Jahre 2009 geändert und die Mitwirkung des Europäischen Parlaments auf ein bloßes Anhörungsrecht beim Erlass der Verordnung nach Art. 127 Abs. 6 AEUV reduziert hat (ABl EU Nr. C 306 vom 17. Dezember 2007, S. 1 ff.), belegt zudem, dass über Notwendigkeit und Ausgestaltung der Bankenunion zehn Jahre nach Eintritt in die dritte Stufe der Währungsunion noch keine Einigkeit bestand. Aus der Entstehungsgeschichte ergibt sich überdies, dass gegenüber einer Einbeziehung der EZB in die Bankenaufsicht Bedenken bestanden, auf die mit der Einfügung des Tatbestandsmerkmals „besondere Aufgaben“ reagiert wurde (vgl. Kaufhold, Systemaufsicht, 2016, S. 286). Jedenfalls unterstreicht dies die Notwendigkeit einer restriktiven Auslegung".

supervision that are not subject to the SSM Regulation, national supervisory authorities retain their competences.[6]

National supervisory authorities exercise their powers on the basis of their primary competences under national law and not on the basis of a conferral of powers under the SSMR.

See, in this vein, § 186 of the judgment:

> 186. Art. 127 Abs. 6 AEUV ermöglicht lediglich die Übertragung von „besonderen Aufgaben" der Bankenaufsicht auf die EZB und beschränkt damit deren Zuständigkeit auf im Einzelnen definierte und umgrenzte Bereiche der Bankenaufsicht. Eine vollständige Übertragung der Bankenaufsicht gestattet er nicht (vgl. Rn. 160 ff.), so dass alle Aufgaben und Befugnisse, die nicht durch die SSM-Verordnung der EZB zugewiesen werden, in der Zuständigkeit der Mitgliedstaaten verbleiben. Soweit die SSM-Verordnung im Rahmen des einheitlichen Aufsichtsmechanismus, also in einem Bereich geteilter Zuständigkeiten (Art. 4 AEUV), Aufgaben und Befugnisse bei den nationalen Aufsichtsbehörden belässt, knüpft sie angesichts der die Kompetenzverteilung zwischen Europäischer Union und Mitgliedstaaten prägenden Grundsätze der begrenzten Einzelermächtigung (Art. 5 Abs. 1 Satz 1, Abs. 2 EUV), der Subsidiarität (Art. 5 Abs. 1 Satz 2, Abs. 3 EUV) und der Verhältnismäßigkeit (Art. 5 Abs. 1 Satz 2, Abs. 4 EUV) an die Souveränität der Mitgliedstaaten an und weist sie deren Behörden nicht konstitutiv im Sinne einer Rückdelegation zu.

A "re-delegation" of powers would entail all supervisory tasks to be fully conferred on the ECB, which is not allowed by Article 127(6) TFEU and the SSMR itself; a different interpretation would turn the SSMR into an ultra vires act (§ 187 of the judgement):

> 187. Eine Rückdelegation unionaler Verwaltungsaufgaben würde eine vollständige Übertragung der Bankenaufsicht auf die EZB voraussetzen, die jedoch gerade nicht Gegenstand der SSM-

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[6] See § 172 of the judgment: "Mit der SSM-Verordnung ist der EZB die Aufsicht über Kreditinstitute in der Eurozone nicht vollständig übertragen worden. In der Sache sieht sie eine Zweiteilung der Bankenaufsicht vor, wobei für die Bankenaufsicht im Wesentlichen die nationalen Behörden zuständig sein sollen (5. Erwägungsgrund Satz 1 SSM-VO), bei denen sämtliche der EZB nicht übertragenen Aufsichtsaufgaben verbleiben (28. Erwägungsgrund Satz 1 SSM-VO). Der EZB kommen hingegen besondere Aufsichtsaufgaben zu, die für eine kohärente und wirksame Politik der Union hinsichtlich der Beaufsichtigung von Kreditinstituten entscheidend sind (15. Erwägungsgrund Satz 1 SSM-VO). Dazu werden ihr bestimmte Aufgaben übertragen, die sie für alle Kreditinstitute in der Eurozone wahrzunehmen hat (a). Hinsichtlich der übrigen Bereiche wird der EZB grundsätzlich nur die Aufsicht für bedeutende Kreditinstitute zugewiesen, während die nationalen Aufsichtsbehörden regelmäßig für weniger bedeutende Kreditinstitute nach Maßgabe der von der EZB erlassenen Verordnungen, Leitlinien und allgemeinen Weisungen zuständig bleiben (b). Schließlich verbleibt es in allen nicht von der SSM-Verordnung erfassten Bereichen der Bankenaufsicht bei der Zuständigkeit der nationalen Aufsichtsbehörden (c)".

> Verordnung ist. Die gegenteilige Auffassung wäre weder mit der primärrechtlichen Grundlage noch mit der Systematik der SSM-Verordnung vereinbar (α). Die SSM-Verordnung stellte sich in dieser Auslegung als Ultra-vires-Akt dar (β)…

More to the point, in the interpretation of the SSMR, one has to take into account the principles of conferral, proportionality and subsidiarity and the fact that the banking supervision is not included within the EU exclusive competences (§§ 189 and 190 of the judgement):

> 189. (αα) Eine Interpretation der SSM-Verordnung kann nicht ohne Berücksichtigung ihrer primärrechtlichen Grundlage erfolgen. Das Primärrecht geht dem Sekundär- und Tertiärrecht vor und ist Maßstab für dessen Rechtmäßigkeit. Gegebenenfalls bedarf es einer primärrechtskonformen Auslegung des Sekundärrechts (vgl. EuGH, Urteil vom 13. Dezember 1983, Kommission/Rat, C-218/82, Slg. 1983, I-4063 <4075 Rn. 15>; Urteil vom 1. April 2004, Borgmann, C-1/02, Slg. 2004, I-3238 <3248 Rn. 30 m.w.N.>; BVerfGE 142, 123 <214 ff. Rn. 175 ff., 227 ff. Rn. 201 ff.>). Mit Blick auf die SSM-Verordnung muss daher nicht nur Art. 127 Abs. 6 AEUV Rechnung getragen werden, sondern auch den Grundsätzen der begrenzten Einzelermächtigung (Art. 5 Abs. 1 Satz 1, Abs. 2 EUV), der Subsidiarität (Art. 5 Abs. 1 Satz 2, Abs. 3 EUV) und der Verhältnismäßigkeit (Art. 5 Abs. 1 Satz 2, Abs. 4 EUV). Eine primärrechtskonforme Auslegung muss berücksichtigen, dass Art. 3 AEUV die Gegenstände der ausschließlichen Zuständigkeiten der Europäischen Union abschließend aufführt und nicht durch Rechtsakte des Sekundär- oder Tertiärrechts erweitert werden kann (vgl. Obwexer, in: v. der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7. Aufl. 2015, Art. 3 AEUV Rn. 3; Häde, in: Pechstein/Nowak/ders., Frankfurter Kommentar EUV GRC AEUV, Bd. II, 2017, Art. 3 AEUV Rn. 2; Streinz, in: ders., EUV/AEUV, 3. Aufl. 2018, Art. 3 AEUV Rn. 1).
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> 190. Wie dargelegt, gehört die Bankenaufsicht im Sinne von Art. 127 Abs. 6 AEUV nicht zu den ausschließlichen Zuständigkeiten der Union im Sinne von Art. 3 Abs. 1 Buchstabe c AEUV. Im Bereich dieser ausschließlichen Zuständigkeiten sind die Mitgliedstaaten von der Rechtsetzung ausgeschlossen, soweit nicht das Unionsrecht entsprechende Öffnungsklauseln oder Rückdelegationen enthält (vgl. Obwexer, in: v. der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7. Aufl. 2015, Art. 2 AEUV Rn. 15 f.). Dies trifft für den Bereich der Bankenaufsicht jedoch schon deshalb nicht zu, weil diese nach dem Eintritt in die dritte Stufe der Währungsunion im Jahre 1999 bis zum Inkrafttreten der SSM-Verordnung im Jahre 2014 ausschließlich in die Zuständigkeit der Mitgliedstaaten fiel. Angesichts der tiefgreifenden Unterschiede, die zwischen den Mitgliedstaaten bei der Ausgestaltung der Bankenaufsicht bestanden, hatte der Vertrag von Maastricht auf eine entsprechende Harmonisierung verzichtet (vgl. Art.

> 105 Abs. 6 EUV, ABl EU Nr. C 191 vom 29. Juli 1992, S. 1) und der EZB zunächst keine Aufsichtsbefugnisse zugewiesen (vgl. Selmayr, in: v. der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7. Aufl. 2015, Art. 127 AEUV Rn. 42; Siekmann, in: Sachs, GG, 8. Aufl. 2018, Art. 88 Rn. 102; Streinz, in: ders., EUV/AEUV, 3. Aufl. 2018, Art. 2 AEUV Rn. 5). Der Vertrag von Lissabon hat dies mit der Änderung von Art. 127 Abs. 6 AEUV 16 Jahre später noch einmal bestätigt. Die Annahme einer ausschließlichen Zuständigkeit der EZB für die Bankenaufsicht liegt deshalb fern.

Against this background, one has to conclude that the SSMR simply recognises and does not establish any NCAs' supervisory responsibilities (§ 191 of the judgement):

> 191. Vor diesem Hintergrund ist die Annahme, die Zuständigkeiten der nationalen Aufsichtsbehörden seien keine originären Kompetenzen der Mitgliedstaaten, die von der SSM-Verordnung geordnet und anerkannt, nicht jedoch konstitutiv zugewiesen worden sind, nicht nachvollziehbar (vgl. Neumann, EuZW-Beilage 2014, S. 9; Schuster, EuZW-Beilage 2014, S. 3, 7; Glos/Benzing, a.a.O., Rn. 82). Die SSM-Verordnung begründet daher keine Zuständigkeiten der nationalen Aufsichtsbehörden. Sie setzt diese vielmehr voraus und beschränkt sie in dem von Art. 4 und Art. 6 SSM-VO geregelten Umfang.

Not surprisingly, Article 6 of the SSM Regulation limits, in the Court's view, the scope of Article 4(1) SSM Regulation.

In other words, although the wording of Article 4(1) of the SSM Regulation does not differentiate between SIs and LSIs, it is "within the framework of Article 6" that the ECB is competent in relation to all credit institutions. Article 4 read in conjunction with Articles 6(4) and 6(6) drives to the conclusion that the ECB may perform its tasks under Article 4(1) (except for the tasks under lit. (a) and (c) thereof) only in relation to SIs.

See § 174 of the judgement:

> Hinsichtlich der weiteren in Art. 4 Abs. 1 SSM-VO aufgeführten Aufgaben hängt die Zuständigkeit für die Aufsicht von der Bedeutung des Kreditinstituts ab. Im Rahmen des einheitlichen Aufsichtsmechanismus (Art. 6 SSM-VO) ist die EZB für die Beaufsichtigung sämtlicher in den teilnehmenden Mitgliedstaaten niedergelassener Kreditinstitute zuständig (Art. 4 Abs. 1 1. Halbsatz SSM-VO). Der Wortlaut der Vorschriften unterscheidet dabei zwar nicht zwischen bedeutenden und weniger bedeutenden Kreditinstituten; aus dem Zusammenspiel von Art. 4 und Art. 6 Abs. 4 UAbs. 1 und Abs. 6 Satz 1 SSM-VO ergibt sich jedoch, dass die EZB die in Art. 4 Abs. 1 SSM-VO aufgeführten Befugnisse – mit Ausnahme von Abs. 1 Buchstaben a und c SSM-VO – nur für bedeutende Kreditinstitute ausüben darf. Ihr

> obliegt die (unmittelbare) Zuständigkeit für die Beaufsichtigung der in teilnehmenden Mitgliedstaaten niedergelassenen Kreditinstitute, Finanzholdinggesellschaften, gemischten Holdinggesellschaften und der dort niedergelassenen Zweigstellen von in nicht teilnehmenden Mitgliedstaaten niedergelassenen Kreditinstituten, soweit diese bedeutend sind (aa). Die nationalen Aufsichtsbehörden sind dagegen nach Maßgabe der von der EZB erlassenen Verordnungen, Leitlinien und allgemeinen Weisungen für die Aufsicht über die Unternehmen zuständig, die weniger bedeutend sind, soweit die EZB von ihrem Selbsteintrittsrecht keinen Gebrauch macht (bb).

The BVerfG does not ignore the decision of the Court of Justice of the European Union (CJEU) of 8 May 2019 (C-450/17 P Landeskreditbank Baden-Württemberg v European Central Bank).

Nevertheless, it believes that the CJEU does not contradict its view. According to the BVerfG, the CJEU simply held that the ECB's exclusive competence was limited to determine the definition of "particular circumstances" within the meaning of Article 6(4) subsection 2 SSM Regulation, in accordance with the subject of the case.

More to the point, under § 195 of the judgement:

> 195. Die Entscheidung des EuGH vom 8. Mai 2019 (Landeskreditbank Baden-Württemberg/Europäische Zentralbank, C-450/17 P, EU:C:2019:372) steht dieser Sichtweise nicht entgegen. Zwar bestätigt der EuGH darin die Auffassung des EuG (Urteil vom 16. Mai 2017, Landeskreditbank Baden-Württemberg/Europäische Zentralbank, T-122/15, EU:T:2017:337, Rn. 54, 63, 72), der EZB sei in Bezug auf die in Art. 4 Abs. 1 SSM-VO genannten Aufgaben eine ausschließliche Zuständigkeit übertragen, deren dezentralisierte Ausübung durch die nationalen Behörden im Rahmen des ESM (wohl SSM) und unter Aufsicht der EZB bei den weniger bedeutenden Kreditinstituten im Sinne von Art. 6 Abs. 4 UAbs. 1 SSM-VO hinsichtlich einiger dieser Aufgaben durch Art. 6 gestattet werde, *wobei der EZB die ausschließliche Befugnis eingeräumt sei, den Inhalt des Begriffs „besondere Umstände" im Sinne von Art. 6 Abs. 4 UAbs. 2 SSM-VO zu bestimmen* [emphasis added] (vgl. EuGH, a.a.O., Rn. 49). Gegenstand des Rechtsstreits war aber allein die Frage nach der Auslegung des Begriffs der „besonderen Umstände" im Sinne von Art. 6 Abs. 4 UAbs. 2 SSM-VO und Art. 70 SSM-R-VO (vgl. EuGH, a.a.O., Rn. 29, 31), unter denen ein Kreditinstitut abweichend von den Regelfällen des Art. 6 Abs. 4 UAbs. 2 SSM-VO als weniger bedeutend einzustufen ist. Die der EZB durch den EuGH zuerkannte ausschließliche Befugnis zur Definition des Begriffs dieser „besonderen Umstände" setzt voraus, dass ihr eine ausschließliche Aufsichtskompetenz hinsichtlich aller Institute zusteht, die nach den Kriterien von Art. 6 Abs. 4 UAbs. 2 SSM-

> VO grundsätzlich als bedeutend gelten. Sie erfordert jedoch keine umfassende Aufsichtskompetenz der EZB auch bezüglich der nach diesen Kriterien als weniger bedeutend geltenden Kreditinstitute, solange die EZB nicht von ihrem Selbsteintrittsrecht nach Art. 6 Abs. 5 SSM-VO Gebrauch macht. Dementsprechend weist auch der EuGH darauf hin, dass die nationalen zuständigen Behörden gemäß Art. 6 Abs. 6 SSM-VO in Bezug auf die in Art. 6 Abs. 4 UAbs. 1 dieser Verordnung genannten Kreditinstitute, das heißt diejenigen, die gemäß den in dieser Bestimmung genannten Kriterien „weniger bedeutend" sind, die in Art. 4 Abs. 1 Buchstaben b, d bis g und i dieser Verordnung genannten Aufgaben wahrnehmen und für diese sowie für die Annahme aller einschlägigen Aufsichtsbeschlüsse verantwortlich sind (vgl. EuGH, a.a.O., Rn. 40).

This view seems to be based on the German version of § 49 of the CJEU's decision, according to which:

> Folglich hat der Rat, wie das Gericht in den Rn. 54, 63 und 72 des angefochtenen Urteils in Bezug auf die in Art. 4 Abs. 1 der Verordnung Nr. 1024/2013 genannten Aufgaben entschieden hat, der EZB eine ausschließliche Zuständigkeit übertragen, deren dezentralisierte Ausübung durch die nationalen Behörden im Rahmen des ESM und unter Aufsicht der EZB bei den weniger bedeutenden Kreditinstituten im Sinne von Art. 6 Abs. 4 Unterabs. 1 dieser Verordnung hinsichtlich einiger dieser Aufgaben durch Art. 6 gestattet wird, *wobei der EZB die ausschließliche Befugnis eingeräumt wird, den Inhalt des Begriffs „besondere Umstände" im Sinne von Art. 6 Abs. 4 Unterabs. 2 dieser Verordnung zu bestimmen* [emphasis added]; diese Befugnis wurde durch den Erlass der Art. 70 und 71 der Verordnung Nr. 468/2014 umgesetzt.

In other words, under the German version of § 49 of the CJEU's ruling, the ECB's exclusive competence seems to be confined to the exclusive task of determining the content of the definition of 'particular circumstances' within the meaning of the second subparagraph of Article 6(4) SSMR,[7] which – as the BVerfG also noted (see § 195 above-mentioned) - is moreover in line with the subject of the dispute before the CJEU.

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[7] The English or the French versions of said § 49 seem to suggest a different interpretation, whereby the wording "wobei der EZB die ausschließliche Befugnis eingeräumt wird, den Inhalt des Begriffs 'besondere Umstände' im Sinne von Art. 6 Abs. 4 Unterabs. 2 dieser Verordnung zu bestimmen" is translated "whilst conferring on the ECB exclusive competence for determining the content of the definition of 'particular circumstances' within the meaning of the second subparagraph of Article 6(4)" and "tout en conférant à la BCE la compétence exclusive pour préciser le contenu de la notion de 'circonstances particulières', au sens dudit article 6, paragraphe 4, deuxième alinéa" respectively. The same holds true with regard to the Italian ("attribuendo nel contempo alla BCE la competenza esclusiva a definire il contenuto della nozione di 'circostanze particolari' ai sensi dell'articolo 6, paragrafo 4, secondo comma") and the Spanish version ("reservando al mismo tiempo al BCE la competencia exclusiva para precisar el concepto de 'circunstancias particulares' a los efectos del antedicho artículo 6, apartado 4, párrafo segundo") of § 49.

The BVerfG supports its view also with a de facto argument, which seems to be grounded on a quantitative interpretation of the expression "besondere Aufgabe" under Article 127(6) TFEU.[8] Indeed, under the Court's view, not only the number of credit institutions subject to the NCAs supervision is patently higher than those supervised by the BaFin, but the ECB itself made an exceptional use of its take over power under Article 6(5)(b) SSMR.[9]

This de facto argument deserves some criticism as the subject of the constitutional review has to be the abstract norm and cannot be conditional upon factual circumstances impinging on its scope. Moreover, the ECB's broad interpretation of the scope of most of its SSM tasks and powers (see **Chapter IV.A. The involvement of the NCAs in the ECB's supervisory proceedings, § 2**) denies the Court's assumption even from a purely factual point of view.

In light of all the arguments above the BVerfG decided not to refer to the ECJ, as in its view the interpretation of the SSMR was to be considered either clear from the outset ("acte clair") or, in any case, clarified by the case-law in a way that leaves no reasonable doubt open ("acte éclairé"). More to the point, under the Court's view (see § 317, last sentence):

> Soweit er hier auf Ausfuhrungen des EuGH zur ausschliesslichen Kompetenz der EZB zur Wahrnehmung aller in Art. 4 Abs. 1 SSM-VO und zur Einstufung eines Finanzinstituts als „weniger bedeutend" Bezug nimmt, geht der Senat von einem „acte eclaire" aus.

For an analysis of the CJEU's judgments on *Landeskreditbank* see **Chapter V.B. Case-study: Judgments of the General Court and of the ECJ on the Landeskreditbank (General Court, T-122/15 and ECJ, C-450/17 P)**.

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[8] See the last two senteces of § 162 of the judgment: "Dem Adjektiv "besondere(r,s)" kommt, jedenfalls wenn es als Tatbestandsmerkmal verwendet wird, in der Regel die Bedeutung zu, dass es bei quantitativer Betrachtung einen mengenmäßig – deutlich – kleineren Teil eines „großen Ganzen" bezeichnet. Im Ergebnis bedeutet dies, dass im Falle einer Übertragung „besonderer Aufgaben" ein nicht nur unwesentlicher „Rest" bei den Mitgliedstaaten verbleiben muss (vgl. Ohler, Bankenaufsicht und Geldpolitik in der Währungsunion, 2015, § 5 Rn. 19)".

[9] See § 196 of the judegment: "Im Übrigen bestätigt die bisherige Praxis der Bankenaufsicht die hier vorgenommene Auslegung. Sie lässt eine Dominanz der EZB bei der Wahrnehmung von Aufgaben und Befugnisse der Bankenaufsicht noch nicht erkennen. Die EZB beaufsichtigt derzeit unmittelbar nur 119 von etwa 3.600 Kreditinstituten in den teilnehmenden Mitgliedstaaten, auf die allerdings etwa 82 % der Bankaktiva im Euroraum entfallen (vgl. www.bankingsupervision.europa.eu////.de.html <4. Januar 2019>). In Deutschland stehen derzeit 21 Kreditinstitute unter direkter Aufsicht der EZB, während die BaFin für etwa 1.700 Institute zuständig ist. Die in Art. 6 SSM-VO vorgesehenen Möglichkeiten, das Aufsichtsregime zu ändern, haben nach Aussage des Präsidenten der BaFin in der mündlichen Verhandlung bislang eine absolut untergeordnete Rolle gespielt und lediglich zwei Fälle betroffen".

2.3. *Whether Article 127(6) TFEU ensures a design of the SSM granting equal rights to euroarea and non-euroarea participating Member States*

Further criticism has been raised on Article 127(6) TFEU as suitable legal basis of the SSM with regard to the mechanism of close cooperation of non euroarea participating member States.

Recital 85 SSMR merely acknowledges the problem, rather pleading for an amendment of Article 127(6) TFEU:

> The Commission has stated in its Communication of 28 November 2012 on a Blueprint for a deep and genuine economic and monetary union that Article 127(6) TFEU could be amended… to eliminate some of the legal constraints it currently places on the design of the SSM (e.g. enshrine a direct and irrevocable opt-in by Member States whose currency is not the euro to the SSM, beyond the model of 'close cooperation', grant Member States whose currency is not the euro participating in the SSM fully equal rights in the ECB's decision-making…).

2.4. *Whether the conferral on the ECB of supervisory tasks and powers encroaches on the German constitutional identity*

In the decision of 30 July 2019 (2 BvR 1685/14, 2 BvR 2631/14) mentioned above, the BVerfG also held that the SSMR and the SSM Authorising Act do not encroach on the constitutional identity of the German Basic Law.[10] The diminished level of democratic legitimation in the banking supervision, that results from the independence of the ECB and the national supervisory authorities, does not call parliamentary responsibility into question for the measures at issue in a manner that would affect Article 20(2) first sentence in conjunction with Article 79(3) GG.[11] Under the BVerfG's view, though the diminished level of legitimation is a cause for concern as it is additional to the monetary policy mandate of the ECB, it is still acceptable because it is compensated by specific safeguards serving democratic accountability.

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[10] On the Ultra-vires and Identitätskontrolle by the BverfG see SODAN and ZIEKOW, *Grundkurs Öffentliches Recht*, 7.Aulage, München, 216, pp. 24-26. In sum, while the ultra vires review is based on the protection of the right to vote, the principle of democracy and the popular sovreignity (so that voters enjoy a right vis-à-vis the German political bodies not to exceed the integration program which Germany adhered to), the identity review is based on Article 79(3) GG and the protection of the the essential German constitutional pillars, such as the principle of democracy or the federalism.

[11] Article 20(2) GG reads as follows: "Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt". Under Article 79(3) GG: "Eine Änderung dieses Grundgesetzes, durch welche die Gliederung des Bundes in Länder, die grundsätzliche Mitwirkung der Länder bei der Gesetzgebung oder die in den Artikeln 1 und 20 niedergelegten Grundsätze berührt werden, ist unzulässig".

On the ECB's accountability obligation towards both EU and national Parliaments as a compensation of the diminished level of democratic legitimation of the SSM, see below § 5.7.

3. The allocation of tasks and powers to the ECB and the NCAs

3.1. The allocation of tasks

3.1.1. The ECB's tasks and the criteria for assessing the significance of the credit institutions

The tasks conferred on the ECB are those laid down under Article 4, paragraphs (1) and (2), SSMR.

In light of recital 15 SSMR they are supposed to be "crucial to ensure a coherent and effective implementation of the Union's policy relating to the prudential supervision of credit institutions".

Article 4(1) SSMR reads as follows:

> 1. Within the framework of Article 6, the ECB shall, in accordance with paragraph 3 of this Article, be exclusively competent to carry out, for prudential supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States:
>
> (a) (a) to authorise credit institutions and to withdraw authorisations of credit institutions subject to Article 14;
>
> (b) for credit institutions established in a participating Member State, which wish to establish a branch or provide cross- border services in a non-participating Member State, to carry out the tasks which the competent authority of the home Member State shall have under the relevant Union law;
>
> (c) to assess notifications of the acquisition and disposal of qualifying holdings in credit institutions, except in the case of a bank resolution, and subject to Article 15;
>
> (d) to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose prudential requirements on credit institutions in the areas of own funds requirements, securitisation, large exposure limits, liquidity, leverage, and reporting and public disclosure of information on those matters;
>
> (e) to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose requirements on credit institutions to have in place robust governance

arrangements, including the fit and proper requirements for the persons responsible for the management of credit institutions, risk management processes, internal control mechanisms, remuneration policies and practices and effective internal capital adequacy assessment processes, including Internal Ratings Based models;

(f) to carry out supervisory reviews, including where appropriate in coordination with EBA, stress tests and their possible publication, in order to determine whether the arrangements, strategies, processes and mechanisms put in place by credit institutions and the own funds held by these institutions ensure a sound management and coverage of their risks, and on the basis of that supervisory review to impose on credit institutions specific additional own funds requirements, specific publication requirements, specific liquidity requirements and other measures, where specifically made available to competent authorities by relevant Union law;

(g) to carry out supervision on a consolidated basis over credit institutions' parents established in one of the participating Member States, including over financial holding companies and mixed financial holding companies, and to participate in supervision on a consolidated basis, including in colleges of supervisors without prejudice to the participation of national competent authorities in those colleges as observers, in relation to parents not established in one of the participating Member State;

(h) to participate in supplementary supervision of a financial conglomerate in relation to the credit institutions included in it and to assume the tasks of a coordinator where the ECB is appointed as the coordinator for a financial conglomerate in accordance with the criteria set out in relevant Union law;

(i) to carry out supervisory tasks in relation to recovery plans, and early intervention where a credit institution or group in relation to which the ECB is the consolidating supervisor, does not meet or is likely to breach the applicable prudential requirements, and, only in the cases explicitly stipulated by relevant Union law for competent authorities, structural changes required from credit institutions to prevent financial stress or failure, excluding any resolution powers.

Moreover, under paragraph 2 of Article 4 SSMR

for credit institutions established in a non-participating Member State, which establish a branch or provide cross- border services in a participating Member State, the ECB shall carry out, within the scope of paragraph 1, the tasks for which the national

competent authorities are competent in accordance with relevant Union law.

In light of the principle of conferral and in order to avoid any circumvention of the procedure laid down under Article 127(6) TFEU, Article 4 SSMR needs to be interpreted strictly.

Against this backdrop it is worth noting that tasks under Article 4 SSMR are conferred on the ECB "within the framework of Article 6". This latter makes, in turn, a clear distinction between significant and less significant credit institutions and allocates said tasks to the ECB and the NCAs consistently with the distinction above.

Consequently, the tasks under Article 4 SSMR are exclusively carried out by the ECB only towards the significant credit institutions.

With regard to the less significant ones, supervisory tasks under Article 4 are shared between the ECB and the NCAs, according to the allocation of competences laid down under paras 4 to 6 of said Article 6 SSMR, the only exception being the licensing and the assessment of qualifying holders, which remain within the ECB's exclusive jurisdiction, irrespective of the qualification as significant or less significant of the credit institution concerned.

The criteria according to which the significance has to be assessed are contained in Article 6(4) SSMR and fine-tuned in Articles 39 ff. of the Framework regulation;[12] they are notably:

(i) the size of the credit institutions (the total value of their assets exceeds EUR 30 billion);

(ii) their importance for the economy of the EU or any participating Member State (the ratio of their total assets over the GDP of the participating Member State of establishment exceeds 20%, unless the total value of their assets is below EUR 5 billion; or, following a notification by their national competent authority that it considers such institutions of significant relevance with regard to the domestic economy, the ECB takes a decision confirming such significance following a comprehensive assessment of the credit institution, including a balance sheet assessment);

(iii) the significance of their cross-border activities (the ECB may also, on its own initiative, consider an institution to be of significant relevance where it has established banking subsidiaries in more than one participating Member State and its cross-border assets or liabilities

[12] Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17).

represent a significant part of its total assets or liabilities subject to the conditions laid down in the methodology).

The ECB's supervision includes all the supervised entities which are part of a significant banking group. To be classified as significant, the group shall fundamentally fulfil at the highest level of consolidation, within the participating Member States, the size criterion, the economic importance criterion or the cross-border activities criterion (see Recital 38 and Article 6(4), first hyphen, SSMR and Article 40 of the Framework regulation).

While the supervised entities shall be credit institutions, financial holding companies or mixed financial holding companies, the parent undertaking may be also a central body to which the supervised entities are affiliated under the conditions laid down in Article 10 of the CRR (see Article 2, No. 20 and 21, of the Framework regulation; on the question of whether or not the parent undertaking has necessarily to be a credit institution, a financial holding companies or a mixed financial holding company where the conditions under Article 10 CRR are fulfilled see **Chapter II.A. The application of national law by the ECB, § Case-study: T-712/15 and T-52/16, Joined cases C-152/18 P and C-153/18 P, Crédit Mutuel Arkéa**).

In light of Recital 38 SSMR,

> Where the ECB carries out the tasks conferred on it by this Regulation with regard to a group of credit institutions that is not less significant on a consolidated basis, it should carry out those tasks on a consolidated basis with regard to the group of credit institutions and on an individual basis with regard to the banking subsidiaries and branches of that group established in participating Member States.

Should a financial sector entity that is part of a significant supervised group be neither a credit institution, a financial holding company nor a mixed financial holding company, its supervision on an individual basis, if required by the applicable EU or national law,[13] is to be carried out by the relevant NCA and not by the ECB. In fact, according to Article 40(2) of the Framework Regulation, jointly read with Article 2(20) of that Regulation,

> Each of the supervised entities [*namely, credit institutions, financial holding companies and mixed financial holding companies established in a participating Member State*] forming part of a supervised group shall be deemed to be a significant supervised entity.

[13] In particular, in addition to credit institutions, EU law also qualifies (re)insurance undertakings, investment firms, asset management companies, e-money institutions and payment institutions as entities subject to supervision by a competent authority. National law may also require supervision on additional financial sector entities, such as some categories of financial institutions that pursue one or more of the activities listed in points 2 to 12 and point 15 of Annex I to CRD IV.

Strangely enough, the NCAs still maintain important tasks with respect to financial holding companies and mixed financial holding companies that are part of a significant supervised group, despite the fact that they are supervised directly by the ECB on an on-going basis. In fact, Article 21a CRD – as introduced by Directive (EU) 2019/878 of 20 May 2019 – requires a competent authority to authorise financial holding companies and mixed financial holding companies, and to assess fitness and propriety of their shareholders. Given that Article 4(1)(a) and 14 SSM Regulation only confer upon the ECB the task to license credit institutions, a problem arises with respect to the identification of the authority competent to authorise (mixed) financial holding companies that qualify as significant supervised entities and to assess their qualifying shareholders.

In particular circumstances the ECB may classify a significant credit institution as less significant (Article 6(4) SSMR).

Indeed, under Article 70 of the Framework Regulation

> 1. Particular circumstances, as referred to in the second and fifth subparagraphs of Article 6(4) of the SSM Regulation (hereinafter the 'particular circumstances') exist where there are specific and factual circumstances that make the classification of a supervised entity as significant inappropriate, taking into account the objectives and principles of the SSM Regulation and, in particular, the need to ensure the consistent application of high supervisory standards. 2. The term 'particular circumstances' shall be strictly interpreted". Moreover, Article 71(1) of said regulation clarifies that Whether particular circumstances exist that justify classifying what would otherwise be a significant supervised entity as less significant shall be determined on a case-by-case basis and specifically for the supervised entity or supervised group concerned, but not for categories of supervised entities.

On the application by the ECB of Article 70 of the Framework Regulation see again **Chapter V.B. Case-study: Judgments of the General Court and of the ECJ on the Landeskreditbank (General Court, T-122/15 and ECJ, C-450/17 P)**.

Specularly, the ECB may decide to take over the direct supervision of a less significant credit institution.

Indeed, Article 6(5), lit. (b) SSMR stipulates that

> when necessary to ensure consistent application of high supervisory standards, the ECB may at any time, on its own initiative after consulting with national competent authorities or upon request by a national competent authority, decide to exercise directly itself all the relevant powers for one or more credit institutions referred to in paragraph 4, including in the case where financial assistance has been requested or received indirectly from the EFSF or the ESM.

For more details on the ECB's powers under Article 6(5) SSMR see **Chapter V.A. The supervision of the less significant credit institutions**.

3.1.2. The NCAs' tasks

A short description of tasks remaining within the remit of the NCAs is given below.

Which tasks remain within the NCAs' responsibility is laid down under Articles 1, 6(3) and (6) and Recitals 15, 28, 29, 36, 37 and 53 SSMR.

In light of said provisions and recitals, the NCAs are vested with:

(i) supervisory tasks concerning financial intermediaries not supervised by the ECB (Recital 28 SSMR), including the central counterparties (Article 1 SSMR);

(ii) supervisory tasks concerning credit institutions not transferred to the ECB, including the supervision of non-EU branches of credit institutions (Recital 28 SSMR) and the day-to-day verifications of credit institutions (Recitals 28 and 37, Article 6(3) SSMR; but see Articles 3 ff. Framework regulation);

(iii) non-supervisory tasks, including the functions of competent authorities over credit institutions in relation to markets in financial instruments as well as money laundering and consumer protection (Recitals 28 and 29 SSMR);

(iv) in conjunction with the ECB, supervisory tasks concerning the supervision of less significant credit institutions, with the only exception of the licensing and the assessment of qualifying holders which are exclusively ECB's tasks.

With specific regard to the functions of competent authorities over credit institutions in relation to markets in financial instruments, a problem arises as to whether the ECB's banking license will also cover the investment services activity and other credit institutions' activities relating to the market in financial services, such as the custodian of common funds' assets.

In light of recital 28 SSMR, the author favours a restrictive reading of the ECB's authorising power (see **Chapter IV.A. The involvement of the NCAs in the ECB's supervisory proceedings, § 1.1.**).

Moreover, under the EMIR regulation (Regulation No 648/2012) "OTC derivative contracts that are intragroup transactions shall not be subject to the clearing obligation" (Article 3(2)) but they shall be subject to some risk-mitigation techniques. The latter are provided for under Article 11 of the EMIR regulation and may be waived by the NCAs where certain conditions are met. In the case

of intragroup transactions entered into by counterparties which are established in different Member States, exemptions from the risk-mitigation techniques have to be authorised by both the relevant competent authorities. Disagreements are settled by ESMA.

In light of the above, the NCAs' powers to authorise these exceptions, though impinging on the prudential requirements, pertain to the field of the market in financial instruments as confirmed by the involvement of ESMA's mediation powers.

A peculiar case is the one under Article 17(5) and (6) MAR.[14]

Paragraph 5 of Article 17 MAR stipulates that:

> 5. In order to preserve the stability of the financial system, an issuer that is a credit institution or a financial institution, may, on its own responsibility, delay the public disclosure of inside information, including information which is related to a temporary liquidity problem and, in particular, the need to receive temporary liquidity assistance from a central bank or lender of last resort, provided that all of the following conditions are met:
>
> (a) the disclosure of the inside information entails a risk of undermining the financial stability of the issuer and of the financial system;
>
> (b) it is in the public interest to delay the disclosure;
>
> (c) the confidentiality of that information can be ensured; and
>
> (d) the competent authority specified under paragraph 3 has consented to the delay on the basis that the conditions in points (a), (b) and (c) are met.

Paragraph 6 provides for, in turn, that:

> 6. For the purposes of points (a) to (d) of paragraph 5, an issuer shall notify the competent authority specified under paragraph 3 of its intention to delay the disclosure of the inside information and provide evidence that the conditions set out in points (a), (b) and (c) of paragraph 5 are met. The competent authority specified under paragraph 3 shall consult, as appropriate, the national central bank or the macro-prudential authority, where instituted, or, alternatively, the following authorities:
>
> (a) where the issuer is a credit institution or an investment firm the authority designated in accordance with Article 133(1) of Directive 2013/36/EU of the European Parliament and of the Council;

[14] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

> (b) in cases other than those referred to in point (a), any other national authority responsible for the supervision of the issuer.
>
> The competent authority specified under paragraph 3 shall ensure that disclosure of the inside information is delayed only for a period as is necessary in the public interest. The competent authority specified under paragraph 3 shall evaluate at least on a weekly basis whether the conditions set out in points (a), (b) and (c) of paragraph 5 are still met.
>
> If the competent authority specified under paragraph 3 does not consent to the delay of disclosure of the inside information, the issuer shall disclose the inside information immediately…

The responsible authority for providing advice to the market authority is either the NCB, the national macro-prudential authority or the national authority competent for the application of the systemic risk buffer under Article 133 CRD IV.

The reason why the responsibility lies at a national rather than a EU level is twofold. Indeed, not only the case at hand may be included within the NCA's responsibility over credit institutions in relation to markets in financial instruments, but it may also be encompassed within the NCA's macroprudential taks, subject as such to the criteria on the allocation of competences provided for under Article 5 SSMR.

A different approach is followed with regard to the structural changes required from credit institutions.

The relevant powers, where provided for in the EU law, are included within the ECB's supervisory tasks, as clearly laid down under Article 4(1)(i) SSMR. Though the decision to impose structural changes mainly pertains to the activities carried out by banks in the field of the market in financial instruments (separation of certain trading activities), the ECB's competence is here grounded on the arguments (see Article 8 ff. of the draft Regulation) that such a decision:

(i) involves the whole organisational structure of the banking group;

(ii) entails the re-organisation of the group into two separate and homogeneous functional sub-groups constituted, on the one side, by the core credit institution carrying out mainly retail activities and, on the other side, by the trading entity(ies) engaging in speculative activities, without prejudice to the ban on proprietary trading as per Article 6(1); and

(iii) implies that the core credit institution and the trading entity(ies) shall comply with prudential requirements on an individual or subconsolidated basis along with other organisational requirements aimed at ensuring legal, operational and economic separation of the two entities.

This case, however, will remain only theoretical. Indeed, the EU draft regulation on structural measures has been withdrawn, so that currently there is no ECB power on structural measure anchored in the EU law. For details on the topic see **Chapter VII.A. Recovery plans, early intervention measures and structural measures, § 4**.

The author's view favouring a restrictive interpretation of the ECB's powers with regard to banking activities in markets of financial instruments is called into question both by the Commission's report on SSM and the recent new prudential regime for investment firms.

Page 8 of the Commission's report on the SSM of October 2017[15] reads as follows:

> Some questions arise in relation to the remaining competences of NCAs, and the way they may be used for circumventing the distribution of responsibilities within the SSM. Recent structural market developments show a trend for third country groups to have increasingly complex structures in the Union, operating through entities that escape ECB supervision. For instance, the ECB would not have powers over investment firms or EU branches of institutions having their head office in third countries, which may constitute a loophole in its overall mandate and opens the door to regulatory and supervisory arbitrage. A specific concern exists in relation to the largest investment firms that provide key wholesale market and investment banking services across the EU, which are "bank-like" in nature. These firms therefore present a clear risk to financial stability, given their size and interconnectedness. This is why they are subject to essentially the same obligations as credit institutions. However, they are not necessarily authorised and supervised by the same authorities as credit institutions, which might create an un-level playing field in the application of the CRD and CRR. The ongoing reviews of the CRD-CRR and of the prudential treatment of investment firms may provide a good opportunity to address this aspect.

In the same vein, the revised EU regime on the prudential requirements and supervision of investment firms[16] includes in the definition of credit institutions the systemically important investment firms dealing on their own account, underwriting

[15] Report from the Commission to the European Parliament on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/201, Brussels, 11.10.2017 COM(2017) 591 final.

[16] See Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 (Text with EEA relevance) and Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU (Text with EEA relevance).

or placing instruments on a firm commitment basis and makes them subject to the ECB's supervision, in light of the required total value of their assets.

More to the point the new Article 4(1) of the CRR is point (1) reads as follows:

> 1. "credit institution" means an undertaking the business of which consists of any of the following:
>
> (a) to take deposits or other repayable funds from the public and to grant credits for its own account;
>
> (b) to carry out any of the activities referred to in points (3) and (6) of Section A of Annex I to Directive 2014/65/EU of the European Parliament and of the Council, where one of the following applies, but the undertaking is not a commodity and emission allowance dealer, a collective investment undertaking or an insurance undertaking:
>
> (i) the total value of the consolidated assets of the undertaking is equal to or exceeds EUR 30 billion;
>
> (ii) the total value of the assets of the undertaking is less than EUR 30 billion, and the undertaking is part of a group in which the total value of the consolidated assets of all undertakings in that group that individually have total assets of less than EUR 30 billion and that carry out any of the activities referred to in points (3) and (6) of Section A of Annex I to Directive 2014/65/EU is equal to or exceeds EUR 30 billion; or
>
> (iii) the total value of the assets of the undertaking is less than EUR 30 billion, and the undertaking is part of a group in which the total value of the consolidated assets of all undertakings in the group that carry out any of the activities referred to in points (3) and (6) of Section A of Annex I to Directive 2014/65/EU is equal to or exceeds EUR 30 billion, where the consolidating supervisor, in consultation with the supervisory college, so decides in order to address potential risks of circumvention and potential risks for the financial stability of the Union;
>
> for the purposes of points (b)(ii) and (b)(iii), where the undertaking is part of a third-country group, the total assets of each branch of the third-country group authorised in the Union shall be included in the combined total value of the assets of all undertakings in the group.

In the author's view, it cannot legitimately be inferred from this provision that said systemic investment firms were subject to the ECB's supervision.

Indeed, by introducing a definition of banking activity that makes it possible to completely disregard the taking of deposits and the granting of credits, the new regime surreptitiously extends the scope of the ECB's licensing task – that that definition presupposes - beyond the limits allowed under the the SSM Regulation and circumvents the procedure laid down under Article 127(6) TFEU.

The NCAs remain competent also for consumer protection and the fight against money laundering.

Nevertheless, it is not clear what is the scope of these tasks.

Indeed, in some national legal frameworks, such as the Italian one, consumer protection and the fight against money laundering extend to the relevant organisational agreements and internal control mechanisms (see Article 127(01) of the Italian Banking Law). These latter fall within the scope of the ECB's supervisory tasks.

In light of the principle of conferral and the strict interpretation of the rules on the allocation of competences to the EU institutions, a possible criterion for the allocation of responsibilities in these fields could be the following:

(i) the ECB would be responsible for ensuring that credit institutions have organisational agreements and internal control mechanisms in place, compliant with the relevant EU prudential banking law, whilst

(ii) the NCAs would be responsible for ensuring that credit institutions' organisational agreements and internal control mechanisms are such as to ensure a high level of consumer protection and an effective fight against money laundering.

Given the links between the NCAs' consumer protection tasks and the ECB's supervisory ones (breaches of consumer protection rules can be symptoms of unsound governance and internal control mechanisms; while viceversa unsound governance and internal control mechanisms may affect the credit instituions' compliance with the consumer protection rules), the duties of sincere cooperation between the SSM authorities become of outmost importance.

Not surprisingly, Recital 29 SSMR provides for a duty of the ECB to fully cooperate with the NCAs.

3.1.3. AML and CTF-related supervisory tasks

Under Recital 28 SSMR, AML and CTF-related supervisory tasks and the enforcement of the relevant legislation are not among the competences transferred to the ECB.

Indeed, as underlined by the ECB in its web-site (The ECB and anti-money laundering: what we can and cannot do):

> it is clear that breaches of AML or CTF provisions can be symptoms of unsound governance and internal control mechanisms, the supervision of which is a task of the ECB for significant banks. Breaches in those supervisory areas can be a ground for the withdrawal of a bank's licence, which is a task of the ECB for both significant and less significant banks. Points of contact therefore exist between AML/CTF supervision and ECB competences.

ECB also clarifies, with regard to the fields of banking licence withdrawal and governance/risk control supervision, where do the competences of other authorities end and those of the ECB begin:

> the primary question here is whether the ECB can use its investigatory powers to collect evidence in order to decide on a licence withdrawal. Since the ECB's tasks do not include AML/CTF, it cannot conduct its own investigations (for example, on-site inspections) into AML/CTF compliance. It has to rely on the facts as investigated by the other authorities competent for AML/CTF. Drawing conclusions from these facts, in particular whether they justify a licence withdrawal, would, however, be a competence of the ECB.

Moreover:

> the purposes of governance/risk control supervision are different from those of AML/CTF supervision. Governance/risk control supervision is intended to ensure that banks are properly managed to cover their prudential risks. For example, the ECB cannot monitor know-your-customer (KYC) procedures in individual cases, but it can check whether a general failure to conduct KYC procedures in a given bank is the result of more fundamental governance deficiencies. Nor can the ECB monitor whether a bank has complied with its obligation to submit suspicious transaction reports to the AML authorities; it can, however, check whether there is a more deeply-rooted problem behind the failure to submit the reports. The ECB can also assess whether there are legal, reputational or organisational risks to which a bank under its supervision is exposed.
>
> Consequently, the ECB cannot determine whether breaches of AML legislation have taken place. The competence for investigating such breaches, and determining whether AML legislation has indeed been breached, lies solely with the AML authority, as part of its fact-finding competences… Once such breaches have been established by the AML authority, the ECB can take the facts thus identified as given and use its Pillar 2 powers. The most appropriate context for doing so would be the annual Supervisory Review and Evaluation Process exercise. Any measures adopted by the ECB would, however, always be applied from a prudential perspective and not from a crime avoidance perspective.

> The same principles apply in other governance-related areas of the ECB's supervisory activities. For instance, AML/CTF-related findings can be used to assess the suitability of a (proposed) board member in fit-and-proper proceedings (for significant banks) or of a proposed acquirer of shareholdings in a bank, in qualifying holding proceedings (for all banks). Here too, the investigations must be carried out by AML authorities, but the ECB can take their findings into account within the scope of its own responsibilities and tasks.

Similarly to what was noted with regard to the consumer protection task, Recital 29 SSMR provides for a duty of the ECB to cooperate with AML authorities too. This is due to the links between the AML and CTF-related supervisory tasks and the ECB's supervisory ones.

In the same vein, AMLD4 was amended by the AMLD5 in June 2018,[17] with a new Article 57a(2) being introduced, which requires the European Supervisory Authorities (ESAs) to support the conclusion of an agreement on the practical modalities for exchange of information between the ECB and all competent authorities (CAs) responsible for supervising compliance of credit and financial institutions with anti-money laundering and countering the financing of terrorism (AML/CFT), under the fourth Anti-Money Laundering Directive (AMLD4).

On 10 January 2019 the ESAs approved the content of the Multilateral Agreement on the practical modalities for the exchange of information between the ECB and the CAs pursuant to Article 57a(2) of Directive (EU) 2015/849.[18]

Under Article 3(2) of the Agreement:

> The ECB may submit a request to the CAs for information, which is

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[17] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, as amended by any other subsequent legal instrument, including Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018.

[18] Article 57a(2) of Directive (EU) 2015/849 reads as follows:
"Paragraph 1 [on profressional secrecy] shall not prevent the exchange of information between:
(a) competent authorities supervising credit and financial institutions within a Member State in accordance with this Directive or other legislative acts relating to the supervision of credit and financial institutions;
(b) competent authorities supervising credit and financial institutions in different Member States in accordance with this Directive or other legislative acts relating to the supervision of credit and financial institutions, including the European Central Bank (ECB) acting in accordance with Council Regulation (EU) No 1024/2013. That exchange of information shall be subject to the conditions of professional secrecy indicated in paragraph 1.
By 10 January 2019, the competent authorities supervising credit and financial institutions in accordance with this Directive and the ECB, acting pursuant to Article 27(2) of Regulation (EU) No 1024/2013 and point (g) of the first subparagraph of Article 56 of Directive 2013/36/EU of the European Parliament and of the Council, shall conclude, with the support of the European Supervisory Authorities, an agreement on the practical modalities for exchange of information".

gathered or created by the CA in the exercise of its AML/CFT functions, that is relevant and necessary for the exercise of the ECB's tasks under the SSM Regulation, including prudential supervision on a consolidated basis. Such request may include, but is not limited to information:

(a) related to AML/CFT sanctions or measures imposed on supervised entities;

(b) gathered from reports received in line with Article 61(1) of the AMLD;[19]

(c) related to material weaknesses in the supervised entity's AML/CFT governance, systems and controls framework;

(d) related to the supervised entity's exposure to significant ML/TF risks;

(e) that is relevant and necessary for the purposes of the assessment of acquisitions of qualifying holdings, the authorisation of supervised entities, notifications connected with the exercise of the freedom of establishment and the freedom to provide services and the assessment of the suitability of members of management bodies of the supervised entities.

Finally, it should be pointed out that the recent regulation amending the ESAs, in giving the EBA a leading role in preventing and countering money laundering and terrorist financing (see, among others, Articles 9a and 9b), expressly required the EBA to coordinate, inter alia, with the ECB with regard to matters relating to the tasks conferred on it by the SSM regulation (see Article 9a(1)(b) of the new text of the EBA founding regulation).[20]

A specific problem arises regarding the relationship between the new provisions contained in Article 9a of the EBA founding regulation (including those on the EBA's leading role in collecting information) and the current regime

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[19] Article 61(1) of the AMLD reads as follows:
"Member States shall ensure that competent authorities, as well as, where applicable, self-regulatory bodies, establish effective and reliable mechanisms to encourage the reporting to competent authorities, as well as, where applicable self-regulatory bodies, of potential or actual breaches of the national provisions transposing this Directive.
For that purpose, they shall provide one or more secure communication channels for persons for the reporting referred to in the first subparagraph. Such channels shall ensure that the identity of persons providing information is known only to the competent authorities, as well as, where applicable, self-regulatory bodies".

[20] See the Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds (Text with EEA relevance) (Text with EEA relevance).

on the exchange of information between the ECB and the competent authorities (under the AMLD5 and the Multilateral Agreement mentioned above).

3.2. The allocation of the powers underpinning an ECB's task

3.2.1. Allocation of tasks and allocation of powers

As the SSM has no legal personality, the supervisory decisions are imputable, as a rule, to the ECB or the NCAs according to the general criteria on the allocation of tasks contained in the SSMR.

Nevertheless, the allocation of powers to the ECB or the NCAs within the SSM may not necessarily duplicate the allocation of tasks.

This is particularly clear with regard to the exercise of the supervisory powers towards the credit institutions having their legal premises in non-euroarea participating Member States.

Indeed, the ECB is vested with direct supervisory powers only over significant credit institutions of euro-area participating MS (Article 6 SSMR), whilst has only indirect supervisory powers with regard to credit institutions having their legal premises in the non-euroarea participating Member States (see Article 7(1), second sub-paragraph, SSMR).

Nevertheless, even with regard to credit institutions having their business premises in the euro area participating Member States there are cases of misalignment between the ECB's tasks and the NCAs' powers, as clearly shown by Articles 9(1), third sub-paragraph, and 18(5) SSMR.

For further details, see **Chapter IV.A. The involvement of the NCAs in the ECB's supervisory proceedings, § 2**.

3.2.2. Allocation of micro-prudential powers

Apart from the cases of misalignment between the ECB's tasks and the NCAs' powers mentioned above, the allocation of micro-prudential supervisory powers follows the allocation of the tasks and the relevant general criteria based on the status as significant or less significant of the credit institution (Article 6(4) SSMR).

3.2.3. Allocation of macro-prudential powers

The allocation of competences to adopt macro-prudential decisions follows a different criterion than the one based on the status as significant or less significant of the credit institution (see Article 5 and Recital 24 SSMR).

Indeed, under Article 5 SSMR both the ECB and the national competent or designated authorities are entitled to apply macro-prudential tools provided for under Union law.

These tools apply to all credit institutions, irrespective of their qualification as significant or less significant.

The ECB may apply only higher buffers than those applied by the national competent/designated authorities (so-called top-up power).

As clarified under Article 102, second period of the Framework regulation, the top-up power implies also that the ECB may apply a macro-prudential measure (i.e. a capital buffer) even when no macro-prudential measures have been adopted at national level.

For further details on the ECB's macroprudential responsibilities see **Chapter I.B. The SSM's macropudential tasks and its relationship with the ESRB.** On the distinction between competent and designated authorites see **§ 2 of Chapter I.B.**

3.2.4. The powers underpinning the ECB's exclusive tasks

With regard to the task of granting and withdrawing the banking license, the ECB is, basically, the only competent authority (Article 14 SSMR).

The same holds true with regard to the competence of assessing the acquisition and disposal of qualifying holdings (Recital 22, Article 15 SSMR).

In both cases, though the ECB is, as a rule, the only competent authority, the NCAs are competent to make a previous assessment of the conditions required for granting/withdrawing the banking license as well as of opposing or not to the acquisition of a qualifying holding in a bank.

The rationale of the ECB's exclusive competence is to preserve the unity and the integrity of the internal market of banks and banks ownership.

For further details on the topic see **Chapter IV.A. The involvement of the NCAs in the ECB's supervisory proceedings, § 1**.

3.2.5. Allocation of sanctioning powers

How competences to adopt the administrative sanctions are allocated to the ECB and the NCAs is not easy to assess, given the uncertain interpretation of Article 18 SSMR and the criteria mentioned therein (the nature of the rule violated/the nature of the addressee of the penalty/the kind, whether pecuniary or non-pecuniary, of the sanction to be applied).

In order to make the allocation of sanctioning powers aligned as much as possible with that of the supervisory tasks of ensuring compliance with the prudential rules (see Article 4(1), lit. (d) and (e) SSMR), the Framework regulation follows the criterion of the status as significant or less significant of the credit institution concerned refined with the criteria of the nature of the rules violated, the nature of the addressee and the kind of sanction to be applied. This criterion is not applied by the ECB with regard to the violations of national rules on common procedures.

In light of the above, as one may infer from Articles 122, 124 and 134 of the Framework regulation and the ECB's praxis, sanctioning powers are allocated as follows within the SSM:

(i) with regard to the imposition of pecuniary penalties for breaches of directly applicable Union law (Article 18(1) SSMR), the ECB is exclusively competent for significant credit institutions while the NCAs are exclusively competent for the less significant ones;

(ii) with regard to the imposition of pecuniary penalties for breaches of the ECB regulations and decisions (Article 18(7) SSMR), the ECB is exclusively competent for all credit institutions;

(iii) save as provided for under point (iv), with regard to the imposition of pecuniary penalties for breaches of national law, the application of penalties to natural persons or the application of non-pecuniary sanctions (Article 18(5) SSMR), the NCAs are exclusively competent upon an ECB's request for significant credit institutions and on their own initiative for the less significant ones;

(iv) as for the imposition of pecuniary sanctions for breaches of the national law on licensing and qualifying holdings, the NCAs are competent only upon an ECB's request, irrespective of the status as significant or less significant of the credit institution, since the corresponding tasks belong exclusively to the ECB;

(v) as for the application of the administrative measures, the ECB is exclusively competent for the significant credit institutions while the NCAs are exclusively competent for the less significant ones (details on the distinction among supervisory decisions, administrative measures and administrative sanctions are illustrated under **Chapter III.A The elusive distinction among supervisory decisions, administrative measures and administrative sanctions**).

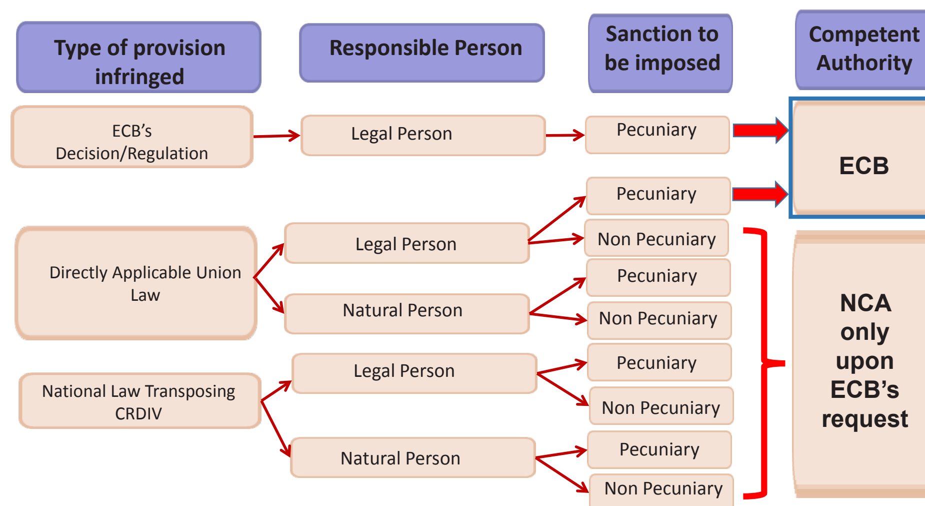
This allocation of sanctioning powers to the ECB and the NCAs, which is more in line with the overall rationale of the SSMR than with the wording of its Article 18, has not yet been submitted to the CJEU.

In any case, notwithstanding the efforts made in the Framework regulation in order to align the sanctioning powers to the supervisory ones, some asymmetries still remain as they are contained in Article 18 SSMR.

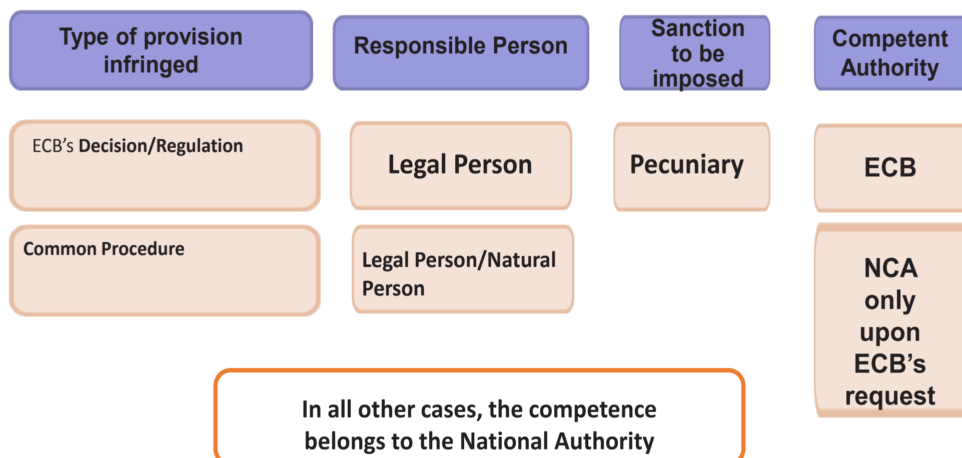
In its Report on the SSM, the Commission noted that (see p. 14):

> Some obvious asymmetries (such as the different scope of sanctioning powers as opposed to supervisory powers), the lack of a common set of enforcement and sanctioning measures, as well as a wide margin in interpreting existing EU sanctioning rules may already be noted. These have the potential of impinging on the level playing field and would need to be closely monitored in terms of implications for the effectiveness of ECB's performance of supervisory tasks.

SSM: Allocation of Sanctioning Power
a) *significant institutions*



SSM: Allocation of Sanctioning Power
b) less significant institutions



3.2.6. The ECB's investigatory powers

Under Article 10 SSMR, the ECB enjoys the power to require legal or natural persons subject to its supervisory powers all information needed in order to carry out the tasks provided for under said regulation.

Article 10 SSMR reads as follows:

> 1. Without prejudice to the powers referred to in Article 9(1), and subject to the conditions set out in relevant Union law, the ECB may require the following legal or natural persons, subject to Article 4, to provide all information that is necessary in order to carry out the tasks conferred on it by this Regulation, including information to be provided at recurring intervals and in specified formats for supervisory and related statistical purposes:
>
> (a) credit institutions established in the participating Member States;
>
> (b) financial holding companies established in the participating Member States;
>
> (c) mixed financial holding companies established in the participating Member States;
>
> (d) mixed-activity holding companies established in the participating Member States;
>
> (e) persons belonging to the entities referred to in points (a) to (d);
>
> (f) third parties to whom the entities referred to in points (a) to (d) have outsourced functions or activities.
>
> 2. The persons referred to in paragraph 1 shall supply the information requested. Professional secrecy provisions do not exempt those persons from the duty to supply that information. Supplying that information shall not be deemed to be in breach of professional secrecy.
>
> 3. Where the ECB obtains information directly from the legal or natural persons referred to in paragraph 1 it shall make that information available to the national competent authorities concerned.

The protection of confidentiality of communications between the natural or legal persons above-mentioned and their legal advisors are protected in accordance with the conditions laid down in the CJEU's case law.

See in this vein Recital 48 SSMR

> Legal profession privilege is a fundamental principle of Union law, protecting the confidentiality of communications between natural or legal persons and their advisors, in accordance with the conditions

> laid down in the case-law of the Court of Justice of the European Union (CJEU).

Recital 48 refers to the ECJ case law, limiting the privilege to the case of the defense of rights (see ECJ, 14 September 2010, C-550/07P, *Akzo Nobel*).

In light of Article 139(2) Framework regulation, before requiring information to be provided in accordance with Article 10(1) of the SSM Regulation, the ECB shall first take account of information already available to the NCAs.

The provision is grounded on the need to avoid double reporting requirements.

See Recital 47 SSMR:

> In order to carry out its tasks effectively, the ECB should be able to require all necessary information, and to conduct investigations and on-site inspections, where appropriate in cooperation with national competent authorities. The ECB and the national competent authorities should have access to the same information without credit institutions being subject to double reporting requirements.

ECB's general investigations powers are singled out in Article 11 SSMR, reading as follows:

> 1. In order to carry out the tasks conferred on it by this Regulation, and subject to other conditions set out in relevant Union law, the ECB may conduct all necessary investigations of any person referred to in Article 10(1) established or located in a participating Member State.
>
> To that end, the ECB shall have the right to:
>
> (a) require the submission of documents;
>
> (b) examine the books and records of the persons referred to in Article 10(1) and take copies or extracts from such books and records;
>
> (c) obtain written or oral explanations from any person referred to in Article 10(1) or their representatives or staff;
>
> (d) interview any other person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation;
>
> 2. The persons referred to in Article 10(1) shall be subject to investigations launched on the basis of a decision of the ECB.
>
> When a person obstructs the conduct of the investigation, the national competent authority of the participating Member State where the relevant premises are located shall afford, in compliance with national law, the necessary assistance including, in the cases

> referred to in Articles 12 and 13, facilitating the access by the ECB to the business premises of the legal persons referred to in Article 10(1), so that the aforementioned rights can be exercised.

In order to carry out its supervisory tasks the ECB also enjoys inspection powers.

These powers are regulated under Article 12 SSMR. ECB's on-site inspections at the business premises of persons mentionend in Article 10 SSMR are subject to prior notification to the relevant NCA.

Where the proper conduct and efficiency of the inspection so require, the ECB may carry out the on-site inspection without prior announcement to those legal persons.

Under paragraph 2 of Article 12 SSMR

> The officials of and other persons authorised by the ECB to conduct an on-site inspection may enter any business premises and land of the legal persons subject to an investigation decision adopted by the ECB and shall have all the powers stipulated in Article 11(1).

In light of paragraph 4 of Article 12 not only the ECB's officers but also the ones of the relevant NCAs

> shall, under the supervision and coordination of the ECB, actively assist the officials of and other persons authorised by the ECB.

Moreover, they

> shall also have the right to participate in the on-site inspections.

The meaning of this provision is not crystal clear. A plausible reading is that the officers of the relevant NCAs maintain the powers to partake in an ECB's inspection in order to assess compliance with aspects of the banking activity falling outside the ECB's tasks (such as the anti-money laundering or consumer protection ones).

Similarly to what provided for under Article 11(2) SSMR, paragraph 5 of Article 12 stipulates that

> Where the officials of and other accompanying persons authorised or appointed by the ECB find that a person opposes an inspection ordered pursuant to this Article, the national competent authority of the participating Member State concerned shall afford them the necessary assistance in accordance with national law. To the extent necessary for the inspection, this assistance shall include the sealing of any business premises and books or records. Where

> that power is not available to the national competent authority concerned, it shall use its powers to request the necessary assistance of other national authorities.

Obstructions to an ECB's investigation under Article 11(2) or to an ECB's on-site inspection under Article 12(5) SSMR are tantamount to a violation of an ECB's decision within the meaning of Article 18(7) SSMR and are subject, as such, to the application of the administrative pecuniary sanctions and the periodic penalty payments provided for under the EU regulation 2532/1998. This is clearly laid down under Articles 142(c) and 143(2)(b) of the Framework regulation.

The application of administrative sanctions and pecuniary penalty payments is without prejudice to national criminal provisions on the obstruction of the supervisory authority tasks.

Under Article 13(1) SSMR

> If an on-site inspection provided for in Article 12(1) and (2) or the assistance provided for in Article 12(5) requires authorisation by a judicial authority according to national rules, such authorisation shall be applied for.

A problem arises here as to whether the above provision is fully compliant with the case law of the ECtHR, since it requires the Court's previous judicial control only where it is provided for by the national law, whilst under the *Cola Est* rule such a control should be made available in any case (for details on these aspects see **Chapter VI.A. The safeguards applicable to the ECB supervisory and sanctioning procedures, § 1.1.**).

As one may infer from the title of Article 9 (Supervisory and investigatory powers), besides the powers provided for under Articles 10 to 12 SSMR above-mentioned, the ECB also enjoys the investigatory national powers conferred to the NCAs by national law transposing EU directives or asks the NCAs to make use of their investigatory powers provided for under their pure national law.

In the exercise of its oversight over the functioning of the SSM, the ECB may make use of the investigation powers under Articles 10 to 13 SSMR also with respect to the less significant credit institutions (see Article 6(5)(d) and 6(6), second subparagraph, first line, SSMR).

For the purpose of investigating alleged breaches of directly applicable EU law or the ECB's regulations and decisions, the investigating unit established within the ECB may exercise all the powers granted to the ECB under the SSM Regulation, as clearly laid down in Article 125(1) of the Framework regulation.

4. *The relationship between the ECB's supervisory tasks and the EBA/ESRB's tasks*

4.1. *The distinction between regulatory tasks and supervisory tasks*

The EU banking law makes a clear distinction between both the regulatory and the supervisory tasks and the corresponding authorities. The authority vested with the power to propose to the EU Commission the adoption of regulatory and implementing technical standards is the European Banking Authority (EBA), whilst the power to adopt punctual supervisory decisions lays on the ECB and the NCAs.

This clearly emerges from the EBA founding regulation[21] and the SSMR.

In the EBA's web-site one may read that

> The main task of the EBA is to contribute to the creation of the European Single Rulebook in banking whose objective is to provide a single set of harmonised prudential rules for financial institutions throughout the EU. The Authority also plays an important role in promoting convergence of supervisory practices and is mandated to assess risks and vulnerabilities in the EU banking sector.

Not surprisingly, the ECB is subject to the EBA's technical standards and may adopt regulations only to the extent necessary to organise or specify the arrangements for the carrying out of its tasks.

See Article 4(3), second sub-paragraph, SSMR, reading as follows:

> the ECB shall adopt guidelines and recommendations, and take decisions subject to and in compliance with the relevant Union law and in particular any legislative and non-legislative act, including those referred to in Articles 290 and 291 TFEU. It shall in particular be subject to binding regulatory and implementing technical standards developed by EBA and adopted by the Commission in accordance with Article 10 to 15 of Regulation (EU) No 1093/2010, to Article 16 of that Regulation, and to the provisions of that Regulation on the European supervisory handbook developed by EBA in accordance with that Regulation. The ECB may also adopt regulations only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred on it by this Regulation.

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[21] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) as amended by Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019.

The ECB may also adopt regulations in matters for which the applicable legislation expressly entrusts the competent supervisory authorities with the discretion to apply the material rules on prudential requirements (see the ECB regulation on options and discretions).

On the contrary, the ECB cannot adopt regulations in the domains falling within the competence of the EU or national legislators. In this area the ECB may only draw the EBA's attention to a potential need to submit Technical Standards to the EU Commission.

This notwithstanding, in some recent legal acts the ECB seems not to follow the above distinction between its supervisory tasks and the EBA regulatory ones.[22]

The Commission's view on the relationship between the EBA and the ECB's role in the EU architecture of financial supervision deserves some criticism.

Indeed, though aware that (see p. 15 of the Commission's Report on the SSM)

> the SSM Regulation did not alter the role and powers of the EBA, which remains the regulatory agency responsible for completing and managing the Single Rulebook of the banking sector in the EU, as well as for ensuring the consistent application of the Single Rulebook

and that consequently

> the ECB is required to comply with the EBA rules

the Commission is of the view that (pp. 15 and 16 of the Report):

> however, it should be acknowledged that the ECB has to implement EBA rules through its own instruments, which may affect the EBA given the extended application of ECB instruments to 19 Member States. It would be advisable that the ECB regularly refers in its own rules, including those adopted in the form of Regulations, to the corresponding EBA rules or to relevant ongoing EBA working

[22] This is particularly true with regard to the ECB's Addendum to the ECB Guidance on non-performing loans. The aim of the Addendum is to reinforce and supplement the already existing ECB Guidance on non-performing loans (NPL) "by specifying quantitative supervisory expectations concerning the minimum levels of prudential provisions expected for non-performing exposures". In order to meet those expectations, banks are required to write down in full non-performing exposures within a certain period of time. The Addendum introduces a direct link between the eventual non-compliance with the newly introduced minimum prudential provisioning requirements, and the outcome of the SREP, in the framework of which the supervisory authority will take into account unjustified deviations from those requirements in its assessment of the need to impose supervisory measures on individual banks. In doing so, the Addendum de facto turns supervisory expectations into additional general rules applicable to banks, the observance of which is ensured through the threat of supervisory measures within the SREP.

> streams. It would also be advisable that the ECB closely coordinates its own implementation initiatives in terms of both content and timeline with those of the EBA. Furthermore, in order to avoid overlaps and inconsistencies in the interpretation of the Single Rulebook, the ECB is invited to cooperate closely with the EBA and make every effort to avoid that its own Q&A tool covers issues that should be dealt by the EBA or contradicts answers already given by the EBA.

and that (see p. 16 of the Report):

> the introduction of the SSM has provided an opportunity to progress faster in the pursuit of supervisory convergence. The ECB often facilitates the coordination of positions between the SSM NCAs in the development of regulatory deliverables of the EBA, and provides valuable expertise at all levels of the decision-making process.

In other words, under the Commission's view the bounderies between the EBA's regulatory and harmonising role and the ECB's supervisory one remain unclear.

From a purely factual point of view, it is worth noting that the EU legislation in the field of banking supervision turns basically in an implementation of the Basel Core Principles for an Effective Banking Supervision.

Not surprisingly, the ECB, in its membership capacity of the Basel Committee on Banking Supervision (BCBS),[23] may actively contribute to the international standard setting relevant for the banking sector in a more influential way than the EBA or the Commission, which only have observer status in the BCBS.

4.2. Coordination of stress tests exercises

Both the ECB and the EBA have the task to carry stress tests and the duty to coordinate each other when performing this task.

Under Article 4(1)(f) ECB has the task

> to carry out supervisory reviews, including where appropriate in coordination with EBA, stress tests and their possible publication, in order to determine whether the arrangements, strategies, processes and mechanisms put in place by credit

[23] The Basel Committee on Banking Supervision (BCBS) is the primary global standard setter for the prudential regulation of banks and provides a forum for regular cooperation on banking supervisory matters. Under Article 4 of the Basel Committee Charter, BCBS members include organisations with direct banking supervisory authority and central banks.

> institutions and the own funds held by these institutions ensure a sound management and coverage of their risks, and on the basis of that supervisory review to impose on credit institutions specific additional own funds requirements, specific publication requirements, specific liquidity requirements and other measures, where specifically made available to competent authorities by relevant Union law.

In turn, Article 21(2), third sub-paragraph, lit. (b) of the EBA's founding regulation, as amended by Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019, stipulates that the EBA may

> initiate and coordinate Union-wide stress tests in accordance with Article 32 to assess the resilience of financial institutions, in particular the systemic risk posed by financial institutions as referred to in Article 23, to adverse market developments, and evaluate the potential for systemic risk to increase in situations of stress, ensuring that a consistent methodology is applied at the national level to such tests and, where appropriate, address a recommendation to the competent authority to correct issues identified in the stress test, including a recommendation to conduct specific assessments…

Under Article 32(2)(d) of said regulation the EBA

> shall, in cooperation with the ESRB, initiate and coordinate Union-wide assessments of the resilience of financial institutions to adverse market developments. To that end it shall develop:
>
> … (d) common methodologies for asset evaluation, as necessary, for the purpose of the stress testing...

Finally, under Article 23(1) the EBA

> shall, in consultation with the ESRB, develop criteria for the identification and measurement of systemic risk and an adequate stress-testing regime which includes an evaluation of the potential for systemic risk posed by, or to, financial institutions to increase in situations of stress, including potential environmental-related systemic risk.The financial institutions that may pose a systemic risk shall be subject to strengthened supervision, and where necessary, the recovery and resolution procedures referred to in Article 25.

Apart from the different territorial scope of the EBA and the ECB stess tests, as the former is extended to all EU countries whilst the latter is limited to the

SSM participating MSs, a problem arises here as to which goals are respectively attained by the EBA and the ECB, where conducting their stress tests exercises.

A plausible answer to the question seems to be the following: while the ECB looks at the stress tests exercises with the aim of ensuring the stability of each credit institution (see Article 4(1)(f) SSMR above), the EBA has a financial stability concern.

Recital 43 of the EBA's founding regulation seems to confirm this view, as one may easily infer from its wording:

> In order to safeguard financial stability it is necessary to identify, at an early stage, trends, potential risks and vulnerabilities stemming from the micro-prudential level, across borders and across sectors. The Authority should monitor and assess such developments in the area of its competence and, where necessary, inform the European Parliament, the Council, the Commission, the other European Supervisory Authorities and the ESRB on a regular and, as necessary, on an ad hoc basis. The Authority should also, in cooperation with the ESRB, initiate and coordinate Union-wide stress tests to assess the resilience of financial institutions to adverse market developments, and it should ensure that an as consistent as possible methodology is applied at the national level to such tests. In order to perform its functions properly, the Authority should conduct economic analyses of the markets and the impact of potential market developments.

4.3. Coordination procedures for macroprudential tasks: the role of the ESRB

The bilateral coordination between the ECB and the NCA/NDAs provided for under Article 5 SSMR for macro-prudential decisions (the ECB may apply only higher buffers than those adopted by the national macro-prudential authorities) has to be without prejudice to the multilateral coordination procedure under the ESRB Regulation (for further details see **Chapter I.B. The SSM's macropudential tasks and its relationship with the ESRB**).

5. Independence and accountability of the ECB and the NCAs

5.1. Balancing independence and accountability

Balancing independence and accountability of supervisors is a paramount task of any banking legislator. The Basel Core Principle n. 2 on the independence and accountability of supervisors requires that the latter possess operational

independence, transparent processes, sound governance, adequate resources and has to be accountable for the discharge of their duties. Moreover, the legal framework for banking supervision has to include legal protection for supervisors.

5.2. Functional independence

Under Article 19 of the SSMR, both the ECB and the NCA need to enjoy functional independence, i.e. they shall act independently when carrying out the SSM tasks.

The functional independence of the ECB is detailed in Recital 75 SSMR, reading as follows:

> In order to carry out its supervisory tasks effectively, the ECB should exercise the supervisory tasks conferred on it in full independence, in particular free from undue political influence and from industry interference which would affect its operational independence.

Articles 19 and 26(1) SSMR require independence from EU Institutions and bodies and from national governments of both the Supervisory Board and the Steering Committee of the ECB.

Under Article 19 SSM

> The members of the Supervisory Board and the steering committee shall act independently and objectively in the interest of the Union as a whole and shall neither seek nor take instructions from the institutions or bodies of the Union, from any government of a Member State or from any other public or private body.

Under Article 26(1) SSMR

> All members of the Supervisory Board shall act in the interest of the Union as a whole.

A problem arises here as to whether Article 19 of the SSM Regulation has a constitutive or a mere declaratory effect with regard to the ECB's indipendence.

In the BVerfG's view, the independence of the ECB in the area of banking supervision can already be deduced from Article 130 TFEU. See § 208 of the judgment, reading as follows:

> Bei der Wahrnehmung der durch die Verträge und die Satzung übertragenen Befugnisse, Aufgaben und Pflichten darf die EZB weder von Organen, Einrichtungen und sonstigen Stellen der Europäischen Union, den Regierungen der Mitgliedstaaten oder anderen Stellen Weisungen einholen oder entgegennehmen (Art. 130, Art. 282 Abs. 3 Satz 3, Satz 4 AEUV). Dies gilt auch für die ihr nach Art. 127 Abs.

> 6 AEUV übertragenen besonderen Aufgaben der Bankenaufsicht (vgl. Herdegen, WM 2012, S. 1889 <1894>; Kempen, in: Streinz, EUV/AEUV, 3. Aufl. 2018, Art. 127 AEUV Rn. 18; Zilioli, in: v. der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7. Aufl. 2015, Art. 130 AEUV Rn. 22; Ohler, Bankenaufsicht und Geldpolitik in der Währungsunion, 2015, § 5 Rn. 82, 91) und wird in Art. 19 Abs. 1 SSM-VO ausdrücklich hervorgehoben…

However, Article 130 TFEU only speaks of the competences transferred to the ECB by primary law and the BVerfG does not clarify why it should also apply to the supervisory tasks and powers conferred to the ECB by the SSMR.

In light of the above, one may conclude that Article 19 SSMR has a constitutive effect on the ECB's independence.

The Codes of conduct for the ECB's staff and management involved in banking supervision (see Articles 19(3) SSMR and 13e ECB rules of procedure)[24] as well as the so-called cooling-off periods (Recital 76, Article 31(3) and (4) SSMR) constitute means to strengthen the functional indipendence.

Recital 76 SSMR reads as follows:

> The use of cooling-off periods in supervisory authorities forms an important part of ensuring the effectiveness and independence of the supervision conducted by those authorities. To this end, and without prejudice to the application of stricter national rules, the ECB should establish and maintain comprehensive and formal procedures, including proportionate review periods, to assess in advance and prevent possible conflicts with the legitimate interest of the SSM/ECB where a former member of the Supervisory Board begins work within the banking industry he or she once supervised.

Under Article 31(3) and (4) SSMR

> 3. The ECB shall establish and maintain comprehensive and formal procedures including ethics procedures and proportionate periods to assess in advance and prevent possible conflicts of interest resulting from subsequent employment within two years of members of the Supervisory Board and ECB staff members engaged in supervisory activities, and shall provide for appropriate disclosures subject to applicable data protection rules.
>
> Those procedures shall be without prejudice to the application of stricter national rules. For members of the Supervisory Board who are representatives of national competent authorities, those procedures

[24] The Single Code of Conduct for high-level ECB officials covers the members of the Governing Council, the Executive Board, the Supervisory Board, the General Council, the Audit Committee, the Ethics Committee and the Administrative Board of Review and is available in the ECB's web-site.

> shall be established and implemented in cooperation with national competent authorities, without prejudice to applicable national law.
>
> For the ECB staff members engaged in supervisory activities, those procedures shall determine categories of positions to which such assessment applies, as well as periods that are proportionate to the functions of those staff members in the supervisory activities during their employment at the ECB.
>
> 4. The procedures referred to in paragraph 3 shall provide that the ECB shall assess whether there are objections that members of the Supervisory Board take paid work in private sector institutions for which the ECB has supervisory responsibility after they have ceased to hold office.
>
> The procedures referred to in paragraph 3 shall apply as a rule for two years after the members of the Supervisory Board have ceased to hold office and may be adjusted, on the basis of due justification, proportionate to the functions performed during that term of office and the length of time that office was held.

5.3. Personal independence

As for the personal independence, the Basel Core Principle No 2 (essential criterion No 2) requires that the process for the appointment and removal of the head(s) of the supervisory authority and members of its governing body has to be transparent.

The head(s) of the supervisory authority is (are) to be appointed for a minimum term and can be removed from office during his/her (their) term only for reasons specified in law or if (s)he (their) is (are) not physically or mentally capable of carrying out the role or has (have) been found guilty of misconduct. The reason(s) for removal is (are) to be publicly disclosed.

Consistently with this principle, complex procedures are provided for with regard to the appointment and the removal of the Chair and Vice-Chair of the Supervisory Board (Article 26(3), and (4) SSMR).

> 3. After hearing the Supervisory Board, the ECB shall submit a proposal for the appointment of the Chair and the Vice-Chair to the European Parliament for approval. Following the approval of this proposal, the Council shall adopt an implementing decision to appoint the Chair and the Vice-Chair of the Supervisory Board. The Chair shall be chosen on the basis of an open selection procedure, on which the European Parliament and the Council shall be kept duly informed, from among individuals of recognised standing and experience in banking and financial matters and who are not members of the Governing Council. The Vice Chair of the Supervisory Board

> shall be chosen from among the members of the Executive Board of the ECB. The Council shall act by qualified majority without taking into account the vote of the members of the Council which are not participating Member States.
>
> Once appointed, the Chair shall be a full-time professional and shall not hold any offices at national competent authorities. The term of office shall be five years and shall not be renewable.
>
> 4. If the Chair of the Supervisory Board no longer fulfils the conditions required for the performance of his duties or has been guilty of serious misconduct, the Council may, following a proposal by the ECB, which has been approved by the European Parliament, adopt an implementing decision to remove the Chair from office. The Council shall act by qualified majority without taking into account the vote of the members of the Council which are not participating Member States.
>
> Following a compulsory retirement of the Vice-Chair of the Supervisory Board as a member of the Executive Board, pronounced in accordance with the Statute of the ESCB and of the ECB, the Council may, following a proposal by the ECB, which has been approved by the European Parliament, adopt an implementing decision to remove the Vice-Chair from office. The Council shall act by qualified majority without taking into account the vote of the members of the Council which are not participating Member States.
>
> For those purposes the European Parliament or the Council may inform the ECB that they consider that the conditions for the removal of the Chair or the Vice Chair of the Supervisory Board from office are fulfilled, to which the ECB shall respond.

These procedures are to be read at the same time as safeguards to independence and means of political accountability.

The term of office of both the Chair and the members of ECB's Supervisory Board is 5 years (see Recital 70 and Article 26(3), second sub-paragraph, SSMR for the Chair and the ECB's decision 6.2.2014 for the four representative of the ECB).

5.4. Financial independence

Financial independence is provided for in the Basel Core Principle No 2, essential criterion No 6. The supervisor should have adequate resources for the conduct of effective supervision and oversight. It has to be financed in a manner that does not undermine its autonomy or operational independence.

Supervisory fees are provided for in Recitals 77 and 78 and in Article 30 SSMR.

Recital 77 reads as follows:

> In order to carry out its supervisory tasks effectively, the ECB should dispose of adequate resources. Those resources should be obtained in a way that ensures the ECB's independence from undue influences by national competent authorities and market participants, and separation between monetary policy and supervisory tasks. The costs of supervision should be borne by the entities subject to it. Therefore, the exercise of supervisory tasks by the ECB should be financed by annual fees charged to credit institutions established in the participating Member States. It should also be able to levy fees on branches established in a participating Member State by a credit institution established in a non-participating Member State to cover the expenditure incurred by the ECB when carrying out its tasks as a host supervisor over these branches. In the case a credit institution or a branch is supervised on a consolidated basis, the fee should be levied on the highest level of a credit institution within the involved group with establishment in participating Member States. The calculation of the fees should exclude any subsidiaries established in non- participating Member States.

Under Recital 78:

> Where a credit institution is included in supervision on a consolidated basis, the fee should be calculated at the highest level of consolidation within participating Member States and allocated to the credit institutions established in a participating Member State and included in the supervision on a consolidated basis, based on objective criteria relating to the importance and risk profile, including the risk weighted assets

Consistently with the wording of the recitals above, Article 30, paragraphs 1 to 3, stipulates that:

> 1. The ECB shall levy an annual supervisory fee on credit institutions established in the participating Member States and branches established in a participating Member State by a credit institution established in a non-participating Member State. The fees shall cover expenditure incurred by the ECB in relation to the tasks conferred on it under Articles 4 to 6 of this Regulation. These fees shall not exceed the expenditure relating to these tasks.
>
> 2. The amount of the fee levied on a credit institution or branch shall be calculated in accordance with the arrangements established, and published in advance, by the ECB.
>
> Before establishing those arrangements, the ECB shall conduct open public consultations and analyse the potential related costs and benefits, and publish the results of both.

> 3. The fees shall be calculated at the highest level of consolidation within participating Member States, and shall be based on objective criteria relating to the importance and risk profile of the credit institution concerned, including its risk weighted assets.
>
> The basis for calculating the annual supervisory fee for a given calendar year shall be the expenditure relating to the supervision of credit institutions and branches in that year. The ECB may require advance payments in respect of the annual supervisory fee which shall be based on a reasonable estimate. The ECB shall communicate with the national competent authority before deciding on the final fee level so as to ensure that supervision remains cost-effective and reasonable for all credit institutions and branches concerned. The ECB shall communicate to credit institutions and branches the basis for the calculation of the annual supervisory fee.

Arrangements for the calculation of the supervisory fees are adopted by the ECB in its Regulation No 1163/2014 of 22 October 2014 on supervisory fees (ECB/2014/41).

Under Article 5(2) of said regulation

> 2. The amount of the annual costs shall be determined on the basis of the amount of the annual expenditure consisting of any expenses incurred by the ECB in the relevant fee period that are directly or indirectly related to its supervisory tasks.

The scope of such a provision is not crystal clear. A question arises as to whether damages to be paid to third parties may be included among the expenses *indirectly* related to the ECB's supervisory tasks. To offload the costs of damages to be paid by the supervisor onto the supervised institutions would be in contrast with the principle of good administration enshrined in Article 41 of the Charter of fundamental rights.

Paragraph 5 of Article 30 SSMR stipulates that

> 5. This Article is without prejudice to the right of national competent authorities to levy fees in accordance with national law and, to the extent supervisory tasks have not been conferred on the ECB, or in respect of costs of cooperating with and assisting the ECB and acting on its instructions, in accordance with relevant Union law and subject to the arrangements made for the implementation of this Regulation, including Articles 6 and 12.

A question arises as to whether the ECB's supervisory fees also applies to the less significant supervised entities.

Under Article 8 of the ECB's regulation No 1163/2014

> 1. In order to calculate the annual supervisory fee payable in respect of each supervised entity and supervised group the annual costs shall be split into two parts, one for each category of supervised entities and supervised groups, as follows: (a) the annual costs to be recovered from significant supervised entities; (b) the annual costs to be recovered from less significant supervised entities.
>
> 2. The split of the annual costs in accordance with paragraph 1 shall be made on the basis of the costs allocated to the relevant functions which perform the direct supervision of significant supervised entities and the indirect supervision of less significant supervised entities.

Indeed, under the ECB's view, as supervisory tasks towards less significant credit institutions are allocated to the ECB and the NCAs, this sharing of supervisory responsibilities within the SSM and the related expenditure incurred by the ECB has to be taken into account when allocating the amount to be recovered via supervisory fees between the categories of significant and less significant supervised entities.

See Recitals 7 and 8 of the ECB's regulation No 1163/2014

> (7) The ECB also oversees the functioning of the SSM, which includes all credit institutions, whether significant or less significant. The ECB is exclusively competent in relation to all credit institutions established in the participating Member States to authorise entities to take up the business of a credit institution, to withdraw authorisations and to assess acquisitions and disposals of qualifying holdings.
>
> (8) The NCAs are responsible for the direct supervision of less significant supervised entities, without prejudice to the ECB's power to exercise direct supervision in specific cases where this is necessary for the consistent application of high supervisory standards. When allocating the amount to be recovered via supervisory fees between the categories of significant supervised entities and less significant supervised entities, this sharing of supervisory responsibilities within the SSM and the related expenditure incurred by the ECB is taken into account.

5.5. Standards for accountability

Standards for accountability are provided for in the SSMR as regards the ECB and in the national banking laws as regards the NCAs.

Article 21(4) SSMR stipulates that the SSM founding regulation "is without prejudice to the accountability" of NCAs "in accordance with national law for the performance of tasks not conferred on the ECB" by the SSMR and "of activities carried out by them in accordance with Article 6".

National laws shall abide by Article 59(2) CRD IV,[25] provided that national constitutional rules on the balance of powers are complied with.

Under Article 59(2) CRD IV

> Member States may authorise the disclosure of certain information relating to the prudential supervision of institutions to parliamentary enquiry committees in their Member State, courts of auditors in their Member State and other entities in charge of enquiries in their Member State, under the following conditions:
>
> (a) that the entities have a precise mandate under national law to investigate or scrutinise the actions of authorities responsible for the supervision of institutions or for laws on such supervision;
>
> (b) that the information is strictly necessary for fulfilling the mandate referred to in point (a);
>
> (c) the persons with access to the information are subject to professional secrecy requirements under national law at least equivalent to those referred to in Article 53(1);
>
> (d) where the information originates in another Member State that it is not disclosed without the express agreement of the competent authorities which have disclosed it and, solely for the purposes for which those authorities gave their agreement.

In its opinions on national laws impinging on the NCBs or NCAs legal framework, the ECB repeatedly asks Member States to abide by provisions contained in Article 59(2) CRD IV (see, among others, the ECB's opinion CON/2015/8).

5.6. A priori accountability

Both Recital 30 and Article 1 SSMR refer to the safety and soundness of credit institutions, the stability of the financial system, equal treatment of credit institutions, integrity of internal market. Recital 30 also refers to the protection of depositors and expressly mentions the single rule book. The ECB's action has, therefore, to comply with the goals laid down in the SSM founding regulation.

The predetermination by law of the objectives to be pursued by an authority (in our case the ECB) is defined in literature as a priori accountability of that authority.

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[25] 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

5.7. Accountability towards EU and national political institutions

The ECB is also accountable to the EU political Institutions.

More to the point, the ECB submits an annual report on the execution of SSM tasks to the EU Parliament, the Council, the Commission and the euro Group. The report is presented in public by the SB's Chair to the EU Parliament and the euro Group. The SB's Chair may be heard by euro Group and the competent EU Parliament committees. The ECB replys orally or in writing to questions from the EU Parliament and the euro Group. The SB's Chair holds confidential oral discussions with the Chair or Vice-Chair of the EU Parliament's competent committees. The ECB sincerely cooperates with any investigations by the EU Parliament.

In light of the European Council conclusions of 18/19 October 2012, the completion of the EMU's accountability should have taken place at the level at which decisions are taken and implemented (see § 7).

Nevertheless, as clarified in Recital 56 SSMR,

> The ECB should also forward the reports, which it addresses to the European Parliament and to the Council, to the national parliaments of the participating Member States. National parliaments of the participating Member States should be able to address any observations or questions to the ECB on the performance of its supervisory tasks, to which the ECB may reply. The internal rules of those national parliaments should take into account details of the relevant procedures and arrangements for addressing the observations and questions to the ECB. In this context particular attention should be attached to observations or questions related to the withdrawal of authorisations of credit institutions in respect of which actions necessary for resolution or to maintain financial stability have been taken by national authorities in accordance with the procedure set out in this Regulation. The national parliament of a participating Member State should also be able to invite the Chair or a representative of the Supervisory Board to participate in an exchange of views in relation to the supervision of credit institutions in that Member State together with a representative of the national competent authority. This role for national parliaments is appropriate given the potential impact that supervisory measures may have on public finances, credit institutions, their customers and employees, and the markets in the participating Member States. Where national competent authorities take action under this Regulation, accountability arrangements provided for under national law should continue to apply.

In light of the above, Article 21 SSMR regulates the ECB's accountability also towards national Parliaments, though underlying (§ 4) that this accountability

> is without prejudice to the accountability of national competent authorities to national parliaments in accordance with national law for the performance of tasks not conferred on the ECB by this Regulation and for the performance of activities carried out by them in accordance with Article 6 [basically the supervision on the less significant credit institutions].

The relationships between the ECB on the one hand and the EU Parliament (EP) and the Council on the other hand have been respectively elaborated on an Inter-Institutional Agreement (IIA) and a Memorandum of Understanding (MoU). Whilst the legal basis for the IIA with the EU Parliament can be found in Article 20 (8) and (9) SSMR, the legal basis of the MoU with the Council is uncertain. However, the content of the MoU is in line with the wording and the aim of Article 20 SSMR.

Accountability arrangements with the EU Parliament are subject to professional secrecy requirements. The areas of EU Parliament's control are expressly provided for by Article 20 SSMR: confidential oral discussions with the Chair and Vice-Chair of the competent EU Parliament committees, access to information, cooperation in investigation, selection procedure of the SB's Chair.

Areas not expressly covered by Article 20 SSMR but encompassed within the practical modalities of the exercise of democratic accountability and the EP's oversight over ECB's tasks include the submission to the EP of all ECB's acts subject to the public consultation procedure.

The IIA regulates (§ V) the relationship between the public consultation procedure provided for with regard to the ECB's regulations (Article 4(3) SSMR) and the ECB's legal acts imposing supervisory fees (Article 30 SSMR) and the consultation with the EP. The two consultations must be conducted in parallel.

More to the point, under § V of the IIA:

> The ECB shall duly inform Parliament's competent committee of the procedures (including timing) it has set up for adoption of ECB regulations, decisions, guidelines and recommendations ('acts'), which are subject to public consultation in accordance with Regulation (EU) No 1024/2013.
>
> The ECB shall, in particular, inform Parliament's competent committee of the principles and kinds of indicators or information it is generally using in developing acts and policy recommendations, with a view to enhancing transparency and policy consistency.
>
> The ECB shall transmit to Parliament's competent committee the draft acts before the beginning of the public consultation procedure. Where Parliament submits comments on the acts, there may be informal exchanges of views with the ECB on such comments. Such informal exchanges of views shall take place in parallel with the open public consultations which the ECB shall conduct in accordance with

Article 4(3) of Regulation (EU) No 1024/2013.

Once the ECB has adopted an act, it shall send it to Parliament's competent committee. The ECB shall also regularly inform Parliament in writing about the need to update adopted acts.

The ECB's accountability towards the EU and, as the case may be, the national political Institutions makes the transferral of supervisory tasks from the NCAs to the ECB compliant with the democratic principle enshrined in the constitutional traditions of the SSM participating MSs.

With specific regard to the compatibility of the SSMR with the German GG, based on the assumption that the diminished level of democratic legitimation is compensated, among others, by the above-mentioned ECB's accountability duties, see the judgment of the BVerfG of 30 July 2019 (2 BvR 1685/14, 2 BvR 2631/14) referred to in § 2.4 of this Chapter.

The reasoning of the Court is very accurate and deserves to be retraced in its fundamental steps.

The Court starts with the assumption that the independence of the ECB in the exercise of its supevisory tasks creates tensions with the principle of the sovreignity of the people (§ 210):

> Die Unabhängigkeit der EZB auch bei der Wahrnehmung der ihr durch die SSM-Verordnung zugewiesenen Aufgaben und Befugnisse steht in einem deutlichen Spannungsverhältnis zum Grundsatz der Volkssouveränität (Art. 20 Abs. 2 Satz 1 GG), weil damit ein wesentlicher Politikbereich der Weisungsbefugnis der unmittelbar demokratisch legitimierten Repräsentanten entzogen und die Einflussmöglichkeiten des Bundestages auf die Wahrnehmung von Aufgaben und Befugnissen in diesem Bereich stark zurückgenommen werden. Dies ist auch nicht durch Art. 88 Satz 2 GG institutionell legitimiert, weil diese Vorschrift – wie der Senat wiederholt ausgesprochen hat – einer restriktiven Auslegung des währungspolitischen Mandats der EZB bedarf und sich auf andere Bereiche nicht ohne weiteres übertragen lässt (vgl. BVerfGE 134, 366 <399 f. Rn. 58 f.>; 142, 123 <220 f. Rn. 188 f.>; 146, 216 <257 f. Rn. 60>).[26]

Nevertheless, these tensions may be lowered thanks to some accountability arrangments (§ 211)

> Werden der EZB daher über die Währungspolitik hinaus weitere

[26] Article 88 GG reads as follows: "Der Bund errichtet eine Währungs- und Notenbank als Bundesbank. Ihre Aufgaben und Befugnisse können im Rahmen der Europäischen Union der Europäischen Zentralbank übertragen werden, die unabhängig ist und dem vorrangigen Ziel der Sicherung der Preisstabilität verpflichtet".

> Aufgaben zugewiesen, so sind zusätzliche Vorkehrungen erforderlich, um die Absenkung des demokratischen Legitimationsniveaus auf das unbedingt Erforderliche zu beschränken. Das können eine strenge gerichtliche Kontrolle des Mandats (vgl. BVerfGE 142, 123 <220 f. Rn. 187 ff.>; 146, 216 <258 f. Rn. 61>; vgl. auch EuGH, Urteil vom 9. März 2010, Kommission/Deutschland, C-518/07, Slg. 2010, I-1897 <1914 Rn. 42>) oder spezifische Kontrollrechte sein, die dem Bundestag weitere Einflussmöglichkeiten auf das Handeln der EZB vermitteln. Auf Ebene der Europäischen Union treten Rechenschaftspflichten gegenüber denjenigen Organen der Europäischen Union hinzu, die der EZB Aufgaben und Befugnisse zugewiesen haben, damit sie diese Zuweisung evaluieren und gegebenenfalls rückgängig machen oder die Unabhängigkeit der EZB einschränken oder beseitigen können. Entscheidend ist, dass der Gesetzgeber die demokratische Verantwortung für das Handeln der unabhängigen Behörde wahrnehmen und über allfällige Änderungen ihrer Rechtsgrundlagen entscheiden kann (vgl. Epron, RFDA 2011, S. 1007 <1017 f.>; Groß, JZ 2012, S. 1087 <1092>, m.w.N.).

Standards of accountability may be found in the procedure for the appointment of the ECB's decision making bodies, in the ECB's obligation to comply with the EU and national law as well as in the judicial accountability (§ 212):

> Eine demokratische Rückbindung erfahren die im Vollzug der SSM-Verordnung ergehenden Entscheidungen in organisatorisch-personeller Hinsicht vor allem durch die Bestellung der Beschlussorgane der EZB. Unter sachlich-inhaltlichem Blickwinkel wird demokratische Legitimation dadurch gewährleistet, dass die EZB bei der Wahrnehmung ihrer Aufsichtsaufgaben an das einschlägige Primärrecht – die Grundsätze der begrenzten Einzelermächtigung (Art. 5 Abs. 1 Satz 1, Abs. 2 EUV) und der Verhältnismäßigkeit (Art. 5 Abs. 1 Satz 2, Abs. 3 EUV) und die Charta der Grundrechte – sowie an die Vorgaben des Sekundärrechts, allen voran die SSM-Verordnung, gebunden ist; darüber hinaus wendet sie auch von den nationalen Parlamenten verabschiedetes nationales Recht an, soweit durch dieses Richtlinien umgesetzt werden oder von in Verordnungen vorgesehenen Wahlrechten Gebrauch gemacht wurde (vgl. Art. 4 Abs. 3 SSM-VO). Soweit der EZB dort Ermessen eingeräumt wird – etwa bei der Anwendung von Art. 6 Abs. 4 UAbs. 2 SSM-VO in Verbindung mit Art. 70, 71 SSM-R-VO oder bei der Auferlegung zusätzlicher Eigenmittelanforderungen nach Art. 16 Abs. 1 Buchstabe c SSM-VO –, steht ihr zwar kein unbegrenzter, wohl aber ein weiter Spielraum zu (vgl. EuGH, Urteil vom 8. Mai 2019, Landeskreditbank Baden-Württemberg/Europäische Zentralbank, C-450/17 P, EU:C:2019:372, Rn. 44 ff.; Almhofer, Die Haftung der Europäischen Zentralbank für rechtswidrige Bankenaufsicht,

> 2018, S. 214 ff.). Das ist im Ergebnis noch hinnehmbar, weil die Einflussknicke durch besondere Vorkehrungen kompensiert werden, die der demokratischen Rückbindung ihres hier in Rede stehenden Handelns dienen: Rechtsschutzmöglichkeiten (a) sowie Rechenschafts- und Berichtspflichten der EZB gegenüber den Organen der Europäischen Union (b) und den nationalen Parlamenten (c).

Accountability and reporting obligations towards the political institution of the EU also come into consideration (§ 216), as they may facilitate the political control on the ECB's exercise of its supervisory tasks (see §§ 217 and 218):

> 217. Diese Rechenschafts- und Berichtspflichten gleichen die mit der Übertragung von Aufgaben der Bankenaufsicht auf die unabhängige EZB verbundenen Einflussknicke zwar nicht aus. Sie erleichtern jedoch eine politische Steuerung und ermöglichen insoweit auch eine demokratische Legitimationsabstützung (vgl. BVerfGE 89, 155 <184>), denn sie versetzen die zuständigen Stellen in die Lage, das Handeln der EZB einzuschätzen, es auf seine Rechtmäßigkeit überprüfen zu lassen (Art. 263 Abs. 2 AEUV) und ihre sachlich-inhaltliche Bindung an das Unionsrecht durchzusetzen. Zudem ermöglichen sie eine stetige Überprüfung des einheitlichen Aufsichtsmechanismus und seiner Zweckmäßigkeit (vgl. Art. 32 SSM-VO), so dass dieser gegebenenfalls geändert und auch wieder abgeschafft werden kann. Damit behält der unionale Gesetzgeber die letzte Kontrolle über die Bankenaufsicht (vgl. zum französischen Verfassungsrecht Epron, RFDA 2011, S. 1007 <1017 f.>).

> 218. (c) Die SSM-Verordnung sieht schließlich Rechenschafts- und Berichtspflichten gegenüber den nationalen Parlamenten vor. Nach Art. 21 Abs. 1 Satz 1 SSM-VO ist die EZB verpflichtet, den nationalen Parlamenten den Jahresbericht (Art. 20 Abs. 2 SSM-VO) zu übersenden. Diese können darauf mit begründeten Stellungnahmen reagieren (Art. 21 Abs. 1 Satz 2 SSM-VO). Außerdem können sie die EZB schriftlich um Antworten zu ihrer Aufgabenerfüllung ersuchen und den Vorsitzenden oder ein Mitglied des Aufsichtsgremiums gemeinsam mit einem Vertreter der nationalen Aufsichtsbehörden zu einem Gedankenaustausch über die Beaufsichtigung von Kreditinstituten im jeweiligen Mitgliedstaat einladen (Art. 21 Abs. 2, Abs. 3 SSM-VO). Diese Rechte ermöglichen ein Mindestmaß an parlamentarischer Rückbindung. Zusammen mit den Informationsrechten, die der Bundestag gegenüber der im Rat vertretenen Bundesregierung besitzt (Art. 23 Abs. 2 und Abs. 3 GG, §§ 3 ff. EUZBBG), tragen sie dazu bei, dass der Bundestag seine Integrationsverantwortung für das Handeln der EZB im Bereich der Bankenaufsicht effektiv wahrnehmen kann (vgl. BVerfGE 134, 366 <395 f. Rn. 49>; 142, 123 <229 f. Rn. 209>).

5.8. Accountability towards the addressees of supervisory decisions: public consultations and costs/benefits analysis

The ECB has to be accountable towards the addressees of its regulatory acts as well.

A public consultation and a costs/benefits analysis is therefore provided for with regard to the ECB's regulations under Articles 4(3) SSMR and to any ECB's legal act concerning the imposition of supervisory fees under Article 30(2) SSMR.

The same holds true for some NCAs. With regard to Banca d'Italia in the performance of its supervisory tasks see Article 23(2) Law No 262/2005.

Under the Italian case law of the Consiglio di Stato (see judgment No 7972 of 27.12.2006), the accountability towards the addressees of the independent authorities' regulatory acts (Banca d'Italia is traditionally included within the independent authorities) has to be read as a second-best of the formal democratic legitimacy. The consultation of the addressees of the regulatory acts takes the place of the parliamentary vote of confidence.

5.9. Accountability towards the EU citizens

The EU citizens enjoy access to the documents of the EU Institutions, including the ECB.

The relationship between transparency and democratic accountability has been outlined in the case law of the CJEU (see ECJ, Joined Cases C-39/05 P e C-52/05 P, *Turco v Council* § 45). The constitutional status of the transparency principle now clearly emerges from Articles 52 of Charter, 11 TEU and 15(3) TFEU.

Under Recital 59 SSMR the regulation of the EP and the Council under Article 15(3) TFEU should determine detailed rules enabling access to documents held by the ECB resulting from the carrying out of the ECB's supervisory tasks.

Nevertheless, under Article 15(3) TFEU the ECB is subject to the regulation of the EP and the Council only with regard to its administrative tasks.

A question arises here as to whether the ECB's supervisory tasks are to be included within the ECB's administrative tasks.

An argument in favour of the exclusion of supervisory tasks from the ECB's administrative tasks is the need of protecting the ECB's independence in the performance of its statutory duties, including both the monetary and the supervisory ones.

An argument in favour of the inclusion of the ECB's supervisory tasks within the ECB's administrative tasks is that the documents held or collected by

the EBA in the performance of similar tasks are subject to the EP and Council's Regulation under Article 15(3) TFEU (see Article 72 of the EBA founding regulation).

The ECB appears to exclude the supervisory tasks from the administrative ones and subject the public access to its supervisory documents to the ECB's general decision No 2004/3 of 4 March 2004.

This view is supported by:

(i) The ECB's decision (EU) 2015/529 of 21 January 2015 amending decision ECB/2004/3 on public access to ECB documents (ECB/2015/1), where it includes within the cases of refusal of access "the Union's or a Member State's policy relating to the prudential supervision of credit institutions and other financial institutions" as well as "the purpose of supervisory inspections";

(ii) the ECB's decision (EU) 2015/811 of the ECB of 27 March 2015 on public access to ECB documents in the possession of the national competent authorities (ECB/2015/16), where it clarifies (recital 1) that "the regime on public access to European Central Bank (ECB) documents is laid down in decision ECB/2004/3".

5.10. Accountability of NCAs towards the ECB

Within the SSM, the NCAs are accountable towards the ECB.

Such accountability of NCAs is based on the ECB's overall responsibility for the smooth functioning of the SSM (see Article 6(1) SSMR) and is regulated and fine-tuned in Article 6(5) SSMR as well as in the Framework regulation's arrangements adopted under Article 6(7) SSMR (see **Chapter V.A. The supervision of the less significant credit institutions**).

5.11. ECB's and NCAs' accountability towards the EBA

A further form of accountability is the ECB and the NCAs accountability towards the EBA, which is based on the different roles of regulators and supervisors within the EU architecture of financial system (see paragraph 4 of this Chapter).

It is understood that both the ECB and the NCAs are subject to the EBA's binding technical standards approved by the EU Commission.

Moreover, to the extent that the EBA is empowered to adopt guidelines and recommendations addressed to the supervisory authorities (including the ECB), these latter are subject to the obligation to comply or explain under Article 16 of the EBA founding regulation.

Article 16, in the new text amended by regulation (EU) 2019/2175, reads as follows:

1. The Authority shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines addressed to all competent authorities or all financial institutions and issue recommendations to one or more competent authorities or to one or more financial institutions.

Guidelines and recommendations shall be in accordance with the empowerments conferred by the legislative acts referred to in Article 1(2) or in this Article.

2. The Authority shall, where appropriate, conduct open public consultations regarding the guidelines and recommendations which it issues and analyse the related potential costs and benefits of issuing such guidelines and recommendations.Those consultations and analyses shall be proportionate in relation to the scope, nature and impact of the guidelines or recommendations.The Authority shall, where appropriate, also request advice from the Banking Stakeholder Group referred to in Article 37.Where the Authority does not conduct open public consultations or does not request advice from the Banking Stakeholder Group, the Authority shall provide reasons.

2a. Guidelines and recommendations shall not merely refer to, or reproduce, elements of legislative acts.Before issuing a new guideline or recommendation, the Authority shall first review existing guidelines and recommendations, in order to avoid any duplication.

3. The competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations.

Within 2 months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or does not intend to comply, it shall inform the Authority, stating its reasons.

The Authority shall publish the fact that a competent authority does not comply or does not intend to comply with that guideline or recommendation. The Authority may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for not complying with that guideline or recommendation. The competent authority shall receive advanced notice of such publication.

If required by that guideline or recommendation, financial institutions shall report, in a clear and detailed way, whether they comply with that guideline or recommendation.

4. In the report referred to in Article 43(5), the Authority shall inform the European Parliament, the Council and the Commission of the guidelines and recommendations that have been issued.

> As made clear by the wording of paragraph 1 of Article 16, the EBA guidelines and recommendations aim at harmonising both the substantive banking rules and the supervisory practices.

With regard to the EBA's guidelines and recommendations aimed at harmonising the substantive banking rules, a question arises as to whether the EBC enjoys the power to issue this sort of rules (limits to the ECB's regulatory powers are treated under § 4.1 above). Should the ECB not enjoy this power, the duty to harmonise national rules in order to comply with the EBA's guidelines and recommendation would be an NCA's responsibility.

A different view has to be followed with regard to the duty to ensure compliance with the EBA's guidelines and recommendations aimed at harmonising the supervisory pactices. Here the ECB is the competent authority with regard to the significant credit institutions.

As for the less significant ones, a question arises as to whether the ECB may coordinate the NCAs' duties to comply with said EBA's guidelines and recommendations.

It is true that under Article 6(5)(a) SSMR

> the ECB shall issue regulations, guidelines or general instructions to national competent authorities, according to which the tasks defined in Article 4 excluding points (a) and (c) of paragraph 1 thereof are performed and supervisory decisions are adopted by national competent authorities

and that the exercise of this power may go so far as to include the coordination of the NCAs compliance with the EBA's guidelines and recommendation aimed at harmonising supervisory practices.

Nevertheless, such an ECB's power has to be exercised "within the framework defined in paragraph 7", the so-called Framework regulation, which currently does not provide for such a form of ECB's coordination of the NCAs supervisory practices.

Furthermore, it is worth noting that under the ESA's reform package[27] the EBA was vested with the additional power to determine the supervisory priorities for all the supervisory authority of the Member States, including the ECB.

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[27] Proposal for a Regulation of the European Parliament and of the Council of 20.9.2017 (COM(2017) 536 final), amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; and Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

In its opinion of 11 April 2018, the ECB duly reacted to the conferral of such a power to the EBA on the ground that it impinges on its supervisory prerogatives.

See paragraph 2.2 of the ECB's Opinion on the EBA's strategic supervisory plans:

> The ECB generally supports the proposed regulation's objective of deepening financial integration and strengthening the stability of the internal market through more supervisory convergence at Union level. However, conferring strategic planning powers on the EBA is inappropriate in this context. Identifying micro-prudential trends, potential risks and vulnerabilities for financial institutions, and defining respective strategic supervisory priorities, are core supervisory tasks that should be carried out by the competent micro-prudential supervisory authority, and not the EBA in its function as a standard-setting regulator.
>
> More specifically, separating planning and implementation when setting supervisory priorities would lead to inefficiencies that unduly complicate the supervisory planning process as well as, more generally, inefficiencies in supervision. Ensuring sound, effective and reliable supervisory processes, and retaining flexibility in responding to adverse developments at both a micro- and a macroprudential level, is essential for the responsible supervisory authority. Hence, the same authority should be responsible for the planning and the implementation of supervision to ensure swift supervisory responses to risks and to efficiently allocate resources.
>
> Ensuring the alignment of the planning and the implementation of supervisory strategies and tasks is also reflected in secondary legislation. Notably, pursuant to Article 26 of Council Regulation (EU) No 1024/2013, the planning and execution of tasks conferred on the ECB as a CA for prudential supervision in the euro area is fully undertaken by the ECB Supervisory Board. Consequently, under the proposed regulation, there is a risk that the EBA might duplicate tasks already performed by the ECB, which may lead to unnecessary redundancies and less efficiency and effectiveness in the overall supervision of credit institutions in the euro area. In addition, there should be full alignment between the ECB's and the EBA's competences and their respective accountability regimes. The EBA must not decide on any strategic supervisory planning for which the ECB might ultimately be held accountable.
>
> From a practical perspective, the proposed regulation poses the risk of significantly impeding the SSM's strategic and operational planning processes as well as its required risk identification process. More specifically, the proposed regulation would require the SSM to submit draft supervisory work programmes several months in advance for the following year to the EBA. Reporting the supervisory work programme for the following year at such an early stage to the EBA

> would disrupt the established SSM strategic and operational planning processes, as well as the preceding risk identification process – all processes which are conducted in close cooperation with the 19 CAs – and would therefore undermine the goal of ensuring effective and efficient supervisory processes. In addition, the proposed regulation would grant the EBA the right to issue a recommendation to require an adjustment of the CAs' work programme.
>
> Such a practice could lead to situations where supervisory priorities may have to be adjusted at a very late stage of the SSM supervisory planning process, raising serious questions about planning reliability for joint supervisory teams, CAs and horizontal functions, thus compromising the effectiveness of prudential supervision in the euro area. Since CAs are closely involved in the SSM supervisory planning process, the proposed amendments would severely affect the existing arrangements between the ECB and the CAs as regards planning and implementing supervisory objectives. In the light of the outlined potential adverse effects on the effectiveness and efficiency of prudential supervision in the euro area, the ECB strongly recommends removing the provision on strategic supervisory planning powers from the proposed regulation.

Although the text initially foreseen in the draft ESAs reform has been then revised and sweetened, the current Article 29a of the EBA funding regulation (union strategic supervisory priorities) stipulates that:

> Following a discussion in the Board of Supervisors and taking into account contributions received from competent authorities, existing work by the Union Institutions, and analysis, warnings and recommendations published by the ESRB, the Authority shall, at least every three years, by 31 March, identify up to two priorities of Union-wide relevance which shall reflect future developments and trends. Competent authorities shall take those priorities into account when drawing up their work programmes and shall notify the Authority accordingly. The Authority shall discuss the relevant activities by the competent authorities in the following year and draw conclusions. The Authority shall discuss possible follow-up which may include guidelines, recommendations to competent authorities, and peer reviews, in the respective area.
>
> The priorities of Union-wide relevance identified by the Authority shall not prevent competent authorities from applying their best practices, acting on their additional priorities and developments, and national specificities shall be considered.

In turn, Recital 31 of regulation 2019/2175, which amends the EBA founding regulation, stipulates that

> integral to the work of the ESAs on the convergence of supervisory practices is the promotion of a Union supervisory culture. Therefore, the Authority may regularly identify up to two priorities of Union-wide relevance.

A question arises as to whether the EBA supervisory priorities should be interpreted as specifc objectives of the prudential supervision, or as possible sources of risk to which supervisors are called upon to pay attention to.

The author is in favour of this second interpretation as it is more in line with the allocation of regulatory and supervisory powers underlying the EU banking law.

5.12. Accountability of the SB towards the GC

A specific question arises as to whether the Supervisory Board (SB) is accountable to the Governing Council (GC). Though the GC is the ECB's formal decision making body, it can only object to the SB's draft supervisory decision, stating fundamentally monetary policy concerns. The IIA between the ECB and the EP stipulates that the ECB's President must inform the EP of the reasons underlying the GC's objections to the SB's draft decisions. Thus, under the EP's and the ECB's view, it should not be a general practice that the GC objects to the SB's draft decision.

See point 4 of the IIA:

> The ECB shall provide Parliament's competent committee at least with a comprehensive and meaningful record of the proceedings of the Supervisory Board that enables an understanding of the discussions, including an annotated list of decisions. In the case of an objection of the Governing Council against a draft decision of the Supervisory Board in accordance with Article 26(8) of Regulation (EU) No 1024/2013, the President of the ECB shall inform the Chair of Parliament's competent committee of the reasons for such an objection, in line with the confidentiality requirements referred to in this Agreement.

5.13. The ECB's accountability towards the European Court of Auditors (ECA)

Under the conditions laid down in the TFEU and in the ESCB and ECB Statute, the ECB is subject to the review by the Court of Justice and the control by the Court of Auditors.

See the judgment of the Court of Justice of 10 July 2003, *Commission* v *ECB*, Case C-11/00, §§ 134 and 135:

134. As is clear from the wording of Article 108 EC, the outside influences from which that provision seeks to shield the ECB and its decision-making bodies are those likely to interfere with the performance of the 'tasks' which the EC Treaty and the ESCB Statute assign to the ECB. As the Advocate General has pointed out at paragraphs 150 and 155 of his Opinion, Article 108 EC seeks, in essence, to shield the ECB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by the EC Treaty and the ESCB Statute.

By contrast, as the Commission and the interveners have rightly pointed out, recognition that the ECB has such independence does not have the consequence of separating it entirely from the European Community and exempting it from every rule of Community law. First, it is evident from Article 105(1) EC that the ECB is to contribute to the achievement of the objectives of the European Community, whilst Article 8 EC states that the ECB is to act within the limits of the powers conferred upon it by the EC Treaty and the ESCB Statute. Second, as the Commission has observed, the ECB is, on the conditions laid down by the EC Treaty and the ESCB Statute, subject to various kinds of Community controls, notably review by the Court of Justice and control by the Court of Auditors. Finally, it is evident that it was not the intention of the Treaty draftsmen to shield the ECB from any kind of legislative action taken by the Community legislature, as is clear from, inter alia, Article 105(6) EC, Article 107(5) and (6) EC and Article 110(1), first indent, and (3) EC, which are cited by the Commission.

The ECB's judicial accountability is touched upon in the next paragraph.

On the ECB's accountability towards the ECA, see Article 27 of the ESCB and ECB's Statute, stating that:

27.1. The accounts of the ECB and national central banks shall be audited by independent external auditors recommended by the Governing Council and approved by the Council. The auditors shall have full power to examine all books and accounts of the ECB and national central banks and obtain full information about their transactions.

27.2. The provisions of Article 287 of the Treaty on the Functioning of the European Union shall only apply to an examination of the operational efficiency of the management of the ECB.

Article 20(7) SSMR clarifies in turn that

When the European Court of Auditors examines the operational efficiency of the management of the ECB under Article 27.2 of the

> Statute of the ESCB and of the ECB, it shall also take into account the supervisory tasks conferred on the ECB by this Regulation.

It is worth underlying that, in order to preserve the ECB's independence, the ECA's assessment should be confined to the management of the ECB's supervisory processes and not interfere with the performance of the supervisory tasks.

See in this vein the letter of the Chiar of the ECB's Sueprvisory Board of 21 March 2018 to Mr. Miguel Viegas, Member of the European Parliament (available on the ECB's web-site):

> The ECA does not have an all-encompassing mandate to audit the ECB. The Treaty defines the ECA's mandate to audit the ECB as the task of examining "the operational efficiency of the management of the ECB". This means that the ECA may only examine the management of processes of the ECB, but not the ECB's substantive decisions. Legislators deliberately restrict ed the ECA's mandate in this way with a view to preserving the ECB's independence.

In its October 2017 report on the SSM, the European Commission suggested (see p. 5) that an inter-institutional agreement should be concluded between the ECB and the ECA to

> specify the modalities of information exchange in view of permitting the ECA access to all information necessary for performing its audit mandate.

At the end of a complex process,[28] the IIA between the ECA and the ECB has been finally subscribed on the 9 October 2019. The IIA allows the ECA to seek and obtain all the documents and information it needs to audit the ECB Banking Supervision. Highly confidential documentation is fully protected and access to sensitive bank-specific information is granted in a controlled environment on-site at the ECB.

The agreement, while reiterating the independence of the ECB and the ECA in the exercise of their respective functions, aims to ensure that the supervisory powers transferred from the Member States to the ECB Banking Supervision are balanced by appropriate transparency and accountability requirements.

With specific regard to the assessment of the operational efficiency, the preamble of the IIA clarifies (see recital e) that

> The ECB and the ECA acknowledge that the concept of "operational efficiency of the management" as referred to in Article 27.2 of the Statute and Article 20(7) of the SSM Regulation is not defined in

[28] See the ECA's Communication to the European Parliament of 13 December 2018.

> Union Law. To the extent applicable, the principle of efficiency underlying Article 33 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (hereinafter the 'Financial Regulation') may figure as a source of interpretation in the examination of the ECB's supervisory activities by the ECA in line with its mandate.

Under Article 33(1)(b) of Regulation (EU, Euratom) 2018/1046 the principle of efficiency "concerns the best relationship between the resources employed, the activities undertaken and the achievement of objectives".

In order to ascertain the scope of the ECA's assessment on the operational efficiency of the management of the ECB's supervisory tasks, attention has to be paid to the exact identification of these latter.

Though Annex 1 to the IIA includes information on the operational efficiency of the ECB's oversight on the NCAs' supervision on the LSIs, it goes without saying that the ECA's assessment cannot go as far as to indirectly check the operational efficiency of the NCAs' supervision.

5.14. Judicial Accountability

Like the other EU Institutions, the ECB is judicial accountable, as underlined in Recitals 60 e 61 SSMR.

According to Recital 60

> Pursuant to Article 263 TFEU, the CJEU is to review the legality of acts of, inter alia, the ECB, other than recommendations and opinions, intended to produce legal effects vis-à-vis third parties.

In light of the above, the CJEU jurisdiction is limited to the legitimacy of the ECB's decisions (see **Chapter X.A. The administrative and judicial review of the decisions taken within the SSM and the SRM, § 3**).

A question arises here as to whether the CJEU has full jurisdiction on ECB sanctions having *coloration pénale* (drawing inspiration from the principle of the effective remedy) (see **Chapter VI.A. The safeguards applicable to the ECB supervisory and sanctioning procedures**).

The ECB's decision may be reviewed by an ECB's internal body, the administrative Board of Review (ABoR). The ABoR review, limited to the legitimacy of the ECB's decisions (see recital 64 and Article 24(1) SSMR), is without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties (Article 24(11) SSMR).

For a deep analysis of the ABoR review see **Chapter X.B. Nature and role of the Administrative Board of Review**.

In light of Recital 61 SSMR, the ECB is liable for anything done or omitted in the discharge of its functions, according to the general rules provided for with regard to the EU.

On the one side, the ECB's liability could be read as a form of accountability.

On the other side, limitations of the ECB's liability – where admissible – could be considered as a means aimed at strengthening the ECB's independence.

For a deep analysis of Recital 61 SSMR and the topic of the ECB's and the NCAs' liability within the SSM see **Chapter X.F. The liability regimes within the SSM and the SRM**.

The Commission does not seem to favour a form of limitation of the ECB's liability whatsoever. Indeed, in its report on the SSM (see p. 4) it expresses the view that:

> Given the liability regime applicable to the ECB and the CJEU's mandate to review the legality of ECB decisions, the ECB offers broader opportunities for judicial review than many NCAs.

6. The structure of the ECB as supervisory authority

6.1. The separation of supervisory tasks from monetary policy functions

Supervisory tasks shall neither interfere nor be determined by those relating to monetary policy.

This is clarified in Recital 65 SSMR, reading as follows:

> The ECB is responsible for carrying out monetary policy functions with a view to maintaining price stability in accordance with Article 127(1) TFEU. The exercise of supervisory tasks has the objective to protect the safety and soundness of credit institutions and the stability of the financial system. They should therefore be carried out in full separation, in order to avoid conflicts of interests and to ensure that each function is exercised in accordance with the applicable objectives. The ECB should be able to ensure that the Governing Council operates in a completely differentiated manner as regards monetary and supervisory functions. Such differentiation should at least include strictly separated meetings and agendas.

In light of the above, Article 25 provides for some punctual rules on separation between monetary policy and supervisory tasks.

The operation of the Governing Council has to be completely differentiated as regards monetary and supervisory functions. Moreover, the staff involved in supervisory tasks is to be organisationally separated from that involved in other ECB tasks. Finally, specific rules on professional secrecy and information exchanges between the two functional areas have to be established.

More to the point, paragraphs 1 to 4 of Article 25 SSMR stipulate that

> 1. When carrying out the tasks conferred on it by this Regulation, the ECB shall pursue only the objectives set by this Regulation.
>
> 2. The ECB shall carry out the tasks conferred on it by this Regulation without prejudice to and separately from its tasks relating to monetary policy and any other tasks. The tasks conferred on the ECB by this Regulation shall neither interfere with, nor be determined by, its tasks relating to monetary policy. The tasks conferred on the ECB by this Regulation shall moreover not interfere with its tasks in relation to the ESRB or any other tasks. The ECB shall report to the European Parliament and to the Council as to how it has complied with this provision. The tasks conferred by this Regulation on the ECB shall not alter the ongoing monitoring of the solvency of its monetary policy counterparties.
>
> The staff involved in carrying out the tasks conferred on the ECB by this Regulation shall be organisationally separated from, and subject to, separate reporting lines from the staff involved in carrying out other tasks conferred on the ECB.
>
> 3. For the purposes of paragraphs 1 and 2, the ECB shall adopt and make public any necessary internal rules, including rules regarding professional secrecy and information exchanges between the two functional areas.
>
> 4. The ECB shall ensure that the operation of the Governing Council is completely differentiated as regards monetary and supervisory functions. Such differentiation shall include strictly separated meetings and agendas.

For further details see the ECB's decision of 17 September 2014 on the implementation of separation between the monetary policy and supervisory functions (ECB/2014/39) available on the ECB's web-site.

The decision (see Article 1(1))

> sets out the arrangements complying with the requirement to separate the ECB's monetary policy function from its supervisory function…, in particular with respect to professional secrecy and the exchange of information between the two policy functions.

In order to implement the organisational separation Article 3(3) of the decision stipulates that

> ECB staff involved in carrying out supervisory tasks shall be organisationally separated from the staff involved in carrying out other tasks conferred on the ECB. Staff involved in carrying out supervisory tasks shall report to the Executive Board in respect of organisational, human resources and administrative issues, but shall be subject to functional reporting to the Chair and the Vice Chair of the Supervisory Board

This notwithstanding (see Article 3(4) of the decision):

> The ECB may establish shared services providing support to both the monetary policy and the supervisory function in order to ensure that these support functions are not duplicated, thus helping to guarantee the efficient and effective delivery of services.

Under the Commission's view (see the Report from the Commission to the European Parliament on the Single Supervisory Mechanism, p. 7):

> This does not undermine the separation principle to the extent that they only perform support functions. However, where such shared services provide advice that is key for the ECB's policy decision-making, reinforced safeguards should be considered.

Special attention is paid to the exchange of information between the ECB's monetary policy and supervisory functions.

See Recital 13 of the decision on separation, reading as follows

> The exchange of information between the ECB's monetary policy and supervisory functions should be organised in strict compliance with the limits established by Union law, taking into account the principle of separation. Obligations protecting confidential information, as provided for in applicable laws and regulations, such as Council Regulation 2533/98 on the use of confidential statistical data and the provisions of Directive 2013/36/EU7 relating to the sharing of supervisory information, will apply. Subject to the conditions set forth in this Decision, the principle of separation applies to the exchange of confidential information from both the monetary policy to the supervisory function as well as from the supervisory to the monetary policy function of the ECB.

Under Article 5(3) of the decision

> Access to confidential information by the supervisory or monetary policy function from the respective other policy function

> shall be determined by the ECB policy function that owns the information in accordance with the ECB's confidentiality regime, unless stated otherwise in this Decision. In the event of conflict between the two policy functions of the ECB regarding access to confidential information, the access to confidential information shall be determined by the Executive Board in compliance with the principle of separation. Consistency of decisions on access rights and adequate recording of such decisions shall be ensured.

It is worth noting that, while no involment of the Supervisory Board (hereinafter also SB) is provided for, an important role is played on this regard by the Executive Board (hereinafter also ExB), in its capacity as the body responsible for the organisational aspects and the current business of the ECB.

6.2. The organisational side-effects of the separation: the governance of the ECB as supervisory authority

The main side-effect of the principle of separation is the establishment of the Supervisory Board (SB) and the Mediation Panel (hereinafter also MP).

In light of Recital 67 SSMR

> a Supervisory Board responsible for preparing decisions on supervisory matters should be set up within the ECB encompassing the specific expertise of national supervisors.

The planning and the execution of the supervisory tasks shall be fully undertaken by the SB (Article 26(1) SSMR).

The SB is competent to submit to the Governing Council (hereinafter also GC) complete draft supervisory decisions, which are subject to the non-objection procedure under Article 26(8) SSMR.

The SB's draft decisions are deemed to be approved by the GC, unless this latter objects within a period not exceeding 10 working days in particular stating monetary policy concerns (so called silent consent procedure: Articles 26(8) SSMR, 13g and 13i ECB Rules of procedure-RoP; exceptions are provided for in Article 13j ECB RoP and pertain to the adoption of macro-prudential supervisory decisions).

In its judgment of of 30 July 2019 (2 BvR 1685/14, 2 BvR 2631/14) referred to in § 2.4 of this Chapter, the BVerfG held that the establishment of the SB does not contistute a violation of Article 129(1) and Article 141(1) TFEU in conjunction with Article 44 ESCB and the ECB Statute. Though these Articles provide for only three decision-making bodies of the ECB (the Governing Council, the Executive Board and the General Council), this does not preclude the establishment of further internal organisational bodies.

See §§ 201 and 201 of the judgment:

> 200. Die Einrichtung weiterer interner Organisationseinheiten ist dadurch nicht ausgeschlossen. Sie kann auf der Grundlage der Geschäftsordnung (Art. 12 Abs. 3 ESZB-Satzung) erfolgen, solange die Einheiten den primärrechtlich vorgesehenen Beschlussorganen untergeordnet bleiben (vgl. Ceyssens, NJW 2013, S. 3704 <3707>; Kämmerer/Starski, ZG 2013, S. 318 <331 f.>; Zagouras, in: v. der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7. Aufl. 2015, Art. 129 AEUV Rn. 13; Pascher, in: Korte/Ludwigs/Thiele/Wedemeyer, Energiewende und Finanzkrise als aktuelle Herausforderungen des Europarechts, 2016, S. 111 <123>).
>
> 201. Vor diesem Hintergrund ist die Einrichtung des Aufsichtsgremiums nicht zu beanstanden. Art. 26 SSM-VO und Art. 13a GeschO-EZB sehen vor, dass das Aufsichtsgremium Planung und Ausführung der der EZB im Zusammenhang mit der Bankenaufsicht übertragenen Aufgaben wahrnimmt, die Zuständigkeiten der EZB-Beschlussorgane jedoch unberührt lässt. Es dient damit der Trennung von Aufsichts- und geldpolitischen Aufgaben der EZB und soll dazu beitragen, dass die EZB ihren durch die SSM-Verordnung übertragenen Aufgaben unbeschadet und getrennt von den Aufgaben im Bereich der Geldpolitik nachkommt (Art. 25 Abs. 2 Satz 1 SSM-VO)…

The provisions on the functioning of the SB and its relationship with the GC are contained in the ECB RoP above-mentioned[29] and in the SB's RoP.[30]

For the adoption of the macroprudential decisions, special rules apply.

Indeed, under Article 13h of the ECB RoP,

> The Governing Council shall have the right to endorse, object to or amend proposals of the Supervisory Board…. The Governing Council shall also have the right to request the Supervisory Board to submit a proposal… or to undertake specific analysis. If the Supervisory Board submits no proposals addressing such requests, the Governing Council, taking into account the input of the relevant committee and of the relevant internal structure, may take a decision in the absence of a proposal from the Supervisory Board.

In the Commission's view, the minor role of the SB in the macro-prudential decision making process deserves some criticism.

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[29] A consolidated text of the ECB rules of procedures is available on the ECB's web-site.

[30] Unofficial consolidated text of the Rules of Procedure of the Supervisory Board is available on the ECB's web-site.

See the Report from the Commission to the European Parliament on the Single Supervisory Mechanism, p. 7:

> The preparatory work for the macro-prudential tasks conferred to the ECB by the SSM Regulation is carried out by the ECB's department responsible for financial stability, which is involved in both supervisory and other ECB tasks. At the same time, the specific procedure dedicated to the adoption of macro-prudential decisions based on Article 5 of the SSM Regulation gives the Governing Council a more prominent role throughout the decision-making process, than the role held by the Governing Council in adopting micro-prudential supervisory decisions. Whilst the ECB's decision to leverage on the expertise and capacity of its existing department for anchoring its new supervisory tasks related to macro-prudential powers is understandable, it is important that the ECB ensures that the Supervisory Board is appropriately involved in the decision-making process and that all decisions pursuant to Article 5 of the SSM Regulation are based on a complete draft proposed by the Supervisory Board.

Under Article 13j of the ECB RoP,

> The Governing Council shall adopt decisions establishing the general framework to organise the practical arrangements for the implementation of Article 6 of Regulation (EU) No 1024/2013, in consultation with national competent authorities and on the basis of a proposal from the Supervisory Board outside the scope of the non-objection procedure.

The SB establishes a Steering Committee (herinafter also SC) to support its activity, without decision making powers (see Recital 71, Article 26(10) SSMR, Article 9-12 of the SB's RoP).

With a view to ensuring the separation between monetary policy and supervisory tasks the ECB shall create a MP.[31]

The MP is charged with the task of resolving differences of views expressed by the NCAs regarding a GC objection to a draft decision of the SB (see Article 25 (5) SSMR).

Special rules apply to the participating MS in close cooperation.

See Article 7, paragraphs (7) and (8) SSMR, reading as follows:

> 7. If a participating Member State whose currency is not the euro notifies the ECB in accordance with Article 26(8) of its reasoned disagreement with an objection of the Governing Council to a

[31] See Regulation (EU) No 673/2014 of the ECB of 2 June 2014 concerning the establishment of a Mediation Panel and its Rules of Procedure (ECB/2014/26).

draft decision of the Supervisory Board, the Governing Council shall, within a period of 30 days, give its opinion on the reasoned disagreement expressed by the Member State and, stating its reasons to do so, confirm or withdraw its objection.

Where the Governing Council confirms its objection, the participating Member State whose currency is not the euro may notify the ECB that it will not be bound by the potential decision related to a possible amended draft decision by the Supervisory Board.

The ECB shall then consider the possible suspension or termination of the close cooperation with that Member State, taking due consideration of supervisory effectiveness, and take a decision in that respect.

The ECB shall take into account, in particular, the following considerations:

(a) whether the absence of such suspension or termination could jeopardise the integrity of the SSM or have significant adverse consequences as regards the fiscal responsibilities of the Member States;

(b) whether such suspension or termination could have significant adverse consequences as regards the fiscal responsibilities in the Member State which has notified a reasoned disagreement in accordance with Article 26(8);

(c) whether or not it is satisfied that the national competent authority concerned has adopted measures which, in the ECB's opinion:

– ensure that credit institutions in the Member State which notified its reasoned disagreement pursuant to the previous subparagraph are not subject to a more favourable treatment than credit institutions in the other participating Member States, and

– are equally effective as the decision of the Governing Council under the second subparagraph of this paragraph in achieving the objectives referred to in Article 1 and in ensuring compliance with relevant Union law.

The ECB shall include these considerations in its decision and communicate them to the Member State in question.

8. If a participating Member State whose currency is not the euro disagrees with a draft decision of the Supervisory Board, it shall inform the Governing Council of its reasoned disagreement within five working days of receiving the draft decision. The Governing Council shall then decide about the matter within five working days, taking fully into account those reasons, and explain in writing its decision to the Member State concerned. The Member State concerned may request the ECB to terminate the close cooperation with immediate effect and will not be bound by the ensuing decision.

As regards the ECB's Administrative Board of Review see again **Chapter X.B. Nature and role of the Administrative Board of Review**.

It is worth noting that a unique secretariat supports the SB's, the MP's and ABoR's activities.

See Article 6(5) of the ECB regulation concerning the establishment of a Mediation Panel and its Rules of Procedure

> The Secretary of the Supervisory Board shall act as Secretary of the Mediation Panel. In the latter function, he/she shall assist the Chair of the Mediation Panel in preparing for Mediation Panel and Case Committee meetings and shall be responsible for drafting the proceedings of these meetings. He/she shall also assist the Secretary of the Governing Council in preparing for Governing Council meetings regarding any issues in which the Mediation Panel has been involved and shall be responsible for drafting the respective part of the minutes of the proceedings.

See also Article 6 of the ECB decision concerning the establishment of the ABoR and its Operatings Rules

> 1. The Secretary of the Supervisory Board shall act as Secretary of the Administrative Board (hereinafter the 'Secretary').
>
> 2. The Secretary shall be responsible for preparing the efficient examination of reviews, organizing the Administrative Board's pre-hearings and hearings, drafting the respective proceedings, maintaining a register of reviews and otherwise providing assistance in relation to the reviews.
>
> 3. The ECB shall provide the Administrative Board with appropriate support including legal expertise to assist in the assessment of the exercise of the powers of the ECB under Regulation (EU) No 1024/2013.

This may lead to conflicts of interests between the different functions of said ECB bodies.

7. Information sharing, confidentiality and disclosure to criminal authorities

Under Articles 53 ff. CRD IV, the obligation of professional secrecy simply does not preclude the exchange of information between supervisory, resolution or other authorities of different MSs.

A specific obligation to exchange information only applies for the purposes of the consolidated supervision (see Article 117 CRD IV and the obligation to provide essential information therein).

A different approach applies to the SSM, where the exchange of information between the supervisory authorities is the rule and the professional secret is the exception.

Indeed, as one may easily infer from Article 6(2) SSM and Articles 20 and 21 of the Framework regulation, the SSM authorities (the ECB and the NCAs) have a duty to cooperate in good faith and a duty to exchange information, with the only logical limit of the need-to-knonw principle.

See Article 6(2) SSMR:

> Both the ECB and national competent authorities shall be subject to a duty of cooperation in good faith, and an obligation to exchange information.
>
> Without prejudice to the ECB's power to receive directly, or have direct access to information reported, on an ongoing basis, by credit institutions, the national competent authorities shall in particular provide the ECB with all information necessary for the purposes of carrying out the tasks conferred on the ECB by this Regulation.

And Article 21 of the Framework regulation:

> 1. Without prejudice to the ECB's power to receive directly, or have direct access to information reported by supervised entities, on an on-going basis, NCAs shall, in particular, provide the ECB in a timely and accurate manner with all the information necessary for the ECB to carry out the tasks conferred on it by the SSM Regulation. Such information shall include information stemming from the NCAs' verification and on-site activities.
>
> 2. In circumstances where the ECB obtains information directly from the legal or natural persons referred to in Article 10(1) of the SSM Regulation, it shall provide the NCAs concerned with such information in a timely and accurate manner. Such information shall include, in particular, information necessary for the NCAs to carry out their role in assisting the ECB.
>
> 3. Without prejudice to paragraph 2, the ECB shall provide NCAs with regular access to updated information necessary for NCAs to carry out their tasks related to prudential supervision.

The ECB and the NCAs' duty of cooperation in good faith and the obligation to exchange information are aimed at:

(i) avoiding a double reporting requirements (recital 47 SSMR); not surpisingly, the NCAs are points of entry of SSM information, as one may easily infer from Article 140 of the Framework regulation and the ECB's decisions on data reporting (Decision of the ECB of

2 July 2014 on the provision to the ECB of supervisory data reported to the national competent authorities by the supervised entities pursuant to Commission Implementing Regulation (EU) No 680/2014 (ECB/2014/29));

(ii) allowing the effective and consistent functioning of the SSM, as clarified in Recital 11 of the Framework regulation, reading as follows

> It is essential for the smooth functioning of the SSM that there is full cooperation between the ECB and NCAs and that they exchange all the information that may have an impact on their respective tasks, in particular, all information that the NCAs avail of regarding procedures that may have an impact on the safety and soundness of a supervised entity or that interact with the supervisory procedures in relation to such entities.

This SSM specific regime on the exchange of information is grounded on the assumption that the SSM is a unitary system as inferred, among others, from:

(i) the ECB ultimate responsibility of the system: Article 6(1) SSMR;

(ii) the features of allocation of powers (the ECB's silent consent within the licensing procedure, the NCAs' responsibility for assisting the ECB in the performance of its tasks, the ECB's power of instructing the NCAs in case of misallocation between the ECB tasks and the NCAs powers).

With regard to the exchange of information between the ECB and the NCAs of non-participating MSs, the general regime contained in the CRD IV provisions applies again.

Not surprisingly, under Article 3(6) SSMR:

> The ECB and the competent authorities of non-participating Member States shall conclude a memorandum of understanding describing in general terms how they will cooperate with one another in the performance of their supervisory tasks under Union law in relation to the financial institutions referred to in Article 2 [credit insitutions, financial holding companies and mixed financial holding companies]. The memorandum shall be reviewed on a regular basis.

The same holds true with regard to the exchange of information between the ECB and the national financial markets authorities (Article 3(1) SSMR):

> Where necessary the ECB shall enter into memoranda of understanding with competent authorities of Member States responsible for markets in financial instruments. Such memoranda shall be made available to

> the European Parliament, to the Council and to competent authorities of all Member States.

These provisions are based on the assumption that special SSM regime on cooperation in good faith and the obligation to exchange information does not apply.

The ECB's disclosure to national criminal authorities calls into question the Protocol 7 on the Privileges and Immunities of the EU, applicable to the ECB as well.

Despite Protocol 7, the ECB made material efforts to get national criminal investigation authorities informed in case of evidence of facts potentially giving rise to a criminal offence.

Nevertheless, a general question arises as to whether Protocol 7, adopted when the European Communities were conceived as mere international organisations and in order to protect them within the Member States' national jurisdictions, should be applied strictly in order to make it compatibile with the new EU constitutional order and the fundamental values enshrined in Article 2 of TEU.

Indeed, the rule of law principle currently referred to under Article 2 of TEU implies, in light of the CJEU case law, the duty of sincere cooperation, which in turn binds not only national but also supranational authorities.

See ECJ, 13 July 1990, C-2/88, Zwartveld, ECLI:EU:C:1990:315, §§ 17 to 19:

> 17. In that community subject to the rule of law, relations between the Member States and the Community institutions are governed, according to Article 5 of the EEC Treaty, by a principle of sincere cooperation . That principle not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law, if necessary by instituting criminal proceedings (see the judgment in Case 68/88 Commission v Greece [1989] ECR 2965, at p . 2984, paragraph 23) but also imposes on Member States and the Community institutions mutual duties of sincere cooperation (see the judgment in Case 230/81 Luxembourg v European Parliament [1983] ECR 255, paragraph 37).
>
> 18. This duty of sincere cooperation imposed on Community institutions is of particular importance vis-à-vis the judicial authorities of the Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system .
>
> 19. When analysed in the light of those principles, the privileges and immunities which the Protocol grants to the European Communities have a purely functional character, inasmuch as they are intended to avoid any interference with the functioning and independence of

> the Communities (see the order of the Court in Case C-1/88 SA Générale de Banque v Commission [1989] ECR 857, paragraph 9).

Among the ECB's efforts to cooperate with the national criminal authorities see, first of all, Article 136 of the Framework regulation, which stipulates that

> Where, in carrying out its tasks under the SSM Regulation, the ECB has reason to suspect that a criminal offence may have been committed, it shall request the relevant NCA to refer the matter to the appropriate authorities for investigation and possible criminal prosecution, in accordance with national law.

Moreover, the ECB's Decision (EU) 2016/1162 of 30 June 2016 on the disclosure of confidential information in the context of criminal investigation represents a first attempt to give a harmonised system of cooperation between the ECB and the NCAs on the one hand and the national investigatoy authorities on the other one.

In the absence of an EU procedural framework for the management of the requests of criminal authories to the supervisory ones within the SSM, the ECB'decisions seek to attain a common approach, as one can easily infer from its Recital 8:

> A procedural framework for the management of requests received by the ECB, NCAs or national central banks (NCBs) from national criminal investigation authorities for confidential information related to the tasks conferred on the ECB by Regulation (EU) No 1024/2013, including information held by an NCA or NCB when assisting the ECB in the exercise of the ECB's tasks under Regulation (EU) No 1024/2013, or related to monetary policy and other ESCB/Eurosystem-related tasks has not yet been established in Union law. However, the application of national procedural rules which apply to such requests should be consistent with the general principles of Union law, in particular the principle of sincere cooperation, and the principle of cooperation in good faith and the obligation to exchange information as provided for in Article 6 of Regulation (EU) No 1024/2013. In this regard, in accordance with Union law the ECB would welcome being consulted on or informed of, as appropriate, requests for confidential information related to the tasks conferred on the ECB by Regulation (EU) No 1024/2013, including information held by an NCA or NCB when assisting the ECB in the exercise of the ECB's tasks under Regulation (EU) No 1024/2013, or related to monetary policy and other ESCB/Eurosystem-related tasks, which are received by an NCA or NCB from national criminal investigation authorities.

Along these lines, according to Recital 10, the decision:

> should therefore set out the conditions applied by the ECB with regard to the disclosure by the NCAs and NCBs of confidential information

> related to the tasks conferred on the ECB by Regulation (EU) No 1024/2013 or to monetary policy and other ESCB/Eurosystem-related tasks to a national criminal investigation authority and the related procedural framework.

Article 3 pertains to the requests received by the NCAs or the NCBs from national criminal investigation authorities.

It reads as follows:

> 1. The ECB shall request the NCAs and NCBs to agree that on receipt of a request from a national criminal investigation authority for disclosure of confidential information related to the tasks conferred on the ECB by Regulation (EU) No 1024/2013, or to monetary policy or other ESCB/Eurosystem-related tasks, they consult the ECB, where possible, on how to respond to the request, irrespective of whether the ECB, or the NCA or NCB concerned holds the information in question. The ECB shall advise as to whether the information in question may be disclosed, and, where applicable, whether there are overriding reasons relating to the need to safeguard the interests of the Union or to avoid any interference with the functioning and independence of the ECB for refusing to disclose the confidential information concerned. The ECB shall advise the NCA or NCB, provided that it is consulted in a timely manner before the NCA or NCB makes a final decision and provides a final response to the request.
>
> 2. The ECB shall request the NCAs to agree to inform the ECB in a timely manner and, in any event, before providing a final response, of requests for confidential information received from national criminal investigation authorities concerning less significant credit institutions directly supervised by the NCA concerned in the exercise of its supervisory responsibilities under Regulation (EU) No 1024/2013, where that NCA considers that the information requested is material, or that disclosure thereof has the potential to adversely affect the reputation of the SSM. The ECB shall use its best efforts to provide its response by the deadline set by the NCA concerned, provided the deadline is reasonable, objectively justifiable and expires before the NCA takes a final decision and provides a final response to the national criminal investigation authority.
>
> 3. The ECB shall request the NCAs and the NCBs to agree to regularly inform the ECB of all requests from national criminal investigation authorities where the ECB was not consulted, in accordance with paragraph 1 or informed in accordance with paragraph 2, for reasons beyond their control and, if possible, of any information disclosed by reason of those requests.

Nevertheless, conditions under Article 3 may be inconsistent with the NCAs' obligation to disclose information to national criminal authorities.

Against this background, the NCAs are subject to a twofold obbligation:

(i) under EU law they shall comply with the ECB's instructions;

(ii) under national law they shall comply with national provisions.

In light of the above, one may expect that the NCAs shall do their best efforts to comply with the ECB's instructions, but cannot oppose any secrets to the national criminal authorities.

Cooperation between the ECB and the national criminal authorities may bear significant shortcomings for the rights of defence of the parties involved, where the information collected within the banking supervisory investigations is used as evidence in the criminal ones.

On this topic see **Chapter VI.A, The safeguards applicable to the ECB supervisory and sanctioning procedures, §§ 1.4 and 5.2.**

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EU Legal references: Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds (Text with EEA relevance) (Text with EEA relevance), *OJ L 334, 27.12.2019, p. 1*; Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 (Text with EEA relevance) *OJ L 314, 5.12.2019, p. 1;* Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU (Text with EEA relevance) *OJ L 314, 5.12.2019, p. 64;* Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (Text with EEA relevance) *OJ L 150, 7.6.2019, p. 253;* Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 (Text with EEA relevance) *OJ L 150, 7.6.2019, p. 1;* Decision of the ECB of 18 April 2019 on the total amount of annual supervisory fees for 2019 (ECB/2019/10), 30.4.2019; Multilateral Agreement on the practical modalities for exchange of information pursuant to Article 57a(2) of Directive (EU) 2015/849; Memorandum of Understanding between the Single Resolution Board and the ECB in respect of cooperation and information exchange 30.5.2018; Decision (EU) 2018/667 of the ECB of 19 April 2018 on the

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Chapter I.B
The SSM's macropudential tasks and their relationship with the ESRB's mandate

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Summary: *1. General remarks – 2. Institutional framework – 3. Macroprudential toolkit – 4. ECB's macroprudential tasks – 5. The ESRB: structure and tasks – 5.1. The ESRB's governance – 5.2. The ESRB's powers – 5.3. The macroprudential framework created by the ESRB – 6. The role of the ESRB within the Banking Union and the relationship between the ECB and the ESRB*

1. General remarks

Macroprudential policy aims at contributing to the safeguard of the stability of the financial system as a whole.

Financial stability can be defined as "a condition in which the financial system – comprising of financial intermediaries, markets and market infrastructures – is capable of withstanding shocks and the unravelling of financial imbalances, thereby mitigating the likelihood of disruptions in the financial intermediation process which are severe enough to significantly impair the allocation of savings to profitable investment opportunities".[1]

In order to provide jobs, credit and growth, the financial system should grant efficient and smooth reallocation of resources from savers to investors, reasonably accurate assessment and pricing of financial risks and efficient risk management, and confortable absorption of financial shocks.

Assessment and management of risks are macroprudential policy's key words, as its main objective is to limit, prevent and mitigate the systemic risk, which means "a risk of disruption in the financial system with the potential to have serious negative consequences for the real economy of the Union or of one or more of its Member States and for the functioning of the internal market" (Article 2(c) of the ESRB Regulation)[2].

Given the structural dimension of such a risk, addressing it requires for a wide scope and a counter-cyclical approach:

(i) all types of financial intermediaries, markets and infrastructures may be potentially important from a systemic perspective. Size and concentration of financial institutions and the interconnectedness of activities matter (*cross-sectional dimension* of the systemic risk);

(ii) cumulative (pro-cyclical) risk increases with excessive risk exposure in boom phase and excessive risk aversion in bust phase (*time dimension* of the systemic risk), so that the creation of financial buffers on a large scale in good times (counter-cyclical approach) should limit the build-up of financial risks, since financial institutions would be allowed to release the buffers in hard times, when financing in the markets becomes more expensive.

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[1] ECB, *Financial Stability Review*, May 2019, *Foreword.*

[2] Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, as amended by Regulation (EU) 2019/2176 of the European Parliament and of the Council of 18 December 2019.

2. *Institutional framework*

The macroprudential oversight in EU is carried out by a complex architecture of authorities (the ESRB at EU level, the ECB/SSM at Banking Union level, national macro-prudential authorities at Member State level) and measures (harmonised or not harmonised at EU level).

The complexity of the macroprudential institutional framework is the result of the different phases which have characterised the development of the financial supervision within the EU after the 2007-2009 financial crisis.

It is worth recalling the high-level group, chaired by Jacques de Larosière, entrusted in November 2008 by the Commission with the mandate to make recommendations on how to strengthen European supervisory arrangements to rebuild trust in the financial system, and its final report presented on 25 February 2009 (the 'de Larosière Report'), recommending, *inter alia*, the establishment of a Union level body charged with overseeing risk in the financial system.

In particular, the de Larosière Report proposed an EU supervisory framework based on two pillars:

(i) microprudential supervision carried out by three European Supervisory Authorities (ESAs) and the national authorities, all together making part of the European System of Financial Supervision (ESFS);

(ii) and, outside the ESFS but closely working with it, a European Systemic Risk Council (ESRC) empowered with tasks extended to the financial system of the entire European Union.

The macroprudential supervisory framework outlined by the de Larosière Report was not changed in its substance by the Regulations that embodied the institutional reform of the ESFS at the end of 2010. With particular regard to the macroprudential oversight, the ESRC was renamed European Systemic Risk Board (ESRB) and constituted as an independent EU body empowered with soft-law tools.

In the context of the centralisation of the EU policy making with the aim to tackle the shortcomings which gave rise to the financial crisis, a Single Supervisory Mechanism (SSM) has been established as a part of the Banking Union. Within the SSM, the ECB is entrusted with hard powers not only in the field of microprudential supervision, but also for macroprudential purposes to the extent described in the following paragraphs.

Moreover, pursuant to the Article 136 CRD IV,

> each Member State shall designate a public authority or body (a 'designated authority') that is responsible for setting the countercyclical buffer rate for that Member State.

The National Designated Authority (NDA) is also empowered with the activation of the other macroprudential instruments provided for in European legislation.

The above-mentioned NDA has to be distinguished from the National Macroprudential Authority established in accordance with Recommendation ESRB/2011/3[3] and responsible for the conduct of the macroprudential policy at national level.

3. *Macroprudential toolkit*

Macroprudential instruments set forth under CRR/CRD IV (harmonised at EU level) can be summed up as follows.

– *Countercyclical capital buffer (CCyB under Articles 130, 135-140 CRD IV).*

It is an additional capital buffer which aims at reducing the procyclicality of the financial system by building up capital reserves during expansions in the financial cycle for absorbing potential losses during contractions.

– *Capital reserves for global systemically important institutions (G-SIIs) and other systemically important institutions (O-SIIs) (Article 131 CRD IV).*

These reserves are an additional capital add-on to increase the ability of systemically important institutions to absorb losses.

Pursuant to the Article 131(1) CRD IV,

> Member States shall designate the authority in charge of identifying, on a consolidated basis, global systemically important institutions (G-SIIs), and, on an individual, sub-consolidated or consolidated basis, as applicable, other systemically important institutions (O-SIIs), which have been authorized within their jurisdiction.

In order to identify G-SIIs, the relevant methodology provides guidance for the assessment of the banks' systemic importance on the basis of a number of indicators reflecting, *inter alia*, size, complexity, interconnectedness and cross-border linkages.[4]

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[3] Recommendation of the ESRB of 22 December 2011 on the macro-prudential mandate of national authorities (ESRB/2011/3).

[4] On the methodology for the identification and classification of G-SIIs, see also Commission Delegated Regulation (EU) No. 1222/2014.

The identification of O-SIIs requires the assessment of a certain number of indicators as well, and, in particular, size, importance for the economy, complexity and interconnectedness with the financial system, in accordance with Article 131(3) CRD IV and the EBA Guidelines referred to therein.[5]

– *Systemic risk buffer (SyRB under Articles 133 and 134 CRD IV).*

It is an additional capital buffer

> for the financial sector or one or more subsets of that sector, in order to prevent and mitigate long term non-cyclical systemic or macroprudential risks not covered by Regulation (EU) No 575/2013, in the meaning of a risk of disruption in the financial system with the potential to have serious negative consequences to the financial system and the real economy in a specific Member State (Article 133(1) CRD IV).

However, CRD V[6] removes the reference to long-term non-cyclical risks, only requiring that the macroprudential or systemic risk addressed by the application of the SyRB is "*not covered by Regulation (EU) No 575/2013 and by Articles 130 and 131 of this Directive*" in order to avoid any overlapping of measures or the double-counting of risks[7]. The rationale of this amendment is that the difficulty of separating structural and cyclical components of the systemic risk could induce authorities not to act.

– *Sectoral risk weights (Articles 124 and 164 CRR).*

To avert or mitigate systemic risks stemming from exposures to the real estate sector, higher risk weights (Article 124 CRR) or higher Loss Given Default (LGD under Article 164 CRR) may be set on the basis of financial stability considerations.

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5 EBA Guidelines on the criteria to determine the conditions of application of Article 131(3) of Directive 2013/36/EU (CRD) in relation to the assessment of other systemically important institutions (O-SIIs), 16 December 2014.

6 Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures.

7 Recital 26 of the CRD V clarifies that "The relevant competent or designated authorities should aim at avoiding any duplicative or inconsistent use of the macroprudential measures laid down in Directive 2013/36/EU and Regulation (EU) No 575/2013. In particular, the relevant competent or designated authorities should duly consider whether measures taken under Article 133 of Directive 2013/36/EU duplicate or are inconsistent with other existing or upcoming measures under Article 124, 164 or 458 of Regulation (EU) No 575/2013".

– *Pillar 2 measures (Articles 103 and 105 CRD IV).*

While Pillar 1 encompasses requirements applying to all banks, Pillar 2 comprises additional requirements that can be imposed by supervisors on a case-by-case basis. Pillar 2 aims at addressing risks that are not sufficiently covered by Pillar 1 and is based on the Supervisory Review and Examination Process (SREP), comprising requirements to improve internal procedures, controls and risk management.

Macroprudential use of Pillar 2 measures includes additional own funds, strengthening of liquidity requirements and additional disclosure.

Indeed, pursuant to Article 103(1) CRD IV,

> Where the competent authorities determine under Article 97 that institutions with similar risk profiles such as similar business models or geographical location of exposures, are or might be exposed to similar risks or pose similar risks to the financial system, they may apply the supervisory review and evaluation process referred to in Article 97 to those institutions in a similar or identical manner. For those purposes, Member States shall ensure that competent authorities have the necessary legal powers to impose requirements under this Directive and under Regulation (EU) No 575/2013 on those institutions in a similar or identical manner, including in particular the exercise of supervisory powers under Articles 104, 105 and 106.

Article 105 CRD IV states that

> For the purposes of determining the appropriate level of liquidity requirements on the basis of the review and evaluation carried out in accordance with Section III, the competent authorities shall assess whether any imposition of a specific liquidity requirement is necessary to capture liquidity risks to which an institution is or might be exposed, taking into account", inter alia, "systemic liquidity risk that threatens the integrity of the financial markets of the Member State concerned.

Therefore, the above-mentioned Articles 103 and 105 CRD IV have been deemed to provide adequate legal basis for a macroprudential application of Pillar 2, which results in imposing additional capital requirements to address the specific risk profile of each institution.

However, as such a use of Pillar 2 creates a complication as well, since in this case the macroprudential instrument is activated by the competent authority in charge with the bank-specific supervision instead of the designated one, and in order to clearly distinguish macroprudential measures from microprudential ones, CRD V repeals the above-mentioned Article

103 and amends Article 105 by deleting the reference to the assessment of the systemic liquidity risk when determining the relevant requirement. Hence, it will be no longer possible to use Pillar 2 capital requirements for macroprudential purposes.

– *Flexibility measures (Article 458 CRR).*

Article 458 CRR allows national competent/designated authority to address changes in the intensity of macroprudential or systemic risk in the financial system by means of stricter national measures in the following areas: additional (institution-specific) capital requirements; tighter requirements for large exposure limitations; further disclosure requirements; adjustment to the level of the capital conservation buffer; tighter liquidity requirements; adjustment to risk weights for residential and/or commercial real estate; intra financial exposures. Article 458 CRR foresees a complex approval process, made up of several steps.

When a Member State takes a macroprudential measure, this measure applies only to the financial institutions domiciled in that particular Member State. Entities with branches in other Member States or providing cross-border services are not subject to the measure applied to institutions domiciled in that Member State. Since this situation could undermine the effectiveness of macroprudential policy measures in the host country and have a distorting effect on competition, a reciprocity regime is provided in order to recognise the measure in the institution's home Member State and apply it to domestically authorised institutions for their cross-border activities.

CRR/CRD IV package has a differentiated approach towards reciprocity depending on the involved instrument:

(i) reciprocity is mandatory for measures under Articles 124 and 164 CRR, as well as for the CCyB for buffer rates not exceeding 2.5 percent;

(ii) reciprocity is voluntary as regards CCyB rates exceeding 2.5 percent, SyRB and measures under Article 458 CRR;

(iii) reciprocity is not explicitly mentioned as regards Pillar 2 measures, G-SIIs buffers and O-SIIs buffers.

Other macroprudential instruments are not harmonised at EU level and are subject to national rules. It is the case of the borrower-based measures, which are intended to attenuate the phases of the credit cycle and to reinforce the resilience of banks by reducing risk-taking by borrowers: Loan-to-value (LTV) and Loan-to-income (LTI) set a cap on the ratio of the value of the loan having regard to the underlying collateral or to the borrower's disposal income; Debt-to-income (DTI) and Debt-service-to-income (DSTI) set a cap on the amount of debt or on the debt servicing costs relative to the borrower's disposable income; requirements relating to maximum maturity and amortization of loans.

Macroprudential instruments harmonised at EU level (capital-based)	Macroprudential instruments not harmonised at EU level (borrower-based)
• Countercyclical capital buffer (CCyB)	• Loan-to-value (LTV)
• Capital reserves for global systemically important institutions (G-SIIs) and other systemically important institutions (O-SIIs)	• Loan-to-income (LTI)
• Systemic risk buffer (SyRB)	• Debt-to-income (DTI)
• Sectoral risk weights	• Debt-service-to-income (DSTI)
• Macroprudential use of Pillar 2 measures (no longer available under CRD V)	• Requirements concerning the maximum maturity of loans
• Flexibility measures	• Amortization requirements

4. ECB's macroprudential tasks

The ECB's role in macroprudential policy is enshrined in Article 5 SSMR, entitled "*Macroprudential tasks and tools*".

Article 5(1) SSMR reads as follows:

> Whenever appropriate or deemed required, and without prejudice to paragraph 2 of this Article, the national competent authorities or national designated authorities of the participating Member States shall apply requirements for capital buffers to be held by credit institutions at the relevant level in accordance with relevant Union law in addition to own funds requirements referred to in point (d) of Article 4(1) of this Regulation, including countercyclical buffer rates, and any other measures aimed at addressing systemic or macro-prudential risks provided for, and subject to the procedures set out, in the Regulation (EU) No 575/2013 and Directive 2013/36/EU in the cases specifically set out in relevant Union law. Ten working days prior to taking such a decision, the concerned authority shall duly notify its intention to the ECB. Where the ECB objects, it shall state its reasons in writing within five working days. The concerned authority shall duly consider the ECB's reasons prior to proceeding with the decision as appropriate.

Therefore, the national authority wanting to activate a macroprudential instrument set forth under CRR/CRD IV package has to prior notify the ECB of its intention.

The ECB may object in writing against the intended measure and, in such a case, the national authority has to take into account the concerns underlined by the ECB before deciding on the activation of the macroprudential measure.

Pursuant to the second paragraph of the Article 5 SSMR itself:

> The ECB may, if deemed necessary, instead of the national competent authorities or national designated authorities of the participating Member State, apply higher requirements for capital buffers than applied by the national competent authorities or national designated authorities of participating Member States to be held by credit institutions at the relevant level in accordance with relevant Union law in addition to own funds requirements referred to in point (d) of Article 4(1) of this Regulation, including countercyclical buffer rates, subject to the conditions set out in paragraphs 4 and 5 of this Article, and apply more stringent measures aimed at addressing systemic or macroprudential risks at the level of credit institutions subject to the procedures set out in the Regulation (EU) No 575/2013 and Directive 2013/36/EU in the cases specifically set out in relevant Union law.

If the above-mentioned paragraph 1 of the Article 5 SSMR deals with the case where the activation of a macroprudential tool is deemed as necessary by the national authority, the second paragraph foresees the conditions for the ECB to directly act in the macroprudential field.

Namely, Article 5(2) SSMR provides for the right upon the ECB to apply higher capital requirements and/or more stringent macroprudential measures (topping-up power only), including higher capital buffers on individual banks based on macroprudential factors arising in the country where the bank is located.

In particular, for the purposes of the exercise of the topping-up powers by the ECB, macroprudential tools mean any of the following instruments (Article 101 SSMFR):

(i) the capital buffers within the meaning of Articles 130 to 142 CRD IV;

(ii) the measures for domestically authorised credit institutions, or a subset of those credit institutions pursuant to Article 458 CRR;

(iii) any other measures to be adopted by NDAs or NCAs aimed at addressing systemic or macro-prudential risks provided for, and subject to the procedures set out, in CRR/CRD IV in the cases specifically set out in relevant Union law.

The designation of national authorities entrusted with macroprudential tasks does not prevent the ECB from taking action under and within the limits of Article 5(2) SSMR, given that under Article 9(1) SSMR

> For the exclusive purpose of carrying out the tasks conferred on it by Articles 4(1), 4(2) and 5(2), the ECB shall be considered, as appropriate, the competent authority or the designated authority in the participating Member States as established by the relevant Union law" and, as a consequence, ECB "shall have all the powers and obligations set out in this Regulation. It shall also have all the powers and obligations, which competent and designated authorities shall have under the relevant Union law, unless otherwise provided for by this Regulation.

Close cooperation between the ECB and the involved NDA is needed (see Article 5(4) SSMR) when the former intends to exercise its macroprudential powers. The ECB has to notify its intention to the concerned NCAs or NDAs ten working days prior to taking such a decision. Where the concerned authority objects, it has to state its reasons in writing within five working days, and the ECB has to consider those reasons prior to proceeding with the decision.

However, if a "NDA does not set a buffer rate, this does not prevent the ECB from setting a buffer requirement in accordance with this Regulation and Article 5(2) of the SSM Regulation" (Article 102 SSMFR). This rule aims at overcoming inaction bias, if any.

Against this framework, the ECB's macroprudential powers can be deemed as limited under different points of view:

(i) from an objective perspective, the ECB has asymmetric powers (only topping up) with regard to the macro-prudential instruments set forth under CRR/CRD IV package (and not extended to the instruments not harmonised at EU level);

(ii) from a subjective perspective, the ECB's macroprudential powers encompass the SSM scope of application, hence they (only) involve entities defined as "*credit institutions*" under EU law.

It is doubtful whether the ECB is empowered to identify O-SIIs and apply a buffer rate also to credit institutions that have not been previously identified by NCAs or NDAs as O-SIIs, using the powers entrusted to the ECB as macroprudential authority by Article 5 SSMR. Indeed, in the wording of Article 5 SSMR this measure is not mentioned.

5. The ESRB: structure and tasks

As already mentioned at the beginning of this chapter, macroprudential policy in the EU is carried out by means of a complex architecture of institutions, tools and proceedings.

Such a complexity is mostly due to the different phases of development of the financial supervisory system within the EU: after the establishment in 2010 of the ESFS, a network made up of three microprudential authorities (EBA, ESMA and EIOPA) and the ESRB, in 2014 SSM came into the scene entrusting the ECB with tasks also in the field of macroprudential supervision.

The ESRB has been established in 2010 under Regulation (EU) no. 1092/2010 (ESRB Regulation) as an independent body without legal personality.

Article 3(1) of the ESRB Regulation describes its mandate as follows:

> The ESRB shall be responsible for the macro-prudential oversight of the financial system within the Union in order to contribute to the prevention or mitigation of systemic risks to financial stability in the Union that arise from developments within the financial system and taking into account macroeconomic developments, so as to avoid periods of widespread financial distress. It shall contribute to the smooth functioning of the internal market and thereby ensure a sustainable contribution of the financial sector to economic growth.

5.1. The ESRB's governance

The ESRB has a General Board, a Steering Committee, a Secretariat, an Advisory Scientific Committee and an Advisory Technical Committee.

The *General Board* is the ESRB's decision-making body, which takes the decisions necessary to ensure that the ESRB is able to perform the tasks entrusted to it. The General Board is a very comprehensive board made up of members with voting rights (the President and the Vice-President of the ECB; the Governors of the national central banks of the Member States or, alternatively, a high-level representative of a designated authority in case the central bank is not the designated authority pursuant to CRD/CRR and such designated authority has the leading role in the field of financial stability; a representative of the Commission; the Chairs of the three ESAs; the Chair and the two Vice-Chairs of the Advisory Scientific Committee; the Chair of the Advisory Technical Committee) and other members without voting rights.

The *Steering Committee* supports the decision-making process of the ESRB by preparing the meeting of the General Board, reviewing analysis presented by the ESRB advisory bodies (Advisory Technical Committee and Advisory Scientific Committee) and discussing the macroprudential policy agenda of the ESRB.

The *Advisory Technical Committee* (ATC) and the *Advisory Scientific Committee* (ASC) are the two ESRB advisory bodies: the former deals with technical issues relevant to the work of the ESRB; the latter conducts research to inform macroprudential decisions by the General Board.

The *Secretariat* is responsible for the day-to-day business of the ESRB, providing administrative, analytical and statistical support to the ESRB's committees.

5.2. The ESRB's powers

In order to contribute to the prevention or the mitigation of systemic risk to financial stability, certain tasks are conferred upon the ESRB.

Within the toolkit under ESRB Regulation, it is firstly worth mentioning the power to provide, in case the systemic risks are deemed to be significant, warnings and to issue recommendations for remedial action, where appropriate (Article 16(1) ESRB Regulation).

Warnings aim at increasing the systemic risk awareness upon authorities and financial market participants, but no specific action is requested. The ESRB's warnings are not mandatory.

Recommendations may be addressed "to the Union, to one or more Member States, to one or more of the ESAs, to one or more of the national supervisory authorities, to one or more national authorities designated for the application of measures aimed at addressing systemic or macro-prudential risk, to the ECB for the tasks conferred to the ECB in accordance with Articles 4(1), 4(2) and 5(2) of Regulation (EU) No 1024/2013, to resolution authorities designated by Member States pursuant to Directive 2014/59/EU of the European Parliament and of the Council or to the Single Resolution Board" or "to the Commission in respect of the relevant Union legislation" (Article 16(2) ESRB Regulation), and require the relevant addressee(s) to take action within a specified timeline for the policy response.

The ESRB's recommendations are not binding; therefore, the addressees are not legally obliged to implement the action indicated therein.

However, their implementation is followed-up through an 'act or explain' mechanism: the addressee has to communicate to the European Parliament, the Council, the Commission and to the ESRB the actions undertaken in response to the recommendations or provide adequate justification for the inaction.

Therefore, on the one hand, the addressees are not legally obliged to implement the recommended remedial action (*soft-law*); on the other hand, they have the legal duty, under Article 17 ESRB Regulation, to assess whether and how they need to take action following the recommendation and to provide the European Parliament, the Council, the Commission and the ESRB with the follow-up to the extent above.

By virtue of the lack of mandatory effects arising from its recommendations, in case the ESRB decides that neither action has been taken nor adequate justification provided, (only) 'political' consequence may occur, as the ESRB

informs the European Parliament, the Council and the concerned ESA, other than the addressee itself (Article 17(2) ESRB Regulation).

Under this point of view, it is worth distinguishing

(i) the case in which, after assessing the justification provided by the addressee, the ESRB deems it as inadequate, falling into the scope of application of the above-mentioned Article 17(2) ESRB Regulation, and

(ii) the case of a complete lack of information from the addressee regarding the follow-up, which could be considered as a breach of EU Law relevant under Article 258 TFEU.

In addition to issuing and monitoring the follow-up of warnings and recommendations, the ESRB Regulation also states that the ESRB carries out further tasks: determining and/or collecting and analysing all the relevant and necessary information for the purposes of prevention and mitigation of systemic risks; identifying and prioritising systemic risks; cooperating closely with all the other parties to the ESFS, also providing the ESAs with information on systemic risks; participating in the Joint Committee; coordinating its actions with those of international financial organisations and third countries' bodies engaged in macroprudential oversight.

Collecting information is functional to identify systemic risks and identifying those risks is functional to issue warnings and recommendations. Furthermore, relying on robust analysis and comprehensive data improves the credibility of the assessment carried out therein and this is an essential aspect for soft-law, such as warnings and recommendations.

In light of the above, it is easy to understand the reason why Article 15 ESRB Regulation provides for a broad regime dedicated to the exchange of information between the ESRB and the ESAs, the ESCB, the Commission and the national supervisory and statistics authorities. Indeed, although the ESRB has soft-law tools, information power is binding.

5.3. The macroprudential framework created by the ESRB

As regards the macroprudential framework created by the ESRB, the following recommendations are worth mentioning:

– *Recommendation of the ESRB of 22 December 2011 on the macro-prudential mandate of national authorities (ESRB/2011/3).*
  Creating a well-defined macroprudential policy framework at national level can enhance the effectiveness of the macroprudential policy also at EU level, as the ESRB's recommendations need to be implemented.

To that end, Member States have been recommended to designate in the national legislation an authority entrusted with the conduct of macro-prudential policy, generally either as a single institution or as a board composed of the authorities, whose actions have a material impact on financial stability, and with a leading role played by central banks. This recommendation is still to be implemented into the Italian legislation.

– *Recommendation of the ESRB of 4 April 2013 on intermediate objectives and instruments of macro-prudential policy (ESRB/2013/1).* By means of the recommendation 2011/3 it was also clarified that the *ultimate* objective of macroprudential policy is "to contribute to the safeguard of the stability of the financial system as a whole, including by strengthening the resilience of the financial system and decreasing the build up of systemic risks, thereby ensuring a sustainable contribution of the financial sector to economic growth". It is a broad definition, which also includes two *intermediate* objectives (strengthening the resilience of the financial system and decreasing the build up of systemic risks).

  As a follow-up of the above, the recommendation 2013/1 sets out the intermediate objectives of macroprudential policy and provides an indicative list of instruments that Member States may assign to relevant authorities to pursue both the ultimate objective and the intermediate objectives of macroprudential policy.

  In particular, five intermediate objectives have been identified: (a) to mitigate and prevent excessive credit growth and leverage; (b) to mitigate and prevent excessive maturity mismatch and market illiquidity; (c) to limit direct and indirect exposure concentrations; (d) to limit the systemic impact of misaligned incentives with a view to reducing moral hazard; (e) to strengthen the resilience of financial infrastructures. Macroprudential authorities should have at least one macroprudential instrument available for each intermediate objective ('Tinbergen Rule').

– *Recommendation of the ESRB of 15 December 2015 on the assessment of cross-border effects and voluntary reciprocity for macroprudential policy measures (ESRB/2015/2).*

  As already mentioned, entities providing cross-border financial services, either directly or through branches located in other Member States, are not usually affected by macroprudential measures applicable at national level in those Member States. This could result in regulatory arbitrage, since financial services providers could route their activities in order to circumvent host country measures.

  Against this background, the recommendation 2015/2 underlines the need for an approach based on two main pillars: (i) the activating relevant authorities are recommended to assess, prior to their adoption, the cross-border effects of the implementation of their own macroprudential policy measures, and to notify the ESRB of macroprudential policy

measures as soon as they are adopted (and no later than two weeks after their adoption) also submitting to the ESRB a request for reciprocation when it is deemed necessary to ensure the effective functioning of the adopted measures; (ii) the relevant authorities are recommended to reciprocate the macroprudential policy measures adopted by other relevant authorities and recommended for reciprocation by the ESRB (however, the *de minimis* principle allows authorities to exempt an individual financial service provider under their jurisdiction from applying a particular reciprocating macroprudential policy measure, if this financial service provider has non-material exposure to the identified macroprudential risk in the activating country).
In any case, the reciprocation set forth under recommendation 2015/2 has a voluntary nature and has to be distinguished from the mandatory recognition of certain macroprudential measures as provided in CRR/CRD IV.[8]

6. The role of the ESRB within the Banking Union and the relationship between the ECB and the ESRB

As already mentioned, the EU macro-prudential framework is complex as it involves many authorities at different levels (the ESRB at EU level, the ECB/SSM at Banking Union level, national macro-prudential authorities at Member State level). This complexity reflects the need to maintain flexibility at national level while limiting negative cross-border spillover effects and protecting the Single Market.

Macro-prudential policies are usually carried out at the national level rather than at EU level due to differences in business and financial cycles across Member States. Accordingly, the establishment of the ESRB in 2010 gave rise to the creation of national macroprudential authorities to address systemic risks in order to achieve the aim of the financial stability, and to a comprehensive set of macroprudential instruments to that purpose.

The banking regulation under CRR/CRD IV package also foresees macroprudential tools to be activated at national level, requiring for the designation of national authorities entrusted with the activation of such tools.

On the one hand, SSMR entrusts the ECB with binding macroprudential powers with regard to the tools set forth under CRR/CRD IV.

On the other hand, CRR/CRD IV package also assigns to the ESRB specific tasks to coordinate Member States' macro-prudential policies and, in particular, the ESRB:

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8 See above, § 3 of this Chapter.

(i) provides guidance to the NDAs on setting countercyclical buffer rates (Article 135 CRD IV);

(ii) provides opinions on systemic risk buffer (Article 133 CRD IV) and on the proper use of national flexibility measures under Article 458 CRR;

(iii) issues recommendations on some systemic risk buffer rates (Article 133 CRD IV).

Both the ECB and the ESRB are involved in macroprudential oversight, but they carry it out with different roles and powers.

The ECB has been granted with specific macroprudential powers pursuant to Article 5 SSMR. These powers are binding but limited under several points of view: the ECB can only impose stricter requirements than those implemented at national level (topping-up); the ECB can only use instruments harmonised at EU level; the ECB's powers are restricted to the Banking Union and to the banking activities.

The ESRB's warnings and recommendations are not mandatory, but its oversight extends across the entire European Union (not only the SSM Area) and covers all financial sectors (not only the banking one), including the shadow-banking system.

As regards the institutional framework, there are relevant links between the ECB and the ESRB.

According to Regulation (EU) 1096/2010[9] the ECB ensures a Secretariat and thereby provides the ESRB with analytical, statistical, logistical and administrative support. It is worth noting that it was the first application (prior to the establishment of the SSM) of Article 127(6) TFEU, which allows the Council to "confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings".

Moreover, the ESRB is chaired by the President of the ECB.

Although supported and hosted, the ESRB is not part of the ECB and is an independent body.

Article 20 ESRB Regulation provided that:

> By 17 December 2013, the European Parliament and the Council shall examine this Regulation on the basis of a report from the Commission and, after having received an opinion from the ECB and the ESAs, shall determine whether the mission and organisation of the ESRB need to be reviewed.

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[9] Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board.

> They shall, in particular, review the modalities for the designation or election of the Chair of the ESRB.

In the context of the reform of the ESFS, specific attention is dedicated to the ESRB Regulation, which has been amended by Regulation 2019/2176 as follows:

- the ECB President becomes the permanent Chair of the ESRB;[10]
- the role of the Head of the ESRB Secretariat is strengthened by changing the selection procedure;
- the Chair of the Supervisory Board of the ECB and the Chair of the Single Resolution Board (SRB) become members of the ESRB General Board without voting rights. Corresponding adjustments are also made to the Advisory Technical Committee;
- in order to better reflect the existing diversity in national macroprudential frameworks and to ensure that the Member States are represented by the most appropriate authority or body, as already mentioned, Member States have the possibility to nominate a high-level representative from a NDA on the condition that the national central bank is not the NDA (National Central Banks will always remain General Board members);
- the list of potential addressees of the ESRB warnings and recommendations is extended by expressly including the ECB (for its tasks conferred by the SSMR as regards micro and macroprudential supervision), national resolution authorities (established under BRRD) and the SRB. It is worth noting that, under the previous text of Article 16 ESRB Regulation, warnings and recommendations were expressly addressed to national supervisory authorities only, whilst it was not crystal clear whether they could be addressed to the ECB as well. Though the ECB could be considered as encompassed within the national supervisory authorities therein provided (under Article 9 SSMR the ECB is tantamount to a national competent authority within the relevant Member State), the new text now clarifies that the ECB is to be included within the addressees of the ESRB's warnings and recommendations.
- The new text of Article 16(2) of the ESRB Regulation reads as follows:

  > Warnings or recommendations issued by the ESRB in accordance with points (c) and (d) of Article 3(2) of this Regulation may be

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[10] The previous text of Article 5(1) ESRB Regulation provided that "The ESRB shall be chaired by the President of the ECB for a term of 5 years following the entry into force of this Regulation. For the subsequent terms, the Chair of the ESRB shall be designated in accordance with the modalities determined on the basis of the review provided for in Article 20".

> of either a general or a specific nature and shall be addressed in particular to the Union, to one or more Member States, to one or more of the ESAs, to one or more of the national supervisory authorities, to one or more national authorities designated for the application of measures aimed at addressing systemic or macro-prudential risk, to the ECB for the tasks conferred to the ECB in accordance with Articles 4(1), 4(2) and 5(2) of Regulation (EU) No 1024/2013, to resolution authorities designated by Member States pursuant to Directive 2014/59/EU of the European Parliament and of the Council or to the Single Resolution Board. If a warning or a recommendation is addressed to one or more of the national supervisory authorities, the Member State or Member States concerned shall also be informed thereof. Recommendations shall include a specified timeline for the policy response. Recommendations may also be addressed to the Commission in respect of the relevant Union legislation.

– In the Explanatory memorandum of the ESRB's reform one can read that:

> It is also proposed to include the ECB as a possible addressee of ESRB warnings and recommendations for ECB tasks conferred to it by the Single Supervisory Mechanism Regulation (Regulation (EC) No 1024/2013), i.e. for supervisory tasks not pertaining to the conduct of monetary policy. This would address the current asymmetry whereby national authorities can receive such warnings and recommendations as members of the General Board, but these are not sent to the ECB as the competent or designated authority at Banking Union level;

– the ESRB's advisory committees are expected to consult interested parties such as market participants, consumer bodies and experts.

As the ESRB was established prior to the introduction of the Banking Union, the ESRB Regulation did not therefore explicitly take account of the establishment of the SSM. The described amendments mostly aim at addressing this issue.

The bilateral coordination between the ECB and the NCA/NDAs provided for under Article 5 SSMR for macro-prudential decisions (the ECB may apply only higher buffers than those adopted by the national macro-prudential authorities) has to be without prejudice to the multilateral coordination procedure under the ESRB Regulation.

This is clarified in recital 24 SSMR, where it stipulates that

> The provisions in this Regulation on measures aimed at addressing systemic or macroprudential risk are without prejudice to any

> coordination procedures provided for in other acts of Union law. National competent authorities or national designated authorities and the ECB shall act in respect of any coordination procedure provided for in such acts after having followed the procedures provided for in this Regulation.

The reform of the ESRB Regulation does not tackle this problem.

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macro-prudential mandate of national authorities (ESRB/2011/3), OJ C 41, 14.2.2012, p.1; Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ L 331, 15.12.2010, p. 1; Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, OJ L 331, 15.12.2010, p. 162.

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Chapter II

The application of national law by the ECB

Raffaele D'Ambrosio

Summary: *1. The provisions under Article 4(3) SSMR and the clarification contained in recital 34 SSMR: the material rules relating to the prudential supervision of credit institutions – 2. The application of national law by the ECB – 3. Whether the ECB has to follow national or EU procedural rules where adopting supervisory decisions based on national substantive banking law – 4. Case-study: T-712/15 and T-52/16, Joined Cases* C-152/18 *P and C-153/18 P, Crédit Mutuel Arkéa – 5. Case-study: Joined cases T-133/16 to T-136/16, Crédit agricole*

1. The provisions under Article 4(3) SSM and the clarification contained in recital 34 SSMR: the material rules relating to the prudential supervision of credit institutions

Under Article 4(3) SSMR, in order to carry out the tasks conferred on it by the SSMR, the ECB shall apply all the relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives.

Where the relevant Union law is composed of Regulations which explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options.

Article 4(3) SSMR makes a mere reference to the national law transposing EU law or exercising options therein and only requires said EU law to be relevant to the ECB's tasks.

Recital 34 SSMR clarifies that in order to carry out its tasks and exercise its supervisory powers, the ECB should apply the material rules relating to the prudential supervision of credit institutions, such as those on capital requirements for credit institutions and on financial conglomerates.

From the wording of recital 34 one may infer that reference has to be done only to material EU and national rules relating to the prudential supervision of credit institutions.

"Material" rules should be understood in the sense of "substantive" rules as opposed to the "procedural" rules.

This is confirmed *a contrario* by Article 22 SSMR, where it applies the due process (procedural) rules to all decisions taken in accordance with Article 4 SSMR, including those aimed at ensuring compliance with requirements specified in the national law transposing the CRD IV provisions (such as the governance ones).

In the same vein see Article 25 of the Framework Regulation:

> Any ECB supervisory procedures initiated in accordance with Article 4 and Section 2 of Chapter III of the SSM Regulation shall be carried out in accordance with Article 22 of the SSM regulation and the provisions of this Title.

With regard to the substantive law, the ECB is called to apply only the national banking law transposing the EU law.

As the national substantive banking law makes frequent references to many civil and company law provisions particularly in the domain of qualitative prudential requirements, there is the need to clarify the boundaries of the banking law.

A possible solution would be to include within the domain of the national substantive banking law only the civil and company law norms, which, in light of the provisions contained in the not directly applicable EU law, are strictly needed in order to denote the relevant prudential requirement. Sometimes these provisions are referred to in the regulations or other legal acts adopted by the national regulatory authorities.

2. The application of national law by the ECB

Where the interpretation of a national law provision is at issue, according to settled case-law of the CJEU, the scope of national laws, regulations or administrative provisions must be assessed in light of the interpretation given by national courts (see *Schmit*, C-240/95, para. 14, and *Commission v. Slovakia*, C-433/13, para. 81).

The same holds true for the ECB where applying national law transposing banking directives in accordance with Article 4(3) SSMR (see *Caisse régionale de crédit agricole mutuel v. ECB*, Joined cases T-133/16 to T-136/16, para. 84).

That being understood, the ECB has to interpret substantive national provisions on the banking supervision, as far as possible, in light of the wording and the purpose of the EU law (fundamentally, the CRD IV) in order to achieve the aim contained therein. This principle is laid down in the established stance of the CJEU's case law. It is applicable to MSs and their public authorities but it is all the more true with regard to the ECB in its capacity as competent authority within the SSM.

In the same vein, see also recital 34 SSMR, where it stipulates that the ECB's application of substantive national banking law "is without prejudice to the principle of the primacy of Union law" and that consequently "the ECB should, when… taking decisions, base itself on, and act in accordance with, the relevant binding Union law".

This latter includes, according to Article 4(3), second subparagraph, and recital 32 SSMR, EBA's binding technical standards as well as the EBA's guidelines and reccomendations.

Indeed, as clearly laid down in the CJEU's case law, the EU's soft law, including the EBA's guidelines, may play an important role in the interpretation of national law transposing EU law, in particular where they cast light on the interpretation of national measures adopted in order to implement them or, in any case, where they are designed to supplement binding EU provisions.[1]

[1] See, among others, ECJ of of 15 September 2016, C-28/15, Koninklijke KPN and Others, ECLI:EU:C:2016:692, § 41; ECJ of 13 December 1989, C-322/88, Grimaldi v Fonds des maladies professionnelles, ECLI:EU:C:1989:646, § 18.

Nevertheless, in light of a consolidate stance of the CJEU's case law, the principle of consistent interpretation of national law cannot be applied, if the only way to render national law compatible with EU law leads to a *contra legem* interpretation or runs counter a general principle of law, such as the principle of legal certainty. Moreover, no consistent interpretation may take place where a directive has not been transposed at all.

Following a different line of reasoning, one could hypothesise that the ECB relies upon a general principle of EU law, which would be given concrete expression in a EU directive (ECJ, Case C-144/04, Mangold, and C-555/07, Kücükdeveci), in the case at hand the CRD IV, or, alternatively, that the provisions contained in a directive may be applied by means of an express reference in a EU regulation (Joined Cases C-37/06 and C-58/06, Viamex Agrar Handels and ZVK), in the case at hand Article 4(3) SSMR.

Both solutions are to be excluded. The first one because the financial stability or the supervision of credit institutions enshrined in the CRD IV cannot be considered as an expression of general principles of EU law; the second one because Article 4(3) SSMR incorporates no specific provisions of the CRD IV but rather obliges the ECB to apply national law transposing directives.

Furthermore, the ECB cannot ask national legislators – with the aim of achieving uniform and coherent supervisory practices within the SSM - to refrain from transposing directives – within the margin of discretion allowed by the latter - in the way they deem opportune.

Indeed, though the ECB is responsible under Article 6(1) SSMR for the effective and consistent functioning of the SSM, this role cannot go so far as to impinge (not only on the EBA's but also) on national legislators' prerogatives.

A different point of view may be found in the ECB's Opinion of 2 September 2015 on a draft German law adapting the national banking resolution law to the Single Resolution Mechanism (SRM) (CON/2015/31), paragraph 3.1.

> 3.1 Competences of the Federal Ministry of Finance to issue regulations
>
> 3.1.1 The ECB understands that by means of the abovementioned delegation of competences to the Federal Ministry of Finance the German legislator transposes certain provisions of Directive 2013/36/EU of the European Parliament and of the Council (hereinafter 'CRD IV'), particularly relating to risk management and governance of credit institutions, and the BRRD, including provisions relating to the incorporation of several guidelines of the European Banking Authority (EBA). These provisions are currently implemented by means of administrative guidelines and take effect through the individual supervisory decisions of the national competent authority (NCA).
>
> 3.1.2 Indeed, CRD IV provides Member States with the scope to accommodate in their legislation national specificities of the banking

sector, legal requirements and supervisory practices. Pursuant to Article 4(3) of Council Regulation (EU) No 1024/20138 (hereinafter the 'SSM Regulation'), the ECB shall apply all relevant Union law and, where such Union law is composed of Directives, the national legislation transposing those Directives.

3.1.3 While the ECB fully acknowledges the scope granted by CRD IV (and also the BRRD) to Member States to make such accommodation in their legislation, this needs to be in line with the objectives of the Banking Union. It has to take into account its potential impact on the effectiveness of the Single Supervisory Mechanism (SSM) and on the ECB's mandate to carry out prudential supervision with full regard for the unity and integrity of the internal market with a view to preventing regulatory arbitrage, as stipulated in Article 1 of the SSM Regulation. In accordance with these objectives, and pursuant to Article 6(1) of the SSM Regulation, the ECB is responsible for the effective and consistent functioning of the SSM, which shall ensure that the Union's policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective way and that the single rulebook for financial services is applied in the same manner to credit institutions in all Member States concerned.

3.1.4 Binding national prudential legislation that leads to fragmentation of the prudential rules applicable to credit institutions within the Banking Union has an impact on the ECB's exercise of its responsibilities within the SSM, with respect to both direct supervision and the SSM's effectiveness and consistency. Member States should acknowledge that the advent of the SSM means that the ECB's new responsibilities have to be adequately considered in the context of the adoption of any future banking or prudential legislation with a view to facilitating the harmonisation of supervisory practices in the Banking Union. Indeed, fragmentation would result in a considerable additional burden not only on the SSM, which would have to consider and enforce at worst 19 different prudential regimes for credit institutions, but also on bank groups themselves, which would have to implement such different regimes for each group entity in other Member States participating in the Banking Union.

3.1.5 In addition, national mandatory diverging provisions will have an impact on the level playing field for credit institutions that the ECB seeks to ensure across the Banking Union. The establishment of uniform conditions of competition could be hampered significantly.

3.1.6 In addition to the above considerations, the ECB notes the following. The BRRD and CRD IV require the EBA, in certain areas, to issue guidelines in order to establish consistent, efficient and effective supervisory practices within the European System

> of Financial Supervision, and to ensure the common, uniform and consistent application of Union law. Competent authorities are subject to a 'comply or explain' procedure in relation to these guidelines, pursuant to Article 16(3) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council (hereinafter the 'EBA Regulation'). In this regard, it should be noted that the ECB is the competent authority as regards matters relating to the tasks conferred on it by the SSM Regulation. Therefore, regulations issued by the Federal Ministry of Finance under the competences delegated under the draft law may conflict with the ECB's discretion under the EBA Regulation to incorporate the guidelines into its supervisory practices: the regulations, which would qualify as national legislation transposing directives, could vitiate the measure of discretion available to the ECB under the 'comply or explain' procedure.
>
> 3.1.7 At the same time, the regulations would bind the NCA concerned and the ECB would be deprived, on the matters subject to the regulations, of the capacity to establish a consistent, harmonised and effective approach across the SSM to the supervision of credit institutions subject to the SSM. The alleged benefit resulting from converting non-binding guidelines into binding legal acts – namely, that infringements can be sanctioned directly – should therefore be balanced against the objectives of the Banking Union and the abovementioned capacity of the ECB. An administrative guideline that contains provisions on governance and risk management and incorporates EBA guidelines, such as the MaRisk in its current form, already allows the NCA concerned to issue supervisory decisions enforcing the objectives of the guideline in individual cases, without unduly limiting the ECB in the performance of its tasks or depriving it of its capacity to establish consistency across the SSM.
>
> 3.1.8 To summarise, banking legislation adopted by the Member States after the establishment of the SSM should facilitate the exercise by the ECB of its responsibilities within the SSM including its capacity to enhance the consistency of the supervision of credit institutions across the SSM. Member States should refrain from setting obstacles both to uniform supervisory practice and to the exercise of supervisory discretion by the ECB within the SSM. In view of the principle of supremacy of Union law and the ECB's status as an independent institution, the ECB will not be bound by any governmental regulations or similar measures which may affect its independence or the smooth functioning of the SSM, for which the ECB is responsible.

In the same vein see also paragraph 2.2 of the ECB's Opinion of 31 October 2016 on the reorganisation of the duties of the Federal Agency for Financial Market Stabilisation and the implementation of the EBA guidelines on sound remuneration policies (CON/2016/53).

Nevertheless, the fact that the ECB's view cannot be followed is all the more true in light of the recent judgment of the Federal German Constitutional Court of 30 July 2019 (2 BvR 1685/14, 2 BvR 2631/14), where it concedes that the SSMR meets the requirements for democratic accountability to the extent that the ECB is bound, among others, by law adopted by the national Parliaments transposing EU law (see § 211 of the judgement in **Chapter I.A. The SSM: allocation of tasks and powers between the ECB and the NCAs and organisational issues, § 5.7**).

3. Whether the ECB has to follow national or EU procedural rules where adopting supervisory decisions based on national substantive banking law

The due process rules that the ECB has to follow when adopting national supervisory decisions are contained in Article 22 SSMR and in Chapter 1 of Title 2 of Part III of the Framework Regulation.

Being the ECB an EU Institution, it shall be subject to the rules on due process and good administration contained in directly applicable EU law and comply with the principles recognised in the Charter of Fundamental Rights of the European Union (see, among others, recitals 58, 63 and 86 SSMR).

Though the directly applicable EU law does not cover all the procedural administrative requirements provided for in the relevant national administrative laws (as is the case of the rules on the time limit for taking and notifying a decision), gaps are to be filled with the general principle of good administration enshrined in Article 47 of the Charter.

There are cases where the EU banking law contains specific provisions on the time limits for the notification of a supervisory decision and for the procedural steps to be taken in order to adopt that decision.

See Article 22, paras. 1 to 8, CRD IV on qualifying holdings in a credit institution.

> 1. Member States shall require any natural or legal person or such persons acting in concert (the "proposed acquirer"), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in a credit institution or to further increase, directly or indirectly, such a qualifying holding in a credit institution as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the credit institution would become its subsidiary (the "proposed acquisition"), to notify the competent authorities of the credit institution in which they are seeking to acquire or increase a qualifying holding in writing in advance of the acquisition, indicating the size of the intended holding and the relevant information, as specified in accordance with Article 23(4). Member States shall not be required to apply the 30 % threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, they apply a threshold of one-third.

2. The competent authorities shall acknowledge receipt of notification under paragraph 1 or of further information under paragraph 3 promptly and in any event within two working days following receipt in writing to the proposed acquirer.

The competent authorities shall have a maximum of 60 working days as from the date of the written acknowledgement of receipt of the notification and all documents required by the Member State to be attached to the notification on the basis of the list referred to in Article 23(4) (the "assessment period"), to carry out the assessment provided for in Article 23(1) (the "assessment").

The competent authorities shall inform the proposed acquirer of the date of the expiry of the assessment period at the time of acknowledging receipt.

3. The competent authorities may, during the assessment period if necessary, and no later than on the 50th working day of the assessment period, request further information that is necessary to complete the assessment. Such a request shall be made in writing and shall specify the additional information needed.

For the period between the date of request for information by the competent authorities and the receipt of a response thereto by the proposed acquirer, the assessment period shall be suspended. The suspension shall not exceed 20 working days. Any further requests by the competent authorities for completion or clarification of the information shall be at their discretion but shall not result in a suspension of the assessment period.

4. The competent authorities may extend the suspension referred to in the second subparagraph of paragraph 3 up to 30 working days if the proposed acquirer is situated or regulated in a third country or is a natural or legal person not subject to supervision under this Directive or under Directives 2009/65/EC, 2009/138EC, or 2004/39/EC.

5. If the competent authorities decide to oppose the proposed acquisition, they shall, within two working days of completion of the assessment, and not exceeding the assessment period, inform the proposed acquirer in writing, providing the reasons. Subject to national law, an appropriate statement of the reasons for the decision may be made accessible to the public at the request of the proposed acquirer. This shall not prevent a Member State from allowing the competent authority to publish such information in the absence of a request by the proposed acquirer.

6. If the competent authorities do not oppose the proposed acquisition within the assessment period in writing, it shall be deemed to be approved.

7. The competent authorities may fix a maximum period for concluding the proposed acquisition and extend it where appropriate.

> 8. Member States shall not impose requirements for notification to, or approval by, the competent authorities of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in this Directive.

In this case, the ECB should apply the national law transposing said provisions, in the assumption that the latter has to be considered as absorbed in the substantive banking law.

Though Article 88 of the Framework Regulation stipulates that the ECB's decisions on the acquisition of a qualifying holding in a credit institution are to be notified "without undue delay", the provision has to be read in conjunction with the relevant national law transposing Article 22 CRD IV and in line with the time-limits therein.

Under Article 93 of the Framework Regulation, decisions on the assessment of the suitability of members of the management bodies are to be taken and notified according to the procedural rules contained in the relevant national law.

Differently from the national rules on the time limits for the adoption of decisions on qualifying holdings, the national rules on time limits for the adoption of decisions on fitness and propriety of members of the management body of credit institutions do not transpose any CRD IV provisions.

Therefore, these national provisions could have not been considered as part of the national banking law that the ECB was obliged to apply.

Against this backdrop, Article 93 of the Framework Regulation has to be interpreted strictly as it waives to the general rule according to which the ECB has to apply the national substantive banking law transposing EU law and EU procedural administrative law.

4. Case-study: T-712/15 and T-52/16, Joined Cases C-152/18 P and C-153/18 P, Crédit Mutuel Arkéa

On 13 December 2017, the General Court gave two judgments in cases instituted by *Crédit Mutuel Arkéa (Arkéa)* against the European Central Bank (ECB).

Both cases concerned a SREP decision adopted in respect of the *Crédit Mutuel* group, of which *Arkéa* forms a part.

The existence of two largely identical judgments derives from the fact that the applicant has acted against the ECB's SREP decision of 5 October 2015 (Case T-712/15), which was the result of review by the Administrative Board of Review (ABoR) of a SREP decision of 17 June 2015, and, subsequently, proceeded against a further ECB decision of 4 December 2015 (Case T-52/16).

The main question at issue is whether consolidated supervision of establishments affiliated to a central body depends on the status of the central body as a credit institution.

Under Article 2(21)(c) Framework Regulation, "supervised group" means, *inter alia*, supervised entities having their head office in the same participating MS, provided that they are permanently affiliated to a central body which supervises them under the conditions laid down in Article 10 CRR and which is established in the same participating MS.

Article 10(1) CRR allows competent authorities, in accordance with national law, to waive the application of prudential requirements to one or more credit institutions situated in the same MS, permanently affiliated to a central body which supervises them and is established in the same MS, if the following conditions are met:

(i) the commitments of the central body and affiliated institutions are joint and several liabilities or the commitments of its affiliated institutions are entirely guaranteed by the central body;

(ii) the solvency and liquidity of the central body and of all the affiliated institutions are monitored as a whole on the basis of consolidated accounts of these institutions;

(iii) the management of the central body is empowered to issue instructions to the management of the affiliated institutions.

According to the Court, consolidated supervision serves two goals:

(i) to enable the ECB to understand the risks likely to affect a credit institution which does not originate from it, but from the group to which it belongs;

(ii) to avoid the prudential supervision of entities making up those groups to be fragmented between different supervisory authorities.

Under the Court's view, for a banking group to exist under the SSM framework regulation, the central body does not necessarily have to be a credit institution.

The Court based its view on EU law (Articles 10(1)(b) and 11(4) CRR and Article 2(21)(c) Framework Regulation) and on a reading of national law (Articles of L. 511-31 and R. 512-20 and 512-24 of the French Code monétaire et financier, hereinafter also CoMoFi) based in part (Articles R. 512-20 and 512-24 of CoMoFi) on the *Conseil d'Etat*'s interpretation (judgment of 13 December 2016, para. 5 and 13).

As for the interpretation of the EU law, the Court observed that its view was grounded not only on its literal but also on its teleological interpretation.

See §§ 58-64 of the judgment T-712/15 (the same holds true for §§ 57-63 of the judgment T-52/16):

> 58. In that connection, it should be noted that the prudential supervision of groups of credit institutions on a consolidated basis has essentially two aims.
>
> 59. The first aim is to enable the ECB to identify the risks likely to affect a credit institution which derive not from the institution itself, but from the group of which it forms part.
>
> 60. Thus, recital 26 of the Basic Regulation provides as follows:
>
> 'Risks for the safety and soundness of a credit institution can arise both at the level of an individual credit institution and at the level of a banking group or of a financial conglomerate. Specific supervisory arrangements to mitigate those risks are important to ensure the safety and soundness of credit institutions. In addition to supervision of individual credit institutions, the ECB's tasks should include supervision at the consolidated level…'
>
> 61. The second aim pursued by the prudential supervision of groups of credit institutions on a consolidated basis is to avoid the prudential supervision of the entities making up those groups being fragmented between different supervisory authorities.
>
> 62. That is apparent, in particular, first, from the fact that according to recital 38 and Article 6(4) of the Basic Regulation, the assessment of the significance of a credit institution, which determines whether certain prudential supervision tasks will be carried out by the ECB alone or decentralised under the SSM (see, to that effect, judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg* v *ECB*, T-122/15, under appeal, EU:T:2017:337, paragraph 63), is conducted at the highest level of consolidation within participating Member States. That aim is reproduced in Article 40(1) and (2)(a) of the SSM Framework Regulation in relation to supervised groups.
>
> 63. The above aim is also apparent, secondly, from Article 40(2) of the SSM Framework Regulation, which provides that if an entity that is part of a group comes under the prudential supervision of the ECB, either because it fulfils the direct public financial assistance criterion or is one of the three most significant credit institutions in a participating Member State, that supervision will be extended to the entire group.
>
> 64. It follows from the foregoing that, in order to comply with the aims of the Basic Regulation, Article 2(21)(c) of the SSM Framework Regulation and the conditions laid down in Article 10(1) of Regulation No 575/2013 to which it refers must be interpreted in the light of the legislature's intention to enable the ECB to have an overall picture of the risks likely to affect a credit institution and to avoid the fragmentation of prudential supervision between the ECB and national authorities.

Compliance with the condition under Article 10(1)(a) CRR is ensured, in the Cout's view, by the joint and several liability mechanisms adopted in the *Crédit Mutuel* group by a decision of the *Confédération national du Crédit Mutuel* (CNCM).

The other conditions are deemed to be met on the basis of the Court's interpretation of the Articles of CoMoFi mentioned above.

See paragraph 132 of the judgment T-712/15

> it is settled case-law that the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (see judgment of 16 September 2015, *Commission* v *Slovakia*, C-433/13, EU:C:2015:602, paragraph 81 and the case-law cited). However, in the absence of decisions by the competent national courts, it is for the Court to rule on the scope of those provisions.

The reasoning of the Court can be summarised as follows.

Under Article L.511-31 CoMoFi, the central bodies "shall take all necessary measures, particularly to ensure the liquidity and solvency of each of those institutions and companies and of the network as a whole" and "shall represent the credit institutions and finance companies affiliated to them… before the [ACPR]".

The logical consequence is that the CNCM is empowered by the CoMoFi to represent *Crédit Mutuel* before the authorities responsible for the prudential supervision of compliance with the solvency and liquidity requirements.

The second paragraph of Article R.512-20 CoMoFi stipulates that credit union branches "must undertake to comply with the articles of association, internal regulations, instructions and decisions of the [CNCM]".

In breach of regulations in force, Article R.512-24 CoMoFi allows the CNCM to impose a penalty on a branch, consisting of "[a] warning[, a] reprimand [or] removal from the list of credit union branches".

Both cases decided by the GC were brought before the ECJ, challenging, amongst others, the interpretation of Article 2(21)(c) Framework Regulation as allegedly in contrast with the wording of Article 127(6) TFEU.

The ECJ (Joined Cases C-152/18 P and C-153/18 P) confirmed the GC's interpretation of Article 2(21)(c) Framework Regulation on the following grounds (see §§ 52-67):

> 52. L'article 127, paragraphe 6, TFUE, qui constitue la base juridique sur le fondement de laquelle le règlement n° 1024/2013 a été adopté, prévoit que le Conseil de l'Union européenne peut confier à la BCE des missions spécifiques ayant trait aux politiques en

matière de contrôle prudentiel des établissements de crédit et autres établissements financiers, à l'exception des entreprises d'assurances.

53. S'il est vrai que le libellé de cette disposition vise les «établissements de crédit » et les « autres établissements financiers », il convient de déterminer la portée de l'habilitation prévue à cette disposition en tenant compte du contexte dans lequel elle s'inscrit et des objectifs poursuivis par celle-ci.

54. À cet égard, il y a lieu de relever que l'article 127 TFUE figure sous le chapitre 2, intitulé « La politique monétaire », du titre VIII de la troisième partie du traité FUE, et fixe les objectifs ainsi que les missions fondamentales du Système européen de banques centrales (SEBC) et de la BCE.

55. Ainsi que M. l'avocat général l'a indiqué aux points 55 et 56 de ses conclusions, l'exercice des missions de surveillance prudentielle bancaire visées à l'article 127, paragraphe 6, TFUE a pour objectif d'assurer la sécurité et la solidité des établissements de crédit, notamment celles des grands établissements de crédit et des groupes bancaires, afin de contribuer à garantir la stabilité du système financier de l'Union dans son ensemble.

56. Par ailleurs, la poursuite de ces objectifs est explicitement énoncée aux considérants 16, 26, 30 et 65 du règlement n° 1024/2013 ainsi qu'à l'article 1er, premier alinéa, de ce règlement.

57. En particulier, il ressort du considérant 26 du règlement n° 1024/2013 que, pour garantir la sécurité et la solidité des établissements de crédit, il est important de prévoir des dispositions en matière de surveillance visant spécifiquement à atténuer les risques menaçant la sécurité et la solidité d'un établissement de crédit, qui peuvent survenir tant au niveau de l'établissement de crédit proprement dit qu'au niveau du groupe bancaire ou du conglomérat financier auquel il appartient.

58. Ce considérant précise que, outre la surveillance au niveau des établissements de crédit proprement dits, la BCE devrait aussi avoir pour mission d'exercer une surveillance sur base consolidée.

59. À cet égard, il y a lieu de rappeler que l'article 4 du règlement n° 1024/2013, intitulé « Missions confiées à la BCE », prévoit, à son paragraphe 1, sous g), que la BCE est notamment compétente pour assurer la surveillance sur base consolidée des sociétés mères des établissements de crédit établies dans l'un des États membres participants.

60. Conformément à l'article 6, paragraphe 1, de ce règlement, la BCE s'acquitte de cette mission dans le cadre du MSU, composé d'elle-même et des autorités compétentes nationales, et veille au fonctionnement efficace et cohérent de celui-ci.

61. Ainsi qu'il ressort du considérant 9 du règlement n° 468/2014, celui-ci a pour objectif de développer et de préciser les procédures de

coopération établies par le règlement n° 1024/2013 entre la BCE et les autorités compétentes nationales au sein du MSU, assurant ainsi le fonctionnement effectif et cohérent de ce dernier.

62. C'est dans ce contexte que l'article 2, point 21, sous c), du règlement n° 468/2014 définit la notion de « groupe soumis à la surveillance prudentielle » comme désignant, notamment, les entités soumises à la surveillance prudentielle ayant leurs sièges dans un même État membre participant, sous réserve qu'elles soient affiliées de façon permanente à un organisme central qui exerce une surveillance prudentielle à leur égard dans les conditions décrites à l'article 10 du règlement n° 575/2013 et qui est établi dans le même État membre participant.

63. Par conséquent, le Tribunal a jugé à bon droit, aux points 58 à 64 du premier arrêt attaqué et aux points 57 à 63 du second arrêt attaqué, que la surveillance prudentielle des établissements de crédit appartenant à des groupes bancaires sur une base consolidée répond essentiellement à deux finalités, à savoir, d'une part, à celle de permettre à la BCE d'appréhender les risques susceptibles d'affecter un établissement de crédit qui proviennent non pas de celui-ci, mais du groupe auquel il appartient, et, d'autre part, à celle d'éviter un fractionnement de la surveillance prudentielle des entités composant ce groupe.

64. En outre, il ne découle nullement de l'article 127, paragraphe 6, TFUE que l'« organisme central », visé à l'article 2, point 21, sous c), du règlement n° 468/2014, doit disposer de la qualité d'établissement de crédit.

65. Au contraire, ainsi que M. l'avocat général l'a relevé aux points 62 à 64 de ses conclusions, il résulte des objectifs poursuivis par l'attribution, sur le fondement de l'article 127, paragraphe 6, TFUE, de missions spécifiques en matière de contrôle prudentiel à la BCE que celle-ci doit pouvoir exercer une surveillance prudentielle sur une base consolidée à l'égard d'un groupe tel que celui visé à l'article 2, point 21, sous c), du règlement n° 468/2014, indépendamment de la forme juridique de l'organisme central auquel les entités faisant partie de ce groupe sont affiliées et pour autant que les conditions énoncées à l'article 10 du règlement n° 575/2013 sont remplies.

66. En effet, à défaut, un groupe bancaire pourrait se soustraire à une surveillance prudentielle sur une base consolidée en raison de la forme juridique de l'entité faisant office d'organe central de ce groupe et risquerait, dès lors, de porter atteinte à l'efficacité de l'exercice, par la BCE, desdites missions.

67. Par conséquent, l'article 127, paragraphe 6, TFUE et l'article 1er du règlement n° 1024/2013 ne s'opposent pas à ce que la BCE exerce une surveillance prudentielle sur une base consolidée à

> l'égard d'un groupe bancaire dont l'organisme central ne dispose pas de la qualité d'établissement de crédit, dès lors que les conditions énoncées à l'article 10, paragraphe 1, du règlement n° 575/2013 sont remplies.

The reasoning of both the ECB and the CJEU is correct in the sense that for the existence of a banking group under the SSM Framework Regulation the central body does not necessarily have to be a credit institution.

Nevertheless, a question arises here – the issue was not brought to the Court's attention – as to whether the ECB has the power to directly address supervisory decisions to a body which is neither a credit institution, nor a financial holding company nor a mixed-financial holding company, under Article 16 SSMR.

The ECB should have required the ACPR to ask the CNCM to adopt the SREP decision in respect of the *Crédit Mutuel* group.

A further issue pertains to the jurisdictional interplay between the EU and the national courts on the interpretation of national law. Under the ECJ's view, the scope of national laws, regulations or administrative provisions must be assessed in light of the interpretation given to them by national courts. The General Court seems to challenge this settled stance of the ECJ by affirming that in the absence of decisions by the competent national courts, the Court has to rule on the scope of national law (see **Chapter X.A. The administrative and judicial review of the decisions taken within the SSM and SRM, § 3**).

5. Case-study: Joined cases T-133/16 to T-136/16, Crédit agricole

Crédit Agricole is a non-centralised banking group governed by Articles L. 512-20 to L. 512-54 CoMoFi, classified as significant supervised group within the meaning of Article 6 SSMR.

The central authority of *Crédit agricole* at the request of some *Caisse régionales* sought approval for the appointment of some individuals as both chairmen of the board of directors and effective directors of the applicant institutions.

The ECB approved the appointment of those individuals as chairmen of the board of directors but refused to approve their appointment as effective directors of the applicant institutions.

The ECB grounded its decisions on the following arguments:

(i) Article 88(1)(e) CRD IV prohibits, in principle, chairmen of the management body of a credit institution in their supervisory function

from simultaneously exercising the functions of chief executive officer within the same institution;

(ii) pursuant to Article 4(3) SSMR, the ECB was required to apply Article L. 511-58 CoMoFi, transposing Article 88(1)(e) CRD IV and preventing that the role of chairmen of the mangement board or any other body exercising equivalent supervisory functions to be performed by the chief executive officer or by a person exercising equivalent management functions; and

(iii) under Article L. 511-12 of CoMoFi, the functions enabling a person to obtain the approval as effective director within the meaning of Article L. 511-13 were those of chief executive officer, deputy chief executive officer, member of the board of director and sole managing director.

Against this background, there had to be a separation between the exercise of executive and non-executive functions within a management body.

The applicants brought actions before the General Court basically alleging an incorrect interpretation by the ECB of the concept of "effective director" under both CRD IV and CoMoFi relevant provisions.

The Court rejected the actions on the basis of the following arguments:

(i) CRD IV lays down specific rules concerning good governance of credit institutions precluding, in principle, the chairman of the management body in its supervisory functions from being also responsible for the effective direction of the business of the credit institution under Article 13(1) CRD IV; and

(ii) the interpretation by the ECB of a national law provision as Article L. 511-13 of CoMoFi must follow the interpretation given by national courts; consequently, in the case at hand, the Conseil d'Etat (judgment of 30 June 2016, para. 7) held that the chairman of a credit institution in the form of a joint stock company may not be regarded as effectively directing the credit institution within the meaning of Article L. 511-13 CoMoFi, except where he/she is responsible for the institution's general management on the condition that he/she has been authorised under conditions laid down in Article L. 511-58 CoMoFi.

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EU Legal references: Recital 34 and Articles 4(3) and 22 SSMR; Article 25, 88 e 93 Framework Regulation; Article 22 CRD IV.

National legal references: Articles L. 511-12, L. 511-13, L. 511-31, L. 511-58, L. 512-20 to L. 512-54 of French CoMoFi, Version consolidée au 19 juillet 2019; Articles R. 512-20 and 512-24 of French CoMoFi.

Other official documents: CB's Opinion of 31 October 2016 on the reorganisation of the duties of the Federal Agency for Financial Market Stabilisation and the implementation of the EBA guidelines on sound remuneration policies (CON/2016/53); ECB's Opinion of 2 September 2015 on a draft German law adapting the national banking resolution law to the Single Resolution Mechanism (SRM) (CON/2015/31).

CJEU's case law: ECJ, Joined Cases C-152/18 P and C-153/18 P, Crédit Mutuel Arkéa v European Central Bank, ECLI:EU:C:2019:810 2 October 2019; ECJ, Case C-555/07, Kücükdeveci, ECLI:EU:C:2010:21, of 19 January 2010; Joined Cases C-37/06 and C-58/06, Viamex Agrar Handels and ZVK, ECLI:EU:C:2008:18 of 17 January 2008; Case C-144/04, Mangold, ECLI:EU:C:2005:709 of 22 November 2005; GC, *Crédit agricole*, Joined cases T-133/16 to T-136/16, ECLI:EU:T:2018:219 of 24 April 2018; GC, *Crédit Mutuel Arkéa*, T-712/15 (ECLI:EU:T:2017:900) and T-52/16 (ECLI:EU:T:2017:902) of 13 December 2017.

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Chapter III

The elusive distinction between supervisory decisions, administrative measures and administrative sanctions

Raffaele D'Ambrosio

Summary: *1. The distinction between supervisory decisions and administrative measures/sanctions – 2. The distinction between administrative measures and administrative sanctions – 3. The (floating) criteria for identifying the sanctions having a coloration pénale – 4. Some side-effects of said distinctions – 4.1. The allocation of competences between the ECB and the NCAs within the SSM – 4.2. The different sets of safeguards granted to the addressees of each form of decision – 5. Case-study: ECJ, C-52/17, VTB Bank AG v Finanzmarktaufsichtsbehörde*

1. The distinction between supervisory decisions and administrative measures/sanctions

Under Article 65 CRD IV, administrative measures and administrative sanctions are applied to breaches of national provisions transposing CRD IV and of CRR.

This can be easily inferred from the wording of Article 65(1), first period, CRD IV, reading as follows:

> Without prejudice to the supervisory powers of competent authorities referred to in Article 64 and the right of Member States to provide for and impose criminal penalties, Member States shall lay down rules on administrative penalties and other administrative measures in respect of breaches of national provisions transposing this Directive and of Regulation (EU) No 575/2013 and shall take all measures necessary to ensure that they are implemented.

Under Article 64 CRD IV

> Competent authorities shall be given all supervisory powers to intervene in the activity of institutions that are necessary for the exercise of their function, including in particular the right to withdraw an authorisation in accordance with Article 18, the powers required in accordance with Article 102 [measures at an early stage] and the powers set out in Articles 104 [Pillar 2 decisions] and 105 [specific liquidity requirements].

The application to a credit institution of a prudential requirement stricter than the one required by the CRR/CRD IV package is neither an administrative measure nor an administrative sanction under Article 65 CRD IV, but basically a Pillar 2 decision (see Articles 102, 104 and 105 CRD IV and 16(2) SSMR).

The violation of a Pillar 2 decision applied by the supervisory authority may lead, in turn, to the imposition of an administrative measure or an administrative sanction.

Unlike the supervisory decisions, administrative measures and administrative sanctions need to be (not only proportionate and effective but also) dissuasive.

2. The distinction between administrative measures and administrative sanctions

Administrative measures and administrative sanctions for violations of banking law are laid down in Articles 66(2) and 67(2) CRD IV.

Nevertheless, Articles 66(2) and 67(2) give no criteria for distinguishing between administrative measures and administrative sanctions. Therefore, the qualification as a measure or as a sanction may differ across Member States.

The CJEU follows a criterion based on the aim – reparatory or punitive – of the decision.

This criterion applies not only to the forms of reactions to a previous violation provided for in the directly applicable EU law (Case C-489/10, *Bonda*, para. 40, and Joined cases C-260/14 and C-261/14, *Judeţul Neamţ* and *Judeţul Bacău*, para. 47-51), but also to those provided for in the national law transposing directives (the penalty interest under Article 97 of Austrian BWG transposing Article 67(2) CRD IV; case *VTB Bank*, C- 52/17, para. 42; see below § 5).

Consequently, the qualification as a measure or a sanction contained in national law transposing Articles 66(2) and 67(2) CRD IV should be re-interpreted in line with the CJEU's criterion (the aim of the decision).

The application of the CJEU criterion (aim of the decision) may lead to the following qualifications:

– *Public statement*
  The public statement, which indicates the natural or the legal person responsible and the nature of the breach, has basically, a negative reputational effect on the offender, in the field of the prudential supervision of credit institutions. It has therefore a punitive rather than a restoring aim and should be considered as a penalty.

– *Cease and desist order*
  The order requiring natural or legal persons to cease their present conduct and to desist from repetition in the future seems to have the sole purpose of restoring the public interest harmed by the offender. It should therefore be qualified as a measure.

– *Withdrawal of authorisation*
  The withdrawal of the banking licence is a reaction to unlawful behavior too severe to be considered as having only a reparatory aim. It should therefore be considered as a penalty.

– *Temporary ban*
  The temporary ban, against any member of the institution's management body or any other natural person who is held responsible on the exercise of 'functions' for the period of time deemed adequate to restore governance arrangements and to prevent other violations is fundamentally designed to restore the interest violated by the offender. Thus, it should be considered as a measure.

– *Suspension of voting rights*
  The suspension of the voting rights of banks' shareholders may have a reparatory or a punitive aim depending on the circumstances of the case.

Under Article 66(2), letter f) of the CR Directive, the suspension of voting rights is conceived as applicable to all the breaches referred to in Article 66(1). Nevertheless, it is reasonable to assume that it only applies to those under letters c) and d). In fact, only these latter refer to the acquisition/increasing and to the disposal/reduction of qualifying holding.

In the first case (provided for under letter c) of Article 66(1)), the qualifying shareholder acquires/increases its stake without notifying in writing the competent authority during the assessment period or acquires/increases its stake against the opposition of this authority. The "suspension" is only aimed at impeding the exercise of voting rights by a shareholder that the supervisory authority had no opportunity to scrutinise or that it considered as not fit and proper. Thus the purpose is to restore the public interest harmed by the offender. It should therefore be considered as a measure.

In the second case (provided for under letter d) of Article 66(1)), the qualifying shareholder disposes of/reduces its stake without notifying in writing the competent authority. In the event of a partial disposal not notified to the authority, the suspension is only aimed at punishing the offender for non-compliance with the rules on notification. Thus, it should be considered as a penalty.

The supervisory authorities are often vested also with the power to apply periodic penalty payments (PPPs), in order to punish continued infringement or to compel a supervised entity to comply with a supervisory decision.

It is not crystal clear whether the PPPs are to be considered as administrative measures or administrative sanctions.

An agreeable solution could be the following: the PPPs are to be considered as administrative measures, where adopted to compel the addressee to comply with a supervisory decision; on the contrary, they are to be considered as administrative penalties, where adopted with the view to punishing the offender who committed a continued infringement.

In almost all EU regulations[1] PPPs:

(i) are applied in order to force the addressee to comply with an obligation;

[1] See, among others: Article 24 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty; Article 36b Regulation (EC) No 1060/2009 of the European Parliament and Council of 16 September 2009 on credit rating agencies (consolidated version); Article 66 of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories reg. 648/2012; Article 39 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010.

(ii) are expected to be proportionate and effective (but not dissuasive);

(iii) are subject to time limits and enjoy some general safeguards (right to be heard);

(iv) are subject to the full jurisdiction of the CJEU (with the only exception of those under the SRMR)

With regard to the PPPs applied by the ECB, one has to look at the provisions contained in the EU regulation No 2532/98[2] as amended by regulation No 2015/159[3] as well as at those contained in Article 129 of the Framework regulation.

Under Article 1, point 6, of EU regulation No 2532/98

> "periodic penalty payments" shall mean amounts of money which, in the case of a continued infringement, an undertaking is obliged to pay either as a punishment, or with a view to forcing the persons concerned to comply with the ECB supervisory regulations and decisions.

In light of the above, the PPPs under the EU regulation No 2532/98, as amended, may be considered alternatively as measures or sanctions depending on their aim.

Under Article 129(1) of the Framework regulation

> In the event of a continuing breach of a regulation or supervisory decision of the ECB, the ECB may impose a periodic penalty payment with a view to compelling the persons concerned to comply with the regulation or supervisory decision.

Therefore, under the Framework Regulation PPPs are considered only as mere administrative measures. Nevertheless, provisions under Regulation No 2532/92, as amended, prevail over those contained in the Framework regulation.

In this vein, see Recital 6 of regulation No 2015/159, reading as follows

> On the basis of its power to implement the supervisory tasks allocated to it by the Treaties, laid down under Article 34 of the Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, the ECB has adopted Regulation (EU) No 468/2014. In order to organise the ECB task of ensuring compliance with the rules contained under the directly applicable Union law, Regulation (EU) No 468/2014 further specifies, in

[2] Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions.

[3] Council regulation 2015/159 of 27 January 2015 amending Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions.

accordance with Article 4(3) of Regulation (EU) No 1024/2013 and in accordance with the fundamental rights and principles laid down in the Charter of Fundamental Rights of the European Union, the framework for administrative penalties laid down in Article 18 of Regulation (EU) No 1024/2013. It also establishes rules concerning the imposition of administrative penalties in case of a breach of an ECB regulation or decision. Regulation (EU) No 468/2014 is an instrument implementing secondary legislation. Accordingly, in case of conflict between the provisions laid down in that Regulation and the provisions of Regulation (EC) No 2532/98, Regulation (EC) No 2532/98 will prevail.

3. *The (floating) criteria for identifying the sanctions having a coloration pénale*

Due to the severity of the fine the offender risks incurring, the ECB/NCAs penalties under SSMR and the national law transposing CRD IV may be considered as having a coloration pénale.

See in this vein ECtHR, *Engel and others v. The Netherlands (Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72)*, § 82:

> 82. Hence, the Court must specify, limiting itself to the sphere of military service, how it will determine whether a given "charge" vested by the State in question – as in the present case – with a disciplinary character nonetheless counts as "criminal" within the meaning of Article 6 (art. 6) [of the European Convention on Human Rights].
>
> In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.
>
> The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. In this respect, the Court expresses its agreement with the Government.
>
> However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law,

> there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so (see, mutatis mutandis, the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 36, last sub-paragraph, and p. 42 in fine).

See also ECtHR, *Zolotukhin v. Russia (Application no. 14939/03)*, §§ 52 and 53:

> 52. The Court reiterates that the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of the principle of *non bis in idem* under Article 4 § 1 of Protocol No. 7. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the object and purpose of the Convention (see, most recently, *Storbråten v. Norway* (dec.), no. 12277/04, ECHR 2007-... (extracts), with further references). The notion of "penal procedure" in the text of Article 4 of Protocol No. 7 must be interpreted in the light of the general principles concerning the corresponding words "criminal charge" and "penalty" in Articles 6 and 7 of the Convention respectively (see *Haarvig v. Norway* (dec.), no. 11187/05, 11 December 2007; *Rosenquist v. Sweden* (dec.), no. 60619/00, 14 September 2004; *Manasson v. Sweden* (dec.), no. 41265/98, 8 April 2003; *Göktan v. France,* no. 33402/96, § 48, ECHR 2002-V; *Malige v. France*, 23 September 1998, § 35, *Reports* 1998-VII; and *Nilsson v. Sweden* (dec.), no. 73661/01, ECHR 2005-...).
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> 53. The Court's established case-law sets out three criteria, commonly known as the "*Engel* criteria" (see *Engel and Others*, cited above), to be considered in determining whether or not there was a "criminal charge". The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see, as recent authorities, *Jussila v. Finland* [GC], no. 73053/01, §§ 30-31, ECHR 2006-..., and *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, §§ 82-86, ECHR 2003-X).

This criterion is also followed by the CJEU in the case C-489/10 *Bonda*, §§ 36 and 37:

> 36. The administrative nature of the measures provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004 is not called into question by an examination of the case-law of the European Court of Human Rights on the concept of 'criminal proceedings' within the meaning of Article 4(1) of Protocol No 7, to which the Sąd Najwyższy refers.
>
> 37. According to that case-law, three criteria are relevant in this respect. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (see, inter alia, ECHR, *Engel and Others v. the Netherlands*, 8 June 1976, §§ 80 to 82, Series A no. 22, and *Sergey Zolotukhin v. Russia*, no. 14939/03, §§ 52 and 53, 10 February 2009).

Nevertheless, in the CJEU decisions (see ECJ, 20 March 2018, C-537/16, *Garlsson Real estate v. Commissione nazionale per le società e la borsa*, para. 33-35; 20 March 2018, followed by C-524/15, *Luca Menci*, para. 31 and 33), the criterion seems to be the punitive instead of the reparatory nature of the instrument, being the severity of the fine the offender risk incurring only a further element confirming the coloration pénale.

See *ECJ, 20 March 2018, C-537/16, Garlsson Real estate v. Commissione nazionale per le società e la borsa*, §§ 33 to 35:

> 33. As regards the second criterion, relating to the very nature of the offence, it must be ascertained whether the purpose of the penalty at issue is punitive (see judgment of 5 June 2012, *Bonda*, C-489/10, EU:C:2012:319, paragraph 39). It follows therefrom that a penalty with a punitive purpose is criminal in nature for the purposes of Article 50 of the Charter, and that the mere fact that it also pursues a deterrence purpose does not mean that it cannot be characterised as a criminal penalty. As the Advocate General stated in point 64 of his Opinion, it is of the very nature of criminal penalties that they seek both to punish and to deter unlawful conduct. By contrast, a measure which merely repairs the damage caused by the offence at issue is not criminal in nature.
>
> 34. In this case, Article 187b of the TUF provides that any person who has committed market manipulation is liable to an administrative fine of between EUR 20 000 and 5 000 000, and that penalty may, in certain circumstances, as follows from paragraph 5 of that article, be increased by up to 3 times its amount or up to an amount 10 times greater than the proceeds or profit obtained

from the offence. Moreover, the Italian Government stated, in its observations submitted to the Court, that the application of that penalty always involves the confiscation of the product or the profit gained as a result of the offence and the goods used for the commission thereof. It appears therefore that that penalty is not only intended to repair the harm caused by the offence, but that it also pursues a punitive purpose, which moreover corresponds to the referring court's assessment and that it is therefore criminal in nature.

> 35. As regards the third criterion, it should be noted that an administrative fine which can be of an amount up to 10 times greater than the proceeds or profit obtained from the market manipulation has a high degree of severity which is liable to support the view that that penalty is criminal in nature for the purposes of Article 50 of the Charter, which it is, however, for the referring court to determine.

With regard to the administrative pecuniary penalties provided for by national laws transposing the CRD IV, the choice between the two criteria appears to be negligible as said penalties are severe and, at the same time, clearly aimed at punishing the offender.

With regard to the non-pecuniary forms of reaction to a previous violation, the acknowledgment of a punitive rather than a reparatory aim represents a simpler criterion than the one of the severity of the sanction the offender risks incurring.

In the case C-358/16, *UBS Europe SE*, the CJEU held that (para. 46) a measure consisting in prohibiting a person from holding the office of director or any other office subject to accreditation in an undertaking supervised by the relevant NCA and ordering him to resign from all related offices at the earliest opportunity, on the grounds that he no longer fulfils the requirement of good repute laid down in Article 9 of Directive 2004/39, is part of the 'procedures for the withdrawal of authorisation' referred to in Article 51(1) of the directive.

See § 46 of the Court's decision:

> It should also be noted that, irrespective of how they are classified under national law – to which the referring court refers – the steps that must be taken by the competent authorities further to a finding that a person no longer satisfies the requirement of good repute laid down in Article 9 of Directive 2004/39 are part of the 'procedures for the withdrawal of authorisation' referred to in Article 51(1) of the directive; they do not, however, constitute sanctions within the meaning of that provision and their application is not related to cases covered by criminal law within the meaning of Article 54(1) and (3) of the directive.

4. *Some side-effects of said distinctions*

4.1. *The allocation of competences between the ECB and the NCAs within the SSM*

As already noted under Chapter I.A, § 3.2.5, the allocation of sanctioning decisions within the SSM is based on both the status of the credit institution concerned (see Article 18(1) read in conjunction with Articles 4 and 6 SSMR) and the following further criteria (see Article 18(5) and recitals 36 and 53 SSMR):

(i) the nature of the infringed law: EU law/national law;

(ii) the nature of the sanction: pecuniary/non-pecuniary;

(iii) the status of the addressee: legal person/natural person

These criteria are confirmed by provisions under Articles 122, 124 and 134 of the Framework regulation.

The ECB applies administrative pecuniary sanctions:

(i) to the significant credit institutions (SCIs) for violations of requirements provided for in directly applicable union law

(ii) to SCIs and (as they case may be) to the less significant credit institutions (LSCIs) for violations of ECB regulation or decisions

In all the other cases, sanctions are applied by the NCAs. More to the point:

(i) the NCAs apply administrative pecuniary sanctions to LSCIs for violations of requirements provided for in directly applicable Union law

(ii) the NCAs apply non pecuniary sanctions, sanctions for violations of national law and sanctions/measures to natural persons at request of the ECB as regards SCIs and on their own initiative as regards LSCIs

A problem arises as to whether the allocation of competences for the adoption of administrative measures follows or not the same rationale.

Article 18(5) SSMR only mentions the administrative measures addressed to the members of the administrative body of a credit institution, but not those addressed to the credit institutions themselves.

Administrative measures addressed to the members of the administrative body of a credit institution are always applied by the NCAs at request of the ECB as regards the SCIs and on their own initiative as regards the LSCIs.

Administrative measures addressed to credit institutions could be distinguished into two categories:

(i) those provided for in national law transposing EU law are applied by the ECB or the NCAs depending on the status as significant or less significant of the credit institution (Article 9(1), second sub-paragraph, SSMR)

(ii) those provided for in purely national law are applied by the NCAs at an ECB's request or on their own initiative depending on the status as significant or less significant of the credit institution (Article 9(1), third sub-paragraph, SSMR)

4.2. The different sets of safeguards granted to the addressees of each form of decision

Establishing whether a decision is a supervisory decision, an administrative measure or an administrative sanction impinges on the safeguards applicable to its addressee.

Safeguards granted by EU/national law to the addressees of the ECB/NCAs' decisions gradually increase, as we move from supervisory decisions to sanctions.

In view of treating the topic briefly (see details in **Chapter VI.A. The safeguards applicable to the ECB supervisory and sanctioning procedures**), one has to considered the following:

(i) safeguards applicable to supervisory decisions are confined to the statement of reasons and the right to be heard, including the access to files;

(ii) it is a matter of debate whether additional safeguards apply to the administrative measures (special rules are laid down in some EU regulations);

(iii) administrative sanctions benefit from further safeguards, including culpability, right to remain silent, principle of separation and ne bis in idem.

5. Case-study: ECJ, C-52/17, VTB Bank AG v Finanzmarktaufsichtsbehörde

Section 97 of the Austrian Banking Law (BWG) provides for a penalty interest for exceeding the large exposure limits or not complying with limits for own funds and liquidity.

The Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde*, hereinafter also FMA) has no discretion in using this instrument: whenever the

limits mentioned in Section 97(1) No 1 to 4 BWG are breached, the FMA must impose the penalty interest.

Penalty interest for exceeding the large exposure limits (section 97 BWG) is considered (by both the *Bundesverwaltungsgericht* and the *Verfassungsgerichtshof*) as an enforcement measure without punitive character.

The FMA required VTB Bank to pay, pursuant to Paragraph 97(1)(4) BWG, an 'absorption' interest on the ground that it had exceeded the large exposure limits set out in Article 395(1) of Regulation No 575/2013.

Under paragraph 97(1)(4) BWG '(1) [The FMA] shall levy on credit institutions… interest in the following amounts:…4. 2% of the excess over the large exposure limit laid down in Article 395(1) of [Regulation No 575/2013], calculated annually, for 30 days.'.

VTB brought an action for annulment of the FMA's decision before the *Bundesverwaltungsgericht*, maintaining that it was not required to pay the interest levied by that decision, when the conditions laid down in Article 395(5) CRR – under which a credit institution may derogate from the exposure limits set out in Article 395(1) – occur.

The *Bundesverwaltungsgericht* sought a preliminary ruling from the CJEU, asking whether, among others, Articles 64 and 65(1) CRD IV and Article 395(1) and (5) CRR preclude national legislation which provides that, where the exposure limits set out in Article 395(1) are exceeded, an 'absorption' interest is to be levied automatically on a credit institution, even if that institution fulfils the conditions under Article 395(5).

The CJEU ruled that the 'absorption' interest provided for in Paragraph 97(1)(4) BWG must be classified as an administrative measure within the meaning of Article 65(1) CRD IV.

See §§ 31 to 42 of the judgment:

> 31. It should be noted, first, that, as is apparent from recital 2 of Directive 2013/36 and recital 5 of Regulation No 575/2013, that directive and that regulation, which must be read together, lay down the legal framework governing, inter alia, the supervision of and prudential rules applicable to credit institutions.
>
> 32. Article 395(1) of Regulation No 575/2013, which forms part of those rules, in particular those applicable to 'large exposures', which credit institutions are required, in accordance with Article 387 of that regulation, to monitor and control, prohibits such institutions from incurring an exposure to a client or group of connected clients the value of which exceeds 25% of their eligible capital. However, Article 395(5) of the regulation allows the exposure limits laid down in Article 395(1) to be exceeded where certain conditions are met.

33. Next, it should be noted that, for the purposes of the prudential supervision of credit institutions, Article 1(b) of Directive 2013/36 grants competent authorities the supervisory powers and tools set out in the directive.

34. In that regard, under Article 65(1) of Directive 2013/36, Member States are to lay down rules on administrative penalties and other administrative measures in respect of breaches of national provisions transposing that directive and of Regulation No 575/2013 and are to take all measures necessary to ensure that those penalties and other administrative measures are implemented.

35. It is clear from recital 41 of Directive 2013/36 that the adoption of administrative penalties and other administrative measures must make it possible to ensure the greatest possible scope for action following a breach of EU rules and to help prevent further breaches.

36. Lastly, it follows from a reading of Article 67(1)(k) of Directive 2013/36 in conjunction with Article 67(2) of the directive that, in the cases identified in Article 395 of Regulation No 575/2013, Member States are to ensure that the administrative penalties and other administrative measures that can be applied are, at least, those set out in Article 67(2)(a) to (g).

37. In the present case, the referring court is uncertain whether, as argued by the FMA, the levying of interest on VTB, pursuant to Paragraph 97(1)(4) BWG, constitutes a national, non-punitive economic control measure which is unconnected with Articles 64 and 65 of Directive 2013/36 and is intended only to recover an advantage wrongly obtained as a result of the breach of a rule governing prudential supervision. If that question is answered in the affirmative, the FMA submits that the situation at issue in the main proceedings is not governed by Article 395(1) and (5) of Regulation No 575/2013.

38. In the first place, it should be noted that Paragraph 97(1)(4) BWG expressly provides that the interest in question is to be levied by the FMA at the rate of 2% of the excess over the large exposure limit 'laid down in Article 395(1) of [Regulation No 575/2013]'.

39. In the present case, according to the referring court, VTB exceeded those limits. In those circumstances, and subject to the conditions laid down in Article 395(5) of Regulation No 575/2013 being complied with, Member States, as indicated in paragraph 36 above, are to ensure that at least the administrative penalties and other administrative measures set out in Article 67(2)(a) to (g) of Directive 2013/36 are applied.

40. In that regard, it should be added that, when analysing financial correction measures implemented by Member States to protect the financial interests of the European Union, the Court has classified as an 'administrative measure' the obligation to give back an advantage

improperly received by means of an irregularity (see, to that effect, judgment of 26 May 2016, *Județul Neamț and Județul Bacău*, C-260/14 and C-261/14, EU:C:2016:360, paragraphs 50 and 51).

41. Moreover, recital 9 of Regulation No 575/2013 states that in order to avoid market distortions and regulatory arbitrage, prudential minimum requirements adopted by EU law should ensure maximum harmonisation. Accordingly, where the limits set out in Article 395(1) of Regulation No 575/2013 are exceeded, Member States are required to impose on credit institutions not a measure governed by national law but an administrative penalty or other administrative measure within the meaning of Article 65(1) of Directive 2013/36.

42. Accordingly, the 'absorption' interest provided for in Paragraph 97(1)(4) BWG must be classified as an administrative measure within the meaning of Article 65(1) of Directive 2013/36.

With regard to that classification, the fact that the interest in question is not included in the list set out in Article 67(2) of Directive 2013/36 is irrelevant, as that list is not exhaustive.

See §§ 43 and 44 of the judgment

43 With regard to that classification, the fact that the interest in question is not included in the list set out in Article 67(2) of Directive 2013/36 is irrelevant.

44 Indeed, it is apparent from the wording of that provision that that list is not exhaustive. It should also be recalled that Article 65(1) of Directive 2013/36 provides that Member States are to take all measures necessary to ensure that that directive and Regulation No 575/2013 are implemented.

Under the CJEU's view Articles 64 and 65(1) CRD IV and Article 395(1) and (5) CRR are to be interpreted as precluding national legislation which provides that, where the exposure limits set out in Article 395(1) are exceeded, an 'absorption' interest is to be levied automatically on a credit institution, even if that institution fulfils the conditions under Article 395(5).

See point 1 of the Court's decision:

Articles 64 and 65(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, and Article 395(1) and (5) of 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 are to be interpreted as precluding national

legislation which provides that, where the exposure limits set out in Article 395(1) of that regulation are exceeded, 'absorption' interest is to be levied automatically on a credit institution, even if that institution fulfils the conditions laid down in Article 395(5) of the regulation under which a credit institution may exceed those limits.

***

EU Legal references: Articles 64, 65, 66, 67, 102, 104, 105 CRD IV; Recitals 36 and 53 SSMr; Articles 16 and 18 SSMR; Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions; Council regulation 2015/159 of 27 January 2015 amending Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions; Articles 122, 124 and 134 of the Framework regulation.

CJEU and ECtHR's case law: ECJ, 13 September 2018, C-358/16, *UBS Europe SE,* ECLI:EU:C:2018:715; ECJ, 7 August 2018, C-52/17, *VTB Bank AG v Finanzmarktaufsichtsbehörde,* ECLI:EU:C:2018:648; ECJ, C-537/16, 20 March 2018, *Garlsson Real estate v. Commissione nazionale per le società e la borsa,* ECLI:EU:C:2018:193; ECJ, 20 March 2018, C-524/15, *Luca Menci,* ECLI:EU:C:2018:197; ECJ, Joined Cases C-260 and C-261/14, *Județul Neamț and Județul Bacău,* CLI:EU:C:2016:360; ECJ, 5 June 2012, C-489/10 *Bonda,* ECLI:EU:C:2012:319; ECtHR, *Zolotukhin v. Russia* (Application no. 14939/03); ECtHR, *Engel and others v. The Netherlands* (Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72).

Literature: D'Ambrosio, R., Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings, in *Quaderni di ricerca giuridica della Consulenza Legale della Banca d'Italia*, No 74, Rome, December 2013.

Chapter IV.A

The involvement of the NCAs in the ECB's supervisory proceedings

Raffaele D'Ambrosio

Summary: *1. The common procedures – 1.1. Grant and withdrawal of the banking license – 1.2. Assessment of the acquisition and disposal of qualifying holdings – 2. The misalignment between the ECB's tasks and the NCAs' powers – 2.1. The procedures for close co-operation – 2.2. The ECB's power to instruct the NCAs on the use of their national supervisory powers – 2.3. The ECB's power to require the NCAs to open sanctioning proceedings – 3. The role of the NCAs in assisting the ECB – 3.1. The provision of Article 6(3) SSMR – 3.2. The involvement of the NCAs in the day-to-day verifications of credit institutions – 3.3. The co-operation in general investigations – 4. An overview of the SSM composite procedure*

1. The common procedures

1.1. Grant and withdrawal of the banking license

With regard to the task of granting and withdrawing the banking license, the ECB is the only competent authority (Article 14 SSMR).

The rationale is to preserve the unity and the integrity of the internal market.

However, the ECB's powers are subject to specific arrangements reflecting the role of the NCAs (see recital 20 and Articles 4(1)(a) and 14 SSMR).

Recital 20 SSMR reads as follows

> Prior authorisation for taking up the business of credit institutions is a key prudential technique to ensure that only operators with a sound economic basis, an organisation capable of dealing with the specific risks inherent to deposit taking and credit provision, and suitable directors carry out those activities. The ECB should therefore have the task of authorising credit institutions that are to be established in a participating Member State and should be responsible for the withdrawal of authorisations, subject to specific arrangements reflecting the role of national authorities.

Under Article 4(1)(a) read in conjunction with Article 6 SSMR, the ECB is exclusively competent

> to authorise credit institutions and to withdraw authorisations of credit institutions subject to Article 14

Under Article 14(1) SSMR

> Any application for an authorisation to take up the business of a credit institution to be established in a participating Member State shall be submitted to the national competent authorities of the Member State where the credit institution is to be established in accordance with the requirements set out in relevant national law.

If the applicant does not comply with the requirements for authorisation, the NCA rejects the application and the procedure ends at the national level (Article 14(2) SSMR).

If the applicant complies with these requirements, the NCA takes a draft decision subject to the ECB's silent consent (Article 14(2) and (3) SSMR).

Draft decisions are notified to the credit institution concerned (Article 14(4) SSMR).

See Article 14, paragraphs 2 to 4, SSMR

> 43. If the applicant complies with all conditions of authorisation set out in the relevant national law of that Member State, the national competent authority shall take, within the period provided for by relevant national law, a draft decision to propose to the ECB to grant the authorisation. The draft decision shall be notified to the ECB and the applicant for authorisation. In other cases, the national competent authority shall reject the application for authorisation.
>
> 44. The draft decision shall be deemed to be adopted by the ECB unless the ECB objects within a maximum period of ten working days, extendable once for the same period in duly justified cases. The ECB shall object to the draft decision only where the conditions for authorisation set out in relevant Union law are not met. It shall state the reasons for the rejection in writing.
>
> 45. The decision taken in accordance with paragraphs 2 and 3 shall be notified by the national competent authority to the applicant for authorisation.

The ECB is not bound by the NCA's proposal and enjoys a margin of discretion in granting the license.

The scope of the ECB's authorisation is not crystal clear.

While under Article 14(1) SSMR the ECB's authorisation is referred to the taking up of the banking business, Article 78(3) of the Framework Regulation stipulates that

> The decision granting authorisation shall cover the applicant's activities as a credit institution as provided for in the relevant national law, without prejudice to any additional requirements for authorisation under the relevant national law for activities other than the business of taking deposits or other repayable funds from the public and granting credits for its own account.

The author favours a restrictive reading of the ECB's licensing power. In light of recital 28 SSMR, this power should in fact be limited to the traditional banking activity.

The withdrawal of the authorisation is adopted by the ECB (Article 14(5) SSMR):

(i) following consultations with the NCAs;

(ii) on a proposal from the NCAs.

In the latter case, though the ECB shall take full account of the NCA's proposal (see Article 15(4) SSMR), it enjoys again a broad margin of manoeuvre in deciding on the withdrawal. In this case, however, the ECB is subject to a

particularly onerous obligation to state reasons, as it is required to explain why it may have deviated from the proposal.

In case of resolution of a credit institution (see **Chapter VIII.A The SRM: Allocation of tasks and powers between the SRB and the NRAs and organisational issues**), the ECB has to coordinate with the competent resolution authority (Article 14(6) SSMR).

Article 14, paragraphs 5 and 6, SSMR reads as follows:

> 5. Subject to paragraph 6, the ECB may withdraw the authorisation in the cases set out in relevant Union law on its own initiative, following consultations with the national competent authority of the participating Member State where the credit institution is established, or on a proposal from such national competent authority. These consultations shall in particular ensure that before taking decisions regarding withdrawal, the ECB allows sufficient time for the national authorities to decide on the necessary remedial actions, including possible resolution measures, and takes these into account.
> Where the national competent authority which has proposed the authorisation in accordance with paragraph 1 considers that the authorisation must be withdrawn in accordance with the relevant national law, it shall submit a proposal to the ECB to that end. In that case, the ECB shall take a decision on the proposed withdrawal taking full account of the justification for withdrawal put forward by the national competent authority.
>
> 6. As long as national authorities remain competent to resolve credit institutions, in cases where they consider that the withdrawal of the authorisation would prejudice the adequate implementation of or actions necessary for resolution or to maintain financial stability, they shall duly notify their objection to the ECB explaining in detail the prejudice that a withdrawal would cause. In those cases, the ECB shall abstain from proceeding to the withdrawal for a period mutually agreed with the national authorities. The ECB may extend that period if it is of the opinion that sufficient progress has been made. If, however, the ECB determines in a reasoned decision that proper actions necessary to maintain financial stability have not been implemented by the national authorities, the withdrawal of the authorisations shall apply immediately.

No specific provisions apply to the authorisation of credit institutions within the resolution context.

Indeed, according to Article 41(1), first sub-paragraph, BRRD, the requirements for the bridge institution to operate include, among others, the authorisation "in accordance with Directive 2013/36/EU or Directive 2014/65/EU, as applicable" and "the necessary authorisation under the applicable national law

to carry out the activities or services that it acquires by virtue of a transfer made pursuant to Article 63 of this Directive" (lit. e).

Nevertheless, under Article 41(1), second sub-paragraph, BRRD

> Notwithstanding the provisions referred to in points (e) and (f) of the first subparagraph and where necessary to meet the resolution objectives, the bridge institution may be established and authorised without complying with Directive 2013/36/EU or Directive 2014/65/EU for a short period of time at the beginning of its operation. To that end, the resolution authority shall submit a request in that sense to the competent authority. If the competent authority decides to grant such an authorisation, it shall indicate the period for which the bridge institution is waived from complying with the requirements of those Directives.

1.2. Assessment of the acquisition and disposal of qualifying holdings

The ECB is the only competent authority to authorise the acquisition and disposal of qualifying holdings. Nevertheless the NCAs are competent to make a previous assessment (Recital 22, Article 15 SSMR).

Recital 22 reads as follows:

> An assessment of the suitability of any new owner prior to the purchase of a significant stake in a credit institution is an indispensable tool for ensuring the continuous suitability and financial soundness of credit institutions' owners. The ECB as a Union institution is well placed to carry out such an assessment without imposing undue restrictions on the internal market. The ECB should have the task of assessing the acquisition and disposal of significant holdings in credit institutions, except in the context of bank resolution.

Under Article 4(1)(c) read in conjunction with Article 6 SSMR, the ECB is exclusively competent

> to assess notifications of the acquisition and disposal of qualifying holdings in credit institutions, except in the case of a bank resolution, and subject to Article 15

Article 15 reads as follows:

> 1. Without prejudice to the exemptions provided for in point (c) of Article 4(1), any notification of an acquisition of a qualifying holding in a credit institution established in a participating Member State or any related information shall be introduced with the national competent authorities of the Member State where the credit institution

> is established in accordance with the requirements set out in relevant national law based on the acts referred to in the first subparagraph of Article 4(3).
>
> 2. The national competent authority shall assess the proposed acquisition, and shall forward the notification and a proposal for a decision to oppose or not to oppose the acquisition, based on the criteria set out in the acts referred to in the first subparagraph of Article 4(3), to the ECB, at least ten working days before the expiry of the relevant assessment period as defined by relevant Union law, and shall assist the ECB in accordance with Article 6.
>
> 3. The ECB shall decide whether to oppose the acquisition on the basis of the assessment criteria set out in relevant Union law and in accordance with the procedure and within the assessment periods set out therein.

The ECB enjoys a broad margin of discretion in deciding whether or not to oppose the acquisition (for further details see **Chapter IV.B. Case-study: ruling of the ECJ C-219/17 *Fininvest and Berlusconi***).

The scope of the ECB's authorisation should also include a change of ownership as the outcome of a merger or a division, though Article 15 SSMR does not expressly provide for such cases.

The scope of the NCAs assessment is the national law transposing Union law (Article 15 SSMR).

Article 4(1)(c) read in conjunction with recital 22 SSMR expressly excludes from the competences of the ECB the authorisation of new significant shareholders in the context of a bank's resolution.

In this field, the involvement of the NCAs rather than the ECB seems to better suit the achievement of the resolution objectives.

In this vein, with regard to the sale of business tool and the bail-in tool, respectively see Articles 38(8) and 47 (4) BRRD, both pleading for the need to carry out the assessment of the qualifying holders in a timely manner that does not delay the application of the sale of business tool/the application of the bail-in tool or the conversion of capital instruments, and prevent the resolution action from achieving the relevant resolution objectives.

Indeed, it is worth noting that even with regard to the resolution of the significant credit institutions, the implementation of the resolution schemes is a NRAs' responsibility (see **Chapter VIII.A. The SRM: Allocation of tasks and powers between the SRB and the NRAs and organisational issues**). Therefore, one may reasonably assume that the EU legislator pleaded for an easier coordination between the relevant NRA and NCA with a view to ensuring a smooth and timely completion of the resolution proceeding.

2. *The misalignment between the ECB's tasks and the NCAs' powers*

2.1. *The procedures for close co-operation*

Since the ECB may not act directly in relation to credit institutions established in a Member State under close co-operation, it has to ask the relevant NCA to make use of its own supervisory powers under the ECB's instructions.

Under Article 7 SSMR, the ECB's power to instruct the NCAs is consubstantial to the mechanism of close co-operation.

Article 7(1), second subparagraph, last sentence, SSMR stipulates that for the purpose of carrying out its supervisory tasks, "the ECB may address instructions to the national competent authority or to the national designated authority of the participating Member State whose currency is not the euro".

Among the conditions for close co-operation, it is provided that the Member State concerned:

(i) undertakes "to ensure that its national competent authority or national designated authority will abide by any guidelines or requests issued by the ECB" and

(ii) "has adopted relevant national legislation to ensure that its national competent authority will be obliged to adopt any measure in relation to credit institutions requested by the ECB, in accordance with paragraph 4", which provides the ECB with the power to address instructions to the NCAs.

Where the ECB considers that a measure relating to the tasks referred to in Article 4(1) and (2) of the SSMR should be adopted by a NCA of a participating Member State, in close co-operation in relation to a supervised entity or group, it will address to the NCA (see Articles 107 and 108 of the Framework regulation):

(i) in the case of a significant credit institution, a general or specific instruction, request or guideline requiring the issuance of a supervisory decision in relation to that significant supervised entity or group; or

(ii) in the case of a less significant credit institution, a general instruction, request or guideline.

A question arises on how the ECB may exercise under a close cooperation arrangment its specific oversight powers on NCAs supervision of the less significant credit institutions provided for under Article 6(5), (b) and (d), SSMR. A plausible solution would be to turn the exercise of the take-over or the direct investigatory power, respectively, into the power to address specific rather than general instructions to the relevant NCA.

Further provisions are contained in the ECB's Decision of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5).

Though Article 7 SSMR contains no provisions on the ECB's power to regulate the procedural aspects of the close-cooperation, recitals 3 and 4 of the decision underline respectively that:

> (recital 3) It is necessary to specify the procedural aspects relating to (a) requests by Member States whose currency is not the euro (hereinafter 'non-euro area Member States') to enter into a close cooperation, (b) the assessment of these requests by the ECB, and (c) the ECB decision establishing close cooperation with the specific Member State

and that:

> (recital 4) It is necessary to specify the procedural aspects relating to potential suspension and termination of a close cooperation.

Close cooperation in relation to each aspect of the ECB's tasks under the SSM regulation is regulated in details under Articles 109 ff. of the Framework regulation.

2.2. The ECB's power to instruct the NCAs on the use of their national supervisory powers

For the exclusive purpose of carrying out the tasks conferred on the ECB by Articles 4(1), 4(2) and 5(2), Article 9(1) SSMR provides for two different rules.

The first one is contained in subparagraph 2 and vests the ECB with the same powers the NCAs enjoy under relevant Union law, besides the powers entrusted to it by the SSMR.

The second one is contained in subparagraph 3 and gives the ECB the right to require the NCAs, by way of instructions, to make use of powers conferred upon them by national law.

The powers the ECB can benefit from under Article 9 are only those which may be encompassed within the "exclusive purpose of carrying out the tasks conferred on it by Articles 4(1), 4(2) and 5(2)", including the investigatory powers, as clearly emerges from the title of Article 9 ("Supervisory and investigatory powers").

Powers which are not strictly related to the prudential supervision of credit institutions should therefore be considered beyond the scope of Article 9(1) SSMR.

Article 9(1), sub-paragraph 3, SSMR refers exclusively to the powers provided for by pure national law, i.e. by national law not implementing EU directives.

Differently from the close co-operation regime, the ECB's powers to instruct the NCAs on the adoption of a particular supervisory decision under Article 9(1), third subparagraph, SSMR are to be considered an exception to the normal performance of the ECB's tasks, since the ECB is generally vested with both the tasks and the relevant supervisory powers.

Article 9(1), third subparagraph, SSMR stipulates that the ECB may require, by way of instructions, the NCAs to make use of their powers "under and in accordance with the conditions set out in national law".

The ECB and the Commission give an interpretation of Article 9 SSMR which is different from the one illustrated above.

According to the ECB and the Commission's view, the ECB is competent to directly adopt any national powers, only if those powers:

(i) fall within an ECB's task under Articles 4 and 5 SSMR;

(ii) underpin any supervisory functions under the CRDIV/CRR package.

See p. 8 of the Commission's Report on the SSM p. 8, reading as follows:

> Thus, it is highlighted that the ECB's supervisory powers under the SSM Regulation should be construed broadly enough to include powers given to national authorities by national law for carrying out supervisory functions under the CRD and the CRR in relation to credit institutions".

Thinking along these lines, one may go as far as to argue that:

(i) Article 64 of the CRD IV requires that competent authorities shall be given all supervisory powers to intervene in the activity of institutions that are necessary for the exercise of their functions under the CRD IV and the CRR; it follows that all the supervisory powers that the NCAs enjoy in order to perform their supervisory functions are to be considered as encompassed within the domain of EU law and be automatically conferred on the ECB as per Article 9, paragraph 1, sub-paragraph 2, SSMR;

(ii) Article 9, paragraph 1, sub-paragraph 3, SSMR refers to the NCAs' residual powers that go beyond the SSM's tasks; with regard to these powers the ECB may give instructions to the NCAs.

2.3. The ECB's power to require the NCAs to open sanctioning proceedings

With regard to the imposition of pecuniary penalties to SCIs for breaches of national law and the imposition of penalties to members of bodies of SCIs (Article 18(5) SSMR):

(i) the NCAs are exclusively competent;

(ii) the ECB may ask NCAs to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed (Article 18(5) SSMR).

With regard to the imposition of non-pecuniary penalties (Article 18(5) SSMR), a distinction has to be drawn between non-pecuniary penalties and measures. As clarified above (see **Chapter II.A. The distinction among supervisory decisions, administrative measures and administrative sanctions)**, this distinction is relevant for establishing which is the competent authority, whether the ECB or the NCAs.

Paragraph 5 of Article 18 SSMR stipulates that

> in the cases not covered by paragraph 1 of this Article… the ECB may require national competent authorities to open proceedings with a view to taking action in order to ensure that appropriate sanctions are imposed…

Recital 36 SSMR stipulates that

> where the ECB considers it appropriate for the fulfilment of its tasks that a sanction is applied for such breaches [violations of national law transposing directives], it should be able to refer the matter to national authorities for those purposes.

The wording "refer the matter to national authorities" militates in favour of a broader discretion to the NCAs. Within the matter referred to them by the ECB, the NCAs may choose to open any kind of sanctioning procedure.

3. The role of the NCAs in assisting the ECB

3.1. The provision of Article 6(3) SSMR

Under Article 6(3) SSMR,

> were appropriate and without prejudice to the responsibility and accountability of the ECB for the tasks conferred on it by this Regulation, national competent authorities shall be responsible for assisting the ECB, under the conditions set out in the framework mentioned in paragraph 7 of this Article, with the preparation and implementation of any acts relating to the tasks referred to in Article 4 related to all credit institutions, including assistance in verification activities. They shall follow the instructions given by the ECB when performing the tasks mentioned in Article 4.

Article 6(3) should not be read by itself but in conjunction with Article 6(4) SSMR. This means that ECB's powers of instruction under Article 6(3) SSMR only relate to the significant credit institutions.

Here the NCAs enjoy no margin of discretion since both the tasks and the powers fall under the remit of the ECB. The NCAs are responsible for assisting the ECB and they have to follow its instructions in full.

3.2. The involvement of the NCAs in the day-to-day verifications of credit institutions

Under recital 28 SSMR the carrying out of "day-to-day verifications of credit institutions" is solely a task for the NCAs, not for the ECB.

This notwithstanding, under Part II, Title 1, of the Framework Regulation, the day-to-day verification of significant credit institutions is carried out through Joint Supervisory Teams (hereinafter JSTs) established by the ECB.

This is clearly laid down in Article 3 of the Framework Regulation, in light of which JSTs are operational units within which the NCAs assist the ECB's staff in the supervision of significant supervised entities.

Article 3 of the Framework regulation reads as follows:

> 1. A joint supervisory team shall be established for the supervision of each significant supervised entity or significant supervised group in participating Member States. Each joint supervisory team shall be composed of staff members from the ECB and from the NCAs appointed in accordance with Article 4 and working under the coordination of a designated ECB staff member (hereinafter the 'JST coordinator') and one or more NCA sub-coordinators, as further laid down in Article 6.
>
> 2. Without prejudice to other provisions of this Regulation, the tasks of a joint supervisory team shall include, but are not limited to, the following:
>
> (a) performing the supervisory review and evaluation process (SREP) referred to in Article 97 of Directive 2013/36/EU for the significant supervised entity or significant supervised group that it supervises;
>
> (b) taking into account the SREP, participating in the preparation of a supervisory examination programme to be proposed to the Supervisory Board, including an on-site inspection plan, as laid down in Article 99 of Directive 2013/36/EC, for such a significant supervised entity or significant supervised group;
>
> (c) implementing the supervisory examination programme approved by the ECB and any ECB supervisory decisions with respect to the significant supervised entity or significant supervised group that it supervises;

(d) ensuring coordination with the on-site inspection team referred to in Part XI as regards the implementation of the on-site inspection plan;

(e) liaising with NCAs where relevant.

Instead of establishing a coordination between the ECB and the NCAs, with the ECB having the power to give instructions to the latter, the Framework regulation has provided for a different organisational arrangement where the NCAs' staff is coordinated directly by the ECB within the JSTs.

The NCAs only maintain the power to submit draft decisions prepared on their own initiative to the ECB for its consideration through the relevant JST (Article 91(2) SSM Framework Regulation).

In light of the above, the JSTs' national members act on behalf of the ECB rather than of the NCAs and their activity appears to be an extension of an ECB's task rather than of an NCA's task.

Each JST will be composed of staff from both the ECB and the NCAs, and will be coordinated by an ECB's staff member (the 'JST coordinator').

The JST coordinator ensures the coordination of the work within the joint supervisory team. For this purpose, JST members must follow the JST coordinator's instructions as regards their tasks in the JST.

Each NCA that appoints more than one staff member to the JST shall designate one of them as sub-coordinator (hereinafter an 'NCA sub-coordinator'). The ECB may require the NCAs to modify the appointments they have made, if appropriate for the purpose of the composition of a JST.

The NCA sub-coordinators assist the JST coordinator in the organisation and coordination of the tasks of the joint supervisory team, in particular as regards the staff members that were appointed by the same NCA.

The NCA sub-coordinators may give instructions to the members of the joint supervisory team appointed by the same NCA, but these instructions cannot conflict with the instructions given by the JST coordinator.

As provided for in the SSM's Supervisory Manual,[1] the JSTs of significant credit institutions operating in more than one participating MSs are expected to establish a core JST, chaired by the JST's coordinator and composed of sub-coordinators of all the relavant NCAs.

The core JST is responsible, inter alia, for organising the allocation of tasks among the JST members. It is practice that diverging views among the NCAs or between the NCAs and the JST coordinator are resolved within the JST or the core JST.

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[1] See the abstract of March 2018 available in the ECB's web-site.

Should they not be resolved at that level, one may argue that they may be addressed through bilateral contact between the ECB and the NCAs's senior management and/or, as the case may be, escalated to the supervisory Board for decision.

Indeed, such an involvement of the NCAs' senior management in solving conflicts among JST's members would be in line with the NCAs' role in the day-to-day supervision of credit institutions as well as with their responsibilities within the so-called common procedures (see §§ 1 and 3.2. above).

3.3. The co-operation in general investigations

The ECB is also vested with the power to appoint on-site inspection teams (OSITs) "to conduct all necessary on-site inspections on the premises of a legal person as referred to in Article 10(1) SSM Regulation" (see Articles 143 to 146 Framework Regulation).

The head of the on-site inspection team is appointed by the ECB, but, differently from what is provided for as regards the JSTs, he may be either an ECB or an NCA staff member.

Those carrying out on-site inspections have to follow the instructions of the head of the on-site inspection team.

As already mentioned in Chapter I.A, § 3.2.6, under Article 11(2) SSMR when a person obstructs the conduct of an ECB's investigation, the NCA of the participating Member State where the relevant premises are located shall afford, in compliance with national law, the necessary assistance including facilitating the access by the ECB to the business premises of the legal person subject to the ECB's investigating powers.

Under Article 12 SSMR, where the officials and other accompanying persons authorised or appointed by the ECB find that a person opposes an ECB inspection, the NCA concerned shall afford them the necessary assistance in accordance with national law.

This assistance shall include the sealing of any business premises and books or records. Where that power is not available to the national competent authority concerned, the NCA shall use its powers to request the necessary assistance of other national authorities.

4. An overview of the SSM composite procedures

Most of the cases above-mentioned are composite procedure, i.e. administrative procedures where an EU authority (the ECB) and the authorities of a Member State (the relevant NCAs) have distinct functions which are inter-dependent.

How the distribution of proposal and decision-making powers is reflected in the procedural guarantees and the identification of the judge who has jurisdiction, whether national or European, will be examined in the **Chapters VI.A. The safeguards applicable to the ECB supervisory and sanctioning procedures** and **X.A. The administrative and judicial review of the decisions taken within the SSM and the SRM** respectively.

Below is a table of composite procedures in the SSM

SSM Composite Procedures*				
NCA's INFORMATION to the ECB**	**NCA's REQUEST**	**NCA's PROPOSAL**	**ECB's CONSULTATION of NCAs**	**ECB's DECISION**
Art. 11(1) FR *Right of establishment within the SSM*				Art. 11(3) FR
Art. 12 (1) FR *Freedom to provide services within the SSM*				
Art. 17(1) FR *Right of establishment and freedom to provide services in non-participating MS*				Art. 17(1) FR
			Art. 39 (6) FR *Classification as significant*	Art. 39 FR
Art. 43 (4) and (5) FR *Review of the status*				Art. 43 (3) FR
	Art. 43 (5) FR *Review of the status*			Art. 43 (3) FR
			Art. 52 (3) FR *Determining significance – specific/exceptional circumstances*	Art. 52 (3) FR
Art. 58 (1) FR *Determining significance – importance for the economy*				Art. 58 (2) FR
	Art. 6 (5) (b) SSMR *Direct supervision of the ECB* Art. 68 FR			Art. 6 (5) (b) SSMR Art. 68 FR

			Art. 6 (5) (b) SSMR *Direct supervision of the ECB* Art. 69 FR	Art. 6 (5) (b) SSMR Art. 69 FR
		Art. 14 (2) SSMR *Authorisation* Art. 76 FR		Art. 14 (3) SSMR Art. 78 FR
Art. 79 FR *Lapsing of the authorisation*				Art. 79 FR
		Art. 14 (5) SSMR *Withdrawal of the authorisation* Art. 80 FR		Art. 14 (5) SSMR Art. 83 FR
			Art. 14 (5) SSMR Art. 82 FR	Art. 14 (5) SSMR Art. 83 FR
		Art. 15 (2) SSMR *Acquisition of qualifying holdings* Art. 86 FR		Art. 15 (3) SSMR Art. 87 FR
		Artt. 6 (3) – 6 (7) (b) SSMR, *Supervision of SIs**** 90 – 91 FR		*Any* SSMR *provision*

* *The JSTs' proposals of supervisory decisions and their escalation to the SB are not encompassed within the composite procedures in the assumption that the JSTs are to be considered as ECB bodies. The JST liaising with the NCAs under Article 3 (2) (e) FR would not be an exception as it should be deemed as referred to the NCAs' administrative structures and not to their decision-making bodies. This assumption seems to be confirmed by the fact that the FR contains a different and specific provision (Article 91 (2) FR) that entitles the NCAs to submit to the ECB draft supervisory decision through the JST.*

** *Encompassing these procedures within the composite procedures depends on the qualification of the NCAs communication to the ECB as a mere information or rather (see Artt. 43 (4) (5) and 58 (1) FR) as an assessment.*

*** *The ECB has tentatively implemented a process to task the NCAs with procedures for the assessment of compliance with certain fit and proper requirements, while the final decision is taken by the ECB (the 'alternative' F&P process). Under this alternative process, the NCAs would be responsible precisely for the preparation of ECB's draft decisions on fit and proper that would be finally adopted by the ECB's heads of units.*

ECB's REQUEST	ECB's INSTRUCTION	NCA's DECISION
	Art. 6 (3) SSMR *Cooperation within SSM*	Art. 6 (3) SSMR
	Art. 7 (4) SSMR *Close cooperation non-euro MS* Art. 108 FR	*National Law*
	Art. 9 (1) SSMR *Supervisory and investigatory powers* Art. 90 FR	*National Law*
Art. 18 (5) SSMR *Administrative penalties* Art. 134 FR		*National Law*

NCA's INFORMATION to the ECB	NCA's REQUEST	ECB's REQUEST	NCA's DRAFT DECISION	ECB's VIEW	NCA's DECISION
Art. 6 (7) (c) SSMR *ECB's involvement in the NCAs supervisory procedures concerning HPLSIs* Art. 97 (1) FR		Art. 6 (7) (c) SSMR Art. 97 (5) FR	Art. 6 (7) (c) SSMR Art. 98 (1) FR	Art. 6 (7) (c) SSMR Art. 98 (4) FR	*Any national/ CRR rules*
	Art. 134 (2) FR *Cooperation in the field of administrative penalties*	Art. 134 (2) FR			*Any national/ CRR rules*

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EU Legal references: Recitals 22 and Article 64 CRD IV; Articles 38(8), 41(1), first sub-paragraph, and 47(4) BRRD; Articles 4, 6, 7, 9(1), 14, 15 and 18(5) SSMR; Articles 3 to 6, Article 78(3), 91(2), 106 to 118, 143 to 146 Framework Regulation; ECB's Decision of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5).

Other official documents: SSM Supervisory Manual European banking supervision: functioning of the SSM and supervisory approach, March 2018; Report from the

Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013, Brussels, 11.10.2017 COM(2017) 591 final.

CJEU's case law: see the judgments reported under **Chapter IV.B**. **Case-study: Ruling of the ECJ C-219/17 *Fininvest and Berlusconi*.**

Literature: D'Ambrosio R., Meccanismo di Vigilanza Unico, in *Enciclopedia del Diritto, Annali IX,* 2016, p. 589 *et seq*, pp. 600 to 602; D'Ambrosio, R. The ECB and NCAs liability within the SSM, in *Quaderni di ricerca giuridica della Consulenza legale della Banca d'Italia*, No 78, Rome, January 2015, pp. 86 to 88 and 92 to 97.; D'Ambrosio, R. Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings, in *Quaderni di ricerca giuridica della Consulenza Legale della Banca d'Italia*, No 74, Rome, December 2013, pp. 59 to 61; Posada Rodríguez, M., Los denominados procedimientos comunes en el marco del Mecanismo Unico de Supervisión, in *Cuestiones controvertidas de la regulación bancaria*, edited by José Carlos González Vázquez, J.C. and Colino Mediavilla, J.L., Madrid, 2018, pp. 91 ff..

Chapter IV.B

Case-study: Ruling of the ECJ C-219/17 *Fininvest and Berlusconi*

Guido Crapanzano

Summary: *1. Facts of the case – 2. The Consiglio di Stato's request for preliminary ruling and the divergent views offered to the ECJ – 3. The Opinion of the Advocate General – 4. The ECJ's ruling – 5. Further Fininvest and Berlusconi's judicial initiatives*

1. *Facts of the case*

Since the 1990s, Mr Silvio Berlusconi had been holding, through Fininvest, approximately 30% of the share capital of Mediolanum s.p.a., an Italian mixed financial holding company that controlled, amongst others, Banca Mediolanum s.p.a., an Italian credit institution.

In 2014 the Italian government passed the legislative decree 4 March 2014 No. 53, which transposed the first Financial Conglomerates Directive (FICOD1)[1] into the Italian law and extended some rules of financial supervision to mixed financial holding companies. In particular, mixed financial holding companies were required to enroll in a special register, qualified as supervised entities and were subject – amongst other things – to fitness and propriety assessment of their qualified shareholders, according to the same rules applicable to banks and other financial sector entities.[2]-[3]

Taking into account Mr Berlusconi's 2013 final criminal conviction for tax fraud, in October 2014 the Banca d'Italia together with the Istituto per la Vigilanza sulle Assicurazioni (IVASS) – the Italian insurance supervisor – determined that he did not fulfil the reputation requirement imposed by the national law and that, accordingly: (i) Fininvest's holding in Mediolanum that exceeded the 9.999…%[4] had to be divested; and (ii) the voting rights attached to those shares were suspended.

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1 Directive 2011/89/EU of the European Parliament and of the Council of 16 November 2011 amending Directives 98/78/EC, 2002/87/EC, 2006/48/EC and 2009/138/EC as regards the supplementary supervision of financial entities in a financial conglomerate (OJ L 326, 8.12.2011, p. 113).

2 Namely, the rules introduced by legislative decree 27 January 2010 No. 21, implementing Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector (OJ L 247, 21.9.2007, p. 1). The relevant European law applicable to banks has been then recast into Article 22 et seq. of the 'CRD IV', that is 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 L 176, 27.6.2013, p. 338).
In summary, according to EU law Member States are required to ask anyone intending to acquire a qualifying holding in a financial institution to apply for the authorisation of the competent authority. In this regard, qualifying holdings are those (*i*) equal to or exceeding 10% of either the share capital or voting rights of a financial institution; or (*ii*) conferring significant influence over the financial institution. The authorisation is granted if the competent authority is content with the suitability of the proposed acquirer, according to the following criteria: (*a*) the reputation of the proposed acquirer; (*b*) the reputation, knowledge, skills and experience of any member of the management body and any member of senior management who will direct the business of the financial institution; (*c*) the financial soundness of the proposed acquirer; (*d*) whether the financial institution will be able to comply and continue to comply with the prudential requirements; (*e*) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing is being or has been committed or attempted.

3 According to Article 21a of CRD, as introduced by Directive (EU) 2019/878 of 20 May 2019, financial holding companies and mixed financial holding companies are required to be authorised, and fitness and propriety of their shareholders be assessed, by a competent authority. See also Chapter I, para. 3.1.1.

4 Namely, one share less than the threshold of the qualifying holdings.

Mr Berlusconi and Fininvest challenged this decision before the Italian administrative courts.

On 5 June 2015 – a few months after the ECB started exercising the supervisory powers provided by the SSM Regulation and Banca Mediolanum had been qualified as a less significant institution – the Administrative Court of First Instance (hereinafter TAR Lazio) dismissed the challenge and upheld the decision of the Italian competent authorities.[5] Fininvest and Mr Berlusconi appealed before the Italian Supreme Administrative Court (hereinafter Consiglio di Stato).

In the meantime, the Mediolanum Group planned the reverse merger of Mediolanum s.p.a. into Banca Mediolanum and, on 25 May 2015, the boards of directors of both companies approved the reorganisation and applied for the permit of the competent authorities. The merger was authorised by the Banca d'Italia in July 2015 pursuant to Article 57 of the Italian Consolidated Law on Banking (legislative decree 1 September 1993 No. 385) and took effect on 30 December 2015.

Taking into account the decision of the authorities adopted on 7 October 2014, confirmed by the TAR Lazio, the merger was authorised on condition that Fininvest divested the shares of Banca Mediolanum that it would acquire, as a result of the merger, in exchange for Mediolanum S.p.A.'s shares.

On 3 March 2016 the Consiglio di Stato upheld the appeal submitted by Fininvest and Berlusconi and annulled the decision of the authorities.[6]

The judgment was based on the application of Article 2 of Ministerial Decree No. 144/98 on the integrity requirements of qualified shareholders of credit institutions, as deemed applicable to mixed financial holding companies according to legislative decree 53/2014. Article 2 stipulates that the absence of an integrity requirement is irrelevant when it predates the entry into force of the rule introducing such a requirement and the legislation previously in force did not ask for any such a requirement to be met.

The ruling also decided that the annulment of the decision of the Banca d'Italia and IVASS would not affect the reverse merger of Mediolanum s.p.a. into Banca Mediolanum. Therefore, as a combined result of the court's ruling and the merger, Fininvest had been holding, without being granted any authorisation, a direct qualified stake of around 30% in a credit institution and was empowered to exercise direct shareholders' rights.

After the ruling, the Banca d'Italia and the ECB decided that a new qualifying holding assessment had to be performed.

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5 Tar Lazio – Roma, III Chamber, 5 June 2015 No. 7966.

6 Consiglio di Stato, VI Chamber, 3 March 2016 No. 882.

As no application was submitted by Fininvest, despite the request of the authorities, the assessment was commenced by the Banca d'Italia on its own initiative (*ex officio*).

The Banca d'Italia submitted its proposal pursuant to Article 15 SSM Regulation to the ECB in September 2016.

After Fininvest and Mr Berlusconi were granted right to be heard, in October 2016 the ECB adopted its final decision opposing the acquisition by Mr Berlusconi and Fininvest of a qualifying holding in Banca Mediolanum, on the ground that the acquirers did not meet the reputational requirement imposed by the applicable law.

Mr Berlusconi and Fininvest's reaction to the qualifying holding procedure and its final decision were manifold.

On the EU level, they lodged with the General Court of the European Union an action for annulment of the ECB's final decision (Fininvest and Berlusconi v ECB, in case T-913/16).

On the national level, they brought several proceedings before the national administrative courts applying for the annulment/declaration of nullity of the Banca d'Italia's acts preparatory to the ECB's decision. In particular, before the national courts Fininvest and Mr Berlusconi pleaded (amongst other things): (*i*) the violation of due process and the unconstitutionality of the national law transposing the EU provisions on qualifying holdings (see TAR Lazio, Fininvest v Banca d'Italia and others, in case No 11741/2016; TAR Lazio, Berlusconi v Banca d'Italia and others, in case No. 12779/2016); (*ii*) the violation of the final ruling (*res judicata*) of the Consiglio di Stato No. 882/2016, which had annulled the previous decision of the Banca d'Italia and IVASS disqualifying Fininvest and Berlusconi as shareholders of the mixed financial holding company Mediolanum s.p.a. (see Consiglio di Stato, Fininvest v Banca d'Italia and Berlusconi v Banca d'Italia, joint cases Nos 8163/2016 and 8711/2016).

The defendant pleaded the lack of jurisdiction of the national court, as, in its opinion, the preparatory acts made in the context of the qualifying holdings procedure under Article 15 SSMR had to be challenged only in conjunction with the ECB's final decision, before the European courts.

2. *The Consiglio di Stato's request for preliminary ruling and the divergent views offered to the ECJ*

This resulted in the Consiglio di Stato asking for the preliminary ruling of the ECJ.

The Consiglio di Stato referred two questions (see Consiglio di Stato, order 14 April 2017 No 1805, in joint cases Nos 8163/2016 and 8711/2016):

(i) whether Article 263 TFEU must be interpreted as precluding national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by the NCAs in the qualifying holding procedure provided for by Articles 22 and 23 of the CRD IV and Articles 4(1)(c) and 15 of the SSM Regulation;

(ii) whether the answer to the first question is different where a specific action for a declaration of invalidity, on the ground of the alleged violation of the finality of *res judicata* of a previous national judicial decision, is brought before the national court.

Two different theories – based on two different set of precedents – have been offered to the ECJ (Great Chamber) to solve the case.

Fininvest and Berlusconi referred to the ruling *Oleificio Borelli* (C-97/91) to argue that the preparatory acts of the NCA can be challenged autonomously before the national courts, as the latter have jurisdiction on all acts of national authorities being part of a decision-making process of the European Union, when those acts are a necessary stage of the procedure in which the EU institutions have limited or no discretion, so that the national act is *de facto* binding on the EU institution.

In *Borelli,* the Court of Justice concluded that it had no jurisdiction to rule on the legality of an act adopted by a national authority (in particular, a binding opinion on the possibility to grant an economic contribution), even where that measure formed part of an EU decision-making procedure.

To ensure that there were no gaps in judicial review in such cases, the Court of Justice held that it is for the national courts, where appropriate after referring a preliminary ruling to the ECJ, to rule on the legality of the acts adopted by national authorities, when the latter are able to adversely affect third parties because they have predetermined the final decision eventually adopted, though with no residual discretion, by the EU institutions.

The Borelli principle received many applications over the years: *e.g.* ECJ 17 September 2014 (C-562/12 *Liivimaa Lihaveis*); ECJ 6 December 2001 (C-269/99 *Carl Kühne*).

The Banca d'Italia (with the supporting intervention of the ECB, the Commission and the Spanish Kingdom) referred to the ruling *Sweden vs Commission* (C-64/05) to argue that, where the final decision-making power is conferred by the EU law upon the European Institutions, which exercise it without being bound by the preparatory acts of the national authorities, those preparatory acts can be challenged only in conjunction with the final decision before the European Court, as they are all part of a unitary decision-making process.

In *Sweden vs Commission* the Court held that when the final decision-making power is conferred on EU institutions and national authorities are involved, with no bindig power, in the preliminary or preparatory stages, responsibility for

taking the decision lies entirely with the EU institution and, therefore, such a decision is necessarily subject to the judicial review of the General Court and the Court of Justice.

In this case, the EU Courts can examine, in order to ensure effective judicial protection of the persons concerned, any illegality of the preparatory acts of the national authorities that may affect the validity of that final decision.

The Sweden principle also stems from many precedents of the EU Courts: e.g. ECJ 17 October 1995 (C-478/93 *Netherlands* v *Commission*); ECJ 21 March 2000 (C-6/99 *Greenpeace France).*

3. The Opinion of the Advocate General

In the opinion of the Advocate General (§§ 88 and 90) delivered on 27 June 2018 in the case *Fininvest and Berlusconi* (C-219/17):

> 88. … the SSM Regulation has created 'a truly integrated supervisory mechanism', in which the key processes are, in general terms, identical for all credit institutions, whether 'significant' or 'less significant', and involve both the ECB and the NCAs.
>
> 90. … the ECB exercises its competence to review acquisitions of and increases in qualifying holdings in the terms laid down in Article 15 of the SSM Regulation, supplemented by Articles 85 to 87 of the SSM Framework Regulation. In the procedure to be followed for these purposes, the ECB is the decision-making authority and the NCAs are responsible for the preparatory work for the decisions.

Therefore (§§ 95, 97 and 105):

> 95. … ECB has total power to assess the matters of fact and law when it comes to take its final decision. The proposal submitted to it by the NCA is one more element in that assessment, but not necessarily the only one. There is nothing to prevent the ECB from performing its own independent investigation and research activities and arriving at a different conclusion from that proposed by the NCA, which is not binding on it.
>
> 97. … the ECB may decide to amend its final decision and to depart from a proposal by an NCA that it previously adopted, following the intervention of the Administrative Board of Review.
>
> 105. In the procedure for authorising qualifying holdings, sole power to take the final decision is concentrated in the ECB, as it is in most composite administrative procedures within the banking union. Symmetrically, sole jurisdiction to conduct a judicial review of the exercise of that concentrated power must lie with the General Court and the Court of Justice.

> When one argues that the General Court and the Court of Justice have exclusive jurisdiction to carry out a judicial review of the measures adopted in these procedures, and that the national courts have no such jurisdiction, the fact that the national courts may be called on to make a ruling through the giudizio di ottemperanza or any other procedural mechanism of their domestic law is irrelevant.

4. *The ECJ's ruling*

In line with the opinion of the Advocate General, the ECJ upheld the arguments of the defendant (see ECJ 19 December 2018, C-219/17, *Fininvest and Berlusconi*).

According to the Court (§ 45),

> 45. … an act of a national authority that is part of a decision-making process of the European Union does not fall within the exclusive jurisdiction of the EU Courts where it is apparent from the division of powers in the field in question between the national authorities and the EU institutions that the act adopted by the national authority is a necessary stage of a procedure for adopting an EU act in which the EU institutions have only a limited or no discretion, so that the national act is binding on the EU institution.

This is not the case for the qualifying holdings assessment pursuant to Article 4(1)(c) and 15 SSM Regulation.

The Court ruled that Article 263 TFEU precludes national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by the NCAs in the procedure provided for by Articles 22 and 23 of the CRD IV, Articles 4(1)(c) and 15 of the SSM Regulation and Articles 85 to 87 of the SSM Framework Regulation, as the acts adopted by national authorities have no binding effects and do not produce legal consequences on the applicant. According to the ECJ, this is made especially clear by Article 87 of the SSM Framework Regulation, which stipulates that «The ECB shall decide whether or not to oppose the acquisition on the basis of its assessment of the proposed acquisition and the NCA's draft decision.» Therefore, the proposal of the NCA is only an element of the assessment of the ECB, which remains free to diverge from the opinion of the national authority.

The ECJ deemed necessary to ensure a single judicial review of acts adopted by EU institutions capable of producing unitary legal effects.

If national courts were to be allowed to review the NCA's proposal in this type of procedures, the risk of divergent judicial assessments would not be ruled out and, therefore, the EU courts' exclusive jurisdiction to rule on the legality of the related final decisions could be compromised.

See §§ 48 and 50:

> 48. Where the EU legislature opts for an administrative procedure under which the national authorities adopt acts that are preparatory to a final decision of an EU institution which produces legal effects and is capable of adversely affecting a person, it seeks to establish between the EU institution and the national authorities a specific cooperation mechanism which is based on the exclusive decision-making power of the EU institution.
>
> 50. If national remedies against preparatory acts or proposals of Member State authorities in this type of procedure were to exist alongside the action provided for in Article 263 TFEU against the decision of the EU institution bringing the administrative procedure established by the EU legislature to an end, the risk of divergent assessments in one and the same procedure would not be ruled out and, therefore, the Court's exclusive jurisdiction to rule on the legality of that final decision could be compromised.

Consequently, the ECJ held that the European courts alone have jurisdiction to determine, as an incidental matter, whether the legality of the European Institution's decision is affected by any defects of the preparatory acts adopted by the national authorities.

Making reference to the previous *Lucchini* case (C-119/05), the ECJ deemed, in this respect, immaterial that a specific action for nullity on the ground of the alleged disregard of the *res judicata* has been brought before a national court (§§ 57 and 58).

> 57. … the EU Courts alone have jurisdiction to determine, as an incidental matter, whether the legality of the ECB's decision of 25 October 2016 is affected by any defects rendering unlawful the acts preparatory to that decision that were adopted by the Bank of Italy. That jurisdiction excludes any jurisdiction of national courts in respect of those acts, and it is irrelevant in that regard that an action such as the azione di ottemperanza has been brought before a national court.
>
> 58. … the ECB's exclusive competence to decide whether or not to approve the acquisition of a qualifying holding in a credit institution, and the corresponding exclusive jurisdiction of the EU Courts to review the validity of such a decision and, as an incidental matter, to determine whether the preparatory national acts are vitiated by defects such as to affect the validity of the ECB's decision, preclude a national court from being able to hear an action contesting the compliance of such an act with a national provision relating to the principle of res judicata (see, by analogy, judgment of 18 July 2007, Lucchini, C-119/05).

Therefore, the final decision of the ECJ on the preliminary ruling was as follows:

> Article 263 TFEU must be interpreted as precluding national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by competent national authorities in the procedure provided for in Articles 22 and 23 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, in Articles 4(1)(c) and 15 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 and in Articles 85 to 87 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation).
>
> It is immaterial in that regard that a specific action for a declaration of invalidity on the ground of alleged disregard of the force of res judicata attaching to a national judicial decision has been brought before a national court.

5. *Further Fininvest and Berlusconi's judicial initiatives*

After the publication of the ruling of the ECJ, Fininvest and Berlusconi filed a request for hearing before the Italian Consiglio di Stato, asking for a further preliminary reference to the Italian Constitutional Court. According to the applicants, the ruling of the ECJ, resulting in the lost of jurisdiction of the national courts, especialy with regard to the alleged violation of the *res judicata*, would breach fundamental constitutional principles that serve as counter-limits to the supremacy of EU law. In particular, they pleaded the violation of the right to a due process, as the special action for nullity (*giudizio di ottemperanza*) based on a violation of *res judicata* is constitutionally required to give effectiveness to the rulings of the courts, and regulates the mutual limits of the Judiciary and Executive powers.

The final decision of the Consiglio di Stato (3 May 2019 No. 2890) set aside the joint cases brought by Fininvest and Mr Berlusconi on the basis of the lack of jurisdiction of the national courts, without referring any additional preliminary issues to the Italian Constitutional Court. According to the Consiglio di Stato,

> 6.2.1. […] when it is pleaded, as in the case at hand, the violation of a contitutional counterlimit related to fundamental rights recognised

> also at the European level (namely, by Articles 19 TEU and 14 of the Charter of Fundamental Rights […]), the counterlimits doctrine seems applicable only and as long as the European safeguards are weaker – because less tight or deep – than those given by the national constitutional law.
>
> In the opinion of the Court, given that the decision of the ECJ is not limiting or restraining the essential core of the right to a judicial review, but is rather aimed at reinforcing its standard of effectiveness, the constitutional issue about the pleaded violation of the counterlimits […] is to be rejected.
>
> 6.2.4. Nor the applicants complained about possible specific lacks of safeguards in the procedure governing the actions of annulment before the Union Judge, which on the contrary is inspired to standard of judicial review that does not appear to be evidently and generally weaker than those of the national law, so that the essential and undeniable core of the constitutional right to an effective judicial review cannot be deemed violated.

Before the TAR Lazio, Fininvest and Berlusconi complained about additional breaches of fundamental constitutional principles that serve as counter-limits to the supremacy of EU law. In particular, they reported the violation of the jurisdiction of the Italian Constitutional Court, as the exclusive competence of the ECB to apply the Italian law on qualifying holdings of credit institutions (as provided for by Articles 4(3) and 15 of the SSM Regulation), jointly with the exclusive jurisdiction of the European Courts on all acts of the qualifying holdings procedure, would make it impossible for the national Constitutional Court to assess the compliance of the Italian law on qualifying holdings with the Constitution, on the assumption that the European courts cannot ask for a preliminary ruling of national constitutional courts.

In its judgments of 24 September 2019 Nos 11264 and 12276 the TAR Lazio held that the question was irrelevant to the case at hand, given that the ECB is expected to apply the Italian law on qualifying holdings only to the extent that it is consistent with the EU law and that, consequently, no problem of counter-limits arise due to the principle of primacy of the EU law.

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EU legal references: Articles 22 and 23 of the CRD IV; Articles 4(1)(c) and 15 of the SSMR; Articles 85 to 87 of the SSM Framework Regulation.

National legal references: Articles 19 to 25 of the Italian Consolidated Law on Banking; Ministerial Decree No. 144/98 on the integrity requirements of qualified shareholders of credit institutions; Articles 112 to 115 of the Italian legislative decree 2 July 2010 No. 104 (Code of Administrative Procedure).

ECJ case law: Besides the ECJ of 19 December 2018, C-219/17, *Fininvest and Berlusconi,*

ECLI:EU:C:2018:1023, and the Opinion of the Advocate general, ECLI:EU:C:2018:502, see, among others: ECJ, 17 September 2014, C-562/12, *Liivimaa Lihaveis*, ECLI:EU:C:2014:2229; ECJ, 18 December 2007, C-64/05, P *Sweden* v *Commission*, ECLI:EU:C:2007:802; ECJ, 18 July 2007, C-119/05, *Lucchini*, ECLI:EU:C:2007:434; ECJ, 6 December 2001, C-269/99, *Carl Kühne*, ECLI:EU:C:2001:659; ECJ, 21 March 2000, C-6/99, *Greenpeace France,* ECLI:EU:C:2000:148*;* ECJ, 17 October 1995, C-478/93, *Netherlands* v *Commission*, ECLI:EU:C:1995:324; ECJ 3 December 1992, C-97/91, *Oleificio Borelli*, ECLI:EU:C:1992:491.

National case law: See Tar Lazio – Roma, III Chamber, 5 June 2015 No. 7966; Consiglio di Stato, VI Chamber, 3 March 2016 No. 882; Consiglio di Stato, VI Chamber, order 14 April 2017 No. 1805; Consiglio di Stato, VI Chamber, 3 May 2019 No. 2890.

Literature: Annunziata, F., Fostering Centralization of EU Banking Supervision through Case-law: The European Court of Justice and the Role of the European Central Bank, in *Bocconi Legal Stud. Research Pap. Ser*., April 2019, 13 ff.; Chiti, M.P., The European Banking Union in the Case Law of the Court of Justice of the European Union, in *The Palgrave Handbook of European Banking Union Law* edited by Chiti, M.P. and Santoro, V., Palgrave-Macmillan, 2019, 122 ff.; ID., *I procedimenti amministrativi composti e l'effettività della tutela giurisdizionale. La pronuncia Berlusconi e Fininvest della Corte di Giustizia*, in *Giorn. dir. amm.,* 2019, 187 ff.; Dermine, P. and Eliantonio, M., Case Note: CJEU (Grand Chamber), Judgment of 19 December 2018, C-219/17, Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS), in *Review of European Administrative Law* (REALaw), 2019; Mancini, E., The judicial review of acts issued by NCAs within the context of the 'common procedures' established under the SSM - the Fininvest case law, in *The role of the CJEU in shaping the Banking Union: notes on Tercas (T-98/16) and Fininvest (C-219/17), Quad. ric. giur. della Banca d'Italia*, n. 85, Rome, 2019, 93 ff.; Santorio, V., La partecipazione qualificata nelle banche. Profili di competenza autorizzativa e di conseguente competenza giurisdizionale, in *Banca, borsa, titoli di credito*, 2019, 393 ff..

Chapter IV.C

The allocation of powers within the ECB and the delegation framework

Raffaele D'Ambrosio

Summary: *1. The ECB's remedy to the (unintended) increase of its supervisory powers: delegation to the ECB's internal divisions – 2. Alternative istituional arrangments – 2.1. Delegations by the Supervisory Board and the Governing Council of the powers they respectively enjoy under the SSMR – 2.2. The NCAs' responsibility for assisting the ECB in the performance of its supervisory tasks*

1. *The ECB's remedy to the (unintended) increase of its supervisory powers: delegation to the ECB's internal divisions*

As demonstrated in the Chapters above, the allocation of supervisory tasks and powers within the SSM is not always crystal clear and may lead to an unnecessary increase in the workload of the ECB's decision-making bodies, particularly in the domain of what are referred to as national powers under Article 9 SSMR.

In turn, burdening the Supervisory Board with an increasing amount of trivial supervisory decisions, which would be better taken at national level, runs the risk of frustrating the smooth functioning of the ECB and the SSM itself.

In order to reduce the operational burden deriving from the undue increase of the ECB's supervisory powers, the ECB Governing Council came out with a set of general decisions aimed at delegating minor non-discretionary decisions to the ECB's staff assigned to the supervisory units, designated by the Executive Board.

The legal framework for delegation consists of:

(i) an umbrella decision on the general framework for delegating decision-making in relation to the ECB's supervisory powers;

(ii) a set of decisions on the delegation of specific supervisory powers; and

(iii) and a set of decisions on the designation of ECB units charged with the adoption of delegated acts.

The umbrella decision[1] is grounded on the case-law of the CJEU referred to in the preamble,[2] whereby the CJEU establishes that a procedure for delegation may be necessary, taking into account the considerable number of decisions that an institution may be required to adopt in order to perform its duties. The Court fundamentally based this assessment on the need to ensure that the decision-making body is able to function, which corresponds to a principle inherent in all institutional systems.

According to the ECB's umbrella decision:

(i) the Governing Council, through a delegation decision in accordance with the procedure under Article 26(7) SSMR, may delegate decision-making powers to the heads of the ECB's work units;

(ii) the delegation decision shall set out in detail the scope of the matter to be delegated and the conditions on the basis of which powers may be exercised;

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[1] See ECB decision (EU) 2017/933 of 16 November 2016 on a general framework for delegating decision-making powers for legal instruments related to supervisory tasks (ECB/2016/40).

[2] See, inter alia, Case 5/85 *AKZO Chemie* v *Commission* [1986] ECR 2585, §§ 35 to 37, and Case C-301/02 P, Carmine Salvatore Tralli v European Central Bank, [2005] ECR I-4071, § 59.

(iii) the Executive Board, in its capacity as an ECB body vested with the responsibility for the current business of the ECB, may nominate one or more heads of work units of the ECB to take decisions on the basis of a delegation decision by adopting a nomination decision after consultation with the Chair of the Supervisory Board.

So far, in compliance with the umbrella decision, the Governing Council has issued four delegation decisions on:

(i) the significance of supervised entities;[3]

(ii) compliance with fit and proper requirements;[4]

(iii) compliance with own funds requirements;[5]

(iv) national powers;[6]

(v) passporting, acquisition of qualifying holdings and withdrawal of authorisations of credit institutions.[7]

The Executive Board, in turn, has appointed the heads of work units to take said specific supervisory decisions.[8]

In order to limit the decision-making powers of the ECB's heads of work units, each delegation decision laid down some criteria according to which the delegated decisions are to be adopted.

Where the criteria for the adoption of a delegated decision are not met, the decision has to be taken according to the non-objection procedure under Article 26(8) SSMR. The same holds true for the negative decisions on own funds and on compliance with fit and proper requirements. Decisions on the significance of supervised entities cannot be adopted by the ECB's delegated heads of units if the criterion for the assessment of the significance is subject to a discretionary judgment, as is the case for the decisions regarding cross-border activities.

The ECB's delegation framework has two main advantages:

(i) first of all, it allows the Supervisory Board to focus on the most important dossiers, as a great amount of routine, non-discretionary supervisory decisions are delegated to the heads of the ECB's work units;

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[3] See the ECB decision (EU) 2017/934 of 16 November 2016 (ECB/2016/41).

[4] See the ECB decision (EU) 2017/935 of 16 November 2016 (ECB/2016/42).

[5] See ECB decision (EU) 2018/546 of 15 March 2018 (ECB/2018/10).

[6] See ECB decision (EU) 2019/322 of 31 January 2019 on delegation of the power to adopt decisions regarding supervisory powers granted under national law (ECB/2019/4).

[7] See ECB decision (EU) 2019/1376 of 23 July 2019 (ECB/2019/23)

[8] See ECB decisions (EU) 2017/937 of 23 May 2017 (ECB/2017/17), (EU) 2017/936 of 23 May 2017 (ECB/2017/16) as amended by ECB decision (EU) 2018/228 of 13 February 2018 (ECB/2018/6), (EU) 2018/547 of 27 March 2018 (ECB/2018/11), (EU) 2019/1377 of the ECB of 31 July 2019 (ECB/2019/26).

(ii) secondly, it better ensures a level-playing field, as the same set of decisions would be taken by the corresponding competent ECB's work units rather than by the different NCAs.

This notwithstanding, the ECB's delegation framework runs the risk of marginalising the role of the Supervisory Board as it appears in Article 26 SSMR and imperilling the principle of separation between the monetary policy and the supervisory functions.

Indeed, given that under Article 26(8) SSMR the Governing Council has only the power to object, one may argue that it would be inconceivable for the Governing Council to delegate active decision-making powers to the ECB divisions and thus circumvent the Supervisory Board's preparatory role as enshrined in Article 26 itself.

Under the current ECB framework on delegation, the Executive Board has the power to appoint the heads of the ECB's work units directly vested with external supervisory powers. Indeed, as per Article 6 of the umbrella decision, "[a] delegated decision shall be [directly] taken [by the heads of work units] on behalf of and under the responsibility of the Governing Council".

To the extent that decisions on delegation leave a certain margin of discretion to the heads of the ECB's work units, without providing for strict guidelines and criteria for escalating doubtful cases to the Supervisory Board, there is a real risk of a certain marginalisation of the Supervisory Board's role to fully undertake the planning and execution of the ECB's supervisory tasks as per Article 26(1) SSMR.

One grey area is that of negative decisions, which - as a rule - cannot be delegated to the ECB's internal structures. The definition of negative decisions includes decisions that do not, or do not fully, grant the permission requested by the supervised entity. A decision with ancillary provisions such as conditions or obligations is considered as a negative decision, unless it ensures the fulfilment of the requirements provided for in the relevant law. The ECB legal framework on delegation does not clarify in which cases said ancillary provisions are to be considered as ensuring or not ensuring the fulfilment of these requirements and, therefore, be deemed as delegable or non-delegable.

Further grey areas include cases where insufficient information or the complexity of the assessment require that a decision is adopted under the non-objection procedure. Decisions on delegation merely refer to such cases but stop short of giving precise criteria or methodologies in order to identify them and bring them to the attention of the Supervisory Board.

Moreover, where decisions are to be taken according to national law, the delegation of decision-making powers to the ECB's internal divisions runs the risk of ignoring national specificities.

It is worth noting that:

(i) decisions on the significance of supervised entities are to be taken according to directly applicable EU law (the Framework Regulation);

(ii) decisions on compliance with fit and proper requirements and national powers decisions are to be taken according to national law transposing CRD IV;

(iii) decisions on own funds are to be taken in part according to directly applicable EU law (the CRR) and in part according to national law.

It is true that in the case of decisions on the fitness and propriety of the members of the management bodies of credit institutions, the ECB's decision on delegation - abstracting from the specificities laid down in relevant national law - gave some general criteria for the assessment of said requirements.

Nevertheless, those criteria cannot take the place of the specific rules contained in the applicable national law and can be followed only where they prove to be compliant with that national law.

2. *Alternative institutional arrangments*

2.1. *Delegations by the SB and the GC of the powers they respectively enjoy and the NCAs' assistance to the ECB*

While the delegation of decision-making powers to the ECB's internal structures presents some advantages, it also has some disadvantages. Alternative solutions are to be sought.

A first alternative solution is a system of two distinct internal delegations.

As each ECB decision making body in the field of supervision may only delegate the powers conferred on it, the Supervisory Board may delegate the power to adopt complete draft supervisory decisions, and the Governing Council may delegate the power to object to said draft decisions.

In this framework, should the delegation be conferred outside of each body, a separation between the delegated ECB units shall be maintained in order to comply with Articles 25 and 26 SSMR. In other words, designations should be maintained within the supervisory and monetary policy business areas, respectively.

2.2. *The NCAs' responsibility for assisting the ECB in the performance of its supervisory tasks*

A second solution may take place within the SSM and be grounded on the NCAs' responsibility to assist the ECB in the performance of its supervisory tasks, as clearly laid down in Article 6(3) SSMR.

Article 6(3) SSMR reads as follows:

> Where appropriate and without prejudice to the responsibility and accountability of the ECB for the tasks conferred on it by this Regulation, national competent authorities shall be responsible for assisting the ECB, under the conditions set out in the framework mentioned in paragraph 7 of this Article, with the preparation and implementation of any acts relating to the tasks referred to in Article 4 related to all credit institutions, including assistance in verification activities. They shall follow the instructions given by the ECB when performing the tasks mentioned in Article 4.

The rationale of the NCAs' responsibility to assist the ECB in the performance of its supervisory tasks within the SSM has to be found (see recital 37 SSMR) in the need "to ensure high-quality, Union-wide supervision", given the NCAs' "important and long-established expertise in the supervision of credit institutions within their territory and their economic, organisational and cultural specificities" and the fact that "they have established a large body of dedicated and highly qualified staff for those purposes".

Moreover, under the new overall architecture of EU supervision and resolution of financial intermediaries, the national authorities' assistance to Union authorities is more the rule than the exception.[9]

A problem arises as to whether the involvement of the NCAs in assisting the ECB in the performance of its tasks should be confined to the mere

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[9] Within the Single Resolution Mechanism (SRM), the National Resolution Authorities (NRAs) shall take all necessary actions to implement the Single Resolution Board (SRB)'s decisions. This is due to the fact that, under the SRMR, most of the SRB's decisions need to be implemented by the NRA's decisions. The SRB is vested with the power to adopt the resolution scheme according to the resolution plan, whilst the specific resolution tools and measures are adopted by the NRAs according to the resolution scheme. The SRB may directly apply specific resolution tools and measures only when the NRAs do not comply with its decisions. For further details on this topic see Chapter VIII.A, § 4.3. The CRA and EMIR regulations provide for the involvement of the national market authorities in the performance of the European Securities and Market Authority (ESMA)'s supervision on credit rating agencies (CRAs) and trade repositories. Such involvement is triggered by a delegation decision taken by ESMA. Indeed, under Article 30(1) of Regulation (EC) No 1060/2009 of the European Parliament and the Council on credit rating agencies as amended "Where it is necessary for the proper performance of a supervisory task, ESMA may delegate specific supervisory tasks to the competent authority of a Member State in accordance with the guidelines issued by ESMA pursuant to Article 21(2). Such specific supervisory tasks may, in particular, include the power to request information in accordance with Article 23b and to conduct investigations and on-site inspections in accordance with Article 23d(6)". Delegation should be grounded on the NCAs' knowledge and experience of local conditions "which are more easily available at national level". Under paragraph 4, second sub-paragraph, of said Article 30, "a delegation of tasks shall not affect the responsibility of ESMA and shall not limit ESMA's ability to conduct and oversee the delegated activity. Supervisory responsibilities under this Regulation, including registration decisions, final assessments and follow-up decisions concerning infringements, shall not be delegated". See also ESMA's "Guideline on Cooperation including delegation between ESMA, the competent authorities and the sectoral competent authorities under Regulation (EU) No 513/2011 on credit rating agencies". Similar provisions and grounds can be found in Article 74 and recital 80 of Regulation No 648/2012 of the European Parliament and the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

preparation or implementation of specific ECB's supervisory decisions or whether it should also include the adoption of minor, non-discretionary, supervisory decisions.

The ECB has already implemented a process to task the NCAs with procedures for the assessment of compliance with certain fit and proper requirements, while the final decision is taken by the ECB (the 'alternative' process).

Under this alternative process, the NCAs would be responsible precisely for the preparation of the ECB's draft decisions on fit and proper that would be finally adopted by the ECB's heads of units.

Another possibility would be to directly vest the NCAs with some decision-making powers through an ECB's delegation decision.

The Tralli judgement reminds us that the powers conferred on an institution include the right to delegate a certain number of powers among them, subject to conditions to be determined by the institution.

In the case at hand, not only is there no provision which expressly prohibits any delegations, but Article 6(3) SSMR may even be read as implicitly allowing the ECB to delegate minor supervisory decisions to the NCAs, in that it refers to the NCAs' implementation of "any [ECB] acts", which may also include any of the ECB's decisions on delegation "relating to the tasks referred to in Article 4".

The ECB would be able to delegate only limited supervisory decisions, while it would remain responsible for the related task. Indeed, while a delegation of tasks to the NCAs would actually be in contrast with the aim of the SSMR, a separation between an ECB's task and some implementing powers of the NCAs is not unusual under the SSM and could be introduced with regard to minor non-discretionary supervisory decisions, under the framework of Article 6(3) SSMR, without disrupting the SSM legal framework.

To the extent that the NCAs will comply with the ECB's framework on delegation, the ECB will continue to remain accountable for the task concerned.

One may contend that a risk implied in the delegation of powers to the NCAs is that the NCAs' delegated decisions will be subject to different regimes, which may in turn imperil the level playing field in banking supervision.

Nevertheless, the risk that NCAs will apply different regimes is minimised by both the common EU source of the applicable national law and the criteria laid down in the ECB's delegation decision.

In any event, such a risk would be the inevitable side effect of the nuances contained in the national law – which in the end binds the ECB itself – rather than the consequence of the delegation to the NCAs.

Application of national law is without prejudice to the principle of the primacy of Union law. Consequently, when applying national law, both the ECB

and the NCAs have to interpret national provisions, as far as possible, in light of the wording and purpose of the CRD IV, in order to achieve the aims contained therein.

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EU Legal references: Decision (EU) 2019/323 of the ECB of 12 February 2019 nominating heads of work units to adopt delegated decisions regarding supervisory powers granted under national law (ECB/2019/5), OJ L 55, 25.2.2019, p. 16; Decision (EU) 2019/322 of the ECB of 31 January 2019 on delegation of the power to adopt decisions regarding supervisory powers granted under national law (ECB/2019/4), OJ L 55, 25.2.2019, p. 7; Decision (EU) 2018/547 of the ECB of 27 March 2018 nominating heads of work units to adopt delegated own funds decisions (ECB/2018/11), OJ L 90, 6.4.2018, p. 110; Decision (EU) 2018/546 of the ECB of 15 March 2018 on delegation of the power to adopt own funds decisions (ECB/2018/10), OJ L 90, 6.4.2018, p. 105; Decision (EU) 2017/937 of the ECB of 23 May 2017 nominating heads of work units to adopt delegated decisions on the significance of supervised entities (ECB/2017/17), OJ L 141, 1.6.2017, p. 28; Decision (EU) 2017/936 of the ECB of 23 May 2017 nominating heads of work units to adopt delegated fit and proper decisions (ECB/2017/16), OJ L 141, 1.6.2017, p. 26; Decision (EU) 2017/935 of the ECB of 16 November 2016 on delegation of the power to adopt fit and proper decisions and the assessment of fit and proper requirements (ECB/2016/42), OJ L 141, 1.6.2017, p. 21; Decision (EU) 2017/934 of the ECB of 16 November 2016 on the delegation of decisions on the significance of supervised entities (ECB/2016/41), OJ L 141, 1.6.2017, p. 18; Decision (EU) 2017/933 of the ECB of 16 November 2016 on a general framework for delegating decision-making powers for legal instruments related to supervisory tasks (ECB/2016/40), OJ L 141, 1.6.2017, p. 14.

CJEU's case law: ECJ, 23 September 1986, Case 5/85, *AKZO Chemie* v *Commission,* ECLI:EU:C:1986:328, and ECJ, 26 May 2005, Case C-301/02 P, *Carmine Salvatore Tralli v European Central Bank*, ECLI:EU:C:2005:306.

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Chapter V.A

Supervision of the less significant credit institutions

Raffaele D'Ambrosio and Stefano Montemaggi

Summary: *1. The allocation to the ECB and the NCAs of the supervisory tasks on the less significant credit institutions – 1.1. The interpretation of Articles 4 and 6 SSMR and the rationale of the ECB's responsibilities for the supervision of less significant credit institutions – 1.2. The ECB's responsibilities – 1.3. The NCAs responsibilities – 1.4. The special and ordinary Regions' responsibilities under the Italian law – 2. The relationship between the ECB and the NCAs regarding the supervision of less significant credit institutions under the Framework Regulation – 3. NCAs' notification to the ECB of material supervisory procedures and decisions – 4. Ex–post reporting by the NCAs to the ECB regarding less significant supervised entities*

1. The allocation to the ECB and the NCAs of the supervisory tasks on the less significant credit institutions

1.1. The interpretation of Articles 4 and 6 SSMR and the rationale of the ECB's responsibilities for the supervision of less significant credit institutions

Articles 4 and 6 SSMR are not crystal clear with regard to the allocation of the supervisory tasks on the less significant credit institutions (LSIs).

Under both the General Court's and the ECJ's interpretation of Articles 4 and 6 SSMR, the ECB would exercise – though indirectly, i.e. through the NCAs – its supervisory tasks on the less significant credit institutions as well (see **Chapter V.B - Case-study: Judgments of the General Court and of the ECJ on the Landeskreditbank**).

A different view – based on the assumption that Article 4 SSMR has to be read in light of Article 6 SSMR and that the ECB's supervisory tasks are basically limited to the significant credit institutions – is followed by the Federal German Constitutional Court in its judgement of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 (see **Chapter I.A. The SSM: allocation of tasks and powers between the ECB and the NCAs and organisational issue, § 2.2**).

The authors advocate a restrictive interpretation of the scope of the ECB's supervisory tasks on LSIs. This view is based on the wording of Article 6(4) SSMR, which expressly refers – within the non-exclusive ECB's tasks under Article 4 – to different responsibilities of the ECB and the NCAs respectively.

This reading of Articles 4 and 6 SSMR would imply a level of intrusiveness that the ECB may display in making use of its oversight powers under Article 6(5) SSMR, which is lower than the one that would be allowed if the "L-Bank doctrine" was taken to its extreme consequences.

The rationale of the ECB's responsibilities for the supervision of the less significant credit institutions can be inferred from recital 16 and Article 6(1) SSMR.

Under Recital 16 SSMR, whilst

> he safety and soundness of large credit institutions is essential to ensure the stability of the financial system… recent experience shows that smaller credit institutions can also pose a threat to financial stability… Therefore, the ECB should be able to exercise supervisory tasks in relation to all credit institutions authorised in, and branches established in, participating Member States.

Moreover, under Article 6(1) SSMR, the ECB shall be responsible for the effective and consistent functioning of the SSM in its entirety, including the supervision of less significant credit institutions.

Responsibilities for the supervision of less significant credit institutions are allocated between the ECB and the NCAs according to the provisions under Article 6, paras 5 and 6, SSMR.

As a rule, the ECB shall give the criteria according to which the supervision on the less significant credit institution has to be performed by the NCAs and oversight the exercise of the NCAs' supervisory tasks.

The NCAs shall exercise the supervisory tasks on the less significant credit institutions and shall refer to the ECB on the measures taken and the activities performed.

1.2. The ECB's responsibilities

The ECB's powers and the NCAs' obligations are regulated in the Framework Regulation, as it clearly emerges from the first two lines of Article 6(5) SSMR ("with regard to the credit institutions referred to in paragraph 4, and within the framework defined in paragraph 7…").

Consequently, additional ECB's powers and NCAs' obligations need to be agreed between the former and the latter, according to the procedure laid down in paragraph 7 of Article 6 SSMR for the adoption of the Framework regulation.

Under paragraph 5 of Article 6 SSMR, the ECB shall issue regulations, guidelines or general instructions to the NCAs, according to which the supervisory tasks are performed and supervisory decisions are adopted by NCAs.

Such instructions may refer to the specific powers in Article 16(2) (Pillar 2 powers) for groups or categories of credit institutions for the purposes of ensuring the consistency of supervisory outcomes within the SSM.

The ECB's normative power and the coordination tools are the following:

(i) *Guideline (EU) 2017/697 of the ECB of 4 April 2017* on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/9);

(ii) *Recommendation of the ECB of 4 April 2017* on common specifications for the exercise of some options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/10).

Moreover, the ECB adopted some *Joint supervisory standards* (JSSs). These are policy documents, not legally-binding, developed by the ECB together with the NCAs with the aim of ensuring the consistent application of high supervisory standards across the SSM.

Up untill now the ECB adopted the following JSSs (referred to in the ECB-Banking Supervision, LSI supervision within the SSM, November 2017):

(i) *JSSs on supervisory planning process*: through which the NCAs prioritise, plan and monitor the execution of key on-site and off-site supervisory activities for less significant institutions;

(ii) *JSSs on recovery planning*: taking into account the provisions of the BRRD which grant to competent authorities the discretion to apply simplified obligations for recovery planning to non-systemic institutions under certain conditions. More precisely, the ECB recommends that NCAs apply simplified obligations only for non-high-priority LSIs, while high-priority LSIs should be subject to the full recovery planning requirements. IPS (institutional protection schemes) should provide a single full scope recovery plan for all the institutions that have individually been waived from the requirement;

(iii) *JSS for the conduct of on-site inspections at LSIs*: covers the definition and objectives of on-site inspections as well as the main principles to be followed in their conduct, and the minimum level of engagement in terms of frequency, duration and resources;

(iv) The *LSIs crisis management cooperation framework*: with the purpose of assisting the tasks of the NCA as the responsible authority for LSI crisis management and of the ECB as the responsible authority for deciding on common procedures. In particular, three JSS for LSI crisis management have been developed. The first (*JSS on NCAs' supervisory practices for LSI crisis management and cooperation with resolution authorities*) provides the NCAs and the ECB with a common understanding on internal procedures for dealing with LSIs in crisis, cooperation with the NRAs, the SRB and other relevant external parties, and communication with the public. The second (*JSS on NCAs' supervisory procedures for LSIs breaching minimum capital requirements*) aims at ensuring consistent supervisory actions, should an LSI breach the minimum capital requirements, which could ultimately lead to a procedure for the withdrawal of authorisation. The third (*JSS on LSIs' FOLTF determination*) promotes a joint understanding of FOLTF determinations for LSIs, focusing on applying proportionality in the expert judgement, to ensure that the intended measure is appropriate and necessary to achieve the objectives pursued by the supervisor;

(v) *JSS on the supervision of car financing institutions*: aims at promoting common approaches to the supervision of risks arising from the specific business model of those credit institutions whose main business activity is granting loans or leasing contracts to finance the purchase of motor vehicles;

(vi) *Guide on the prudential recognition of IPS*: on how to (i) monitor IPSs (including adherence to legal requirements) and (ii) coordinate the activities of the ECB and the NCAs in order to ensure that new IPS applications are assessed in a harmonised way;

A *Policy stance on licencing of fintech credit institutions* (referred to in the ECB-Banking Supervision, LSI supervision within the SSM, November 2017) was developed owing to the increasing number of SSM common procedures related to fintech credit institutions, which are generally LSIs, with the objective of promoting a harmonised approach within the euro area in this increasingly important sector. This policy stance recently evolved into the *Guide to assessments of fintech credit institution licence applications*, published by the ECB in March 2018.

On 4 July 2018, the ECB also published its *SSM LSI SREP Methodology* to illustrate the main features of the methodology followed in the Supervisory Review and Evaluation Process (SREP) for LSIs, which was developed jointly with the NCAs in order to foster growing harmonisation of analysis methods and supervisory practices within the SSM, while taking into due account the different regulatory environments. The NCAs continue to retain full responsibility, as direct supervisors of LSIs, for carrying out the assessments and deciding on capital, liquidity and qualitative measures. The harmonised SREP methodology will be rolled out gradually, by applying it to the high-priority LSIs since 2018, whereas its implementation vis-à-vis all LSIs is scheduled by 2020.

The ECB shall exercise oversight over the functioning of the system and request, on an ad hoc or a continuous basis, information from the national competent authorities on the performance of the tasks carried out by them. Moreover, the ECB may, at any time, make use of investigatory powers.

When necessary to ensure consistent application of high supervisory standards, the ECB may, at any time, on its own initiative after consulting with the NCAs or upon request by a NCA, decide to exercise directly itself all the relevant powers for one or more less significant credit institutions, including in the case where financial assistance has been requested or received indirectly from the EFSF or the ESM.

The criteria for an ECB's decision on take-over are laid down in Article 67 of the Framework regulation, reading as follows:

> 1. The ECB may, pursuant to Article 6(5)(b) of the SSM Regulation, decide at any time, by means of an ECB decision, to exercise directly the supervision of a less significant supervised entity or less significant supervised group where this is necessary to ensure consistent application of high supervisory standards.
>
> 2. Before taking the ECB decision referred to in paragraph 1, the ECB shall take into account, inter alia, any of the following factors:
>
> (a) whether or not the less significant supervised entity or less significant supervised group is close to meeting one of the criteria contained in Article 6(4) of the SSM Regulation;
>
> (b) the interconnectedness of the less significant supervised entity or less significant supervised group with other credit institutions;

(c) whether or not the less significant supervised entity concerned is a subsidiary of a supervised entity which has its head office in a non-participating Member State or a third country and has established one or more subsidiaries, which are also credit institutions, or one or more branches in participating Member States, of which one or more is significant;

(d) the fact that the ECB's instructions have not been followed by the NCA;

(e) the fact that the NCA has not complied with the acts referred to in the first subparagraph of Article 4(3) of the SSM Regulation;

(f) the fact that the less significant supervised entity has requested or received indirectly financial assistance from the EFSF or the ESM.

The ECB's power to take over the NCAs' responsibilities for the direct supervision of one or more less significant credit institutions is an exception to the criterion on the allocation of those responsibilities between the ECB and the NCAs and has to be interpreted strictly.

See the replay by Danièle Nouy of 2 may 2016 to a MEP's written question (QZ042):

> As stipulated in Article 6(5)(b) of the SSM Regulation, the ECB has the power to take over direct supervision of an entity if this is required to ensure consistent application of high supervisory standards, after consulting with national competent authorities. However, I would like to underline that assuming the responsibility for direct supervision is very much seen as an exceptional response – a measure of last resort which should be considered only when all other appropriate supervisory measures have been unsuccessful.

In the same vein see also the Commission's report on the SSM (p. 7), according to which

> The default attribution of supervision of LSIs was given to NCAs and the ECB's right to take over LSI supervision could only be exercised if there is necessary and sufficient justification for departing from that rule.

This view is also followed by the BVerfG in its judgement of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14. Indeed, according to § 178, second sentence, of judgment

> Als Ultima Ratio kann sie im Einzelfall schlieslich auch in Bezug auf ein weniger bedeutsames Institut alle Befugnisse selbst ausuben (sogenanntes Selbsteintrittsrecht), wenn dies fur die Sicherstellung der koharenten Anwendung hoher Aufsichtsstandards erforderlich

> ist (vgl. Art. 6 Abs. 5 Buchstabe b SSM-VO,Art. 69 Abs. 3 SSM-R-VO; EuGH, Urteil vom 8. Mai 2019, Landeskreditbank Baden-Wurttemberg/Europaische Zentralbank, C-450/17 P, EU:C:2019:372, Rn. 56; Deutsche Bundesbank, Monatsbericht Januar 2016, S. 53 <57>; Glos/Benzing, a.a.O.,Rn. 22, 95; Ohler, Bankenaufsicht und Geldpolitik in der Wahrungsunion, 2015, § 5 Rn. 21; Lackhoff, Single Supervisory Mechanism, 2017, Rn. 669).

See also § 193 of the judgment:

> Hinzu kommt, dass Art. 4 Abs. 1 SSM-VO die dort aufgeführten Aufgaben nur im Rahmen des Art. 6 SSM-VO der Aufsicht durch die EZB unterstellt und sie insbesondere an die in Art. 6 Abs. 4 bis 6 SSM-VO geregelte Zuständigkeitsverteilung bindet. Das Selbsteintrittsrecht der EZB nach Art. 6 Abs. 5 SSM-VO ist als Ultima Ratio eine Ausnahme und stellt die in Art. 6 Abs. 6 SSM-VO niedergelegte Regel nicht in Frage.

Against this backdrop, in the authors' view, the ECB's take over cannot be extended to all the less significant credit institutions supervised by an NCA.

1.3. The NCAs' responsibilities

Under Article 6(6) SSMR, the NCAs shall carry out and be responsible for the tasks referred to in points (b), (d) to (g) and (i) of Article 4(1) and adopt all the relevant supervisory decisions.

Moreover, the NCAs shall maintain the powers, in accordance with national law, to obtain information from less significant credit institutions and to perform on-site inspections at those credit institutions.

The NCAs shall inform the ECB of the measures taken and closely coordinate those measures with the ECB and report to the ECB on a regular basis on the performance of the activities performed under Article 6 SSMR.

1.4. The special and ordinary Regions' responsibilities under the Italian law

The Italian constitutional framework grants some legislative and administrative competences to the special statute Regions[1] and ordinary statute Regions[2] towards the so-called regional banks.

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1 See the Statutes of Friuli Venezia Giulia, Sardegna, Sicilia, Trentino-Alto Adige and valle d'Aosta.

2 See Article 117(3) of the Italian Constitution.

Under Article 2 of the Legislative-Decree No 171 of 18 April 2006 (adopted in the implementation of the Law No 131 of 5 June 2003), regional banks are those banks having their headquarters and branches and carrying out their banking activity within the same Region.

Given the allocation of competences between the ECB and the NCAs within the SSM (no other supervisory authorities are mentioned either in the SSMR or in the Framework regulation), a question arises as to whether such competences encroach on the performance by the ECB and Banca d'Italia of the SSM supervisory powers.

It is, first of all, worth noting that the competences conferred to Italian Regions in the field of the regional banks shall abide by both the EU law and the general principles contained in Article 159 of the Italian banking law (see, besides this latter, Article 3(2) of the Legislative-Decree No 171/2003).

Article 159 reads as follows:

> 1. Supervisory evaluations shall be reserved to the Bank of Italy.
>
> 2. Where the administrative measures provided for in Articles 14, 31, 36, 56 and 57 fall within the authority of the regions, the Bank of Italy shall deliver, for purposes of supervision, a binding opinion.
>
> 3. The provisions of paragraphs 1 and 2 and of Articles 15, 16, 26 and 47 shall be mandatory and shall prevail over any previously issued contrary provisions.
>
> 4. Special statute regions which are granted powers in matters governed by Directive 2013/36/EU under the implementing provisions of their respective statutes shall adopt measures for the transposition of such Directive in accordance with the principles of the mandatory provisions contained in the preceding paragraphs.
>
> 4.bis The competences of the special statute regions provided for in this Article shall be exercised within the limits stemming from and in harmony with the SSM provisions.[3]

In the same vein, the Italian Constitutional Court (see the judgment of 26 January 1994, No 224) held that the regional competences provided for under the special statute Regions may not authorise the endurance of regional competences in contrast with the Union law.

It is worth mentioning that the Law-Decree No 18 of 14 January 2016 (converted into Law No 49 of 8 April 2016):

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[3] Added by Article 1(25) of the Legislative-Decree No 223/2016.

(i) reforms the cooperative banks (BCCs) with the aim of bringing about more transparent and efficient governance standards and eliminating structural weaknesses in the system of BCCs (see the amendments introduced to Articles 33 – 37-ter of the Italian Banking Law and the subsequent modifications introduced by Decree-Law No 91 of 25 July 2018);

(ii) requires each BCC to choose between joining a cooperative banking Group or, subject to certain conditions, being converted into a joint stock company. A BCC must join such a Group in order to be authorised to carry out banking business in the form of a BCC. Alternatively, individual BCCs whose net assets exceed EUR 200 million may opt not to join a Group on condition that they become joint stock companies, with the authorisation of Banca d'Italia;

(iii) provides that each Group must have a parent company, incorporated as a joint stock company, with the majority of its shares held by the BCCs in the group. The parent company primarily directs and coordinates the BCCs in its Group in accordance with the relevant cohesion contract, which sets out its powers, including: (i) the power to identify and implement the strategic orientation and operational objectives of the Group adjusted to the risk level of the BCC in question; (ii) the power to approve or reject, in exceptional cases, the appointment of one or more BCCs' board members; and (iii) the power to expel a BCC from the Group in the event of a serious breach of one or more of the terms of the cohesion contract, and other types of sanction proportionate to the seriousness of the breach in question;

(iv) establishes that the cohesion contract also provides for joint and several guarantees of the obligations assumed by the parent company and the BCCs.

Following the reform, more than 300 Italian small cooperative banks (originally LSIs) have formed three large banking groups (Iccrea Banca, Cassa Centrale Banca, Cassa Centrale Raiffeisen), the first two fall under the direct supervision of the ECB, as significant supervised groups.

In light of the above, once the cooperative banks join a cooperative banking group of national character, they cease to meet the definition of "regional banks" and therefore lose this status. Indeed, under Article 2 of the Legislative-Decree No 171/2006 above-mentioned, should the banks be part of a banking group they may be considered regional banks only where all the components of the group maintain their headquarters and branches and carry out their banking activity within the same Region. Consequently, the cooperative banks that form a national banking group will fall under the exclusive competence of the central authorities (either the Italian ones, in particular Banca d'Italia, or the ECB).

This view has been authoritatively endorsed by the Italian Constitutional Court, with decision No 17 of 15 January 2020. The Sicilian Region complained that the Italian State had infringed regional prerogatives, since the Bank of Italy had placed a Sicilian BCC, part of a national banking group, under extraordinary administration, without involving the Region in the adoption of the act. The Court found the appeal unfounded, ruling that it was for the State and, on its behalf, the Bank of Italy to adopt the measure in question.

2. *The relationship between the ECB and the NCAs regarding the supervision of less significant credit institutions under the Framework Regulation*

Under Article 6(7) SSMR, the Framework Regulation shall include the definition of the procedures, including time-limits, for the relation between the ECB and the NCAs regarding the supervision of less significant credit institutions.

Such procedures shall in particular require the NCAs, depending on the cases defined in the framework, to:

(i) notify the ECB of any material supervisory procedure;

(ii) further assess, on request of the ECB, specific aspects of the procedure;

(iii) transmit to the ECB material draft supervisory decisions on which the ECB may express its views.

In light of the above, the NCAs' duty under Article 96 SSM Framework Regulation to inform the ECB on the deterioration of the financial situation of a less significant supervised entity (especially if such deterioration could lead to a request for direct or indirect financial assistance from the ESM) is an exception and has to be interpreted strictly.

3. *NCAs' notification to the ECB of material supervisory procedures and decisions*

The NCAs shall provide the ECB with information relating to material NCA supervisory procedures concerning less significant supervised entities.

The ECB shall define general criteria, in particular taking into account the risk situation and potential impact on the domestic financial system of the less significant supervised entity concerned, to determine for which less significant supervised entities which information shall be notified.

See Article 97(1) Framework regulation, reading as follows

> To enable the ECB to exercise oversight over the functioning of the system, as laid down in Article 6(5)(c) of the SSM Regulation, NCAs

> shall provide the ECB with information relating to material NCA supervisory procedures concerning less significant supervised entities. The ECB shall define general criteria, in particular taking into account the risk situation and potential impact on the domestic financial system of the less significant supervised entity concerned, to determine for which less significant supervised entities which information shall be notified. The information shall be provided by the NCAs ex ante or in duly justified cases of urgency simultaneously to opening a procedure.

The ECB's oversight should take into account the principles of proportionality and subsidiarity.

More to the point, an intervention of the ECB should only take place when it is deemed necessary by the ECB and proportionate to address the shortcomings in an adequate way.

This translates into basic oversight in the case of small, well-run and low-impact LSIs.

Oversight by the ECB becomes more intensive as riskiness and/or impact of LSIs increase. In case of risky and high-impact LSIs, in case of crises and of LSIs approaching any of the significance criteria, the oversight and exchange of information between the ECB and the NCA may intensify.

This suggests the need for a prioritisation framework which has been developed by the SSM.

LSIs are then individually classified into three groups, based on their intrinsic risk score and the impact score:

(i) the low-priority LSIs, which do not represent a threat for financial stability and whose intrinsic riskiness is deemed manageable;

(ii) the medium-priority LSIs, which display (i) either high intrinsic riskiness and at the same time low or medium impact, (ii) low intrinsic riskiness but medium or high impact or (iii) rank medium in both dimensions;

(iii) the high-priority LSIs (HP LSIs), which are considered as medium or highly risky and have a high impact. Therefore, their failure may endanger the domestic financial system.

Material NCAs' supervisory procedures include removal of members of the management boards and the appointment of special managers as well as the procedures which have a significant impact on the less significant supervised entity (see Article 97(2) Framework regulation).

Under Article 97(3) Framework regulation

> In addition to the information requirements set out by the ECB in accordance with this Article, the ECB may, at any time, request

from NCAs information on the performance of the tasks carried out by them in respect of less significant supervised entities.

According to Article 97(4) Framework regulation, the NCAs shall, on their own initiative, notify the ECB of any other NCA supervisory procedure which

(i) they consider material; or

(ii) may negatively affect the reputation of the SSM.

If the ECB requests an NCA to further assess specific aspects of a material NCA supervisory procedure, this request shall specify which aspects are concerned (Article 97(5) Framework regulation).

Notification by the NCAs to the ECB of material draft supervisory decisions is regulated by Article 98 Framework regulation.

The NCAs shall send to the ECB draft supervisory decisions.

Draft supervisory decisions shall be sent to the ECB prior to being addressed to less significant supervised entities, if such decisions:

(i) relate to the removal of members of the management boards of the less significant supervised entities and the appointment of special managers; or

(ii) have a significant impact on the less significant supervised entity.

The NCAs shall transmit to the ECB any other draft supervisory decisions:

(i) on which the ECB's views are sought; or

(ii) which may negatively affect the reputation of the SSM.

The ECB shall express its views on the draft decision within a reasonable time before the planned adoption of the decision.

4. Ex-post reporting by the NCAs to the ECB regarding less significant supervised entities

The ex-post reporting by the NCAs to the ECB regarding less significant supervised entities is regulated by Articles 99 and 100 Framework regulation.

Under Article 99 Framework regulation, the ECB may require the NCAs to report to the ECB on a regular basis on the measures they have taken and on the performance of the tasks they have to carry out.

The ECB shall inform the NCAs annually of the categories of less significant supervised entities and of the nature of the information required.

This is without prejudice to the ECB's right to make use of the investigative powers referred to in Articles 10 to 13 of the SSM Regulation in respect of less significant supervised entities.

Under Article 100 Framework regulation, the NCAs shall submit to the ECB an annual report on less significant supervised entities, less significant supervised groups or categories of less significant supervised entities in accordance with the ECB's requirements.

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EU Legal references: Articles 4 and 6 SSMR; Articles 96 to 100 Framework regulation; Recommendation of the ECB of 4 April 2017 *on common specifications for the exercise of some options and discretions available in Union law by national competent authorities in relation to less significant institutions* (ECB/2017/10); Guideline (EU) 2017/697 of the ECB of 4 April 2017 *on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions* (ECB/2017/9); ECB's *SSM LSI SREP Methodology* of 4 July 2018; the ECB's *Guide to assessments of fintech credit institution licence applications*, published by the ECB in March 2018.

National legal references: Italian Law-Decree No 18 of 14 January 2016 (converted into Law No 49 of 8 April 2016).

Other official documents: ECB (Banking Supervision), LSI supervision within the SSM, November 2017.

CJEU's case law: see the judgments reported under **Chapter V.B**. **Case-study: Judgments of the General Court and of the ECJ on the Landeskreditbank (General Court, T-122/15 and ECJ, C-450/17 P).**

National case law: Italian Constitutional Court, judgment of 15 January 2020, No 17; Italian Constitutional Court, judgment of 26 January 1994, No 224.

Chapter V.B

Case-study: Judgments of the General Court and of the ECJ on the Landeskreditbank

(General Court, T-122/15 and ECJ, C-450/17 P)

Stefano Montemaggi

Summary: *1. The facts – 2. The General Court's decision – 3. The appeal before the ECJ and the Opinion of the Advocate general – 4. The ECJ's decision – 5. Some concerns on the interpretation adopted by the EU Judges*

1. The facts

The Landeskreditbank Baden-Württemberg – Förderbank (L-Bank), created by law and established in Karlsruhe (Germany), is the investment and development bank (Förderbank) of Baden-Württemberg. It is a legal person governed by public law and wholly owned by the *Land* (State) of Baden-Württemberg.

On 25 June 2014, the L-Bank was informed by the ECB that, on account of its size, it would have been subject to the exclusive supervision of the ECB (with invitation to submit observations).

On 1 September 2014, L-Bank was officially classified as a significant institution (SI) within the meaning of Article 6(4) of the SSM Regulation (SSMR).

The ECB decision ECB/SSM/15/1 was grounded on two main arguments:

(i) the value of the L-Bank's assets exceeding EUR 30 billion.

(ii) the fact that the ECB's direct supervision over L-Bank would not have been inappropriate within the meaning of Article 70(1) of Regulation (EU) No 468/2014 (Framework Regulation).

Pursuant to Article 6(4) of the SSM Regulation in conjunction with Article 70 (1) of the Framework Regulation, a credit institutions meeting the conditions of significance under Article 6(4) is to be considered less significant when "*justified by particular circumstances*", which occur

> where there are specific and factual circumstances that make the classification of a supervised entity as significant inappropriate, taking into account the objectives and principles of the SSM Regulation and, in particular, the need to ensure the consistent application of high supervisory standards.

In the ECB's view, the significance-related criteria set out in Article 6(4) of SSMR can be waived through the use of the 'particular circumstances' option only if the objectives of the SSMR, including the need to guarantee consistent application of high prudential supervisory standards, would be better safeguarded through direct supervision by national authorities, which L-Bank had failed to demonstrate.

Therefore, according to the ECB, the alleged low risk profile of L-Bank was entirely irrelevant, since the risk assessment put forward by an institution for the stability of the financial system or its creditors are not to be taken into account at the stage of classification of an entity.

On 6 October 2014, L-Bank submitted a request to review the ECB's decision to the Administrative Board of Review (ABoR). On 20 November 2014, the ABoR gave an Opinion finding the ECB's decision to be lawful.

By an application lodged at the Registry on 12 March 2015, L-Bank brought an action before the General Court, challenging the ECB decision.

The European Commission was admitted to intervene in the judicial proceeding in support of the ECB.

The main arguments raised by L-Bank are briefly described below:

(i) the classification of an entity as "significant" on the basis of the size criterion does not justify the direct prudential supervision by the ECB and is, accordingly, "inappropriate", because it is not necessary, where the monitoring by the national competent authority under the macro-prudential supervision of the ECB would be sufficient to achieve the objectives of the SSMR;

(ii) there has been no transfer of competence in favour of the ECB with regard to all the tasks listed in Article 4(1) of the SSMR and in respect of all banks. In conformity with the principle of subsidiarity, the transfer of competence was made only in respect of significant entities, with the direct prudential supervision of less significant entities remaining within the remit of the national authorities;

(iii) in the case at hand, the objective of the protection of the financial stability pursued by the SSMR will be sufficiently achieved by the German authorities exercising their supervision over L-Bank, considering that its profile is characterised by a low risk degree.

The General Court dismissed the action brought by L-Bank with a judgment of 16 May 2017.

Regardless of the decision on the specific issue of the classification of L-Bank as SI, the ruling is interesting to the extent that it is the first statement of the European judiciary on the architecture of the SSM.

In other words, the ruling reveals how the General Court considers the SSM from a structural and organisational perspective.

Indeed, the Court takes the opportunity presented by the action brought by L-Bank to elaborate on the fundamental issue of the allocation of tasks and powers within the SSM between the ECB, on the one hand, and the NCAs, on the other hand.

The appeal against the decision has been dismissed by the Court of Justice on 8 May 2019.

In the analysis, we will follow the steps below:

(i) an explanation of the Court's views on the division of competences and responsibilities between the ECB and the NCAs;

(ii) a presentation of the Court's reasoning on Article 70 SSMFR;

(iii) a quick description of the opinion of the Advocate General Hogan of 5 December 2018;

(iv) an overview of the judgment of the Court of Justice of 8 May 2019;

(v) the presentation of some open issues.

2. The General Court's decision

The General Court opts for a "pro-centralisation stance".

In its reasoning, the Court notes that (§ 63):

> The Council has delegated to the ECB exclusive competence in respect of the tasks laid down in Article 4(1) of the Basic Regulation [*i.e.* the SSM Regulation] and (..) the sole purpose of Article 6 of that same regulation is to enable decentralised implementation under the SSM of that competence by the national authorities, under the control of the ECB, in respect of the less significant entities and in respect of the tasks listed in Article 4(1)(b) and (d) to (i) of the Basic Regulation;

and that (§ 72)

> Under the SSM the national authorities are acting within the scope of decentralised implementation of an exclusive competence of the Union, not the exercise of a national competence.

The logic of the relationship between Article 4(1) and Article 6 of the Basic Regulation (§ 54)

> consists in allowing the exclusive competences delegated to the ECB to be implemented within a decentralised framework, rather than having a distribution of competences between the ECB and the national authorities in the performance of the tasks referred to in Article 4(1) of that regulation.

More to the point (§ 58)

> The arrangement of the recitals of the Basic Regulation suggests that direct prudential supervision by the national authorities under the SSM was envisaged by the Council of the European Union as a mechanism of assistance to the ECB rather than the exercise of autonomous competence.

The Court recalls the Recital 37 of the SSMR where stating that "national competent authorities should be responsible for assisting the ECB in the

preparation and implementation of any acts relating to the exercise of the ECB supervisory tasks" and that "[t]his should include, in particular, the ongoing day-to-day assessment of a credit institution's situation and related on-site verifications".

The Court also notes that (§ 57)

> although recital 28 in the preamble to the Basic Regulation provides a list of the supervisory tasks that are to remain within the remit of the national authorities, it does not include any of the tasks listed in Article 4(1) of the Basic Regulation. Nor does that recital present direct supervision of less significant entities as constituting the exercise of a competence falling within the remit of the national authorities.

As stressed by the Court (§ 59),

> the ECB retains important prerogatives even when the national authorities perform the supervisory tasks laid down in Article 4(1)(b) and (d) to (i) of the Basic Regulation, and that the existence of such prerogatives is indicative of the subordinate nature of the intervention by the national authorities in the performance of those tasks.

Reference is made to the ECB's power to issue regulations, guidelines or general instructions to national competent authorities, according to which the tasks defined in Article 4, excluding points (a) and (c) of paragraph 1 thereof, are performed and supervisory decisions are adopted by national competent authorities (§ 61).

> Although it is true that that subordination does not include the possibility for the ECB to issue individual guidelines to a national authority, that is compensated for by the possibility offered by Article 6(5)(b) of the Basic Regulation to remove direct prudential supervision of an entity from the competence of a national authority.

Article 6(5)(b) SSMR stipulates that "when necessary to ensure consistent application of high supervisory standards, the ECB may at any time, on its own initiative after consulting with national competent authorities or upon request by a national competent authority, decide to exercise directly itself all the relevant powers for one or more credit institutions referred to in paragraph 4".

In the Court's view" (§§ 61, 62 and 72),

> the terms employed in that provision (…) calls for broad discretion conferred on the ECB (§ 61).
>
> Whereas Article 6(5)(b) of the Basic Regulation provides *broadly* for the possibility for the ECB to remove competence from a national authority, Article 6(4), second subparagraph, of that same regulation

> uses, on the contrary, the more restrictive formulation of *particular* circumstances for the purposes of envisaging the possibility of direct supervision of an entity which should be classified as 'significant' being entrusted to a national authority and entrusts the ECB with exclusive competence to determine the content (§ 62).
>
> Under the SSM the national authorities are acting within the scope of decentralised implementation of an exclusive competence of the Union, not the exercise of a national competence (§ 72).

As for the interpretation of Article 70 Framework Regulation, the Court's view is that there is no ground for invoking the application of the principle of subsidiarity: this principle, which involves *inter alia* a determination of whether the proposed action can be better achieved by the European Union or whether it can be achieved just as effectively by the Member States, applies, pursuant to Article 5(3) TEU, "only in areas which do not fall within exclusive EU competence" (par. 65).

See also § 80

> Article 70(1) of the SSM Framework Regulation must be understood as referring solely to *specific factual circumstances entailing that direct prudential supervision by the national authorities is better able* to attain the objectives and the principles of the Basic Regulation, in particular the need to guarantee consistent application of high prudential supervisory standards.

According to the Court (§ 75), an interpretation of Article 70(1) requiring to assess, on a case-by-case basis, in respect of any significant institution, whether the objectives provided by the SSM Regulation may be just as well attained through direct supervision by the national authority

> amounts to calling into question the balance [already] provided for [on an ex ante basis] in the (…) Regulation.

Such an interpretation (§ 76)

> would run directly counter to two factors that play a fundamental role in the logic of Article 6(4) of the Basic Regulation, being, firstly, the principle that significant institutions come under the sole supervision of the ECB and, secondly, the existence of specific alternative criteria affording the classification of a financial institution.

The Court also rejects the argument raised by L-Bank according to which "prudential supervision by the German authorities would be better able to attain the objective of consistent application of high prudential supervisory standards", given "the diversity of legal frameworks and supervisory authorities forming the parameters of its activity".

As noted by the claimant, L-Bank "is subject to various regulatory instruments, being not only Regulation (EU) No 575/2013 (…) and the German law on the organisation of the banking sector, but also the Law on the regional credit bank of Baden-Württemberg, as well as multiple supervisory authorities, being not only the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) (Federal Financial Supervisory Authority, Germany), the Bundesbank (German Federal Bank) and the ECB, but also the Ministry of Finance, Baden-Württemberg".

On this regard, the Court notices that (§ 111)

> the applicant does not highlight any arrangement or collaboration between the authorities of Baden-Württemberg and the German authorities that might make cooperation easier with them than with the ECB.

3. The appeal before the ECJ and the Opinion of the Advocate general

On 26th July 2017, L-Bank brought an appeal before the Court of Justice (C-450/17 P) against the judgment of the General Court of 16 May 2017 in the caseT-122/15.

In his Opinion of 5 December 2018, the Advocate General Hogan agrees with the General Court.

More to the point, on the division of competences, the Advocate General notes that (§§ 50, 53 and 57):

> Article 4(1) of the Basic Regulation vests the ECB with exclusive competence to carry out the nine specified tasks in respect of 'all' credit institution established in the participating Member States within the framework of Article 6 of that regulation. Here it may be recalled that no distinction is drawn for this purpose in Article 4 of the Basic Regulation between significant and less significant entities. Article 6(4) of the Basic Regulation provides, however, in respect of less significant entities, that the ECB shall have certain responsibilities in relation to the tasks specified in points (b), (d) to (g) and (i) of Article 4(1) while the national competent authorities have other responsibilities in relation to those tasks. The ECB is solely responsible for the tasks listed in Article 4(1)(a) and (c) of the Basic Regulation in respect of less significant entities (§ 50).
>
> Given the sheer breadth of the competences conferred on the ECB in respect of less significant entities and the clearly secondary or ancillary role played by the national competent authorities in that regard under the Basic Regulation, I cannot agree with the claim by the appellant that those authorities retain their pre-existing competences in respect of those entities. The ECB thus exercises exclusive prudential supervision of less significant entities in

> respect of the nine tasks specified in Article 4(1) of the Basic Regulation and is assisted in that exercise with respect to the tasks specified in points (b), (d) to (g) and (i) of Article 4(1) of the Basic Regulation (§ 53).
>
> the principle of proportionality cannot alter the division of competences of the Member States and the Union which is governed by the principle of conferral pursuant to Article 5(1) and (2) TEU (§ 57).

On the interpretation of the concepts of 'particular circumstances' pursuant to Article 6(4) of the Basic Regulation and 'inappropriate' pursuant to Article 70 of the SSMFR, the Opinion can be summarised as follows (see §§ 59, 71 and 72):

> It is (..) not sufficient to establish that the national competent authorities can achieve the objectives of the Basic Regulation, (..) as this merely satisfies the requirement of the appropriateness of the action under the proportionality test. Rather the fact that supervision by the national competent authorities is better able to attain the objectives of the Basic Regulation (..) must also be established (§ 59);
>
> it is clear from Article 70(2) of the SSM Framework Regulation that the term 'particular circumstances' in the second subparagraph of Article 6(4) of the Basic Regulation must be interpreted strictly. The classification of a significant entity as a less significant entity due to the existence of particular circumstances in accordance with the second subparagraph of Article 6(4) of the Basic Regulation must accordingly be regarded as being exceptional in nature (§ 71);
>
> the exception provided for by the second subparagraph of Article 6(4) of the Basic Regulation seems principally directed to those special and unusual circumstances where designation of the entity as significant would amount in practice to an obstacle to the consistent application of these high supervisory standards (§ 72).

4. The ECJ's decision

The Court of Justice totally confirms the decision of first instance.

On the scope of the ECB's competence, the Court recalls that (§ 37)

> Article 4 of Regulation No 1024/2013, headed 'Tasks conferred on the ECB', provides in paragraph 1 that, within the framework of Article 6 of that regulation, the ECB is 'exclusively competent' to carry out, for prudential supervisory purposes, the tasks listed in Article 4(1) in relation to 'all' credit institutions established in the participating Member States, without drawing a distinction between significant institutions and less significant institutions.

The Court adds that (§ 39)

> under Article 6(1) of Regulation No 1024/2013, the ECB is to carry out its tasks within an SSM composed of the ECB and national competent authorities, and is to be responsible for the effective and consistent functioning of the SSM.

The ECJ's conclusion immediately follows (§ 41):

> The national competent authorities thus assist the ECB in carrying out the tasks conferred on it by Regulation No 1024/2013, by a decentralised implementation of some of those tasks in relation to less significant credit institutions, within the meaning of the first subparagraph of Article 6(4) of that regulation.

A more restrictive reading of the ECB's competences – which is in line with the subject of the dispute before the CJEU, but is difficult to reconcile with the other paragraphs of the judgment mentioned above - seems to be drawn from the German version of § 49 of the CJEU's ruling, where the ECB's exclusive competence appears to be confined to the exclusive task of determining the content of the definition of 'particular circumstances' within the meaning of the second subparagraph of Article 6(4) SSMR (see **Chapter I.A. The SSM: allocation of tasks and powers between the ECB and the NCAs and organisational issue, § 2.2**).

On the specific issue raised by the claimant, the Court says that (§§ 47 and 55)

> direct prudential supervision of a significant entity by the national authorities is possible only when there are circumstances indicating that the classification of that entity as significant is inappropriate in order to achieve the objectives pursued by Regulation No 1024/2013 (§ 47).
>
> The circumstances (…) are those in which direct prudential supervision of a significant entity by the national authorities would enable the objectives pursued by Regulation No 1024/2013 to be better achieved than by direct prudential supervision of that entity by the ECB or, vice versa, the circumstances in which the latter supervision would not enable those objectives to be achieved as effectively as by direct prudential supervision of the relevant entity by those authorities (§ 55).

It is noteworthy that, in the Court's view, the ECB's decision to classify an entity as significant institution is (§ 86)

> a measure relating to the prudential supervision (…), adopted by the ECB, which has a broad discretion in that regard since, as stated in recital 55 of Regulation No 1024/2013, the conferral of supervisory tasks implies a significant responsibility for the ECB to safeguard financial stability in the Union, and to use its supervisory powers in the most effective and proportionate way.

5. *Some concerns on the interpretation adopted by the EU Judges*

Here some concerns on the findings of the EU Judges:

(i) The Court's interpretation on the division of competences within the SSM ends up confusing the organisational model adopted for the supervision over the SI with the organisational design thought by the Legislature with reference to the supervision over the LSIs.

(ii) The idea that stays behind this decision, according to which the supervision by the national authorities vis-à-vis LSIs was envisaged by the Council as a mechanism of mere assistance to the ECB rather than the exercise of an autonomous competence, reveals this over-simplification.

(iii) Against this background, the reference to Recital no. 37 SSMR undermines the General Court's reasoning. Indeed, pursuant to the Framework Regulation (Articles 89 – 92), the NCAs assist the ECB in the supervision of the SI.

In particular, under Article 90 of the Framework regulation (which stays within a Title named "Supervision of significant supervised entities and assistance by NCAs"):

> 1. An NCA shall assist the ECB in the performance of its tasks under the conditions set out in the SSM Regulation and this Regulation, and shall, in particular, perform all the following activities:
>
> (a) submit draft decisions to the ECB in respect of significant supervised entities established in its participating Member State, in accordance with Article 91;
>
> (b) assist the ECB in preparing and implementing any acts relating to the exercise of the tasks conferred on the ECB by the SSM Regulation, including assisting in verification activities and the day-to-day assessment of the situation of a significant supervised entity;
>
> (c) assist the ECB in enforcing its decisions, using when necessary the powers referred to in the third subparagraph of Article 9(1) and Article 11(2) of the SSM Regulation.
>
> 2. When assisting the ECB, an NCA shall follow the ECB's instructions in relation to significant supervised entities.

Therefore, the concept of "assistance" is unambiguously referred by the Framework Regulation to the relationship between the NCAs and the ECB when the supervision of SI comes into play.

Moreover, the definition, provided by the General Court, of the role of the NCAs (with respect to the supervision of LSIs) as secondary and ancillary

appears to be inconsistent with the very nature of the powers retained by the NCAs vis-à-vis LSIs, *i.e.* their power to directly adopt towards these entities legally-binding measures (which do not require any preliminary formalised decision by the ECB).

If the ECB is exclusively competent for the supervision of LSIs, how can the circumstance that the ECB is not vested with the power to intervene in the national process of adoption of a certain supervisory measure by imposing a veto be explained?

If the ECB is exclusively competent for the supervision of LSIs, how can the circumstance that the ECB is not vested with the power to issue specific instructions to the NCA for the supervision of a specific LSI be explained?

If the ECB is exclusively competent for the supervision of LSIs, how can the circumstance that the ECB is not vested with the power to directly revoke a measure adopted by the NCA be explained, when deemed incompatible with the legal framework or with the high supervisory standards the ECB is competent to safeguard?

The ECB's take-over power, provided under Article 6(5)(b) SSMR, does not overturn these conclusions.

Indeed, Article 6(5)(b) explicitly establishes that the take-over may be triggered, "within the framework defined in paragraph 7" only "when necessary" to "ensure consistency in the application of high supervisory standards".

This means that the take-over power is not upon the exclusive will of the ECB, which would make sense only if the ECB was exclusively competent for the supervision of LSIs.

The singularity of the trigger (inadequacy of the NCA in its supervisory action) requires that the decision shall be based on a case-by-case analysis as well as on very strong elements, which cannot be the weaknesses of a LSI by itself.

More precisely, the deterioration of the financial condition of an LSI or the initiation of crisis management proceedings are not *per se* reasons for the ECB to take over supervision from the responsible NCA.

The inadequacy of the NCA's supervision on that LSI has to be proven in order to justify the need of a take-over, having regard to specific actions or omissions which the NCA could be deemed responsible for.

The causal relationship between the LSI's situation and the NCA's inadequate supervision should be demonstrated by the ECB.

Moreover, the possibility to take-over an entire national LSI sector has to be excluded, since the provision of Article 6(5)(b) clearly confers on the ECB the power to take charge of supervision only for "one or more credit institutions" (no reference to the hypothesis of all LSIs), once the inadequacy of the action taken by the NCA has been, in fact, verified with respect to that

or those specific credit institutions. This further demonstrates the narrow boundaries – not perfectly consistent with the idea of the ECB vested with exclusive powers over all the LSIs – within which the take-over mechanism can legitimately operate.

In turn, the ECJ – called to pronounce on the appeal filed by L-Bank – does not elaborate further on the issue of the *division of powers* between the NCAs and the ECB. As already illustrated, the reasoning provided is grounded on a mere literal reading of Article 4 of the SSM Regulation, and in particular to the reference therein contained to the 'exclusive competence' of the ECB to carry out, for prudential supervisory purposes, the tasks listed in Article 4(1).

No specific relevance is given to the fact that Article 4 SSMR starts with a clear cross-reference to the "*framework of Article 6*", contemplating the NCAs' *tasks* and *responsibilities* over LSIs. Apparently, the ECJ opts to consider Article 4 as the provision dictating the "cornerstone principles" on the allocation of powers within the SSM, whereas – in this perspective – Article 6 would merely provide details on the way these powers, as shaped under Article 4, have to be exercised.

Neither a distinction is drawn by the ECJ between tasks and powers, and more precisely between the task of prudential supervision of all credit institutions assigned to the ECB by virtue of Article 4 SSMR, on the one hand, and the specific supervisory powers conferred on the ECB and on the NCAs according to the complex matrix resulting from Article 6 of the same Regulation, on the other hand.

***

EU Legal references: Recital 37 and Articles 4 and 6 SSMR; Article 90 of the Framework regulation.

Literature: Adalid, S., Le MSU, nouveau sous-système de droit de l'Union européenne, in *Révue des affaires européennes*, 2017, pp. 363 ff.; Annunziata, F., Fostering Centralization of EU Banking Supervision Through Case-Law. The European Court of Justice and the Role of the European Central Bank, in *Bocconi University Legal Studies Research Paper Series*, aprile 2019; Anzini M., What Role is left for National Authorities within the Single Supervisory Mechanism? A Critical Assessment of the L-Bank Case, *CEP Adhoc*, Friburgo, 30.07.2019, accessibile al sito https://www.cep.eu/en/eu-topics/details/cep/what-role-is-left-for-national-authorities-within-the-single-supervisory-mechanism.html; D'Ambrosio, R. and Lamandini, M., La "prima volta" del Tribunale dell'Unione europea in materia di Meccanismo di Vigilanza Unico, in *Giur. Comm.*, 2017, II, pp. 17 and ff.; Tröger, T., How not to do banking law in the 21st century : the Judgement of the European General Court (EGC) in the Case T-122/15 – Landeskreditbank Baden-Württemberg – Förderbank v Euro-pean Central Bank (ECB), in *Universitätsbibliothek Johann Christian Senckenberg working papers*, June 2017.

Chapter VI.A

The safeguards applicable to the ECB supervisory and sanctioning procedures

Raffaele D'Ambrosio

Summary: *1. The regime applicable to the proceedings for the adoption of micro-prudential decisions – 1.1. The ECB's obligation to respect fundamental rights – 1.2. Protection against entering business premises – 1.3. Time frame for the adoption of decisions – 1.4. Right to be heard – 1.5. Right of access to the information in the file – 1.6. Statement of reasons – 2. The regime applicable to the proceedings for the adoption of macro–prudential decisions – 3. The procedure applicable to banking licensing, qualifying holdings and other composite procedures – 4. A common regime applicable both to administrative measures and to administrative penalties? – 5. The special regime applicable to the imposition of administrative penalties having a coloration pénale – 5.1. The principle of culpability – 5.2. The right to remain silent and the obstruction of the supervisor's investigative powers: where to strike the balance? – 5.3. The full jurisdiction of the CJEU as an element of the right to an effective judicial remedy – 5.4. The principle of separation and the public hearing – 5.5. Avoiding accumulation of sanctions – 5.6. Whether severe administrative pecuniary penalties have to be applied by Courts or may also be applied by administrative supervisory authorities*

1. The regime applicable to the proceedings for the adoption of micro-prudential decisions

1.1. The ECB's obligation to respect fundamental rights

The ECB's obligation to respect the fundamental rights enshrined in the Charter and to abide by the general principles of EU law is underlined in the following SSMR recitals:

(i) recital (58): "in its action the ECB should comply with the principles of due process and transparency";

(ii) recital (63): "the ECB should respect the fundamental rights and observe the principles recognized by the Charter of Fundamental Rights of the European Union, in particular the right to an effective remedy and to a fair trial";

(iii) recital (86): "the Regulation respects the fundamental rights and observes the principles recognized in the Charter of Fundamental Rights of the European Union, in particular the right to the protection of personal data, the freedom to conduct a business, the right to an effective remedy and to a fair trial, and has to be implemented in accordance with those rights and principles".

Some fundamental rights are common to all ECB decisions irrespective of their qualification as supervisory decisions, administrative measures or administrative sanctions.

Defence rights are granted, as a rule, to the "parties" of the ECB supervisory procedure, as defined by Article 26(1) Framework regulation.

> Parties to an ECB supervisory procedure shall be:
>
> (a) those making an application;
>
> (b) those to which the ECB intends to address or has addressed an ECB supervisory decision.

Under Article 2(26) Framework regulation:

> 'ECB supervisory decision' means a legal act adopted by the ECB in the exercise of the tasks and powers conferred on it by the SSM Regulation, which takes the form of an ECB decision, is addressed to one or more supervised entities or supervised groups or one or more other persons and is not a legal act of general application.

In light of the above, procedural rights do not seem applicable neither to ECB's requests under Article 18(5) SSMR, nor to instructions under Article 9(2) SSMR.

1.2. Protection against entering business premises

In the exercise of its investigatory powers, the ECB has to respect the conditions laid down in the ECtHR and the CJEU's case law on the protection against entering business premises.

In the *Cola Est* ruling, the ECtHR (ECrtHR, 16 April 2002, 37971/97, *Société Colas Est and others*, §§ 45-50) laid down the conditions for interference in the right of privacy of home, requiring some form of previous judicial control in order to prevent possible arbitrary actions, where the authority's investigative powers are very broad.

In the case at hand the Court ruled that a violation of Article 8 of the ECHR occurred, the relevant parts of which provide:

> 1. Everyone has the right to respect for... his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society... for the prevention of... crime... or for the protection of the rights and freedoms of others.

See ECtHR, 16 April 2002, 37971/97, *Société Colas Est and others*, Application no. 37971/97, §§ 45-50.

> 45. The Court notes that the Government submitted that, in accordance with the 1945 ordinance, the officials had exercised only a general right of inspection, supplemented by a power of seizure, and that no "house searches" or "general searches" had been carried out. Although the exercise of the inspectors' powers had not been subject to prior authorisation by a judge, it had been reviewed *ex post facto* by the courts. The Government considered that the interference did not appear disproportionate, and they relied on the State's margin of appreciation, which could be more far-reaching where business premises or professional activities were concerned.
> The applicant companies considered that a house search had been carried out on their premises and pointed out that sections 15 and 16(2) of the 1945 ordinance empowered officials to make such searches and seizures without any prior judicial authorisation or any supervision in the course of such operations. The safeguards laid down in the 1986 ordinance in relation to searches and seizures had not existed in the legislation applicable at the material time. The applicant companies accordingly submitted that the interference had not been proportionate to the aims pursued.
>
> 46. The Court notes that the inspections ordered by the authorities were carried out simultaneously at the applicant companies' head offices and branches included in a "list of companies to be inspected"

(see paragraph 9 above). The inspectors entered the premises of the applicant companies' head or branch offices, without judicial authorisation, in order to obtain and seize numerous documents containing evidence of unlawful agreements. It therefore appears to the Court that the operations in issue, on account of the manner in which they were carried out, constituted intrusions into the applicant companies' "homes" (see paragraph 11 above). The Court considers that although the Ministry of Economic Affairs, to which the authority responsible for ordering investigations was attached at the material time, made no distinction between the power of inspection and the power of search or entry, as the applicant companies pointed out (see paragraph 18 above), it is not necessary to determine this issue, as at all events "the interference complained of is incompatible with Article 8 in other respects" (see, *mutatis mutandis*, *Funke*, *Crémieux* and *Miailhe (no. 1)*, cited above, p. 23, § 51, p. 61, § 34, and p. 88, § 32, respectively).

47. Admittedly, the Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the need for interference, but it goes hand in hand with European supervision. The exceptions provided for in paragraph 2 of Article 8 are to be interpreted narrowly (see *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, p. 21, § 42), and the need for them in a given case must be convincingly established (see *Funke*, *Crémieux* and *Miailhe (no. 1)*, cited above, p. 24, § 55, p. 62, § 38, and p. 89, § 36, respectively).

48. The Court considers that although the scale of the operations that were conducted – as the Government pointed out – in order to prevent the disappearance or concealment of evidence of anti-competitive practices justified the impugned interference with the applicant companies' right to respect for their premises, the relevant legislation and practice should nevertheless have afforded adequate and effective safeguards against abuse (ibid., *mutatis mutandis*, pp. 24-25, § 56, p. 62, § 39, and pp. 89-90, § 37, respectively).

49. The Court observes, however, that that was not so in the instant case. At the material time – and the Court does not have to express an opinion on the legislative reforms of 1986, whereby inspectors' investigative powers became subject to prior authorisation by a judge – the relevant authorities had very wide powers which, pursuant to the 1945 ordinance, gave them exclusive competence to determine the expediency, number, length and scale of inspections. Moreover, the inspections in issue took place without any prior warrant being issued by a judge and without a senior police officer being present (ibid., *mutatis mutandis*, p. 25, § 57, p. 63, § 40, and p. 90, § 38, respectively). That being so, even supposing that the entitlement to interfere may be more far-reaching where the business premises of a juristic person are concerned (see, *mutatis mutandis*, *Niemietz*,

cited above, p. 34, § 31), the Court considers, having regard to the manner of proceeding outlined above, that the impugned operations in the competition field cannot be regarded as strictly proportionate to the legitimate aims pursued (see *Funke*, *Crémieux* and *Miailhe (no. 1)*, cited above, p. 25, § 57, p. 63, § 40, and p. 90, § 38, respectively).

50. In conclusion, there has been a violation of Article 8 of the Convention.

Article 13 SSMR stipulates that

1. If an on-site inspection provided for in Article 12(1) and (2) or the assistance provided for in Article 12(5) requires authorisation by a judicial authority according to national rules, such authorisation shall be applied for.

2. Where authorisation as referred to in paragraph 1 of this Article is applied for, the national judicial authority shall control that the decision of the ECB is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the ECB for detailed explanations, in particular relating to the grounds the ECB has for suspecting that an infringement of the acts referred to in the first subparagraph of Article 4(3) has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the inspection or demand to be provided with the information on the ECB's file. The lawfulness of the ECB's decision shall be subject to review only by the CJEU.

Though not perfectly in line with the *Cola Est* ruling, that required a judicial control in every case and not only where requested by national law, the solution under Article 13(2) of the SSM Regulation seems to represent a fair compromise between the values involved, since it preserves the effectiveness of the ECB's supervisory powers without prejudice to the protection of business premises to the extent that it is recognised in the relevant national law.

1.3. Time frame for the adoption of decisions

In light of the principle of sound administration and in order to preserve the rights of defense, a certain time frame is requested for the adoption of the ECB's supervisory decisions.

See ECJ, Case Guérin Automobiles, C-282/95, § 37:

> "the Commission's definitive decision must, in accordance with the principles of good administration, be adopted within a reasonable time after it has received the complainant's observations".

See also ECJ, Case C-105/04, Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied, § 49:

> "the excessive duration of the first phase of the administrative procedure may have an effect on the future ability of the undertakings concerned to defend themselves, in particular by reducing the effectiveness of the rights of the defence in the second phase of the procedure".

Nevertheless, in the Court's view there is no need for strict time limits. The assessment of the required time frame is rather based on the principle of proportionality and depends on the circumstances of the case.

Specific time limits are provided for under Article 4 of Council Regulation 2532/98 as well as under Articles 130 ff. of the Framework regulation on the ECB's sanctioning powers.

1.4. Right to be heard

In light of Article 41(2)(a) of the Charter of fundamental rights "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken" applies to all EU Institutions including the ECB.

Moreover, under Article 22 SSMR before taking any supervisory decisions, the ECB shall give the persons who are the subject of the proceedings the opportunity of being heard. The ECB shall base its decisions only on objections on which the parties have been able to comment.

This obligation shall not apply if urgent action is needed in order to prevent a significant damage to the financial system. In such a case, the ECB may adopt a provisional decision and shall give the persons concerned the opportunity to be heard as soon as possible after taking its decision.

The right to be heard does not *per se* entail a right to an oral hearing.

Detailed provisions on the right to be heard are contained in Article 31 of the Framework regulation:

> 1. Before the ECB may adopt an ECB supervisory decision addressed to a party which would adversely affect the rights of such party, the party must be given the opportunity of commenting in writing to the ECB on the facts, objections and legal grounds relevant to the ECB supervisory decision. If the

ECB deems it appropriate it may give the parties the opportunity to comment on the facts, objections and legal grounds relevant to the ECB supervisory decision in a meeting. The notification by which the ECB gives the party the opportunity to provide its comments shall mention the material content of the intended ECB supervisory decision and the material facts, objections and legal grounds on which the ECB intends to base its decision. Section 1 of Chapter III of the SSM Regulation shall not be subject to the provisions of this Article.

2. If the ECB gives a party the opportunity to comment on the facts, objections and legal grounds relevant to the ECB supervisory decision in a meeting, unless duly excused, the absence of the party is not a reason to postpone the meeting. If the party is duly excused, the ECB may postpone the meeting or give the party the opportunity to comment on the facts, objections and legal grounds relevant to the ECB supervisory decision in writing. The ECB shall prepare written minutes of the meeting that shall be signed by the parties and shall provide a copy of the minutes to the parties.

3. The party shall, in principle, be given the opportunity to provide its comments in writing within a time limit of two weeks following receipt of a statement setting out the facts, objections and legal grounds on which the ECB intends to base the ECB supervisory decision. On application of the party, the ECB may extend the time limit as appropriate. In particular circumstances, the ECB may shorten the time limit to three working days. The time limit shall also be shortened to three working days in the situations covered by Articles 14 and 15 of the SSM Regulation.

4. Notwithstanding paragraph 3, and subject to paragraph 5, the ECB may adopt an ECB supervisory decision addressed to a party which would adversely affect the rights of such party without giving the party the opportunity to comment on the facts, objections and legal grounds relevant to the ECB supervisory decision prior to its adoption if an urgent decision appears necessary in order to prevent significant damage to the financial system.

5. If an urgent ECB supervisory decision is adopted in accordance with paragraph 4, the party shall be given the opportunity to comment in writing on the facts, objections and legal grounds relevant to the ECB supervisory decision without undue delay after its adoption. The party shall, in principle, be given the opportunity to provide its comments in writing within a time limit of two weeks from receipt of the ECB supervisory decision. On application of the party, the ECB may extend the time limit; however, the time limit may not exceed six months. The ECB shall review the ECB supervisory

> decision in the light of the party's comments and may either confirm it, revoke it, amend it or revoke it and replace it by a new ECB supervisory decision.
>
> 6. For ECB supervisory procedures relating to penalties pursuant to Article 18 of the SSM Regulation and Part X of this Regulation, paragraphs 4 and 5 shall not apply.

As clearly emerges from its wording, Article 22 SSMR does not apply to the ECB's investigatory powers. This not withstanding, in its Guide to on-site inspections and internal model investigations of September 2018,[1] the ECB gives to the entity concerned the possibility to comment on the facts and findings resulting in the course of the on-site inspection.

See § 3.3.1 of the Guide (Rights of the inspected legal entities. Possibility to comment on the facts and findings):

> The inspected legal entity is given the opportunity to submit written comments on the content of the draft report within a period of two weeks. These comments should focus on the executive summary and key findings and should be submitted in a feedback template (3-column-table) that will be provided to the inspected legal entity along with the draft report. The first column is used to quote the parts of the draft report the inspected legal entity wishes to comment on; the second column is used by the inspected legal entity to comment on the report; and the third column is used by the HoM [Head of Mission] to respond to the comments received. The filled-out feedback template will be added to the final report as an annex. The HoM takes the feedback provided into account when finalising the report after the exit meeting.

1.5. Right of access to the information in the file

As clearly laid dawn in Article 22(2) SSMR, instrumental to the right to be heard is the right of access to the information in the file.

> The rights of defence of the persons concerned shall be fully respected in the proceedings. They shall be entitled to have access to the ECB's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information.

[1] The Guide is available on the ECB's web-site.

As one may infer from the wording of Article 22(2) SSMR, access to file is subject to some limitations which are further specified in Article 32(1) Framework regulation.

The latter reads as follows

> 1. The rights of defence of the parties concerned shall be fully respected in ECB supervisory procedures. For this purpose, and after the opening of the ECB supervisory procedure, the parties shall be entitled to have access to the ECB's file, subject to the legitimate interest of legal and natural persons other than the relevant party, in the protection of their business secrets. The right of access to the file shall not extend to confidential information. The NCAs shall forward to the ECB, without undue delay, any request received by them related to the access to files connected with ECB supervisory procedures.
>
> 2. The files consist of all documents obtained, produced or assembled by the ECB during the ECB supervisory procedure, irrespective of the storage medium.
>
> 3. Nothing in this Article shall prevent the ECB or NCAs from disclosing and using information necessary to prove an infringement.
>
> 4. The ECB may determine that access to a file shall be granted in one or more of the following ways, taking due account of the technical capabilities of the parties:
>
> (a) by means of CD-ROMs or any other electronic data storage device including any that may become available in future;
>
> (b) through copies of the accessible file in paper form sent to them by mail;
>
> (c) by inviting them to examine the accessible file in the offices of the ECB.
>
> 5. For the purpose of this article, confidential information may include internal documents of the ECB and NCAs and correspondence between the ECB and an NCA or between NCAs.

In the *Solvay* (CFI, T-30/91, § 59) and *ICI (*CFI, T-36 and 37/91, §§ 69 and 49 respectively) cases, the Court observed that the purpose of providing access to the file, in competition cases, is to enable the addressees of statements of objections to examine evidence in the Commission's file, so that they are in a position to effectively express their views on the conclusion reached by the Commission in its statement of objections on the basis of that evidence.

Access to file is thus one of the procedural safeguards intended to protect the rights of defense.

In the Case T-410/03 *Hoechst GmbH v Commission* (2008), the Court clarified that the Commission cannot rely on confidentiality as a sort of blank

check (i.e. by failing to "balance" confidentiality with the right of access); it should have provided a non-confidential version of the documents in issue or, where appropriate, if that proved difficult, prepared a list of the documents concerned and a sufficiently precise non-confidential summary of their content.

Furthermore, in the Court's view, limitations to the access to files have to be duly justified in light of the proportionality principle, indicating how the disclosure would "specifically and actually undermine" the protection of the interests which confidentiality aims at safeguarding.

In the case Case T-251/15, *Espírito Santo Financial (Portugal) v ECB*, the General Court annulled the ECB's decision on the denial to access to files (also) because the reasons that justified it were deemed insufficient.

See GC, 26 April 2018, Case T-251/15, *Espírito Santo Financial (Portugal) v ECB*, ECLI:EU:T:2018:234, § 75:

> The ECB has failed to provide any explanation as to how disclosure of the ceiling for the provision of emergency liquidity in question, the amount of which was included in the minutes that were provided to the applicant in the form of extracts, from which that amount had, however, been redacted, could specifically and actually undermine the protection of the public interest as regards the confidentiality of the proceedings of the Governing Council. It merely referred to Article 10.4 of the ESCB and ECB Statute and to the first indent of Article 4(1)(a) of Decision 2004/258.

For further details on the topic see **Chapter VI.B. Access to confidential information: the Buccioni case**.

1.6. Statement of reasons

The ECB must respect the requirement for acts to state the reasons on which they are based. Article 22(2), second sub-paragraph, of the SSM Regulation requires that "the decisions of the ECB shall state the reasons on which they are based".

See also Article 33 of the Framework Regulation:

> 1. Subject to paragraph 2, an ECB supervisory decision shall be accompanied by a statement of the reasons for that decision.
>
> 2. The statement of reasons shall contain the material facts and legal reasons on which the ECB supervisory decision is based.
>
> 3. Subject to Article 31(4), the ECB shall base an ECB supervisory decision only on facts and objections on which a party has been able to comment.

The obligation to state the reasons is functional to judicial control called for under Article 263 of the TFEU and is of even more fundamental importance where the authority, as in the case of the ECB's supervisory powers, enjoys broad power of appraisal.

2. *The regime applicable to the proceedings for the adoption of macro-prudential decisions*

Article 22 SSMR only applies to micro-prudential decisions, since it refers to the decisions taken under Article 4 and not to those also taken under Article 5.

Macro-prudential decisions are, therefore, not subject to the rules of due process under Article 22.

A problem arises as to whether these decisions are subject to Article 41(2) of the Charter.

Under the provisions of Article 41(2), every person has a right to be heard "before an individual measure which would affect him or her adversely is taken" and a right to have access to files as an essential precondition of the right to be heard.

Thus, for these rights to be guaranteed to the addressees of a decision adversely affecting them, the decision has to be an individual decision.

Since macro-prudential decisions are basically general and not individual decisions, their addressees do not have the right to be heard (and to have access to files) before the decision is adopted.

Nevertheless, it cannot be excluded that a macro-prudential decision could be addressed to a single credit institution, as is the case of the capital conservation measures provided for under the CR Directive.

In these cases, the right to be heard and the right to access to files do apply as fundamental rights provided for within the Charter.

This is confirmed by Article 101(2) Framework regulation

> The macro-prudential procedures referred to in Articles 5(1) and (2) of the SSM Regulation shall not constitute ECB or NCA supervisory procedures within the meaning of this Regulation, without prejudice to Article 22 of the SSM Regulation in relation to decisions addressed to individual supervised entities.

3. *The regime applicable to banking licensing, qualifying holdings and other composite procedures*

An overview of the SSM composite procedures, i.e. those administrative procedures where an EU authority (the ECB) and the authorities of a Member State

(the relevant NCAs) have distinct inter-dependent functions, can be found in **Chapter IV.A. The involvement of the NCAs in the ECB's supervisory proceedings**.

As a rule, within said procedures, the decision-making authority, whether the ECB or the relevant NCA, must comply with the due process requirements, including the right to be heard. Nevertheless, where the decision making authority is legally bound by a proposal or a request made by another authority, the due process rights must be adequately protected before this authority.

Within the banking licensing and the qualifying holdings procedures, the Framework regulation ensures the application of the right to be heard in the ECB phase only (see Articles 77, 81(2), 83(2) and 87). Instead, it is silent with regard to the national phase, in the assumption that the ECB is not bound by the NCAs' proposals.

However, there is a case where the protection of the right to be heard already occurs at the national stage. Indeed, if the applicant does not comply with the conditions for the authorisation set out in the relevant national law, the authority competent to reject the application for the authorisation is the NCA and the right to be heard has to be granted within the national phase.

In the composite proceedings at the ECB's initiative (see Articles 7, 9 and 18(5) SSMR), it is not always clear to what extent the ECB's request is binding for the NCAs and detrimental for the addresse of the final decision.

Should this occur, the right to be heard is expected to be granted before the requesting authority.

Shoud the NCA enjoy a margin of maneouvre, as in the case under Article 18(5) SSMR, the right to be heard has to be granted before the NCA. However, since the ECB's request is a necessary precondition for the sanctioning procedure, the right to be heard has to include knowledge of the request and the ability to contest its findings.

Despite defects in the endo-procedural acts should not affect the final decisions whenever, as it is the rule, the ECB may decide to depart from it, a potential problem remains in all cases the NCA – in spite of the duty of cooperation in good faith – has not adopted the required endo-procedural act.

The question arises here as to whether the ECB can instruct the NCA to adopt the necessary act and based on which rule and/or, as appropriate, it can act independently of this act.

As to the legal basis and with regard to the endo-procedural national phase, it is unclear whether Article 6(1) SSMR allows for interferences by the ECB in individual administrative procedures. An alternative could be to refer to Article 6(7), which allows the ECB to regulate procedures concerning all SSM credit institutions. However, an amendment of the FR would be necessary.

With regard to the implementing national phase, specific provisions are in place requiring the NCAs to comply with the ECB instructions.

Under Article 90(2) of the Framework Regulation

> When assisting the ECB, an NCA shall follow the ECB's instructions in relation to significant supervised entities.

Moreover, Article 108(5) of the Framework Regulation stipulates that

> An NCA in close cooperation shall take all necessary measures to comply with the ECB's instructions, requests or guidelines and it shall inform the ECB without undue delay of the measures it has taken.

Article 134(7), on the other hand, merely states that

> An NCA of a participating Member State shall notify the ECB of the completion of a penalty procedure initiated at the request of the ECB pursuant to paragraph 1. In particular, the ECB shall be informed of the penalties imposed, if any.

It is worth noting that, differently from what is provided for in the field of monetary policy (see Article 35.6 of the Statute of the ESCB and of the ECB), the ECB enjoys no coercive power to oblige the NCAs to follows its instructions.

4. *A common regime applicable both to administrative measures and to administrative penalties?*

It is uncertain whether administrative measures are subject to the principle of legality.

In the *Könicke* case (C-117/83), the CJEU emphasises that a "penalty", even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis.

Despite the use of the term "penalty", the judgment refers to the forfeiture of a deposit, which is of reparatory nature and might be considered as a "measure" under Regulation No 2988/95. The judgment seems therefore to suggest, at first glance, that a legal basis is necessary for reparatory measures as well.

5. *The regime applicable to the imposition of administrative penalties having a coloration pénale*

5.1. *The principle of culpability*

In the case *Kaserai Champignon Hofmeister* (ECJ, C-210/00, 11 July 2002, §§ 43-44), the CJEU excluded the application of the *nulla poena sina culpa*

principle since, in the particular circumstances, the sanction was not considered as having a criminal nature. The same view was taken in *Maizena* (ECJ, C-137/85, 1987, §§ 12-14).

It is clear that, under CJEU case law, the culpability principle only applies to penalties having a criminal nature.

As regards the penalties under the SSM Regulation, the principle of culpability is provided for by Article 18(1) in relation to penalties imposed by the ECB for violations of directly applicable Union law.

For the sanctions applied to breaches of the ECB's regulations and decisions, no culpability is expressly required by Article 18(7). Nor is culpability provided for by Council Regulation No 2532/98, in accordance with which these sanctions are imposed.

To the extent that the sanctions under the Council Regulation above may be considered as having a "*coloration pénale*", a problem arises as to whether the provisions are compatible with the principle of culpability or not.

5.2. The right to remain silent and the obstruction of the supervisor's investigative powers: where to strike the balance?

As already mentioned in Chapter I.A, § 3.2.6, under Article 10(1) of the SSMR, the ECB may require the legal and natural persons mentioned therein "to provide all information that is necessary in order to carry out the tasks conferred on it" by the regulation.

Paragraph 2 adds that "the persons referred to in paragraph 1 shall supply the information requested" and clarifies that even "professional secrecy provisions do not exempt those persons from the duty to supply that information" and that "supplying that information shall not be deemed to be in breach of professional secrecy".

Under some national jurisdictions, obstructing the supervisor's investigatory powers is tantamount to a criminal or administrative offence.

Under Article 2638 of the Italian Civil code the following conducts - committed by directors, general managers, CFOs, auditors and liquidators of any kind of supervised entities - are punished with the imprisonment from one to four years (the punishment is doubled for listed companies/issuers of financial instruments widely distributed among the public):

(i) reporting to the supervisory authorities material facts not corresponding to the truth for the purpose of hampering the exercise of its functions, even if such facts are subject to evaluation, on the economic, patrimonial or financial status of the supervised entity; or hiding, for the same purpose, with other fraudulent means, facts that they should have communicated, relating to said status (para. 1);

(ii) consciously hampering in whatever form the function of the supervisory authorities, also through the omission of communications due to them (para. 2).

A problem arises as to whether the ECB can be considered as a national competent authority for the purposes of Article 2638 of the Italian Civil Code.

As the ECB is vested with supervisory tasks in respect of significant credit institutions under SSMR, it has to be considered as a supervisory authority under said Article 2638.

This view is confirmed by the Italian Courts. The Tribunal of Vicenza, in the context of the criminal proceedings for the alleged crimes of obstacles to supervisory activity against managers of *Banca Popolare di Vicenza SpA*, decided that not only *Banca d'Italia* but also the ECB, in its capacity as supervisory authority, has to be considered as an injured party under provisions contained in Article 2638 of the Italian civil code.

The respect of the right to remain silent requires that the authority vested with sanctioning powers is prohibited from compelling an undertaking to provide answers, which the authority itself should prove.

Different approaches are followed in the HCtHR (*Funke v. France*, Appl. 10828/84, 1993, § 44) and the ECJ (*Orkem*, C-374/87 and *Solvay*, C-27/88) case-law respectively.

In *Orkem* (ECJ, C-374/87) and *Solvay* (ECJ, C-27/88), the ECJ held that the right under Article 6 of the ECHR not to give evidence against oneself applied only to persons charged with an offence in criminal proceedings and that it was not a principle which could be relied on in relation to infringements in the economic sphere, in order to resist a demand for information such as may be made by the Commission to establish a breach of EU competition law.

Under paragraphs 29 and 30 of *Orkem*, the ECJ took the view that:

> "29. In general, the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings. A comparative analysis of national law does not therefore indicate the existence of such a principle, common to the laws of the Member States, which may be relied upon by legal persons in relation to infringements in the economic sphere, in particular infringements of competition law.
>
> 30. As far as Article 6 of the European Convention is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself".

The right against self-incrimination is therefore recognised by the ECJ only to the extent that it is necessary to prevent the rights of defence from being irremediably impaired during preliminary inquiry procedures, as results from §§ 32 to 35 of the *Orkem* case:

> 32. It is necessary, however, to consider whether certain limitations on the Commission's powers of investigation are implied by the need to safeguard the rights of the defence which the Court has held to be a fundamental principle of the Community legal order…
>
> 33. In that connection, the Court observed recently… that whilst it is true that the rights of the defence must be observed in administrative procedures which may lead to the imposition of penalties, it is necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures which may be decisive in providing evidence of the unlawful nature
>
> of conduct engaged in by undertakings and for which they may be liable. Consequently, although certain rights of the defence relate only to contentious proceedings which follow the delivery of the statement of objections, other rights must be respected even during the preliminary inquiry.
>
> 34. Accordingly, whilst the Commission is entitled, in order to preserve the useful effect of Article 11(2) and (5) of Regulation No 17, to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned.
>
> 35. 35 Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove".

To sum up, an undertaking under investigation by the Commission, in competition law proceedings, is under an obligation to answer questions of purely factual nature and produce pre-existing documents. It is however not obliged to answer questions regarding the purpose and motive of its actions or other questions which might involve the admission of an infringement.

The case law of the ECJ was put into question by the ECtHR ruling in the case *Funke v. France* (ECtHR, Appl. 10828/84, 1993). The ECtHR ruled that Article 6 of the ECHR, according to its "autonomous meaning", was broad enough to be applied to penalties imposed in the circumstances and that, under this provision, any person charged with a criminal offence had the right to remain silent and not to contribute towards self-incrimination (*Funke v. France*, § 44).

The ECJ case law appears to offer less protection than the ECtHR case law. The reason for this is that the ECJ prioritises the values involved in a different way. The ECJ's concern is that a full endorsement of the right against self-incrimination might render the Commission's investigatory powers ineffective.

In order for the right to remain silent to be preserved, the undertakings may only be obliged to answer factual questions.

A norm similar to that under Article 9(2) of the OLAF regulation,[2] imposing a duty to inform the persons subject to an investigation of their rights, including the privilege against self-incrimination, is not provided for in the SSM legal framework.

However, Article 29(2) of the Framework Regulation recognises that the duty of the parties to an ECB procedure to "state truthfully the facts known to them" is "subject to the limits relating to sanctioning procedures under Union law".

Given that, one may conclude that it is only within the limits mentioned above that the ECB may sanction a credit institution's refusal to provide information (see Articles 142, lit. (c) and 142(2), lit. (b), Framework regulation).

This solution seems to be a fair compromise between the values involved, since it preserves the effectiveness of the ECB's supervisory powers without prejudice to the core aspects of the protection against self-incrimination.

It is worth noting that, in its Order No 117 of 10 May 2019, the Italian Constitutional Court made a reference to the CJEU seeking a preliminary ruling on whether, in EU law, the "right to silence", enjoyed by those who may be charged with an offence, can also be invoked in proceedings before the *Commissione Nazionale per le Società e la Borsa* (National Commission for Companies and the Stock Exchange; CONSOB) regarding offences falling within its sphere of competence.

As clarified in the Italian Consitutional Court Press Release of 10 may 2019

> The question before the Constitutional Court, which the CJEU will also have to address, arises in a case involving a company director who had to pay a substantial fine for failing to answer Consob's questions on suspicious financial operations. The party challenged the fine, stating that he had simply relied upon the constitutional right to refrain from answering questions from which his own liability might have emerged.
>
> The Supreme Court of Cassation, seised of the case, had raised

[2] Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999.

a question of constitutionality regarding the provision of the Consolidated Text on Finance that imposes a fine in the range of 50,000 euros to 1 million euros for “failing to meet Consob’s requests on time”, without allowing for any exceptions for individuals who are already suspected of an offence.

The Constitutional Court found that EU law requires Member States to punish the failure to cooperate with financial market supervisory authorities. Thus, before deciding the question of constitutionality, it considered it appropriate to seek a preliminary ruling from the CJEU on whether this duty also applies towards those who are suspected of committing an offence, and whether it is compatible with the “right to silence”, that is, with the right not to be forced to make self-incriminating statements, a right recognized by the Italian Constitution and by the Charter of Fundamental Rights of the European Union.

5.3. The full jurisdiction of the CJEU as an element of the right to an effective judicial remedy

It is established in case law that decisions of the Commission imposing fines in competition cases involve a criminal charge for the purposes of Article 6(1) of the ECHR, not least because the purpose of such fines is to punish and deter.

It is also established that, in order to satisfy Article 6(1) of the ECHR, the tribunal determining the criminal charge must not only be independent and impartial, but also have full jurisdiction. The same holds with regard to Article 47 of the Charter and the right to the effective judicial remedy therein.

Nevertheless, the mere review of legality prescribed by Article 263 of the TFEU may be derogated only through Regulations adopted jointly by the EU Parliament and the Council or by the Council pursuant to the provision of the Treaties.

It is unclear whether Article 18 SSMR allows the CJEU to have full jurisdictions on the ECB’s sanctioning decisions provided for therein.

Indeed, under Article 18(4) SSMR, the ECB must apply the whole of Article 18 in accordance with the rules of procedure contained in Council Regulation No 2532/98, only as appropriate. Moreover, the rule contained under Article 5 of Council Regulation No 2532/98, concerning the full jurisdiction of the CJEU, is not - strictly speaking - a rule of procedure that the ECB would be bound to apply.

Article 18(7) of the SSM Regulation refers in turn to the whole of Council Regulation 2532/98, but only with regard to the ECB’s power to impose sanctions. Even in this case, there is therefore a doubt as to whether Article 5 of Council

Regulation No 2532/98, concerning the full jurisdiction of the CJEU, is referred to in Article 18 of the SSM Regulation.

Even though the interpreter is required to make any effort in order to read the SSMR provisions in conformity with the principles of the Charter and, thus, read Article 18(4) and (7)'s reference to Council Regulation No 2532/98 as including the rule on the full jurisdiction of the CJEU, the question remains debatable.

5.4. The principle of separation and the public hearing

It is a consolidated stance of the case law of both the ECtHR and the CJEU that the principle of separation between the investigatory and the decision making phase needs to be followed within any sanctioning proceeding.

In the judgment *Dubus v.France,* as regards the application of Article 6 of the ECHR, the ECtHR not only took the view that the French *Commission Bancaire*, when it imposed the penalty in that case, was to be considered as a tribunal for the purposes of Article 6(1) of the ECHR, but also that, in the circumstances of the case, the penalty had a *coloration pénale* and was a criminal charge for the purposes of that Article.

See §§ 61 and 62 of the judgment:

> 61. En résumé, la Cour n'est pas convaincue par l'affirmation du Gouvernement sur l'existence d'une séparation organique au sein de la Commission bancaire. Elle estime que la requérante pouvait nourrir des doutes objectivement fondés quant à l'indépendance et l'impartialité de la Commission du fait de l'absence de distinction claire entre ses différentes fonctions.
>
> 62. Partant, la Cour estime qu'il y a eu violation de l'article 6 § 1 de la Convention.

The full application of this principle implies a double check of the reasons of the addressees of a sanctioning decisions in both the investigatory and the decision making phases.

This notwithstanding, a limited application of the principle of separation is admissible to the extent that the CJEU has full jurisdiction on sanctions, which, as it said before, is not crystal clear under Article 18 SSMR.

See ECtHR, *Menarini,* § 59

> Le respect de l'article 6 de la Convention n'exclut donc pas que dans une procédure de nature administrative, une «peine» soit imposée d'abord par une autorité administrative. Il suppose cependant que la décision d'une autorité administrative ne remplissant pas elle-même les conditions de l'article 6 § 1 subisse

le contrôle ultérieur d'un organe judiciaire de pleine juridiction (*Schmautzer, Umlauft, Gradinger, Pramstaller, Palaoro et Pfarrmeier c. Autriche*, arrêts du 23 octobre 1995, série A nos 328 A-C et 329 A-C, respectivement §§ 34, 37, 42 et 39, 41 et 38). Parmi les caractéristiques d'un organe judiciaire de pleine juridiction figure le pouvoir de réformer en tous points, en fait comme en droit, la décision entreprise, rendue par l'organe inférieur. Il doit notamment avoir compétence pour se pencher sur toutes les questions de fait et de droit pertinentes pour le litige dont il se trouve saisi (*Chevrol c. France*, no 49636/99, § 77, CEDH 2003-III, et *Silvester's Horeca Service c. Belgique*, nº 47650/99, § 27, 4 mars 2004)

and *Grande Stevens,* § 139

> Therefore, in administrative proceedings, the obligation to comply with Article 6 of the Convention does not preclude a "penalty" being imposed by an administrative authority in the first instance. For this to be possible, however, decisions taken by administrative authorities which do not themselves satisfy the requirements of Article 6 § 1 of the Convention must be subject to subsequent control by a judicial body that has full jurisdiction (see Schmautzer, Umlauft, Gradinger, Pramstaller, Palaoro and Pfarrmeier v. Austria, judgments of 23 October 1995, §§ 34, 37, 42 and 39, 41 and 38 respectively, Series A nos. 328 A-C and 329 A-C). The characteristics of a judicial body with full jurisdiction include the power to quash in all respects, on questions of fact and law, the decision of the body below. It must have jurisdiction to examine all questions of fact and law relevant to the dispute before it (see Chevrol v. France, no. 49636/99, § 77, ECHR 2003-III; Silvester's Horeca Service v. Belgium, no. 47650/99, § 27, 4 March 2004; and Menarini Diagnostics S.r.l., cited above, § 59).

The same holds true with regard to the public hearing which has to be considered as a precondition in order to grant the independence and the impartiality of the decision making body in the field of sanctions having a substantive criminal nature.

Should the public hearing not take place in the administrative decision making phase, it has to be granted in the judicial phase before a judge having full jurisdiction on the sanctions to be applied.

See ECtHR, *Grande Stevens*, §§ 118, 122-123, 148-149, 151-155:

> 118. The Court also notes that the proceedings before the CONSOB were essentially written and that the applicants were unable to take part in the only meeting held by the commission, to which they were not invited. This is not disputed by the Government. In this

connection, the Court reiterates that an oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1 (see Jussila, cited above, § 40).

122. As to the present case, the Court considers that a public hearing, open and accessible to the applicants, was necessary. In this connection, the Court notes that the facts were contested, especially with regard to the state of progress in the negotiations with Merrill Lynch International Ltd, and that, quite apart from their financial severity, the penalties which some of the applicants were liable to incur carried, as previously noted (see paragraphs ..., 97 and 98 above), a significant degree of stigma, and were likely to adversely affect the professional honour and reputation of the persons concerned.

123. In the light of the foregoing, the Court considers that the proceedings before the CONSOB did not satisfy all of the requirements of Article 6 of the Convention, particularly with regard to equality of arms between the prosecution and the defence and the holding of a public hearing which would have allowed for an oral confrontation.

148. The Court notes at the outset that there is nothing in the present case to cast doubt on the independence and impartiality of the Turin Court of Appeal. Indeed, the applicants do not contest it.

149. The Court further observes that the court of appeal had jurisdiction to rule, in respect of both law and fact, on whether the offence set out in Article 187 ter of Legislative Decree no. 58 of 1998 had been committed, and was authorised to set aside the decision taken by the CONSOB. It was also called upon to assess the proportionality of the imposed penalties to the seriousness of the alleged conduct. In fact, it reduced the amount of the fines and the length of the ban on exercising their profession imposed on certain of the applicants (see paragraphs 30 and 31 above) and examined their various factual or legal allegations (see paragraphs 32-36 above). Thus, its jurisdiction was not merely confined to reviewing lawfulness.

151. In the light of the above considerations, the Court considers that the Turin Court of Appeal was indeed a “body with full jurisdiction” within the meaning of its case-law (see, mutatis mutandis, Menarini Diagnostics S.r.l., cited above, §§ 60-67). The applicants themselves do not seem to contest this (see paragraph 141 above).

152. It remains to be established whether the hearings on the merits held before the Turin Court of Appeal were public, a factual matter on which the parties’ submissions differ (see paragraphs 142 and 145-146 above). In this connection, the Court cannot but reiterate its conclusions concerning the necessity, in the present case, of a public hearing (see paragraph 122 above).

153. The Court notes that the parties submitted contradictory

> documents with regard to the manner in which the disputed hearings were conducted; according to the written statements from the Administrative Director of the Registry of the Turin Court of Appeal, submitted by the applicants, those hearings were held in private, although – according to the written statements of the President of the Court of Appeal, submitted by the Government – only the hearings which concerned the urgent measures were held in private, all of the other hearings having been public. The Court is hardly in a position to state which of these two versions is correct. Whatever the case, faced with these two versions, both of which are plausible and which come from competent but opposing sources, the Court considers that it should not depart from the content of the official documents in the proceedings. As the applicants have righty emphasised (see paragraph 142 above), the judgments delivered by the court of appeal indicate that it met in private or that the parties had been summoned to deliberations held in private (see paragraph 30 in fine above).
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> 154. On the basis of these references, the Court accordingly concludes that no public hearing was held before the Turin Court of Appeal.
>
> 155. It is true that a public hearing was held before the Court of Cassation. However, the latter did not have jurisdiction to examine the merits of the case, to establish the facts and to assess the evidence; indeed, the Government do no contest this. It could not therefore be considered as a court with full jurisdiction within the meaning of the Court's case-law.

Despite the doubts on the full jurisdiction of the CJEU on the ECB's sanctioning decisions, not only the principle of the public hearing is not included at all within the safeguards provided for in Article 127 Framework regulation, but the principle of separation itself is not completely respected therein.

Indeed, a new exam of the reasons of the addressee of an ECB sanctioning decision is only admitted where the Supervisory Board does not agree with the proposal of the investigating unit, but concludes that a different breach has been committed by a supervised entity, or that there is a different factual basis for the proposal of the investigating unit.

See below the text of Article 127 of the Framework regulation

> 1. If an investigating unit considers that an administrative penalty should be imposed on a supervised entity, the investigating unit shall submit a proposal for a complete draft decision to the Supervisory board, determining that the supervised entity concerned has committed a breach and specifying the administrative penalty to be imposed. The investigating unit shall also submit its file on the investigation to the Supervisory Board.
>
> 2. The investigating unit shall base its proposal for a complete

draft decision only on facts and objections on which the supervised entity has had the opportunity to comment.

3. If the Supervisory Board considers that the file submitted by the investigating unit is incomplete, it may return the file to the investigating unit together with a reasoned request for additional information. Article 125 shall apply accordingly.

4. If the Supervisory Board, on the basis of a complete file, agrees with the proposal for a complete draft decision of the investigating unit in respect of one or more breaches and the factual basis for such decision, it shall adopt the complete draft decision proposed by the investigating unit regarding the breach or breaches it agrees have taken place. To the extent that the Supervisory Board does not agree with the proposal, a decision shall be taken pursuant to the relevant paragraphs of this Article.

5. If the Supervisory Board, on the basis of a complete file, considers that the facts described in the proposal for a complete draft decision as referred to in paragraph 1 do not appear to reveal sufficient evidence of a breach as referred to in Article 124, it may adopt a complete draft decision closing the case.

6. If the Supervisory Board, on the basis of a complete file, agrees with the determination in the proposal for a complete draft decision of the investigating unit that the supervised entity concerned has committed a breach, but disagrees with the proposed recommendation concerning administrative penalties, it shall adopt the complete draft decision, specifying the administrative penalty it considers appropriate.

7. If the Supervisory Board, on the basis of a complete file, does not agree with the proposal of the investigating unit, but concludes that a different breach has been committed by a supervised entity, or that there is a different factual basis for the proposal of the investigating unit, it shall inform the supervised entity concerned in writing of its findings and of the objections raised against the supervised entity concerned. Article 126(2) to (4) shall apply accordingly with regard to the Supervisory Board.

8. The Supervisory Board shall prepare a complete draft decision determining whether or not the supervised entity concerned has committed a breach and specifying the administrative penalties to be imposed, if any.

9. Complete draft decisions adopted by the Supervisory Board and to be proposed to the Governing Council shall be based only on facts and objections on which the supervised entity has had the opportunity to comment.

5.5. Avoiding accumulation of sanctions

In the EU sanctioning law, a pure accumulation of penalties is generally seen as undesirable. Case law offers various remedies, spanning from the *ne bis in idem* principle to the accumulation of sanctions tempered by the principle of proportionality.

In light of the *ne bis in idem* principle, applicable to sanctions criminal in nature, irrespective of their formal qualification as administrative sanction, the accumulation of penalties has to be avoided.

See ECtHR, *Grande Stevens*, §§ 222 to 229:

> 222. Applying those principles to the case at hand, the Court notes, firstly, that it has just concluded, under Article 6 of the Convention, that there existed valid grounds for considering that the procedure before the CONSOB involved a "criminal charge" against the applicants (see paragraph 101 above) and also observes that the sentences imposed by the CONSOB and partly reduced by the court of appeal constituted res judicata on 23 June 2009, when the judgments of the Court of Cassation were delivered (see paragraph 38 above). From that date, the applicants ought therefore to be considered as having been "already finally convicted of an offence" for the purposes of Article 4 of Protocol No. 7.
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> 223. Despite this, the new set of criminal proceedings which had been brought against them in the meantime (see paragraphs 39-40 above) were not closed and resulted in judgments being delivered at first and second instance.
>
> 224. It remains to be ascertained whether those new proceedings were based on facts which were substantially the same as those which had been the subject of the final conviction. In this regard, the Court notes that, contrary to what the Government seem to be asserting (see paragraph 217 above), it follows from the principles set out in the case of Sergey Zolotukhin, cited above, that the question to be answered is not whether or not the elements of the offences set out in Articles 187 ter and 185 § 1 of Legislative Decree No. 58 of 1998 are identical, but whether the offences with which the applicants were charged before the CONSOB and before the criminal courts concerned the same conduct.
>
> 225. Before the CONSOB, the applicants were essentially accused of having failed to mention in the press releases of 24 August 2005 the plan to renegotiate the equity swap contract with Merrill Lynch International Ltd, although that plan already existed and was at an advanced stage of preparation (see paragraphs 20 and 21 above). They were subsequently punished for this by the CONSOB and by the Turin Court of Appeal (see paragraphs 27 and 35 above).

> 226. Before the criminal courts, the applicants were accused of having stated, in those same press releases, that Exor had neither instituted nor examined initiatives concerning the expiry of the financing agreement, although the agreement amending the equity swap had already been examined and concluded, information that was kept secret in order to avoid a probable fall in the FIAT share price (see paragraph 40 above).
>
> 227. In the Court's opinion, these proceedings clearly concerned the same conduct by the same persons on the same date. Moreover, the Turin Court of Appeal itself, in its judgments of 23 January 2008, admitted that Articles 187 ter and 185 § 1 of Legislative Decree No. 58 of 1998 concerned the same conduct, namely the dissemination of false information (see paragraph 34 above). It follows that the new set of proceedings concerned a second "offence" originating in identical acts to those which had been the subject-matter of the first, and final, conviction.
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> 228. This finding is sufficient to conclude that there has been a breach of Article 4 of Protocol No. 7.
>
> 229. Moreover, in so far as the Government submit that European Union law has explicitly authorised the use of a double penalty (administrative and criminal) in the context of combatting unlawful conduct on the financial markets (see paragraph 216 above), the Court, while specifying that its task is not to interpret the case-law of the ECJ, notes that in its judgment of 23 December 2009 in the case of Spector Photo Group, the ECJ indicated that Article 14 of Directive no. 2003/6 does not oblige the Member States to provide for criminal sanctions against authors of insider dealing, but merely states that those States are required to ensure that administrative sanctions are imposed against the persons responsible where there has been a failure to comply with the provisions adopted in implementation of that directive. It also drew the States' attention to the fact that such administrative sanctions may, for the purposes of the application of the Convention, be qualified as criminal sanctions (see paragraph 61 above). Further, in its Åklagaren v. Hans Åkerberg Fransson judgment, on the subject of value-added tax, the ECJ stated that, under the ne bis in idem principle, a State can only impose a double penalty (fiscal and criminal) in respect of the same facts if the first penalty is not criminal in nature (see paragraph 92 above).

Nevertheless, in the judgment *A and B v. Norwey,* §§ 130-132, the ECtHR allowed the accumulation of penalties tempered by the principle of proportionality subject to some conditions (for further details on on this judgment and the ne bis in idem topic see **Chapter VI.B. Case-study: The sanctions imposed upon the ECB request on the individuals responsible for breaches by the BPVi. The first decisions of the Court of Appeal of Rome**).

ECB's sanctions are imposed on credit institutions, not on natural persons. Thus, the need to avoid the accumulation of sanctions under the ECB's sanctioning powers follows from the fact that some Member States admit the criminal liability of the legal persons while others provide for an administrative liability.

5.6. Whether severe administrative pecuniary penalty have to be applied by the Courts or may also be applied by administrative supervisory authorities

In its decision of 13 December 2017 (VfGH, 13 December 2017, joint cases 408/2016, G 412/2016, G 2/2017, G 21/2017, G 54/2017), the Austrian Constitutional Court (*Verfassungsgerichtshof*) overturned its settled case law regarding the interpretation of article 91(1) and (2) of the Autrian Consitution (B-VG), stating that the maximum amount of a possible pecuniary penalty is not a suitable criterion for drawing the line between administrative penal law and criminal law.

Until said decision, the *Verfassungsgerichtshof*'s stance was that the Austrian Constitution set limits to the possibility to confer the power of imposing administrative pecuniary penalties to administrative authorities. Under the previuous Court's view, administrative pecuniary penalties that came close or exceeded the possible maximum amount of criminal pecuniary penalties were to be considered not in conformity with the Austrian Constitution.

In its judegment of 13 December 2017, the Austrian Constitutional Court took the view that focusing only on the maximum amount of a pecuniary penalty would neither adequately reflect the different aims of an administrative pecuniary penalty and a criminal pecuniary penalty, nor the differences in the financial situations of the persons concerned.

Moreover, the previuos approach would not take sufficiently into account the possibility for the legislature to criminalise or decriminalise illegal behaviour by being able to choose between criminal law and administrative law.

Furthermore, the Austrian Constitutional Court held that the newly introduced *Bundesverwaltungsgerichte* (Administrative Courts) offers the same guarantees as penal courts and, subsequently, an adequate system of legal protection that allows the imposition of high pecuniary penalties by administrative authorities.

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EU Legal references: Recitals 58, 63 and 86 and Article 22 SSMR; Articles 25 to 32, 77, 81(2), 83(2), 87 and 126-127 Framework regulation.

Other official documents: ECB's Guide to on-site inspections and internal model investigations of September 2018.

CJEU and ECtHR's case law: *GC,* 26 April 2018, Case T-251/15, *Espírito Santo Financial*

(Portugal) v ECB, ECLI:EU:T:2018:234; ECtHR, *A and B v. Norway* (Applications no. 24130/11 and 29758/11) of 15 November 2016; ECtHR, *Grande Stevens* (Requêtes nos 18640/10, 8647/10, 18663/10, 18668/10 et 18698/10) of 4 March 2014; ECtHR, *Dubus v. France* (Requête no 5242/04) of 11 June 2009; ECtHR, *Menarini Diagnostic s.r.l. c. Italie* (Requête no 43509/08) of 27 September 2011; ECJ, *Hoechst GmbH v Commission,* C-410/03 of 18 June 2008, ECLI:EU:T:2008:211; ECJ, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied*, C-105/04 of 21 September 2006, ECLI:EU:C:2006:592; ECJ, *Kaserai Champignon Hofmeister,* C-210/00, 11 July 2002, ECLI:EU:C:2002:440; ECrtHR, *Société Colas Est and others* (Application No 37971/97), 16 April 2002; ECJ, *Guérin Automobiles*, C-282/95, of 18 March 1997, ECLI:EU:C:1997:159; CFI*, Solvay*, T-30/91, of 29 June 1995, ECLI:EU:T:1995:115; CFI, T-36/91 of 29 June 1995, ECLI:EU:T:1995:118; ECJ, *Solvay*, 18 October 1989, C-27/88 ECLI:EU:C:1989:388; ECJ, *Orkem*, C-374/87 of 18 October 1989, ECLI:EU:C:1989:387; HCtHR, *Funke v. France*, (Appl. 10828/84), 25 February 1993; ECJ, *Maizena,* C-137/85, 18 November 1987 ECLI:EU:C:1987:493; ECJ, *Könicke*, C-117/83 of 25 September 1984, ECLI:EU:C:1984:288.

National court cases: Italian Constitutional Court, Order No 117 of 10 May 2019; Austrian Constitutional Court (VfGH), 13 December 2017, joint cases 408/2016, G 412/2016, G 2/2017, G 21/2017, G 54/2017.

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Chapter VI.B.

Access to confidential information: the Buccioni case

Michelino Villani

Summary: *1. The facts – 2. The Court's decision – 3. The Buccioni judgment in light of the previous case-law of the Court – 4. Open issues – 4.1 The assessment regarding the potential adverse impact on the interests protected by the professional secrecy – 4.2. Possibility to carve out cases of legitimate disclosure of documents covered by the professional secrecy other than the ones expressly set out in the CRD IV. The Italian law on the right of access – 4.3. The "precise and consistent evidence" requirement.*

1. *The facts*

Mr. Buccioni, who held an account with Banca Network Investimenti SpA, suffered losses as a result of the compulsory winding up of that bank. He submitted a request for access to Banca d'Italia, seeking documents in order to assess whether an action for damages could be brought.

Banca d'Italia denied the access on the ground that the requested documents contained information to be deemed as confidential according to Article 7 of the Italian Banking Act.

Indeed, that norm, consistently with Articles 53 to 62 Directive 2013/36/EU (Credit Requirements Directive: "CRD IV"), subjects to a professional secrecy all information, documents and data held by the Bank of Italy in the performance of its supervisory duties.

Mr Buccioni challenged the Banca d'Italia's refusal before the administrative courts. After the action was dismissed by the court of first instance (the Adminsitrative Tribunal of Rome), he lodged an appeal before the Italian Supreme Administrative Court (*Consiglio di Stato*). In sum, the applicant alleged that the documents he asked to be disclosed were no longer subject to a secrecy regime, given that Banca Network was under a compulsory winding up proceeding and thus was no longer performing a banking activity.

On the contrary, the Bank of Italy's main plea was that the case did not fall under the provision of Article 53(1) CRD IV, third subparagraph, which establishes 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.

Indeed, Mr Buccioni, at the time of his request for access, had not started a civil proceeding before the courts yet; hence, Article 53 CRD IV could not be applied, since the provision, in order for the access to be granted, requires – according to the Bank of Italy's interpretation – that a civil action has been already brought by the applicant.

The *Consiglio di Stato* decided to stay the proceeding and refer a preliminary ruling to the European Court of Justice.

The main question submitted to the Court of Justice was whether Article 53 CRD IV can be interpreted as allowing access to documents subject to professional secrecy not only where the request for access is submitted in the context of civil or commercial proceedings already pending, but also where the request is aimed at collecting elements in order to determine the actual possibility of commencing a civil or commercial proceeding, in the light of the necessity of protecting the right of defence.

2. The Court's decision

The Court starts its reasoning by recalling the public interest protected by the professional secrecy under Articles 53 to 62 CRD IV.

It observes that the performance of the prudential supervision requires that credit institutions provide the authorities with all the information necessary for the assessment of their compliance with the legal framework. For an effective transmission of said information, it is essential that both the supervised institutions and the competent authorities can be confident that the information transmitted will, in principle, remain confidential.

In fact, "the absence of such confidence is liable to compromise the smooth transmission of the confidential information that is necessary for prudential monitoring" (*Buccioni*, § 28).

This is one of the reasons why the information held by the supervisory authority is covered by a professional secrecy; indeed, the confidentiality – according to the Court – serves also to protect the public interest connected to the stability of the financial system within the European Union (§ 29).

In order for said objectives to be pursued, Article 53 CRD IV imposes as a general rule an obligation to maintain professional secrecy.

It follows that:

(i) derogations are justified only in the specific cases that are exhaustively set out in the CRD IV (§ 30);

(ii) the norms providing for the exceptions to the general rule must be interpreted strictly (§ 37).

Taking into account said general assumptions, the Court does not hold the view that Article 53 CRD IV enables the disclosure of confidential information concerning a bank under liquidation only in the context of civil or commercial proceedings which have already been initiated, since such a restriction (par. 33)

> cannot be inferred nor 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.

In addition, denying the access, in case a judicial proceeding has not yet be started, would compel the persons harmed by a bankruptcy or the winding up of a bank – whose interests are protected by the exception at issue - to go to the court only with the aim of obtaining the disclosure of confidential information, thus impairing "*the proper administration of justice*" (§ 35).

Therefore, the Court, answering to the question posed by the *Consiglio di Stato*, ruled that Article 53 CRD IV shall be applied regardless of whether or

not the civil or commercial proceeding, in which information is to be used, is pending.

However, being Article 53(1), third subparagraph, an exceptional provision subject to a strict interpretation, the access can be granted only if the following conditions are met (§ 38):

(i) the request for disclosure regards 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";

(ii) the subject matter of the lawsuit is specifically identified by the applicant;

(iii) the applicant makes use of the information in question only in the context of said proceeding.

It follows from the above that the supervisory authority shall, in any case (par. 39),

> 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.

3. The Buccioni judgment in light of the previous case-law of the Court

Buccioni follows two previous decisions of the Court, in which it has ruled on the obligation of professional secrecy incumbent on financial supervisory authorities and on the limits thereof.

Basically, in *Buccioni* the Court has held that:

– the confidentiality regime covering the documents in possession of the banking supervisor aims at both ensuring the smooth transmission of information from the supervised entities to the public authority and preserving the stability of the financial system. An identical argument has been expressed by the Court, in relation to the professional secrecy laid down in Article 54 (1) Directive 2004/39/EC ("MiFID") as regards the information held by the national market authorities, in *Altmann* (C-140/13, 12 November 2014) and *Baumeister* (C-15/16, 19 June 2018). In both decisions, the Court, reflecting on the rationale behind the secrecy regime under Article 54 of MiFID, has observed that "the absence of such secrecy is liable to compromise the smooth transmission of confidential information necessary for monitoring" (Altmann, par. 32; see also Baumeister, par. 32), and that

the confidentiality is also instrumental to "the normal functioning of the markets" (*Altmann,* § 33; see also *Baumeister*, § 33);

- the disclosure of documents falling under the regime provided for in Article 53 CRD IV is admitted only on the grounds of the exceptional provisions contained in the same Directive, which, as a consequence, must be interpreted strictly. Those points have been already developed in *Altmann* (§ 35) and *Baumeister* (§ 38);
- the decision to exceptionally grant the access is the outcome of a case by case scrutiny undertaken by the supervisor (or the judge), implying a balance between the interest of the person requesting the access and the public interests on which the confidentiality regime rests. The necessity of a factual assessment by the authority is apparent also in *Baumeister*, in which the Court - after having identified the public interests protected by the professional secrecy - points out that the general prohibition on the disclosure of confidential information applies only to information "the disclosure of which is likely to adversely affect the interest of the natural or legal person who provided that information or of third parties, or the proper functioning of the system" (§ 35). In sum, the necessity of maintaining confidentiality cannot be established a priori.

4. Open issues

Here below are summarised the main issues left open by the *Buccioni* judgment

4.1. The assessment regarding the potential adverse impact on the interests protected by the professional secrecy

The Court has pointed out that it is for the authority to weigh up the interests of the person applying for the access and the ones to protect the confidentiality of documents regarding banks under liquidation; such an assessment implies – even if this is not expressly stated by the Court – that the opposing interests to be balanced are existent, so that it is necessary to determine which of them shall prevail.

So, what if, in the individual case, there is no actual risk for the smooth transmission of documents or the stability of the financial system?

This point is important in light of the *Baumeister* judgment, according to which the confidentiality regime is applicable only if the public interests it intends to protect are adversely affected and the information to be disclosed is not already public.

A possible solution could be to deem the requested documents per se accessible without any other verification, on the ground that the secrecy regime under Article 53 CRD IV cannot be applied.

On the other hand, one may argue that the scrutiny on the requirements inherent to the exception under Article 53(1) (precise and consistent evidence; specific subject matter; etc.) is to be conducted in any case – thus even in that situation – in order to ascertain if the request for access falls under such a case of derogation.

This interpretation is actually more in line with the reasoning developed in *Buccioni*, since it seems that the Court had in mind a two-pronged assessment, consisting of two separate steps. Firstly, the authority shall make the control over the evidence provided by the applicant as to his concrete necessity of making use of the information held by the former in a given lawsuit; then, once the interest of the applicant has been determined, it can proceed with the said balance.

Hence, the access under Article 53(1) CRD IV, third subparagraph, can be granted only once the authority has verified, in light of the elements submitted by the applicant, that all the conditions for the application of the norm are fulfilled.

4.2. Possibility to carve out cases of legitimate disclosure of documents covered by the professional secrecy other than the ones expressly set out in the CRD IV. The Italian law on the right of access

In *Buccioni,* the Court has established that, being the obligation of secrecy a general rule, the exceptional cases in which the disclosure is allowed are exhaustively set out in the CRD IV.

This seems to be a very stringent condition. One may wonder if, and to what extent, Member States have margin to define further specific cases of access to documents held by the supervisory authority, despite not falling under the scope of the specific exceptions established in the CRD IV.

It must be observed that the access to documents, *a fortiori* where exerted *vis à vis* domestic public administrations, is, generally speaking, a matter of national law (even if it may be subject to some legal constraints from European law in certain areas). As noted in the opinion released by the Advocate General *Bobek* in the *Buccioni* case, “the first level of rules to apply in the present case is constituted by the national rules on access to documents” (§ 32).

The domestic legislation about the right to access, as such, normally rests on a principle – the general principle of transparency and thus accessibility – that is exactly opposite to the one inspiring, according to the Court’s view, Articles 53 to 62 CRD IV.

For example, the Italian legal framework about the access to documents is shaped in this way: the default rule is the access; the confidentiality is the exception.

Accordingly the Italian norms on the right of access, which are contained in the "Law on the administrative proceeding" (Law no. 241 of 1990, Articles 22 to 27), have a broad scope of application. They apply to the entire public administration, *id est* to "all legal entities either subject to public law or civil law, in relation to their activity of public interest that is governed by national or European law" (Article 22(1)); besides, any kind of document is in principle accessible, "including internal ones and those not relating to a specific proceeding", provided that it is "held by a public authority and concern activities of public interest, regardless of whether the substantive law governing them is public or civil law" (Article 22(1)).

Although Article 24(1) stipulates that the right of access shall not apply to cases of secrecy expressly provided for by law (such as the one under Article 7 of Italian Banking Act), the same Article clarifies that documents subject to a secrecy regime are excluded from access solely to the extent that there is a connection with the interests that the secrecy aims at preserving (Article 24(5)); it follows that the norms setting out such regime shall be interpreted strictly (see on this point, in relation to documents held by the Italian market authority, *Consiglio di Stato*, 6 July 2016, No. 3003).

Furthermore, a special protection is reserved to the so called "defensive access" (*accesso difensivo*), which is the access that is requested for the purpose of collecting documents to be used in a given legal proceeding: according to Article 24(7), applicants must in any case be granted access to those documents whose knowledge is necessary to protect or assert their legal interests.

It's worth mentioning a settled stance of *Consiglio di Stato*, according to which the said norm has established a priori that the right of defense shall prevail over any secrecy regime; therefore, there is no possibility for the public administration to oppose the confidentiality, provided that there is an actual need for the documents to defend the applicant's interest in a legal proceeding, to be verified by the authority on a case by case basis (see, *inter alia*, *Consiglio di Stato*, 30 August 2018, No. 5119; *Consiglio di Stato*, 13 April 2016, No. 1435).

Such a special treatment is justified because the right of defense is a fundamental right enshrined in the Italian Constitution (Article 24); it is also recognised, albeit in different terms, by the European Charter of Fundamental Rights (Articles 47 and 48).

Hence – as to the Italian legal system – there could be room for the identification of further cases of disclosure of documents, if such cases were based on the protection of the right of defense; the basic question is to what extent individuals can benefit from the access beyond the narrow scope of the exceptions expressly set out in CRD IV.

Given that Article 53(1), third subparagraph, CRD IV enables the authority to disclose information in a legal proceeding only if the bank has been put into liquidation, a potential additional exception could affect, for example, the requests of documents concerning sound banks that are submitted by individuals intending to use them in a lawsuit.

Such a request – if scrutinised in light of the Italian law – would fall under the scope of Article 24(7) Law no. 241 of 1990, according to which the "*accesso difensivo*" must be admitted in any case, provided that it is necessary for protecting applicants' legal interests.

Conversely, it must be observed that, from the perspective of Articles 53 to 62 CRD IV, the need of confidentiality is even more stringent with regard to information concerning sound banks than with regard to those subject to a winding up proceeding.

As suggested by the Advocate General Bobek in *Buccioni*, the protection of the professional secrecy is of fundamental importance during the "normal" life of a credit institution, whereas, once the bank goes bankrupt, "two additional and newly emerging interests" oppose confidentiality: "the private interest of those who have been harmed by the winding up" and "the legitimate public interest in knowing what went wrong" (Opinion, §§ 84 to 86). That is presumably the reason why CRD IV textually allows individuals to have access only in the situation where the bank to which the information refers is under liquidation.

A right balance between the right of defense and the need to keep the confidentiality in accordance with the CRD IV could be reached by ensuring the access only in case the documents, despite concerning sound banks, are strictly necessary for the defense of the applicant in a given lawsuit; it would be for the supervisory authority to ascertain the strict necessity and thus to weigh up the opposing interests on a case by case basis.

It is worth noting that the Court of Justice, in the UBS Europe case (C-358/16, 13 September 2018), decided on the same day as Buccioni, has recognised that the obligation of professional secrecy "must be guaranteed and implemented in such a way as to reconcile it with the rights of defence" (§ 68); as a result the competent authority may have to strike a balance between the right of defence and the interests relating to confidentiality, in the light of the circumstances of each case.

4.3. The "precise and consistent evidence" requirement

According to *Buccioni*, one of the conditions to be fulfilled by those who apply for the access to confidential documents under the exception provided for in Article 53(1), third subparagraph, is that the request "put forward precise and consistent evidence plausibly suggesting that it is relevant for the purposes of civil or commercial proceedings".

Such a wording leaves room for different interpretations.

In this respect, it is worth mentioning a recent judgement of *Consiglio di Stato* (15 November 2018, No. 6444), which ruled on a case that, like the *Buccioni* one, it fell under the scope of the exception set out in Article 53(3), third subparagraph, CRD IV. Being subsequent to the decision of the European Court of Justice, the ruling at issue takes into account the principles expressed in *Buccioni*.

As for the assessment of the elements suggesting the relevance of the documents, the Italian Supreme Administrative Court held, in light of a settled case-law, that the public administration has just to verify if the person asking for access explained the reason why the documents were necessary for the purposes, but cannot review the substance of his allegations nor the defensive strategy he wants to follow in the civil or commercial lawsuit.

This view clearly reflects the special treatment of the *accesso difensivo* under the Italian law, which – as envisaged by Article 24(7) Law No. 241 of 1990 – shall be granted in any case, provided that the documents are necessary (see above).

Nevertheless, a stricter approach is also possible: the "precise and consistent evidence" requirement can be interpreted also in the sense that the authority is entitled to exercise a more incisive control over the effective relevance of the documents requested by the applicant for the purpose of the legal proceeding. This interpretation is presumably the most consistent with the line of reasoning followed by the European Court in *Buccioni*.

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EU Legal references: Articles 53 to 62 CRD IV; Article 54(1) MiFID.

National Legal References: Article 7 of Italian Banking Law; Articles 22 to 27 of Italian Law No. 241 of 1990.

CJEU's case law: Besides the case illustrated in the text see also: ECJ, 13 September 2018, C-358/16, *UBS Europe*, ECLI:EU:C:2018:715; ECJ, 19 June 2018, C-15/16, *Baumeister*, ECLI:EU:C:2018:464; ECJ, 12 November 2014, C-140/13, *Altmann*, ECLI:EU:C:2014:2362.

National cases: Consiglio di Stato,15 November 2018, No. 6444; Consiglio di Stato, 30 August 2018, No. 5119; Consiglio di Stato, 6 July 2016, No. 3003; Consiglio di Stato, 13 April 2016, No. 1435.

Literature: Smits, R. and Badenhoop, N., Towards a single standard of professional secrecy for supervisory authorities: a reform proposal, *European Law Review, 2019, 3.*

Chapter VI.C

Case-study: The sanctions imposed upon the ECB request on the individuals responsible for breaches by the BPVi. The first decisions of the Court of Appeal of Rome

Stefano Montemaggi

Summary: *1. The ECB's request under Article 18(5) SSMR – 2. The Banca d'Italia's proceeding under national law – 3. The decisions of the Court of appeal of Rome on the sanctions imposed by Banca d'Italia and some open issues – 3.1. The main findings of the judgments – 3.2. The Court's findings with respect to the exception of violation of the time-limit for opening the proceeding – 3.3. The exceptions of a lack of proper assessment by Banca d'Italia and of illegality/unlawfulness of the ECB's findings – 3.4. The exceptions of violation of the rights of defense – 3.5. The exception of violation of «ne bis in idem»*

1. The ECB's request under Article 18(5) SSMR

On 22 December 2015, based on the facts detected in the course of an on-site inspection at the premises of Banca Popolare di Vicenza (26.2.2015 to 3.7.2015), the ECB required Banca d'Italia, under Article 18(5) SSMR, to open proceedings into breaches of national law transposing relevant Union directives on prudential supervision, which may arise from the facts described in the ECB's on-site inspection Report (hereinafter also OSI Report), against the persons responsible under national law for such potential breaches.

The ECB considered that the facts detected could give rise at least to breaches of national law concerning requirements currently laid down in Articles 74, 76, 83, 85 and 88 of CRD IV.

According to the ECB's request, Banca d'Italia enjoys a margin of discretion to identify both the persons responsible and the national legal provisions that have been breached.

After receiving the request, Banca d'Italia examined the facts described in the OSI report under the lens of the national law applicable *ratione temporis*.

The first exam was performed collectively by a Group of experts of the Supervision Department, supported by a lawyer of the Legal Services.

2. The Banca d'Italia's proceeding under the national law

Banca d'Italia opened the sanctioning proceeding in July 2016 against the members of the credit institution's bodies and some credit institution's officers.

The proceeding started with the formal notification of:

(i) the statement of objections, describing for each person the relevant facts as reported in the OSI report; and

(ii) the ECB's request (a prerequisite for the exercise of sanctioning power).

All the addressees required an extension of the deadline to submit written observations (30 days + 45); most of them required an oral hearing as well.

All the addressees required full access to the files of the proceeding, asking specifically for:

(i) the OSI report of the ECB, including an official translation;

(ii) the documents exchanged (after the inspection) between the BPVi and the ECB;

(iii) the documents exchanged between the NCA and the ECB (the supervisory history of BPVi ex art. 43 SSMFR);

(iv) all the other documents examined by the officials authorised by the ECB to conduct the OSI and on which the findings were based.

The main observations and exceptions raised, during the sanctioning proceeding, were the following.

(a) *Lack of sanctioning power:*

(i) the ECB does not have neither direct sanctioning powers nor the power to ask the NCAs to open sanctioning proceedings regarding facts occurred before November 2014;

(ii) the BoI opened the proceeding after the expiration of the time-limit provided for by the law (90 days from the ascertainment of the breach); as no further investigation was conducted by the Banca d'Italia, the detection of the infringement should have been made at least from the ECB's request to Banca d'Italia to open the sanctioning proceeding.

(b) *Infringements of the due process principles for deficiencies of the statement of objections*:

(i) violation of the requirement of specificity (referring to the ECB's findings);

(ii) violation of the right to be heard, for lack of documents supporting the OSI findings and for the language (English) of the OSI report.

(c) *Violation of the "ne bis in idem" principle, due to the proceeding opened by other Authorities (Consob) allegedly for the same facts (some persons were also involved in criminal proceeding*).

Banca d'Italia concluded its investigatory phase by stating that:

(i) the Statement of Objections had to be considered autonomous and self-sufficient vs the ECB's inspection report;

(ii) the ECB's request had to be considered not binding, as it was a mere procedural requirement foreseen for every NCAs' sanctioning procedure in relation to aspects falling under the supervision of the ECB;

(iii) the procedure was compliant with all procedural guarantees provided for by the law (full protection of the right of defense);

(iv) there was no violation of «ne bis in idem»;

(v) there was no violation of the time-limit to open the sanctioning proceeding, given the complexity of the ascertainment conducted by Banca d'Italia after receiving the ECB's request.

On May 2017, the Governing Board of Banca d’Italia imposed administrative pecuniary sanctions on 26 members of the bodies/officers of the BPVi (former Board members, former Statutory auditors, former General Manager, former Deputy Directors, Head of Audit function and Head of Compliance function).

The amount of the penalty imposed on each person was graduated taking into account the specific responsibilities, also in relation to the role played in the organisation of the credit institution.

Sanctions were appealed according to Article 145 of the Italian Banking Law before the Court of appeal of Rome.

Until now the Court has rejected all the applicants’ complaints.

3. *The decisions of the Court of appeal of Rome on the sanctions imposed by Banca d’Italia and some open issues*

3.1. *The main findings of the judgments*

In sum, these are the main findings of the Court:

(i) no violation of the time-limit to open the sanctioning proceeding, given the novelty and the complexity of the ascertainment conducted by Banca d’Italia after receiving the ECB’s request;

(ii) no lack of a proper assessment by Banca d’Italia;

(iii) no lack of investigating and sanctioning powers of the ECB with regard to facts occurred before November 2014 for the sake of the continuity of the legal system;

(iv) no violation of due process rights;

(v) no violation of the *ne bis in idem* principle, as the facts on which the Banca d’Italia’s sanctions are based (failures in organisation, risk management and internal controls) are fundamentally different from those on which are based the Consob’s ones (failures to comply with the investment services rules).

3.2. *The Court’s findings with respect to the exception of violation of the time-limit for opening the proceeding*

The Italian Law No. 689/1981 (Article 14(2)) sets the time limit of 90 days from the assessment of the infringement.

The Court firstly observes – consistently with a consolidated case-law tradition – that the period of 90 days begins to run, only once the competent authority acquires the complete knowledge and awareness of the violation, which means that the complexity of the case matters.

The indicators/markers of complexity, detected by the Court, in the case at hand are the following:

(i) the novelty of the case (the first application of Article 18(5) SSMR in the SSM area);

(ii) the "undeniable difficulties" connected with an OSI Report entirely in English;

(iii) the interactions with the ECB (on the possibility to grant the individuals subject to the sanctioning proceeding access to the OSI Report) and with the Consob (on the sanctioning initiatives taken in parallel by the Italian Commission against the former BPVi managers and officers).

The date of conclusion of the OSI has no relevance in this regard. Indeed, as the Court notes, the assessment falling under the remit of Banca d'Italia (pursuant to Article 18(5) SSMR) cannot be considered as a mere formality within a sequence of administrative acts of the ECB.

The Court also recognises that Banca d'Italia had to examine the individual positions of the former members of the Board of Directors as well as the Board of Statutory Auditors in order to verify the conditions to open a proceeding under Article 145 of the Italian Banking Law.

A question arises as to whether a material delay of the ECB in the transmission of a request under Article 18(5) SSMR can impact on the legitimacy of the sanctions imposed by the NCAs.

The rationale behind the national provision on the time-limit of 90 days is to preserve the right of defence of the accused party, which might be hampered if too much time has elapsed after the alleged violation.

On the other hand, it is self-evident that the requirement under Article 14 of Law No. 689/1981 does not apply to ECB, whose potential delays could not, in any case, be imputed to Banca d'Italia.

3.3. The exceptions of a lack of proper assessment by Banca d'Italia and of illegality/unlawfulness of the ECB's findings

The points raised by the claimants were the following:

(i) the Bank of Italy indiscriminately and uncritically accepted the ECB's findings without exercising any autonomous assessment in order to test their soundness;

(ii) it was its duty to examine *ex novo* the documentation mentioned by the ECB inspectors in their Report;

(iii) by abstaining from this assessment, Banca d'Italia *de facto* relinquished its institutional functions;

(iv) the ECB's findings contained in the OSI Report should have been deemed legally ineffective and the Bank of Italy should have considered itself prevented from opening a sanctioning proceeding on the basis of those findings, since they concern facts occurred before 1 November 2014, when the ECB lacked of supervisory powers over BPVi.

The dismissal of these exceptions leads the Court to deal with the fundamental issue of the interplay between the on-site inspection conducted by the ECB as supervisor and the assessment requested to the NCA under Article 18(5) SSMR.

In the Court's view:

(i) the NCA is essentially requested to assess whether the facts found by the ECB amount to a breach of national law (transposing relevant Directives), punished with sanctions vis-à-vis the credit institutions and/or the members of its Boards (as well as the bank's officers);

(ii) the NCA is not supposed to proceed with a new verification of the historical facts ascertained by the ECB, which are distinguished by "privileged reliability";

(iii) at the same time, the NCA is not bound to the legal qualification given by the ECB (within the OSI Report) to these historical facts;

(iv) the NCA has to autonomously and independently (from the ECB) assess the relevance of the facts detected by the ECB against the sanctioning provisions which, pursuant to the national legal framework recalled by Article 18(5) SSMR, the same NCA is competent to enforce;

(v) in particular, in the case at hand, the assessment performed by Banca d'Italia could be ideally broken down into 3 sub-activities:

    a. a preliminary assessment on the possibility to include the historical facts found by the ECB under one or more national provisions providing sanctions in relation to those facts, so as to identify some infringements;

    b. the "imputability assessment", aimed at verifying whether, on the basis of the national law, the infringements can be referred to one or more members of the BPVi Boards or to the BPVi officers;

    c. a final assessment on the type of sanction to be applied;

(vi) it follows that the OSI Report and the Statement of Objections are connected, but they remain autonomous (meaning that possible procedural or substantive flaws of the ECB's activity do not necessarily affect the acts adopted by the NCA when sanctioning individuals pursuant to Article 18(5) SSMR);

(vii) moreover, there is no lack of investigative power for the ECB with respect to facts occurred before the launch of the SSM, to the extent that these facts directly continue to produce effects on the situation of the credit institution, also after the entry into force of the SSM [in the present case, the fact that BPVi had provided financial assistance for the 2013 capital increase, with the consequence of making the capital raised in that way not eligible as common equity Tier 1 instruments, continued to have an impact on its CET1 also after the 1st November 2014]. The claimant's reasoning, if taken to the extreme, leads to the absurd conclusion that a "free zone" would exist for the infringements committed by significant institutions before November 2014 which were not detected by Banca d'Italia by that date.

In the Court's view, the NCA, when proceeding in accordance with Article 18(5) SSMR, can legitimately rely on the historical facts described by the ECB in its OSI Report.

Against this backdrop, the following questions arise:

(i) What if the ECB's Report (which, in the ECB's perspective, is not ordinarily conceived as the direct basis for sanctions, but as a starting point for subsequent investigating activities by the dedicated unit established within the ECB) is not sufficiently detailed with respect to the conducts of the single directors and officers as to provide, especially after the transposition of CRD IV, a sound basis for proceedings against those individuals?

(ii) Can the NCA ask the ECB to deepen the investigation in order to highlight the factual elements which, pursuant to national law, are needed for the assessment of individual responsibilities?

(iii) Alternatively, could the NCA carry out an autonomous on-site inspection over the significant credit institution, exclusively targeted to look through the facts already detected by the ECB (through its inspection) to complete the puzzle of individual responsibilities? Is the power to conduct on-site inspection over significant credit institution an ECB's exclusive power? Is this solution, even if admissible under the SSMR, consistent with the principle of proportionality of the administrative action?

In the Court's view, the activity carried out by the ECB pursuant to Article 12 SSMR (on-site inspection) and the sanctioning proceeding opened by the ECB are legally autonomous.

In light of the above, the following further questions arise:

(i) What if the claimant alleges before the national Court that the request issued by the ECB under Article 18(5) SSMR is vitiated because of some procedural or substantial flaws inherent to the request itself, or because the inspection which supports that request was conducted (according to the claimant) in breach of some mandatory rules or did not respect some procedural safeguards provided by the SSMR and/or the SSMFR?

(ii) Could the national Court incidentally know and assess the validity/legitimacy of the ECB's request under Article 18(5) SSMR, without requesting the preliminary ruling under Article 267 TFEU?

(iii) Or should the ECB's request under Article 18(5) SSMR be challenged before the ECJ within the time-limit provided under Article 263 TFEU for the action of annulment (running from the day when the addressee of the sanctioning proceeding is notified with the statement of objection)?

3.4. The exceptions of violation of the rights of defense

Several objections have been raised by the claimants on this side. Some of them pertain directly to the sanctioning proceeding as regulated by the (applicable) Italian legal framework. Others do not specifically concern the Italian specificities.

Let's start from the former:

1. material violation of the right of defense due to the fact that the OSI Report, its attachments and the ECB's request under Article 18(5) have been provided by the Banca d'Italia in English language;

2. infringement of the right of access to administrative files in relation to the Banca d'Italia's denial to provide the requesting claimants with the business documents allegedly delivered by BPVi to ECB during the on-site inspection.

The Court's ruling, with reference to the English-language issue, can be summarised as follows.

– The Italian law requires that the Statement of Objections has to be written in Italian. In the case at hand, the Statement of Objections

notified to the claimants was written in Italian and quoted (in Italian) the relevant passages of the OSI Report (and some of its attachments).

– The provision (by the sanctioning Authority) of the complete version of the OSI Report is not a necessary corollary of the right of defense. On the contrary, it represents an extension of the right (beyond what is strictly prescribed).

– It follows that the claimants cannot assert the existence of their right to receive, from the NCA, a complete translation of the OSI Report used by the ECB to formulate the request under Article 18(5) SSMR.

The Court's ruling with reference to the alleged violation of the right of access is the following:

– "as for the documents retained by the ECB and not forwarded to Banca d'Italia, nothing would have prevented the claimant from submitting a request for the access directly to the ECB". Thus, considering that there is no evidence of such a request, an infringement of the right of defense cannot be complained.

The ruling implicitly refers to the Decision ECB/2004/3 (2004/258/EC), as amended by the Decision ECB/2015/1 on public access to ECB documents, according to which (Article 2(1)):

> Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to ECB documents, subject to the conditions and limits defined in [the same] Decision.

In this case, the ECB's refusal to grant access to documents can be overcome only by the ECJ.

Nor the sanctioned person, after the expiry of the deadline under Article 263 TFEU, could obtain that the national Court requests a preliminary ruling of ECJ on the validity of the ECB's refusal (*TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland*, C-188/92).

A question arises as to what extent could the hypothetical illegitimacy of the ECB's refusal of the request of access be incidentally assessed by the national Court in order to estimate its materiality in terms of actual violation of the right of defense.

The dismissal of the exceptions to the "right to be heard" is grounded on the following arguments:

- the claimants, by leaning on the ECtHR case *Grande Stevens and Others v. Italy*, argued that their right to be heard would have been violated by Banca d'Italia as a consequence of the fact that the sanctioning proposal had been transmitted by the Supervisory Department directly to the Governing Board, without any hearing on the contents of said proposal;
- the Court of Appeal of Rome, by recalling a long-established case law of the same Court and of the Italian Supreme Court (Corte di Cassazione: see the judgment No 3656/2016), reaffirms that the sanctions issued by Banca d'Italia pursuant to Article 144 of the Italian Banking Law (Legislative Decree no. 385/1993 - TUB) do not have a "*coloration pénale*" according to the criteria elaborated by the ECHR;
- therefore, no comparison (with regard to the type of sanction, its severity, its impact on the financial and professional conditions of the sanctioned person) may be drawn between the sanctions taken into consideration in the *Grande Stevens* case and the sanctions provided for under Article 144 TUB.

It is noteworthy that, with the transposition of CRDIV, tougher sanctions have been introduced for banks (Article 144 TUB) as well as for its directors and managers, by also providing the accessory penalty of the temporary ban (Article 144-ter TUB). This new regime applies to breaches and violations occurred after the 1st June 2016.

In the meantime, the rules governing the sanctioning proceedings conducted by Banca d'Italia have been amended (by an Act of Banca d'Italia of 3rd May 2016) in order to strengthen the right to be heard (more precisely, the right to present rebuttal arguments with respect to the sanctioning proposal has been codified).

3.5. The exception of violation of «ne bis in idem»

In the claimants' view, the sanctions applied by Banca d'Italia to the BPVi's officers violated the *ne bis in idem principle* due to the fact that administrative sanctions have already been applied to the latter by the Italian Commission on Listed Companies and the Stock Exchange (Consob).

The Court's ruling can be summarised as follows.

(c) When purely administrative sanctions (such as those issued by Consob and Banca d'Italia in the case at hand) come into play, there is no room for the application of the principle of *ne bis in idem*.

(d) The principle of *lex specialis* provided under Article 9(1) of the Italian Law No 689/1981 would theoretically apply. Pursuant to this principle, when the same fact is punished by virtue of a plurality of provisions

providing administrative sanctions, only the special provision applies. In the Court's reasoning, there is no relation of *lex specialis* between two sanctioning provisions whenever they are aimed at enforcing rules which, in turns, are aimed at protecting different interests.

(e) In the case at hand, the sanctions adopted by Consob were referred to the violation of provisions (of the Legislative Decree No 58/1998) for the protection of investors, whereas the sanctions issued by Banca d'Italia related to the infringement of provisions (of the Legislative Decree No 385/1993) aimed at protecting the stability of the credit institution and its safe and sound management.

(f) In any case, there is no "*idem factum*" in the case at hand as showed by the comparison below.

(g) Sanctions issued by Banca d'Italia:

- the Board of Directors (BoD), the former CEO, the deputy general directors and the Board of Statutory Auditors – each of them in relation to their responsibilities – failed to properly identify, manage and mitigate (firstly through an adequate system of internal controls) the risks, especially, of legal and reputational nature, stemming from key processes and procedures of BPVi, such as the bank's share price setting, the newly issued shares placement and underwriting, the treasury shares trading on secondary market with the "Treasury Purchase Fund" as counterpart, the investments in 'unknown exposure' Funds, with relevant (negative) effects on the CET1 of the bank;
- in particular, the Board of Directors (together with the internal control functions), despite clear warning signals about material flaws, abstained from controlling on a substantial basis the process for assessing BPVi's shares price, preferring to shift the responsibility of said process to an external advisor;
- furthermore, the capital increases in 2013 and 2014 (€ 1,3 bln overall) were also achieved along with a significant and wide lending activity in order to provide the customers with the liquidity to underwrite the financial instruments issued by BPVi, with the consequence that the capital (directly or indirectly funded by the bank) was not eligible for CET1.

(h) Sanctions issued by Consob:

- the Board of Directors (BoD), the former top managers and the Board of Statutory Auditors failed to take adequate initiatives in order to assure that BPVi, while providing investment services, acts diligently, fairly and transparently in the interests

of customers and of the integrity of the market (Article 21 of the Legislative Decree no. 58/1998);

– more precisely, BPVi substantially impaired the decision-making by investors when acquiring the shares issued by the bank, by abstaining from adequately controlling the pricing of the shares themselves and systematically offering the investors financial assistance in order to subscribe BPVi shares in the primary market and to acquire them in the secondary market. At the same time, in the secondary market, in violation of the duty to act diligently, fairly and transparently, BPVi did not respect the "pecking order" of the requests of selling the shares.

In the near future, with the new sanctioning powers conferred to Banca d'Italia and Consob by the Legislative Decree No 72/2015, things might become more complex. In particular, excluding that sanctions imposed by Consob and Banca d'Italia have a "*coloration pénal*", according to the criteria elaborated by the ECtHR, might be more controversial. Thus, the principle of *ne bis in idem* might turn to be something that the supervisors have to deal with.

The ECHR (Grand Chamber) decision of 15 November 2016 in A and B v. Norway (Applications No 24130/11 and No 29758/11) suggests this way round.

– Par. 121: In the Court's view, States should be able to legitimately choose complementary legal responses to socially offensive conduct, through different procedures forming a coherent whole, so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned.

– Par. 122: In cases raising an issue under Article 4 of Protocol No 7, it is the task of the Court to determine whether the specific national measure complained of entails, in substance or in effect, double jeopardy to the detriment of the individual or whether, in contrast, it is the product of an integrated system enabling different aspects of the wrongdoing to be addressed in a foreseeable and proportionate manner, forming a coherent whole, so that the individual concerned is not thereby subjected to injustice.

– Par. 123: The object of Article 4 of Protocol No 7 is to prevent the injustice of prosecuting or punishing someone twice for the same criminalised conduct. It does not, however, outlaw legal systems which take an "integrated" approach to the social wrongdoing in question, and in particular an approach involving parallel stages of legal response to the wrongdoing by different authorities and for different purposes.

- Par. 132: Material factors for determining whether there is a sufficiently close connection in substance include:

  i. whether the different proceedings pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved;

  ii. whether the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct;

  iii. whether the relevant sets of proceedings are conducted in such a manner as to avoid, as far as possible, any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities;

  iv. and, above all, whether the sanction imposed in previous proceedings, which became final, is taken into account in further proceedings, in order to prevent that the individual concerned has, in the end, to bear an excessive burden. This latter risk is less likely to be present where an offsetting mechanism is in place, designed to ensure that the overall amount of the penalties imposed is proportionate.

The ECJ has endorsed these ECHR's principles.

In particular, the reference is to ECJ, 20 March 2018, C-524/15, Menci:

(i) Par. 44: A duplication of criminal proceedings and penalties may be justified where those proceedings and penalties pursue, for the purpose of achieving such an objective, complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue, which it is for the referring court to determine.

(ii) Par. 46: As regards compliance with the principle of proportionality, it requires that the duplication of proceedings and penalties provided for by national legislation, such as the one at issue in the main proceedings, does not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation.

In light of the cited ECtHR and ECJ case law, there is an impelling need to open a reflection on how to coordinate the sanctioning proceedings, not only at the national level (between the NCA and the Securities and Markets Authority), but also at the EU level, between the ECB and the NCA.

Indeed, a case may occur where the ECB opens a sanctioning proceeding against a credit institution for violation of some CRR provisions and at the same time asks the relevant NCA, under Article 18(5) SSMR, to start another

proceeding against the same bank for violations of national provisions transposing the CRD IV. Though the rules violated are different, the ECB's and the NCA's sanctions may be grounded on facts that are largely the same or overlapping.

A mechanism, eventually in the form of a MoU, should be established between the ECB, on the one hand, and the NCAs, on the other hand, in order to guarantee the proportionality of the sanctions applied.

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EU Legal References: Article 18(5) SSMR; Articles 74, 76, 83, 85 and 88 of CRD IV.

National Legal References: Legislative Decree No 58/1998 (Italian Consolidated Law on Finance); Article 14 of the Italian Law No 689/1981; Article 145 of the Italian Banking Law.

ECJ and ECtHR's case law: ECJ, 20 March 2018, C-524/15, Menci, ECLI:EU:C:2018:197; ECJ, 9 March 1994, C-188/92, *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland*, ECLI:EU:C:1994:90; ECtHR (Grand Chamber) decision of 15 November 2016 in A and B v. Norway (Applications no. 24130/11 and 29758/11).

National cases: Corte di Cassazione, No. 3656/2016; Court of appeal of Rome, decision No 109/2020, published on 9 January 2020; Court of appeal of Rome, decision No 5009/2019, published on 19 July 2019; Court of appeal of Rome, decision No 4013/2019, published on 17 June 2019; Court of appeal of Rome, decision No 2979/2019, published on 8 May 2019; Court of appeal of Rome, decision No 8173/2018, published on 21 December 2018; Court of appeal of Rome, decision No 7439/2018, published on 23 November 2018; Court of appeal of Rome, decision No 7062/2018, published on 9 November 2018; Court of appeal of Rome, decision No 62/2019, published on 8 January 2019.

Literature: D'Ambrosio, R., Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings, in *Quaderni di ricerca giuridica della Consulenza Legale della Banca d'Italia*, No 74, Rome, December 2013.

PART TWO

THE SINGLE RESOLUTION MECHANISM

Chapter VII.A

Recovery plans, early intervention measures and structural measures

Michele Cossa and Raffaele D'Ambrosio

Summary: *1. The phases of the banking crisis management – 2. Recovery plans – 2.1. Individual Recovery plans (Article 5 BRRD) – 2.2. Assessment of recovery plans by the supervisory authorities (Article 6 BRRD) – 2.3. Measures asked by competent authorities (Article 6(5) and (6) BRRD) – 2.4. Group recovery plans (Article 7 BRRD) – 2.5. Assessment of group recovery plans (Article 8 BRRD) – 2.6. Cases where no joined decision is reached (Article 8(3) and (4) BRRD) – 3. Early intervention measures – 3.1 Early intervention measures under Articles 102 and 104 CRD IV – 3.2. Early intervention measures under Articles 27–29 BRRD – 3.3. Early intervention measures under Article 16 SSMR – 3.4. The notification of the early intervention measures to the resolution authority and its side-effects – 4. Structural measures – 4.1. The proposals at EU level – 4.2. The current national laws – 5. Allocation of competences between the ECB and the NCAs*

1. The phases of the banking crisis management

Ideally, the banking crisis management can be divided into three phases:

(i) A *prevention phase*, during which credit institutions are expected to draw up individual and group recovery plans subject to the assessment of the supervisory authority (the NCAs or the ECB depending on the status as significant or less significant of the credit institution concerned) (see § 2 below); the resolution authorities - National Resolution Authorities (NRAs) or the Single Resolution Board (SRB) - are responsible for drawing up and adopting resolution plans (for resolution plans see **Chapter VIII. The SRM: Allocation of tasks and powers between the SRB and the NRAs and organisational issues, § 4.2**);

(ii) An *early intervention phase*, during which the supervisory authority (NCAs or the ECB depending on the status as significant or less significant of the credit institution concerned) may adopt the so-called early intervention measures: measures under national law transposing Articles 102 and 104 CRD IV; measures under national law transposing Articles 27-29 BRRD; measures under Article 16 SSMR (see § 3 below);

(iii) A *resolution phase*, during which a credit institution is declared failing or likely to fail by the supervisory authority (NCAs or the ECB depending on the status as significant or less significant of the credit institution concerned) and subject to the resolution procedure (under the responsibility of the NRAs or the SRB) (**see Chapter VIII. The SRM: Allocation of tasks and powers between the SRB and the NRAs and organisational issues, § 5**).

2. Recovery plans (Articles 5-9 BRRD)

2.1. Individual Recovery plans (Article 5 BRRD)

One of the major innovations of the new European framework on banking crises is the adoption of an encompassing approach, which aims at preventing the onset of a crisis rather than be confined to gather the most useful tools when the insolvency of the institution has already occurred.

In the wake of the debate carried out in international fora (and transposed in non-binding documents, notably the FSB Key Attributes of effective resolution), the EU legislator combined the identification of new tools for crisis management with a range of ex ante measures, traceable to a general task of 'resolution planning' with a view to remove impediments to a swift management of a possible crisis.

In doing so, the EU framework has enriched the toolbox of the authorities competent for the on-going supervision, while imposing new tasks on them. The consequence is a possible overlap, if not friction, between the two frameworks (prudential supervision, resolution), as will be seen immediately below.

Each institution, that is not part of a group subject to consolidated supervision, draws up and maintains a recovery plan providing for measures to be taken by the institution to restore its financial position following a significant deterioration of its financial situation.

Competent authorities ensure that the institutions update their recovery plans at least annually or after a change to the legal or organisational structure of the institution, its business or its financial situation, which could have a material effect on, or necessitates a change to, the recovery plan. In any case, competent authorities may require institutions to update their recovery plans more frequently.

Recovery plans include at least the information listed in the Directive (Section A of the Annex).

According to Section A of the BRRD Annex, recovery plans shall contain a specific set of information, including inter alia: a disclosure plan outlining how the firm intends to manage any potentially negative market reactions; a range of capital and liquidity actions required to maintain or restore the viability and financial position of the institution; an identification of bank's critical functions; a detailed description of the processes to determine the value and marketability of the core business lines, operations and assets of the institution; preparatory arrangements to facilitate the sale of assets or business lines in a timeframe appropriate for the restoration of financial soundness.

Recovery plans contemplate a range of scenarios of severe macroeconomic and financial stress relevant to the institution's specific conditions including system-wide events and stress specific to individual legal persons and to groups.

Based on Article 5(7) of the BRRD, on 18 July 2014, the EBA adopted the 'Guidelines on the range of scenarios to be used in recovery plans', aimed at specifying 'the range of scenarios of severe macroeconomic and financial distress which should be considered by institutions to test the effectiveness of recovery options and the adequacy of the indicators contained in their recovery plans'. According to the Guidelines, recovery plans must be drafted assessing the institutions' resiliency to at least three scenarios of severe macroeconomic and financial distress, to ensure coverage of a system-wide event, an idiosyncratic event and a combination of system-wide and idiosyncratic events.

2.2. Assessment of recovery plans by the supervisory authorities (Article 6 BRRD)

Where the competent authority assesses that there are material deficiencies in the recovery plan, or material impediments to its implementation, it shall notify the institution or the parent undertaking of the group of its assessment and require the institution to submit a revised plan demonstrating how those deficiencies or impediments are addressed.

Where the competent authority does not consider the deficiencies and impediments to have been adequately addressed by the revised plan, it may direct the institution to make specific changes to the plan.

The competent authority shall provide the recovery plan to the resolution authority.

The resolution authority may examine the recovery plan with a view to identify any actions in the recovery plan which may adversely impact the resolvability of the institution and make recommendations to the competent authority with regard to those matters.

2.3. Measures asked by competent authorities (Article 6(5) and (6) BRRD)

If the institution fails to submit a revised recovery plan, or if the competent authority determines that the revised recovery plan does not adequately remedy the deficiencies or potential impediments identified in its original assessment, and it is not possible to adequately remedy the deficiencies or impediments through a direction to make specific changes to the plan, the competent authority shall require the institution to identify changes it can make to its business in order to address the deficiencies in or impediments to the implementation of the recovery plan.

If the institution fails to identify such changes or if the competent authority assesses that the actions proposed by the institution would not adequately address the deficiencies or impediments, the competent authority may direct the institution to take any measures it considers to be necessary and proportionate, taking into account the seriousness of the deficiencies and impediments and the effect of the measures on the institution's business.

More to the point, the competent authority may, at least (Member States may take additional measures under national law) and without prejudice to Article 104 CRD IV, direct the institution to:

(i) reduce the risk profile of the institution, including liquidity risk;

(ii) enable timely recapitalisation measures;

(iii) review the institution's strategy and structure;

(iv) make changes to the funding strategy so as to improve the resilience of the core business lines and critical functions;

(v) make changes to the governance structure of the institution.

2.4. Group recovery plans (Article 7 BRRD)

The Union parent undertakings shall draw up and submit to the consolidating supervisor a group recovery plan.

The group recovery plan shall identify measures that may be required to be implemented at the level of the Union parent undertaking and each individual subsidiary.

The group recovery plan shall aim to achieve the stabilization of the group as a whole, or any institution of the group, when it is in a situation of stress so as to address or remove the causes of the distress and restore the financial position of the group or the institution in question, at the same time taking into account the financial position of other group entities.

2.5. Assessment of group recovery plans (Article 8 BRRD)

The consolidating supervisor and the competent authorities of subsidiaries shall endeavor to reach a joint decision on:

(i) the review and assessment of the group recovery plan;

(ii) whether a recovery plan on an individual basis shall be drawn up for institutions that are part of the group; and

(iii) the application of the measures referred to in Article 6(5) and (6).

2.6. Cases where no joined decision is reached (Article 8(3) and (4) BRRD)

In the absence of a joint decision between the competent authorities on the review and assessment of the group recovery plan or on any measures the Union parent undertaking is required to take in accordance with Article 6(5) and (6), the consolidating supervisor shall make its own decision with regard to those matters.

In the absence of a joint decision between the competent authorities on (a) whether a recovery plan on an individual basis is to be drawn up for the institutions under its jurisdiction or (b) the application at subsidiary level of the measures referred to in Article 6(5) and (6), each competent authority shall make its own decision on that matter.

If any of the competent authorities has referred to the EBA, the consolidating supervisor/the competent authority of the subsidiary shall defer its decision and await any decision that the EBA may take, and shall take its decision in accordance with the decision of the EBA.

3. *Early intervention measures*

3.1. *Early intervention measures under Articles 102 and 104 CRD IV*

(a) *Triggers (Article102(1))*

Under Article 102(1) CRD IV competent authorities shall require an institution to take the necessary measures at an early stage to address relevant problems in the following circumstances:

i. the institution does not meet the requirements of the Directive or of Regulation (EU) No 575/2013;

ii. competent authorities have evidence that the institution is likely to breach the requirements of the Directive or of Regulation (EU) No 575/2013 within the following 12 months.

(b) *Measures at an early stage including those under Article104 (Article 102(2))*

Under Article 102(2) CRD IV, “for the purposes of paragraph 1, the powers of competent authorities shall include those referred to in Article 104”.

In light of the above the NCAs or the ECB, depending on the status as significant or less significant of the credit institution concerned, may require an institution to: increase own funds; reinforce internal capital strategies and internal governance arrangements; present a plan to restore compliance; apply a specific provisioning policy; reduce risk in activities, products and systems; limit variable payment revenues; use net profits to strengthen own funds; divest risky activities; or, directly, restrict operations; restrict/prohibit distributions or interest payments; impose additional reporting requirements; impose specific liquidity requirements.

3.2. *Early intervention measures under Articles 27-29 BRRD*

(a) *Triggers (Article 27(1))*

Early intervention measures under Article 27 to 29 BRRD may be applied where a credit institution infringes any of the requirements of CRDIV, MiFID II/MiFIR or is likely to do so in the near future (due, inter alia, to a rapidly deteriorating financial condition, including deteriorating liquidity situation,

increasing level of leverage, non-performing loans or concentration of exposures, as assessed on the basis of a set of triggers, which may include the institution's own funds requirement plus 1,5 percentage points).

(b) *Early intervention measures (Articles 27(1), 28 and 29)*

In the cases above-mentioned the NCAs or the ECB, depending on the status as significant or less significant of the credit institution concerned, may: require the board to implement measures in the recovery plan/to update the recovery plan; require the board to examine the situation, identify solutions to the identified problems and draw up an action plan; require the board to convene a shareholders' meeting, set an agenda and require certain decisions to be considered by shareholders; require the removal of the board members/senior management if unfit to perform their duties pursuant the CRDIV/MiFID II; require the board to draw up a plan to negotiate debt restructuring according to the recovery plan; require changes to bank's business strategy; require changes to bank's legal or operational structures; remove the entire board or management; appoint a temporary administrator.

More to the point, under Article 28 of the BRRD (on removal),

> Where there is a significant deterioration in the financial situation of an institution or where there are serious infringements of law, of regulations or of the statutes of the institution, or serious administrative irregularities, and other measures taken in accordance with Article 27 are not sufficient to reverse that deterioration, Member States shall ensure that competent authorities may require the removal of the senior management or management body of the institution, in its entirety or with regard to individuals. The appointment of the new senior management or management body shall be done in accordance with national and Union law and be subject to the approval or consent of the competent authority.

For further details on the Italian case law on removal see **Chapter VII.B – Case-study: The Italian case-law on removal**.

Article 29 BBRD regulates, in turn, the conditions for the appointment of the temporary administrator, the powers of the latter as well as those of the supervisory authority.

> 1. Where replacement of the senior management or management body as referred to in Article 28 is deemed to be insufficient by the competent authority to remedy the situation, Member States shall ensure that competent authorities may appoint one or more temporary administrators to the institution. Competent authorities may, based on what is proportionate in the circumstances, appoint any temporary administrator either to replace the management body of the institution temporarily or to work temporarily with the

management body of the institution and the competent authority shall specify its decision at the time of appointment. If the competent authority appoints a temporary administrator to work with the management body of the institution, the competent authority shall further specify at the time of such an appointment the role, duties and powers of the temporary administrator and any requirements for the management body of the institution to consult or to obtain the consent of the temporary administrator prior to taking specific decisions or actions. The competent authority shall be required to make public the appointment of any temporary administrator except where the temporary administrator does not have the power to represent the institution. Member States shall further ensure that any temporary administrator has the qualifications, ability and knowledge required to carry out his or her functions and is free of any conflict of interests.

2. The competent authority shall specify the powers of the temporary administrator at the time of the appointment of the temporary administrator based on what is proportionate in the circumstances. Such powers may include some or all of the powers of the management body of the institution under the statutes of the institution and under national law, including the power to exercise some or all of the administrative functions of the management body of the institution. The powers of the temporary administrator in relation to the institution shall comply with the applicable company law.

3. The role and functions of the temporary administrator shall be specified by competent authority at the time of appointment and may include ascertaining the financial position of the institution, managing the business or part of the business of the institution with a view to preserving or restoring the financial position of the institution and taking measures to restore the sound and prudent management of the business of the institution. The competent authority shall specify any limits on the role and functions of the temporary administrator at the time of appointment.

4. Member States shall ensure that the competent authorities have the exclusive power to appoint and remove any temporary administrator. The competent authority may remove a temporary administrator at any time and for any reason. The competent authority may vary the terms of appointment of a temporary administrator at any time subject to this Article.

5. The competent authority may require that certain acts of a temporary administrator be subject to the prior consent of the competent authority. The competent authority shall specify any such requirements at the time of appointment of a temporary administrator or at the time of any variation of the terms of appointment of a temporary administrator. In any case, the temporary administrator may exercise the power to convene a general meeting of the

shareholders of the institution and to set the agenda of such a meeting only with the prior consent of the competent authority.

6. The competent authority may require that a temporary administrator draws up reports on the financial position of the institution and on the acts performed in the course of its appointment, at intervals set by the competent authority and at the end of his or her mandate.

7. The appointment of a temporary administrator shall not last more than one year. That period may be exceptionally renewed if the conditions for appointing the temporary administrator continue to be met. The competent authority shall be responsible for determining whether conditions are appropriate to maintain a temporary administrator and justifying any such decision to shareholders.

8. Subject to this Article the appointment of a temporary administrator shall not prejudice the rights of the shareholders in accordance with Union or national company law.

9. Member States may limit the liability of any temporary administrator in accordance with national law for acts and omissions in the discharge of his or her duties as temporary administrator in accordance with paragraph 3.

10. A temporary administrator appointed pursuant to this Article shall not be deemed to be a shadow director or a de facto director under national law.

3.3. Early intervention measures under Article 16 SRMR

(a) *Triggers (Article 16(1))*

The powers under Article 16(2) SSMR may be used by the ECB in any of the following circumstances: the significant credit institution does not meet the requirements of EU/national law; the ECB has evidence that the institution is likely to breach the requirements within 12 months; the ECB comes to the determination, in the supervisory review framework, that the bank's arrangements, strategies, processes and mechanisms and its own funds and liquidity do not ensure a sound management and coverage of its risks.

(b) *Powers set out in Article 16(2) as measures at an early stage*

In the cases mentioned above, the ECB may require the significant institution: to hold own funds in excess of the capital requirements laid down in the acts referred to in the first subparagraph of Article 4(3) related to elements of risks and risks not covered by the relevant Union acts; to reinforce the arrangements, processes, mechanisms and strategies; to present a plan to restore compliance with supervisory requirements pursuant to the acts referred to in the first subparagraph of Article 4(3) and set a deadline for its implementation, including improvements

to that plan regarding scope and deadline; to apply a specific provisioning policy or treatment of assets in terms of own funds requirements; the reduction of the risk inherent in the activities, products and systems of institutions; to limit variable remuneration as a percentage of net revenues when it is inconsistent with the maintenance of a sound capital base; to use net profits to strengthen own funds; or directly: to restrict or limit the business, operations or network of institutions or to request the divestment of activities that pose excessive risks to the soundness of an institution; to restrict or prohibit distributions by the institution to shareholders, members or holders of Additional Tier 1 instruments where the prohibition does not constitute an event of default of the institution; to impose additional or more frequent reporting requirements, including reporting on capital and liquidity positions; to impose specific liquidity requirements, including restrictions on maturity mismatches between assets and liabilities; to require additional disclosures; to remove at any time members from the management body of credit institutions who do not fulfil the requirements set out in the acts referred to in the first subparagraph of Article 4(3).

3.4. The notification of the early intervention measures to the resolution authority and its side-effects

The ECB or NCAs must inform the SRB of any early intervention measure they require the bank or group to take or they take pursuant to the SSM Regulation, the BRRD or the CRDIV.

The SRB may:

(i) prepare for the resolution;

(ii) require the bank or the parent institution to start looking for potential purchasers;

(iii) require national resolution authorities to draft a preliminary resolution scheme for the bank or group.

All the authorities involved must ensure consistency between any additional early intervention measures by the ECB or NCAs and any action by the SRB aimed at preparing for resolution.

According to the wording of Article 27 BRRD, that refers to conditions triggering the early intervention measures, nearly all supervisory measures taken by the ECB under Article 16 SSMR and by NCAs under national law transposing Articles 102 and 104 CRD IV could be seen as early intervention measures.

On the basis of Articles 81(2) BRRD and 13(1) SRMR, this may imply, in turn, the notification of the supervisory measures to the resolution authorities.

The question arises whether such a broad interpretation of early intervention, which also includes supervisory measures not related to banks showing impaired

or potentially impaired capital and liquidity conditions, would contradict the proportionality principle as well as the purpose of the notification requirement, which is to avoid the failure of an institution and ensure the timely involvement of the resolution authority to prepare for resolution.

The confusion between these two types of measures stemming from the current wording might create a twofold negative effect as it could:

(iv) prevent or delay the adoption of the ordinary preventive supervisory measures, due to the fear of triggering the different consequences envisaged by the BRRD (e.g. notification to the Resolution Authority that could, in turn, cause market reactions and intensify pressures on the bank);

(v) determine undesirable impacts on banks, should ordinary supervisory measures be framed as early intervention measures (e.g. market reactions in case the Market Authority discloses to the market the adoption of an early intervention measure).

A general concern on this topic has been expressed by the Commission in its report on the SSM (see p. 17 of the Report):

> When early intervention measures are planned to be taken by the ECB with regard to a supervised institution for which SRB is the resolution authority, such measures should be notified to the SRB, which may prepare for the resolution of the institution concerned and, together with the ECB, shall closely monitor the compliance with the early intervention measures. Some inconsistencies in the legal framework for early intervention measures have been observed and could be addressed by clarifying the use of early intervention powers where they overlap with supervisory powers.

The Commission's Report on the SSM further notices (p. 17) that:

> it could be envisaged to enshrine early intervention powers directly in the Regulation establishing the Single Resolution Mechanism, so as to allow the ECB to use powers provided for in directly applicable Union law.

And that:

> Until such clarifications are made in the law, including on the instances triggering early intervention, it is recommended that the ECB develops its crisis management strategy, especially defining the circumstances that require early intervention measures, and clearly communicates to the SRB all measures addressed to institutions whose financial situation is deteriorating, to enable more effective cooperation.

The relationship between the two Commission's suggestions is not crystal clear. A possible interpretation could be that, in the Commission's view, the ECB

should develop its crisis management strategy in order to apply a harmonised set of early intervention powers in the occurrance of the circumstances defined by the ECB itself.

To this regard it is worth noting that the early intervention measures and the circumstances triggering their application are provided for in Article 16(2) SSMR and in the national law transposing the relevant CRD IV and BRRD provisions and that the ECB is expected to comply with these provisions.

4. *Structural measures*

4.1. *The proposals at EU level*

In 2011, the European Commission created a High-Level Expert Group ('HLEG') to analyse potential structural measures for the EU banking system that could reduce the probability and impact of failures. In 2012, a report was released with a series of recommendations (the Liikanen report).

The report recommended to:

(i) require legal separation of risky financial activities (proprietary trading and other activities linked with securities and derivatives markets) from deposit-taking banks within the banking group;

(ii) implement further measures regarding the bank recovery and resolution framework, capital requirements and the corporate governance of banks in order to reduce systemic risk in deposit-banking and investment-banking activities, even when they are separated.

On January 2014, the European Commission released a draft regulation on structural measures to improve the resilience of EU credit institutions (the so-called banking structural reform) and harmonise the different national initiatives that had grown in Europe.[1]

In its Opinion of 19 November 2014 (CON/2014/83), the ECB (see the General observations) welcomed the Commission proposal as it

> will be directly applicable in all 28 Member States and will contribute towards ensuring a harmonised Union framework addressing concerns regarding banks that are 'too big to fail' and 'too interconnected to fail'. The proposed regulation seeks to reduce the potential fragmentation that could be caused by different national

[1] See the Proposal for a Regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions, Brussels, 29.1.2014, COM (2014) 43 final, 2014/0020 (COD).

> structural regulations in the banking sector and that could lead to inconsistencies, regulatory arbitrage and a lack of a level playing field in the single market.

Not surprisingly, the ECB criticized the so-called derogation clause contained in the initial Commission's proposal (see § 4 of the Opinion):

> Article 21 of the proposed regulation provides that the Commission, at the request of a Member State, can authorise a derogation from the separation requirements for credit institutions that are covered by national legislation having an 'equivalent effect' to the provisions of the proposed regulation.
>
> The preamble to the proposed regulation properly observes that inconsistent national legislation would have the effect of limiting the effectiveness of the SSM because the ECB would have to apply a set of different and inconsistent legislation to credit institutions under its supervision, thereby increasing supervisory costs and complexity. This concern is fully shared by the ECB and such considerations weigh against the inclusion of a derogation from the general regime. The derogation is not compatible with the aim of creating a level playing field and may create a precedent for future derogations in other types of Union legislation. This would impair single market integration and obstruct the very objectives sought to be achieved by the proposed regulation. Moreover, the broad scope of the derogation clause may not be consistent with the legal form of a regulation and with the legal basis of the proposed regulation under Article 114 of the Treaty.

The draft regulation would have imposed new constraints on the structure of European banks, even though there were some divergences between the initial Commission's proposal and the Council's new text.

Whilst the original Commission proposal provided for the prohibition of the proprietary trading for all the entities of the banking group and the separation of some other trading activities within the group, in the Council's agreed text the proposed prohibition of the proprietary trading was softened by the separation of the proprietary trading within the same group.

The proposal was then withdrawn due to the lack of progress in the negotiation of the dossier and to the fact that the objectives pursued by the proposed regulation had already been achieved by other EU legislative acts.

This notwithstanding, some of the ECB's suggestions contained in the opinion mentioned above still remain useful to the extent that they refer to the relationship between the structural measures that can be adopted by the supervisory authorithies under their relevant national law (see § 4.2 below) and the measures impinging on the structure of the bank and the banking group that can be adopted by the resolution authority.

See § 5 of the ECB's Opinion (Cooperation between the competent authority and the resolution authority):

> The structural measures in the proposed regulation are intended to prepare the ground for the resolution and recovery of financial institutions, with the two processes being intrinsically linked. Accordingly, the proposed regulation provides for cooperation between competent authorities and relevant resolution authorities at various stages of a competent authority's assessment and implementation of structural measures. The competent authority with the power to require separation must notify the relevant resolution authorities before taking a decision to separate a trading activity. The assessment of the need for separation must also take into account any ongoing or pre-existing resolvability assessment. Finally, the separation measures have to be consistent with measures imposed in the context of the supervisory review and evaluation process and any measures imposed in the context of a resolvability assessment.
>
> Removing impediments to resolvability is essential to developing an operational resolution plan for a credit institution or group. As the ECB has previously observed, while consultation with the supervisor is sufficient regarding the resolvability assessment itself, measures to remove impediments to resolvability should be jointly determined and implemented in cooperation with the supervisor. The adoption of appropriate measures to increase the resolvability of a credit institution or group, such as changes to business practices, structure or organisation, must duly take into account the effect of such measures on the soundness and stability of the entity's ongoing business. This is a relevant consideration for the competent authority. Enhancing the resolvability of banks while preserving critical financial services in the economy as a whole is also a key aim of the supervisory process to which the measures in the proposed regulation should seek to give effect. Therefore, competent authorities and resolution authorities will have to work in close cooperation in both of these processes.
>
> One of the objectives of the proposed regulation is to facilitate the orderly resolution and recovery of a group of entities. However the objectives of the proposed regulation in providing for the imposition of structural measures are not identical to the objectives of resolvability assessment. The range of structural measures available under the proposed regulation is therefore different to the range of measures aimed at removing impediments to resolvability under the recently adopted Union resolution framework. Accordingly, it is the ECB's understanding that even where the resolvability assessment in the context of resolution planning has not identified any substantive impediments to resolvability, the competent authority may nevertheless identify the need for structural measures under the proposed regulation which would facilitate the recovery and resolution of complex institutions. It must be clarified in this regard that while

> any ongoing or pre-existing resolvability assessment should be taken into account by the competent authority, the conclusions of such assessment should in no way prejudice the competent authority in the exercise of its powers under the proposed regulation, in particular where the competent authority determines that the criteria for the imposition of separation are met.

4.2. The current national laws

Proprietary trading within banking groups is permitted in the French, Belgian and German laws, although it must be conducted by a separate entity where certain thresholds are exceeded.

French Law n° 2013-672 of 26 July 2013 on the separation and regulation of banking activities does not require a complete ban on proprietary trading activities in financial instruments by credit institutions, financial companies and mixed financial holding companies.

Instead, it requires that certain activities are to be carried out by such institutions only through dedicated specialised subsidiaries which are themselves licensed as investment firms or credit institutions.

The purpose is to "ring-fence" such activities within the specialised subsidiaries, that will be required to comply individually with the relevant prudential ratios and have management separate from the credit institutions, financial holding companies and mixed financial holding companies.

To protect the parent credit institutions, financial holding companies or mixed financial holding companies from absorbing future losses of the specialised subsidiaries, prior approval of the French banking authorities is required before the specialised subsidiary can increase its share capital.

In Belgium (see Belgian banking law 25.4.2014, Articles 119-131; NBB regulation 1.4.2014 on "proprietary trading"; Circular of NBB 2015/14 of 30.3.2015), banks may not directly undertake proprietary trading, which has to be undertaken only in a separate, "sister" trading entity (investment firm). The trading entity is therefore outside the consolidation scope of the bank, but it can be in the same group. Strict exposure limits are applied between the bank and the trading entity.

Trading is defined via negative scope: banks are allowed to carry out the following categories of trading activities: financial services to clients; market making when the bank is a certified market maker; hedging of bank's balance sheet; liquidity management; long-term investment. Others are prohibited.

Though in principle they are allowed, the 5 categories mentioned above are subject to strict qualitative requirements and quantitative limits, otherwise they fall into a "grey zone": when they become, in aggregate terms, too risky or do not

comply with qualitative and quantitative requirements, a mandatory separation outside the structure of the bank is provided for.

The German Banking Act (Kreditwesengesetz-KWG), as amended by the Act on the Ring-Fencing of Risks and the Planning of the Recovery and Resolution of Credit Institutions and Financial Groups, prohibits CRR credit institutions or entities that meet certain thresholds from engaging in proprietary trading.

Even if the thresholds set forth by the law are not met, the German Federal Financial Supervisory Authority (BaFin) may prohibit CRR credit institutions or entities to engage in proprietary trading.

The prohibited activities may be transferred to an economically, organisationally and legally separated financial trading institution.

Such institution may be a member of the relevant CRR Credit Institution's/ Entity's group of companies, but it is subject to certain additional organisational requirements.

5. Allocation of competences between the ECB and the NCAs

Under Article 4(1) (i) SSMR, the ECB is empowered to

> carry out supervisory tasks in relation to recovery plans, and early intervention where a credit institution or group in relation to which the ECB is the consolidating supervisor, does not meet or is likely to breach the applicable prudential requirements, and, only in the cases explicitly stipulated by relevant Union law for competent authorities, structural changes required from credit institutions to prevent financial stress or failure, excluding any resolution powers.

Under Article 16 SSMR, the ECB shall have the powers set out in Article16(2) as measures at an early stage.

Under Article 9(1), first sub-paragraph, the ECB shall have the powers that NCAs have under the national law transposing Articles 5-9 BRRD (recovery plans) as well as Articles 102 and 104 CRD IV and Articles 37-39 BRRD (early intervention measures).

As there is no Union law on structural changes required from credit institutions to prevent financial stress or failure, the power to impose structural changes to said credit institutions does not underpin an ECB's task.

Therefore, a question arises as to whether the ECB may instruct the NCAs to make use of their purely national powers on structural measures.

Under the ECB/Commission reading of Article 9(1), third sub-paragraph, SSMR (see **Chapter IV.A. The involvement of the NCAs in the ECB's**

supervisory proceedings, § 2.2), the ECB power to instruct the NCAs applies to NCAs' powers not underpinning an ECB's task. Along this line, the ECB may instruct the NCAs on the use of their powers on structural measures.

Under a different view, the ECB's power to instruct the NCAs only applies to NCAs' powers underpinning an ECB's task and provided for in purely national law. Following this reasoning, the ECB cannot instruct the NCAs on the use of their powers on structural measures.

Nevertheless, the huge set of powers enjoyed by the ECB under Article 16 SSMR and under national provisions transposing CRD IV and BRRD shall cover most of the cases provided for in national law on structural measures.

***

EU Legal References: Articles 102 and 104 CRD IV; Articles 5 to 9, 27 to 29 and 81 BRRD; Articles 4(1)(i), 9 and 16 SSMR; Article 13 SRMR; EBA's 'Guidelines on the range of scenarios to be used in recovery plans' of 18 July 2014.

National Legal References: Belgian banking law 25.4.2014, Articles 119-131, NBB regulation 1.4.2014 on "proprietary trading", Circular of NBB 2015/14 of 30.3.2015; French law n° 2013-672 of 26 July 2013; German Banking Act as amended by the Act on the Ring-Fencing of Risks and the Planning of the Recovery and Resolution of Credit Institutions and Financial Groups.

Other official documents: European Commission (2012), High Level Expert Group on reforming the structure of the EU banking sector: Final Report; "Opinion of the European Banking Authority on the recommendations of the High-level Expert Group on reforming the structure of the EU banking sector"; Proposal for a Regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions, Brussels, 29.1.2014, COM (2014) 43 final, 2014/0020 (COD); ECB's Opinion on a proposal for a regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutionsof 19 November 2014 (CON/2014/83).

Case law: see cases reported in **Chapter VII.B – Case-study: The Italian case-law on removal**

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Chapter VII.B

Case-study: The Italian case law on removal

Michele Cossa

Summary: *1. Introduction. The Italian and EU provisions on removal – 2. The leading case: Credito di Romagna – 3. The TAR Lazio decisions on Credito di Romagna – 4. Further cases.*

1. *Introduction. The Italian and EU provisions on removal*

Before 2015, the power to remove banks' management was conferred to the Italian supervisory authority only in the context of temporary administration. In the lack of a possibility to remove banks' management without leaving the shareholders the power to replace it, the framework was certainly not informed to the principle of proportionality.

In order to overcome this gap, the removal was introduced in the Italian Banking Law (Legislative Decree 385/1993, hereinafter also TUB) by the Legislative-Decree No 72/2015, which aimed to implement the CRD IV.

In particular, in the case of the implementation of the CRD IV, two new powers were introduced. Notably, Article 53-bis introduced the removal of "one or more company representatives", whilst Article 70-bis TUB envisaged the collective removal concerning the bank's governing bodies in their entirety.

Shortly after, the BRRD was also transposed into the Italian legal framework.

Among the early intervention measures (see **Chapter VII.A. Recovery plans, early intervention measures and structural measures**), Article 27 of BRRD includes the power to

> request the removal or replacement of one or more members of the administrative body, if they are not considered suitable to carry out their duties .... (Article 27 (1) lett. D, BRRD).

In turn, Article 28 BRRD provides that

> Where there is a significant deterioration in the financial situation of an institution or where there are serious infringements of law, of regulations or of the statutes of the institution, or serious administrative irregularities, and other measures taken in accordance with Article 27 are not sufficient to reverse that deterioration, Member States shall ensure that competent authorities may require the removal of the senior management or management body of the institution, in its entirety or with regard to individuals. The appointment of the new senior management or management body shall be done in accordance with national and Union law and be subject to the approval or consent of the competent authority.

Legislative-decrees No 180 and No 181 of 2015, implementing the BRRD:

(i) kept in force Article 53-bis TUB on "individual" removal, i.e. the removal of one or more company representatives "*if their stay in office is prejudicial to the bank's sound and prudent management*";

(ii) repealed Article 70-bis TUB and replaced it with:

a. Article 69-octiesdecies TUB which, among the "Early intervention measures", introduces, under letter b)

> the removal of the managers…. when there are serious violations of legislative, regulatory or statutory provisions or serious administrative irregularities or when the deterioration of the bank or the banking group's situation is particularly significant, provided that the measures indicated in the same letter a) [substantially, the implementation of the recovery plan] or those provided for in Articles 53 -bis and 67-ter [other e.i.m.] are not sufficient to address the situation;

b. Article 69-vicies-semel TUB, which states that the removal may be collective (i.e. concerning the administrative or the control bodies in their entirety: paragraph 1) or, with respect to the senior management, individual (paragraph 3).

According to this scenario, the current Italian law provides for a hierarchy of measures. In order of seriousness: the Authority may make use of the intervention powers listed in Article 53-bis and, where those powers prove not sufficient to address the situation, it may resort to the removal or the special administration.

This latter is subject in part to the same conditions as the collective removal (notably, the serious violations of legislative or statutory provisions or the serious irregularities in the administration), so that in these cases the supervisory authority has to assess which of these two tools better allows for the recovery of a sound and prudent management.

If the authority believes that - despite the unfitness of the management in charge - the shareholders may appoint a management capable of achieving the economic rebalancing of the bank, it will merely remove the managers (and, as the case may be, the statutory auditors).

On the contrary, if it considers that there are no alternatives – in view of the credit institution's recovery – to a vicarious management that temporarily replaces or suspends the corporate bodies, it will be inclined to adopt a temporary administration decision.

Lastly, Article 16(2)(m) SSMR must be mentioned, which confers to the ECB the power to

> remove at any time members from the management body of credit institutions who do not fulfill the requirements set out in the acts referred to in the first subparagraphs of Article 4(3) (i.e., relevant Union law and national legislations transposing Directives).

This provision could be interpreted narrowly, referring only to the fit and proper framework, so that the ECB has the power to remove managers who do not meet the reputation and competence requirements.

Otherwise, given the wide reference to all the relevant EU law contained in Article 16(2)(m), one can go so far as to consider the ECB's power of removal as extended to all cases where the managers of the supervised entity, though compliant with the fit and proper requirements, act in prejudice of the sound and safe management of the bank.

2. *The leading case: Credito di Romagna*

At the end of 2015, Banca d'Italia carried out an on-site inspection at the Credito di Romagna's (a LSI) premises. The inspection ended with a negative outcome since, amongst others, it highlighted serious deficiencies in the bank's governance, technical and organisational arrangments as well as failures to comply with the supervisory authority's requirements.

On June 2016, Banca d'Italia stated that the early intervention measure prerequisites of serious violations, serious irregularities in management and significant deterioration of the business situation were met and that consequently, the situation justified the adoption of early intervention measures, including the removal of members of the corporate bodies of the bank (Article 69-vicies-semel and Article 69-octiesdecies, lett. b) TUB).

Violations and irregularities were considered serious as they concerned the governance of the bank, jeopardised the proper functioning of the credit activity, resulted in the deterioration of the bank's technical profiles and were imputable to the shortcomings of the corporate bodies.

Moreover, Banca d'Italia deemed that there was no possibility of reorganisation on a stand-alone basis, so that the bank should proceed without further delay to an aggregation or to allow a qualified professional investor to become a majority shareholder. The implementation of this process required discontinuity in the company management.

Given this scenario, Banca d'Italia ordered, as a matter of urgency, the following set of measures:

(i) the removal of all members of the management board and the board of statutory auditors, starting from the establishment of the new bodies;

(ii) the removal, with immediate effect, of the General Manager;

(iii) the calling, within 15 days, of the shareholders' meeting (the agenda had to include the renewal of the corporate bodies, whose appointment should be submitted to the supervisory authority for approval);

(iv) the appointment with immediate effect, pursuant to Article 75-bis TUB, of a Commissioner acting as General Manager in temporary support to the current Board of Directors;

(v) the order to the renewed Board of Directors to appoint, within 90 days, a new General Manager (again, under prior approval of the Bank of Italy: Article 69-vicies-semel, par. 4, TUB);

(vi) other prudential measures (deduction from own funds, increased capital ratios, prohibition of new operations, restriction of the territorial network).

In the event of failure to comply with such provisions, more intrusive measures were announced (possibly including the start of a liquidation or resolution procedure).

With two differents applications, several managers of Credito di Romagna and the bank itself challenged the decision of Banca d'Italia before the national competent administrative Court (TAR Lazio).

The applications were supported by several pleas, including

(i) violation of Article 98(2) Framework Regulation, according to which "…draft supervisory decisions shall be sent to the ECB prior to being addressed to less significant supervised entities if such decisions: (a) relate to the removal of members of the management boards of the less significant supervised entities and the appointment of special managers…";

(ii) violation of the rules and principles regarding participation and right to be heard in the administrative procedure (Articles 7 and 8 of law No 241 of 1990, of Article 4(3) T.U.B., of Article 24 of the law No 262 of 2005; Article 97 of the Italian Constitution; Article 41 of the Charter of Fundamental Rights). The decision was issued as a matter of urgency and the addressees did not have the chance to be heard. In the opinion of the applicants, this amounted to an infringement of the right of defence, a fortiori, since they considered the removal as a proper (administrative) sanction.

(iii) on the merits: misuse of powers due to lack and falsity of the assumptions, lack of logic, contradiction, violation of the principle of proportionality and reasonableness; manifest injustice, lack of motivation.

3. The TAR Lazio decisions on Credito di Romagna

The Italian Administrative Regional Tribunal of Rome (hereinafter also TAR Lazio) dismissed both applications with the decisions No 1626 and No

1627 of 1 February 2017. The grounds of the decisions on the above-mentioned pleas are the following.

In general, the administrative court adhered to the jurisprudential mainstream according to which the judge, when assessing the decisions of the public administration and in particular of an independent authority, has to adopt a «deferential approach».

The TAR Lazio explicitly noted that the limit of jurisdictional review on “technical discretion” must stand on the line of a control which, without interfering in the discretionary choices of the Public Authority, ensures the substantial legality of its action, especially on matters characterised by a high level of technicality.

This is a sort of judicial self-restraint stemming from the principle of separation of powers and developed over time in various frameworks (and, to a certain extent, recognised by the EU framework: see for instance Article 85(3) BRRD).

This approach aims at safeguarding the technical expertise of the authorities and at limiting the reversal of their decision to the case of arbitrariness, disproportionality, or manifest unreasonableness.

In this case, the TAR Lazio stated that the decision of the supervisory authority was not tainted by any of these defects.

On the violations of the Framework regulation, it was noted by Banca d’Italia that Article 98 does not impose a general duty to notify draft decisions to the ECB with regards to any less significant supervised entities.

On the contrary, the duty concerns only the LSIs

> for which the ECB considers that, based on the general criteria defined by the ECB regarding their risk situation and potential impact on the domestic financial system, the information shall be notified to it.

Credito di Romagna was not part of this previously formed list of LSIs (the so-called «high priority» LSIs, whose list is not public). In any case, the notification of material draft decisions to the ECB is merely informative and it was, anyway, fulfilled in practice.

On the infringement of procedural rules (no communication on the opening of the procedure, no right to be heard), the TAR Lazio noted that a swift procedure is justified in view of the protection of the interests of the depositors and the market.

Removal was introduced in order to grant the supervisory authority a more flexible and less intrusive power, without resorting necessarily to special administration. Settled case law on special administration denies any duty of preventive communication to the concerned parties, in order to protect the public savings and avoid bank runs.

In the Administrative Tribunal's view, it would be illogical if such rules would not apply to the removal procedure, which, in many cases, is an alternative to special administration. Moreover, it would lead, in practice, to a constant preference for the more intrusive instrument (special administration), since it turns out to be more efficient and less burdensome for the authority.

Moreover, the TAR Lazio denied any sanctioning nature or effect of the removal.

The Administrative Tribunal clearly stated that the power at hand does not aim at punishing the managers, but, rather, at addressing serious criticalities in the governance of the bank, which could prejudice its economic and financial balance. Thus, national and supranational provisions concerning the rights of the person involved in a punitive procedure are not applicable.

The applicants challenged the TAR decisions before Consiglio di Stato, the Italian administrative court of second instance. The trial is currently pending.

4. Further cases

The TAR Lazio confirmed such conclusions in two decisions of 2018 (No 8827 and No 8828) concerning the Chairman of the Board and the CEO of an asset management company (SGR) and thus the first Italian case of «individual» removal, based on Article 7 par. 2-bis of the Italian Consolidated Financial Law (TUF) (which *mutatis mutandis* matches with the power provided by art. 53-bis TUB vis-à-vis banks).

The TAR Lazio confirmed the legitimacy of the removal, following the same reasoning with regards to the 'judicial deference', the non-punitive nature of the removal and the justified sacrifice of the guarantees of the interested parties in the procedure.

It is worth noting that the same managers were recipients of administrative pecuniary sanctions, inflicted by the Bank of Italy for the violations ascertained in the same on-site inspection that led to removal. Not surprisingly, they filed an application against the sanctioning decision, complaining, amongst others, about the violation of the *ne bis in idem* principle, on the assumption that removal was, itself, a sanction.

The competent court (the Court of appeal of Milan) dismissed the applications with a very comprehensive reasoning (see decisions No 71 of 10.1.2019 and No 329 of 28.1.2019).

This reasoning is grounded on the main argument that the removal is based on an *ex ante* assessment of the suitability of the managment and has to be regarded as a supervisory rather than as a sanctioning decision.

Consequently, the *ne bis in idem* principle was not violated, as the two decisions adopted by the authority (the sanction and the removal) differ in their nature and their objectives.

More to the point, according to the Court of appeal, the removal has a purpose

> eminentemente prudenziale e ripristinatoria, non fondata sull'accertamento ex post di una violazione prevista dalla legge come illecito amministrativo, quanto, piuttosto, su una valutazione ex ante di inidoneità pro futuro dei vertici della società a garantire condizioni di stabilità all'ente governato… La finalità dei due provvedimenti, quindi, risulta orientata a tutele diverse: il removal a evitare il rischio per gli interessi dei risparmiatori e per il mercato, mentre la sanzione a una finalità meramente afflittiva… Per quanto riguarda il contesto normativo, la Corte rileva come il removal non sia definito in alcun modo come sanzione dal TUF… Il removal, coerentemente con la sua natura di misura di vigilanza prudenziale, si concentra, invece, non sulla persona fisica, ma su uno specifico intermediario, rimuovendo da esso – e solo da esso – il soggetto la cui permanenza in carica ne pregiudicherebbe la sana e prudente gestione, sicché detto esponente potrebbe acquisire o mantenere funzioni in altre banche o imprese del settore finanziario.

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EU legal references: Article 41 of the Charter of Fundamental Rights; Articles 27 and 28 BRRD; Article 16(2)(m) SSMR; Article 98 par. 2 SSM Framework Regulation.

National legal references: Article 97 of the Italian Constitution; Articles 7 and 8 of law No. 241 of 1990; Article 24 of the law No. 262 of 2005; Articles 4(3), Article 53-bis, 69-octiesdecies, lett. b), Article 69-octiesdecies, 69-vicies-semel, 70-bis, 75-bis of the Italian Consolidated Banking Law; Article 7 par. 2-bis of the Italian Consolidated Financial Law (TUF).

National case law: Court of appeal of Milan, decisions No. 71 of 10.1.2019 and No. 329 of 28.1.2019; TAR Lazio, decisions No. 8867 and No 8868 of 7.8,2018; TAR Lazio, decisions No. 1626 and No. 1627 of 1.2.2017.

Chapter VIII.A

The SRM: Allocation of tasks and powers between the SRB and the NRAs and organisational issues

Michele Cossa, Raffaele D'Ambrosio and Andrea Vignini

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1. Key elements of the SRM

1.1. The rationale and the legal basis

The Single Resolution Mechanism (SRM) is the second pillar of the Banking Union.

It was established to break the mutual connection between the sovereign risks and the national banking systems' risks with the view of sustaining the financial stability of the Eurozone.

In order to prevent the tax-payers involvement in bailing out financial institutions, the SRM is based on the assumption that:

(i) according to the general principles regulating the new framework on banking crises (BRRD), banks' shareholders and creditors must primarily bear the losses in case of an institution distress, so that public financial support is considered as an extraordinary and exceptional measure, conditional to the previous involvement of the private sector;

(ii) a Single Resolution Fund (SRF) is established, owned by the Single Resolution Board (SRB) and financed by the banking sector's contributions, with the aim of guaranteeing a centralised source of funding for the institutions resolution, autonomous from MSs interventions.

Article 114 TFEU has been considered as a suitable legal basis for the SRM. The reasons are manifold.

First, the adoption of resolution decisions by Union central bodies – the Board, the Commission and the Council – would bring about the approximation effect sought for resolution rules, by avoiding their potential divergent application by Member States, that could compromise the achievement of the internal market in this particular field.

Secondly, the aim of uniformity is strongly related to the objective of guaranteeing financial stability in the banking sector, which is regarded as a premise for the proper functioning of highly integrated financial markets. The need to preserve financial stability is thus a principle on which the SRMR is based and, more particularly, an objective that has to be pursued by resolution action.

The establishment of the SRM and the SRB is an integral part of the process of harmonisation in the field of resolution and can therefore be regarded as a harmonising measure in the sense of Article 114 TFEU.

In the same vein see the judgment of the BVerG of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14.[1]

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[1] The judgment has already been illustrated in its parts pertaining to the SSM, under Chapter I.A, §§ 2.2, 2.4, 5.7 and 6.2 and under Chapter V.A, § 1.2.

The Court held that, even though the establishment and competences of the Single Resolution Board raise concerns with regard to the principle of conferral, they do satisfy the criteria developed in the CJEU's case-law in the application of Article 114 TFEU.

Indeed, the SRM Regulation aims at the harmonisation of the internal market and also fulfils the other conditions for the establishment of an EU agency (such as the SRB).

The SRB's powers are regulated in a sufficiently specific manner (see §§ 255 to 258), do not extend to fundamental issues (which are regulated by the SRMR itself) (see § 260) and are limited to what is necessary from the point of view of the Union legislator.

See under this respect § 261 of the judgement:

> (cc) Die Vergemeinschaftung der Verwaltungszuständigkeiten beschränkt sich zudem auf das aus der Sicht des unionalen Gesetzgebers Erforderliche. So verbleibt die Zuständigkeit für sämtliche Kreditinstitute, die nicht dem einheitlichen Aufsichtsmechanismus unterliegen – zahlenmäßig also der weitaus größte Teil (vgl. Rn. 196) – bei den nationalen Abwicklungsbehörden. Aber auch im Anwendungsbereich der SRM-Verordnung ist die Erstellung und Verabschiedung von Abwicklungsplänen für andere als die in Art. 7 Abs. 2, Abs. 4 Buchstabe b, Abs. 5 SRM-VO genannten Unternehmen und Unternehmensgruppen Sache der nationalen Abwicklungsbehörden (Art. 7 Abs. 3 UAbs. 1, Art. 9 Abs. 1 SRM-VO); der Ausschuss kann nach Anhörung der betroffenen nationalen Abwicklungsbehörden allerdings von sich aus oder auf deren Ersuchen hin entscheiden, alle der nationalen Abwicklungsbehörde durch die SRM-Verordnung überlassenen Befugnisse unmittelbar auszuüben, soweit dies für die kohärente Anwendung hoher Abwicklungsstandards notwendig ist (Art. 7 Abs. 4 Buchstabe b SRM-VO). Im Rahmen des dezentralen Vollzugs sind die nationalen Abwicklungsbehörden schließlich für die Ausführung der Beschlüsse des Ausschusses und für die Festlegung der näheren Einzelheiten der zu ergreifenden Maßnahmen zuständig (Art. 6 Abs. 7, Art. 18 Abs. 9, Art. 29 Abs. 1 SRM-VO), wobei dem Ausschuss allerdings ein direktes Weisungsrecht gegenüber dem in Abwicklung befindlichen Institut zusteht (Art. 29 Abs. 2 SRM-VO).

These are the reasons why, similarly to what was decided with regard to the SSMR compliance with Article 127(6) TFEU, the Court decided not to refer to the ECJ.

See § 318 of the judgement:

> Bei der Auslegung von Art. 114 Abs. 1 AEUV handelt es sich ebenfalls um einen „acte éclairé“. Das Bundesverfassungsgericht hat zu der Frage der Reichweite des Art. 114 Abs. 1 AEUV als

> Ermächtigungsgrundlage für die Errichtung und Kompetenzausstattung des Ausschusses als unabhängiger Agentur der Europäischen Union die hierzu ergangene Rechtsprechung des EuGH (insbesondere Urteil vom 22. Januar 2014, Vereinigtes Königreich/Parlament und Rat, C-270/12, EU:C:2014:18) zugrunde gelegt und ist unter Anwendung dieser Rechtsprechung und insbesondere der dort genannten Grenzen zur Vermeidung substantieller Kompetenzverschiebungen zwischen der Europäischen Union und den Mitgliedstaaten zu dem Ergebnis gelangt, dass die Errichtung des Ausschusses keine qualifizierte Überschreitung der primärrechtlichen Kompetenzgrundlage des Art. 114 Abs. 1 AEUV darstellt.

Nevertheless, as it will be pointed out in § 5.3 of this Chapter, the SRB's assessment (under Article 18(5) SRMR) that the public interest requirement is not met would leave in the hands of the SRB the decision not to apply the resolution regime, without any involvement of the Commission and the Council.

Thus, in its assessment of the SRM's compliance with Article 114 TFEU, as interpreted by the CJEU in light, amongst others, of the Meroni prohibition, the BVerG seems not to be aware of this discretionary and pivotal power that the SRMR conferred to the SRB.

Moreover, in the Court's view, the fact that the SRM also supports the stability of the financial system of the participating Member States does not prevent the SRM Regulation from being subsumed under Article 114(1) TFEU.

See § 262 of the judgment:

> Dass mit dem einheitlichen Abwicklungsmechanismus zugleich die Stabilität des Finanzsystems in den teilnehmenden Mitgliedstaaten unterstützt wird, hindert die Zuordnung der SRM-Verordnung zu Art. 114 Abs. 1 AEUV nicht. Sie stellt nicht in Frage, dass die Harmonisierung der mitgliedstaatlichen Abwicklungsregime das wesentliche Ziel der SRM-Verordnung und die Stabilisierung der Finanzmärkte eine lediglich flankierende Auswirkung ist (vgl. Kube, Rechtliche Grundlagen und Grenzen der EU-Bankenabgabe, 2016, S. 22 f.).

A question arises as to whether measures adopted on the basis of Article 114 TFEU may have an application limited to entities established in certain Member States only.

This limitation is objectively justified as the circumstance of being established in a participating Member State does not consist of a territorial derogation for some of the Member States. Such a criterion reflects, rather, a specific attribute peculiar to the entities falling within its scope of application, namely the fact of being subject to the SSM, that distinguishes them in an objective and characterised manner from the rest of the credit institutions.

Moreover, due to the high interconnection of banking systems in the internal market, in the absence of the SRM, bank crises in Member States participating in the SSM would have a stronger negative systemic impact also in non-participating Member States.

The establishment of the SRM will ensure a neutral approach in dealing with failing banks and, therefore, increase the stability of the banks of the participating Member States, prevent the spill-over of crises into non-participating Member States and, thus, facilitate the functioning of the internal market as a whole.

Under the BVerfG's view, a partial harmonisation as the one realised through the SRM is not only possible within the framework of Art. 114 TFEU, but it is also in line with his rationale, as it is aimed at reducing the existing fragmentation in the internal market (see §§ 263-264):

> 3. Auch der beschränkte Kreis der am einheitlichen Abwicklungsmechanismus teilnehmenden Mitgliedstaaten stellt die Anwendbarkeit von Art. 114 Abs. 1 AEUV auf die SRM-Verordnung nicht in Frage (kritisch Krauskopf/Langner/Rötting, Banking and finance law review 2014, S. 241 <261 f.>; Ohler, EuR 2016 - Beiheft 2 -, S. 7 <14 f.>). Zwar beschränkt sich deren Anwendungsbereich auf die auch dem einheitlichen Aufsichtsmechanismus unterfallenden Mitgliedstaaten (Art. 2, Art. 4 Abs. 1 SRM-VO). Das Unionsrecht kennt jedoch keinen allgemeinen Grundsatz, wonach der Binnenmarkt nur durch für alle Mitgliedstaaten geltende Regelungen verwirklicht beziehungsweise verbessert werden kann (vgl. BTDrucks 18/1340, S. 7; vgl. auch Art. 20 EUV i.V.m. Art. 326 bis 334 AEUV, Art. 27, Art. 114 Abs. 4 bis 7 AEUV). Im Rahmen von Art. 114 Abs. 1 AEUV ist auch eine Teilharmonisierung möglich (vgl. Kube, Rechtliche Grundlagen und Grenzen der EU-Bankenabgabe, 2016, S. 26 f.).
>
> 4. Die verstärkte Zusammenarbeit bei der Bankenabwicklung ist zudem sachlich gerechtfertigt (vgl. Repasi, Gutachten zur rechtlichen Machbarkeit eines „Single Resolution Mechanism“ <SRM>, 2013, S. 3), weil der einheitliche Abwicklungsmechanismus gewissermaßen der zweite Schritt nach dem bereits etablierten einheitlichen Aufsichtsmechanismus ist (vgl. 15. bis 17. Erwägungsgrund SRM-VO), der Diskriminierungen aufgrund der Nationalität oder des Geschäftssitzes zwischen Unternehmen, Einlegern, Anlegern oder anderen Gläubigern verhindern soll (Art. 6 Abs. 1 SRM-VO; vgl. auch 46. Erwägungsgrund Satz 6 SRM-VO). Die bestehende Fragmentierung des Binnenmarktes wird insoweit zwar nicht aufgehoben, aber verringert.

1.2. Whether the SRMR encroaches on the principle of people's sovereignty under the German Basic Law

Similarly to what was already done with regard to the SSMR (see Chapter I.A, § 2.4), the BVerfG's Judgement of 30 July 2019 also examines the issue of

whether the SRMR encroaches on the principle of people's sovereignty under the GG.

In the Court's view, given the existence of compensating accountability measures, the independence granted in the SRMR to both the SRB and the NRA (BaFin) when exercising the relevant tasks under the SRMR, even though it may create tensions with the principle of democracy, does not violate the provisions contained in Article 20(1) and (2) in conjunction with Article 79(3) GG.

The procedure for the appointment of the members of the SRB, which is independent when carrying out its tasks, the accountability obligations and the fact that it is subject to extensive administrative and judicial scrutiny, ensure a sufficient democratic control.

Moreover, the independence of the National Resolution Authorities (NRAs) is also compensated to some extent by the transparency requirements as well as the reporting and accountability obligations vis-à-vis the national parliaments.

For further details on the SRB and the NRAs accountability towards the EU and national Parliaments, as forms of compensation of the diminished level of democratic legitimation of the SRM, see § 3.2 of this Chapter.

1.3. The legal framework of the SRM: the BRRD, the SRMR and the Intergovernmental agreement (IGA)

The SRMR basically regulates the allocation of tasks and powers between the SRB and the NRAs and the functioning of both the Single Resolution Board and the Single Resolution Fund.

The substantive legal framework on resolution finds its natural location in national law transposing the BRRD, though a great deal of these substantive resolution rules (those on resolution plan, MREL, resolution process and resolution tools) have been reproduced in the SRMR and mimick the ones contained in the BRRD.

This is grounded on the need to apply the same resolution rules within the SRM, as Recital 29 duly clarifies:

> It is essential for the good functioning of the internal market that the same rules apply to all resolution actions, regardless of whether they are taken by the resolution authorities under Directive 2014/59/EU or within the framework of the SRM.

Not surprisingly, under Article 7(3), fourth subparagraph, SRMR, the NRAs of MSs participanting to the SRM are subject to the vast array of rules contained in the SRMR already applicable to the SRB:

> When performing the tasks referred to in this paragraph, the national resolution authorities shall apply the relevant provisions of this Regulation. Any references to the Board in Article 5(2), Article 6(5), Article 8(6), (8), (12) and (13), Article 10(1) to (10), Articles 11 to 14, Article 15(1), (2) and (3), Article 16, the first subparagraph of Article 18(1), Article 18(2) and (6), Article 20, Article 21(1) to (7), the second subparagraph of Article 21(8), Article 21(9) and (10), Article 22(1), (3) and (6), Articles 23 and 24, Article 25(3), Article 27(1) to (15), the second sentence of the second subparagraph, the third subparagraph, and the first, third and fourth sentences of the fourth subparagraph of Article 27(16), and Article 32 shall be read as references to the national resolution authorities with regard to groups and entities referred to in the first subparagraph of this paragraph. For that purpose the national resolution authorities shall exercise the powers conferred on them under national law transposing Directive 2014/59/EU in accordance with the conditions laid down in national law.

Other substantive resolution rules – such as those on the resolution powers under Article 72 BRRD or those on the resolution manager under Article 35 BRRD - are not reprodudced in the SRMR, so that national rules transposing the BRRD apply.

The obligation to apply those national rules lies not only on the NRAs, but also on the SRB. This is the reason why under Article 5(1) SRMR:

> Where, pursuant to this Regulation, the Board performs tasks and exercises powers, which, pursuant to Directive 2014/59/EU are to be performed or exercised by the national resolution authority, the Board shall, for the application of this Regulation and of Directive 2014/59/EU, be considered to be the relevant national resolution authority or, in the event of cross-border group resolution, the relevant group-level resolution authority.

Nevertheless, the execution of the resolution schemes adopted by the SRB is basically a responsibility of the NRAs, which for that purpose shall apply the national law transposing BRRD.

Indeed, according to Article 29(1) SRMR:

> National resolution authorities shall take the necessary action to implement decisions referred to in this Regulation, in particular by exercising control over the entities and groups referred to in Article 7(2), and the entities and groups referred to in Article 7(4)(b) and (5) where the conditions for the application of those paragraphs are met, by taking the necessary measures in accordance with Article 35 or 72 of Directive 2014/59/EU and by ensuring that the safeguards provided for in that Directive are complied with. National resolution authorities shall implement all decisions addressed to them by the Board.

> For those purposes, subject to this Regulation, they shall exercise their powers under national law transposing Directive 2014/59/EU and in accordance with the conditions laid down in national law. National resolution authorities shall fully inform the Board of the exercise of those powers. Any action they take shall comply with the Board's decisions pursuant to this Regulation.
>
> When implementing those decisions, the national resolution authorities shall ensure that the applicable safeguards provided for in Directive 2014/59/EU are complied with.

Consequently the SRB's obligation to apply national law transposing the BRRD is considerably reduced.

The rules contained in the SRMR and in the national law transposing the BRRD do not represent the whole set of rules applicable to the SRM.

Indeed, the transfer to the Resolution Fund of the contributions raised by Member States participating to the SRM from the institutions authorised in their territory and the allocation of said contributions to compartments corresponding to each Member State are regulated by an ad hoc Intergovernmental Agreement (IGA, namely by Articles 3 and 4).

The agreement is closely intertwined with the SRMR, as the use of the Fund is contingent upon the entry into force of the Agreement (Articles 1 and 77 SRMR) and the permanence of the material rules on resolution contained in the SRMR and the BRRD (rebus sic stantibus clause) (Article 9 IGA).

Should the SRMR/BRRD be materially amended, any Contracting Party may request the CJEU to verify the existence of a fundamental change and the consequences ensuing from it (Article 9(2) IGA).

Nevertheless, it must be noted that the option for an IGA rather than an EU legal act, as the legal basis for the provision of financial support for banking, bears some relevant consequences. The most important one is that, being the Agreement outside the EU framework, it falls outside the juridisction of the CJEU: on the contrary, it is up to Member States' supreme or constitutional courts to review international treaties.

2. *The SRB and NRAs: organisational issues*

2.1. *The Single Resolution Mechanism as a unitary system*

The Single Resolution Mechanism has no legal personality. It "brings together the Board, the Council, the Commission and the resolution authorities of the participating Member States" (recital 120 SRMR).

The unity of the SRM may be inferred from several elements, including:

(i) the SRB's responsibility for the effective and consistent functioning of the SRM (Article 7(1) SRMR);

(ii) the SRM's powers to give guidelines and general instructions to the NRAs (Article 31 SRMR) and to take over their resolution powers (Article 7(4) SRMR);

(iii) the NRAs membership of the Board (Article 43(1) SRMR);

(iv) the special rule on the allocation of liability to the Board and the NRAs (Article 87 SRMR).

2.2. The Single Resolution Board

The SRB is an EU agency with legal personality, represented by its Chair (Article 42 SRMR).

The SRB is composed of (Article 43 SRMR):

(i) the Chair and four other full-time members (entrusted with a five-year, non-renewable mandate). They are appointed upon a Council's decision, on a proposal from the Commission after consulting the SRB in its plenary session. Finally, the decision requires the approval of the European Parliament;

(ii) one member for each participating Member State, representing the relevant NRAs.

The Commission and the ECB are permanent observers. They are entitled to participate in the debates and have access to all documents.

The Board acts in a plenary and an executive session.

All members of the Board participate in its plenary session (Article 49 SRMR).

In its plenary session the Board is competent for the following areas (Article 50 SRMR):

(i) administrative tasks (including, among others, the adoption of the annual work program, the annual budget, the annual activity report and the rules of procedures in both its composition);

(ii) cooperation with NRAs (approval of the framework on the practical arrangements for the cooperation with the NRAs; though not expressly mentioned in Article 50 SRMR, the adoption of the general instructions and guidelines to NCRs should be encompassed within the plenary session's remit);

(iii) strategic decisions, including, in particular, those concerning the use of the Fund.

The executive session is composed by the Chair and the 4 full-time members (Article 53(1) SRMR).

Furthermore, when deliberating on an entity or a group, also the member(s) of the State(s) where the entity(ies) is(are) established shall participate (Article 53(2) SRMR).

Decisions relating to an entity or a group are taken by joint agreement by consensus; otherwise, the decision is taken by the Chair and the 4 full-time members, by simple majority (Article 55 SRMR).

The executive session (Article 54 SRMR):

(i) prepares all the decisions to be adopted by the Board in its plenary session;

(ii) takes all the decisions of the Board which are not within the competence of the plenary session (among others, prepares, assesses and approves resolution plans, determines the minimum requirement for own funds and eligible liabilities, provides the Commission with the resolution schemes).

2.3. The National Resolution Authorities and the problem of the monetary financing prohibition

The NRAs are regulated by the BRRD and the national law transposing it.

Under Article 3(2) BRRD, the resolution authority shall be a public administrative authority or an authority entrusted with public administrative powers, rather than a judicial authority.

Moreover, under Article 3(3) BRRD, resolution authorities may be national central banks, competent ministries, or other public administrative authorities or authorities entrusted with public administrative powers.

Member States may exceptionally provide for the resolution authority to be the competent authority for supervision.

However, adequate structural arrangements shall be put in place in order to ensure operational independence and avoid conflicts of interest basically between the supervisory and the resolution functions.

Where the resolution authority is a NCB, a problem of monetary financing prohibition may arise (Article 123 TFEU), as underlined in some opinions of the ECB.

See the ECB opinion 21.1.2015, CON/2015/2, § 3.3

> … Resolution in the financial market is neither a Eurosystem related task, nor a traditional central banking task. Rather, it is a Government task and, as such, it is performed in the interest of the [...] State. Therefore, if the [NCB] is to be entrusted with such a task, it needs to be adequately remunerated in advance, to ensure compliance with the monetary financing prohibition.

In the same vein, see the ECB Opinion 21.1.2015, CON/2015/3, § 2.3.

> … the ECB underlines the importance of safeguarding compliance with the prohibition on monetary financing laid down in Article 123(1) of the Treaty. The new task entrusted to NBS under the draft law is neither an ESCB-related task, nor a traditional central banking task. Rather, the new task is linked to a task for government, i.e. resolution in the financial market. Therefore, if NBS is to be entrusted with such a task, it needs to be adequately remunerated in advance, to ensure compliance with the monetary financing prohibition.

However, in the assumption that resolution tasks contribute to ensure financial stability (Article 127(5) TFEU), the ECB has subsequently changed its view as one may read in the opinion 1.7.2015, CON/2015/22, § 2.3.2, reading as follow:

> resolution tasks discharged by central banks are considered central banking tasks provided that they do not undermine an NCB's independence in accordance with Article 130 of the Treaty. However, the discharge of these tasks by central banks may not extend to the financing of resolution funds or other resolution financial arrangements as these are government tasks.

The same conclusions are presented by ECB's Opinions 20.7.2015, CON/2015/25, § 2.5 and 2.9.2015, CON/2015/33, § 2.2.2.

3. Independence and accountability of the SRB and the NRAs

3.1. Independence of the SRB and the NRAs (Article 47(1) SRMR)

The SRB and the NRAs shall act independently and in the general interest (Article 47(1) SRMR).

The Chair, the Vice-Chair and the four full-time members shall perform their tasks in conformity with the decisions of the Board, the Council and the Commission. They shall act independently and objectively in the interest of the

Union as a whole and shall neither seek nor take instructions from the Union's institutions or bodies, from any government of a Member State or from any other public or private body (Article 47(2) SRMR).

Neither the Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the Chair, the Vice-Chair or the members of the Board (Article 47(3) SRMR).

Unlike the ECB's bodies, no complete independence from the political authorities can be recognised for the SRB's bodies.

Indeed:

(i) although the SRB's full-time members shall act in the interest of the Union, such an obligation does not apply to the members appointed by the NRAs (for the different provisions contained in Articles 19(1) and 26(1) SSMR see Chapter I.A, § 5.2);

(ii) the Chair, the Vice-Chair and the four full-time members of the SRB shall perform their tasks also in conformity with the decisions of the Board, the Council and the Commission.

The rationale of this different regime may be based on the fact that the impact of the resolution decisions on the political interests of each MS and the Union is much more intrusive than the one of the supervisory decisions.

Nevertheless, the EU perspective is taken into account in Article 6(2) SRMR:

> every action, proposal or policy of the Board, the Council, the Commission, or of a national resolution authority in the framework of the SRM shall be undertaken with full regard and duty of care for the unity and integrity of the internal market.

3.2. Accountability of the Board to the EU Parliament, the Council and the Commission (Article 45 SRMR)

The Board shall submit an annual report to the European Parliament, the national parliaments of participating Member States in accordance with Article 46, the Council, the Commission and the European Court of Auditors (Article 45(2) SRMR).

At the request of the European Parliament, the Chair shall participate in a hearing by the competent committee of the European Parliament (Article 45(4) SRMR).

The Chair may be heard by the Council, at the latter's request (Article 45(5) SRMR).

The Board shall reply orally or in writing to questions addressed to it by the European Parliament or by the Council (Article 45(6) SRMR).

Upon request, the Chair shall hold confidential oral discussions with the Chair and Vice-Chair of the competent committee of the European Parliament where such discussions are required for the exercise of the European Parliament's powers under the TFEU (Article 45(7) SRMR).

During any investigations by the European Parliament, the Board shall cooperate with the European Parliament, subject to the TFEU and to regulations referred to in Article 226 thereof (Article 45(7) SRMR).

The SRB has stipulated an agreement with the Parliament regarding the exercise of democratic accountability on the exercise of the Board's duties.[2]

The Board's accountability towards the national Parliaments (submission of the annual report, exchange of views, oral or written replies), whose details are contained in said Agreement, is without prejudice to the accountability of the NRAs for the performance of the resolution tasks not conferred to the Board and for the performance of activities carried out by them in accordance with Article 7(3) SRMR (Article 46 SRMR).

The provision is not crystal clear. A possible reading is the following: the NRAs are accountable to national Parliaments not only for the resolution tasks concerning the LSIs, but also for the tasks ouside the scope of the SRM but closely related to it. One example could be the NRA's decision to put a SI in compulsory administrative liquidation under the relevant national law, following the ECB's declaration of FOLTF and the SRB's declaration that no public interest occurs for the purposes of Article 18 SRMR (see § 5 below).

Under the BVerG's view (judgement of 30 July 2019), due to the accountability obligations mentioned above, the SRM regulation does not affect the German constitutional identity protected under Articles 20(1) and (2) in conjunction with Article 79(3) GG.

A minimum level of political accountability must be ensured for the decisions taken by the institutions, bodies, offices and agencies of the European Union.

See § 267 of the judgement:

> Die Errichtung unabhängiger Einrichtungen und sonstiger Stellen der Europäischen Union steht in einem Spannungsverhältnis zum Demokratiegebot. Auch bei Beschlüssen und Entscheidungen von Organen, Einrichtungen und sonstigen Stellen der Europäischen Union muss daher ein Mindestmaß an politischer Verantwortbarkeit sichergestellt sein. Die Errichtung unabhängiger Behörden und

[2] The agreement of 16 Decembre 2015 on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Single Resolution Board within the framework of the Single Resolution Mechanism is available on the SRB's web-site.

> sonstiger Stellen bedarf einer spezifischen Rechtfertigung und der Sicherstellung, dass Mitgliedstaaten und Organe der Europäischen Union in der Lage sind, ihr Handeln demokratisch zu verantworten und dessen Rechtsgrundlagen gegebenenfalls anzupassen, zu ändern oder auch aufzuheben.

Against this background, the Federal Government should at least have the power to indirectly influence the activities of the Board, pleading for some measures to be adopted by the Council.

See §§ 272 and 273 of the judgement:

> 272. Die Bundesregierung kann vor diesem Hintergrund zumindest mittelbar auf die Tätigkeit des Ausschusses einwirken, indem sie auf entsprechende Maßnahmen des Rates, etwa eine Änderung der SRM-Verordnung, hinwirkt. Dieser Einfluss ist allerdings begrenzt, da der Rat – soweit nichts anderes festgelegt ist (vgl. BVerfGE 143, 65 <97 Rn. 64>) – mit qualifizierter Mehrheit beschließt (Art. 16 Abs. 3 EUV).
>
> 273. Über die im Rat vertretene Bundesregierung hat der Deutsche Bundestag mittelbar an diesen Kontrollinstrumenten teil (Art. 23 Abs. 2 Satz 2 GG) und verfügt insoweit auch über die Möglichkeit zur Stellungnahme nach Art. 23 Abs. 3 GG. Die Unterrichtung muss dem Bundestag eine frühzeitige und effektive Einflussnahme auf die Willensbildung der Bundesregierung eröffnen. Nur auf einer ausreichenden Informationsgrundlage ist er in der Lage, den Integrationsprozess zu begleiten und zu beeinflussen, kann er das Für und Wider eines Vorhabens diskutieren und Stellungnahmen erarbeiten. Dabei muss die Unterrichtung so erfolgen, dass das Parlament nicht in eine bloß nachvollziehende Rolle gerät (vgl. BVerfGE 131, 152 <202 f.>). Dies sichert zugleich ab, dass der Deutsche Bundestag die ihm in Art. 12 EUV sowie in Art. 1 und Art. 2 des Protokolls über die Rolle der nationalen Parlamente in der Europäischen Union und in Art. 4 des Protokolls über die Anwendung der Grundsätze der Subsidiarität und Verhältnismäßigkeit zugewiesenen Aufgaben erfüllen kann, und ist eine wesentliche Voraussetzung des von Art. 20 Abs. 2 Satz 2 GG geforderten effektiven Einflusses des Volkes auf die Ausübung der Staatsgewalt (vgl. BVerfGE 131, 152 <204>).

Differently from what was observed with regard to the accountability measures to be ensured within the SSM, which include the ECB compliance with national law transposing directives (§ 212 of the judgment: see Chapter I.A, § 5.7), this topic is not mentioned in the Court's assessment of the SRB accountability. The reason is probably that, in the design of the SRMR, the

application of national law by the SRB is significantly reduced (see § 1.3 of this Chapter).

The democratic legitimacy of the Board's activities shall also be ensured, under the BVerfG's view,[3] by an internal administrative and a judicial control. Despite what has been said above about the possible infringments by the SRB of the Meroni prohibition (see § 1.1 of this Chapter), the judicial accountability becomes particularly relevant in the case of the SRB, precisely in consideration of the more stringent limits to its activity (when compared to those of the ECB) foreseen in the founding regulation.

The Board, the Commission and the Council are accountable towards the EBA. Indeed, under Article 5(2), second sub-paragraph, SRMR:

> The Board, the Council and the Commission shall be subject to binding regulatory and implementing technical standards developed by EBA and adopted by the Commission in accordance with Articles 10 to 15 of Regulation (EU) No 1093/2010 and to any guidelines and recommendations issued by EBA under Article 16 of that Regulation. They shall make every effort to comply with any guidelines and recommendations of EBA which relate to tasks of a kind to be performed by those bodies. Where they do not comply or do not intend to comply with such guidelines or recommendations EBA shall be informed thereof in accordance with Article 16(3) of that Regulation. The Board, the Council and the Commission shall cooperate with EBA in the application of Articles 25 and 30 of that Regulation. The Board shall also be subject to any decisions of EBA in accordance with Article 19 of Regulation (EU) No 1093/2010 where Directive 2014/59/EU provides for such decisions.

4. The allocation of tasks and powers to the SRB and the NRAs

4.1. The SRB's tasks and powers

The SRB «shall be responsible for drawing up the resolution plans and adopting all decisions relating to resolution» (Article 7(2) SRMR):

(i) for significant credit institutions (as defined in the SSM);

(ii) for cross border groups, irrespective of whether or not they are classified as significant under the SSM provisions.

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[3] See § 274 of the judgment: "Das demokratische Legitimationsniveau der Ausschusstätigkeit wird ferner durch eine verwaltungsinterne und gerichtliche Kontrolle abgesichert".

Furthermore, the SRB adopts the resolution scheme when the recourse to the SRF is needed (Article 7(3), sub-paragraph 2, SRMR).

Participating Member States may require the Board to exercise all the relevant powers and responsibilities also in relation to the less significant credit institutions (Article 7(5) SRMR).

Non-Eurozone Member States may participate in the SRM, entering into a «close cooperation», according to Article 7 of SSM Regulation (under Article 2 SRMR, the regulation applies to credit institutions established in a participating MS).

The SRB is responsible for the effective and consistent functioning of the SRM (Article 7(1) SRMR).

In particular, the SRB may under Article 31 SRMR:

(i) issue «guidelines and general instructions» to the NRAs;

(ii) exercise «investigatory powers» on banks;

(iii) request, on an ad hoc or continuous basis, information from the NRAs on the performance of their tasks;

(iv) receive from the NRAs draft decisions on which it may express its views on the draft decisions.

Moreover, the SRB may under Article 7(4) SRMR:

(i) issue a warning to the NRAs where it considers that their decisions do not comply with the SRMR or with its general instructions;

(ii) exercise directly all the relevant powers, if its warning is not being appropriately addressed.

According to Article 31, the Board shall perform its tasks in close cooperation with national resolution authorities. The same Article provides for a framework to organise the practical arrangements for the implementation of the cooperation.

Pursuant to this provision, the Board adopted, on 28 June 2016, the Decision establishing the framework for the practical arrangements for the cooperation within the SRM, the SRB and the NRAs. The Decision was then replaced on 17 December 2018.

4.2. Resolution planning and MREL

As noted above, as part of the new approach to resolution, the BRRD and the SRMR require financial institutions to continually draft their 'living wills', defining *ex ante* (a) the measures to be taken to face a potential deterioration

of their situation (the so-called ‘early redemption plans’) and (b) the conditions according to which banks would be resolved in case of financial distress.

Under the BRRD, the preparation and prevention regime is integrated into the ongoing supervision of an institution and is mainly composed of the (i) recovery and (ii) resolution planning.

As acknowledged by many authors, the constant need for institutions and authorities to monitor and assess the banks’ legal structure, financial position and business model would have (and has actually) resulted in an effort to simplify their governance, given that the costs of drawing up and maintaining recovery and resolution plans would increase with a firm’s complexity. It is worth noting that the ultimate aim of those exercises is not to prevent the intermediary crisis (which is, in fact, the main objective of supervision), but to prepare the resolution authorities and the institutions to face their potential financial distress.

(i) Recovery plans are a fundamental first step in assessing the institution’s ability to overcome possible financial distress (see **Chapter VII.A. Recovery plans, early intervention measures and structural measures, § 2**).

(ii) In addition to bank-drafted recovery plans, the SRB and the national resolution authorities must prepare resolution plans for each financial institution belonging to their jurisdiction. The purpose of resolution planning is:

a. to obtain a comprehensive understanding of the banks and their critical functions;

b. to identify and address any impediments to the banks’ resolvability;

c. to put the banks in the condition to be prepared for their resolution if needed.

Regarding the role of the SRB, according to Article 8(2) of the SRM Regulation (‘Resolution plans drawn up by the Board’)

> The Board shall draw up the resolution plans, after consulting the ECB or the relevant national competent authorities and the national resolution authorities, including the group-level resolution authority, of the participating Member States in which the entities are established, and the resolution authorities of non-participating Member States in which significant branches are located insofar as relevant to the significant branch. To that end, the Board may require the national resolution authorities to prepare and submit to the Board draft resolution plans and the group-level resolution authority to prepare and submit to the Board a draft group resolution plan.

Section B of the BRRD's Annex allows resolution authorities to require institutions to provide any information deemed necessary for the purposes of drawing up and maintaining resolution plans, and in particular:

(i) a detailed description of the institution's organisational structure including a list of all legal persons;

(ii) a mapping of the institution's critical operations and of the core business lines, including material asset holdings and liabilities relating to such operations and business lines, by reference to legal persons;

(iii) an identification of the major or most critical counterparties of the institution as well as an analysis of the impact of the failure of major counterparties in the institution's financial situation;

(iv) any capital, funding or liquidity arrangements; a description of possible liquidity sources to support resolution.

According to Article 8(6) of the SRMR, when drawing up the resolution plan, the resolution authority 'shall identify any material impediments to resolvability and, where necessary and proportionate, outline relevant actions for how those impediments could be addressed'.

The resolution plan shall not assume any extraordinary public financial support or any central bank emergency liquidity assistance (even if provided 'under non-standard collateralisation, tenor and interest rate terms'), but it shall include 'an analysis of how and when an institution may apply, in the conditions addressed by the plan, for the use of central bank facilities and shall identify those assets which would be expected to qualify as collateral' [Article 8(6)(7) SRMR].

Moreover, the resolution plan shall set out options for applying the resolution tools and shall include a demonstration of how critical functions and core business lines could be legally and economically separated from other functions, in order to ensure continuity upon the failure of the institution.

Regarding the timeline designed by the SRMR for the exercise, Article 8(12) provides that

> The Board shall determine the date by which the first resolution plans shall be drawn up. Resolution plans and group resolution plans shall be reviewed, and where appropriate updated, at least annually and after any material changes to the legal or organisational structure or to the business or the financial position of the entity or, in the case of group resolution plans, of the group including any group entity that could have a material effect on the effectiveness of the plan or that otherwise necessitates a revision of the resolution plan.

A crucial role in guaranteeing the effectiveness of the resolution framework is played by the determination of the minimum requirement for own funds

and eligible liabilities ('MREL'), which is the minimum amount of equity and subordinated debt a firm must maintain to support an effective resolution.

Following the revision of the BRRD and the SRMR, as resulting from the approval of the so-called 'Banking reform package' (16 April 2019), the newly introduced Articles 45c BRRD and 12d SRMR require the resolution authorities to determine the MREL targets on the basis of several criteria, and especially on the need 'to ensure that the resolution group can be resolved by the application of the resolution tools to the resolution entity, including, where appropriate, the bail-in tool, in a way that meets the resolution objectives' [Articles 45c(a) BRRD, 12d(a) SRMR].

For further details on MREL, see **Chapter VIII.B – Minimum Requirement for Own Capital and Eligible Liabilities.**

4.3. The NRAs' tasks and powers

The NRAs exercise the resolution tasks with regard to the less significant credit institutions (Article 7(3) SRMR).

Moreover, the NRAs enjoy the powers to:

(i) assist the SRB in the performance of its resolution tasks, by means of consultative, preparatory and implementing measures; those activities are carried out through the institution of «internal resolution teams» ('IRTs': Article 83 SRMR);

(ii) take the necessary action to implement the SRB's decisions (Article 29 SRMR).

Where the NRA has not applied or has not complied with a NRA's decision, the SRB may directly address a decision to the credit institution concerned (Article 29 SRMR).

For the side-effects of the allocation of the resolution tasks and powers on the allocation of liability between the SRB and the NRAs see **Chapter X.F. The liability regimes within the SSM and the SRM**.

4.4. The SRB's and the NRAs' sanctioning powers

According to Article 38(2) SRMR, the SRB's sanctioning powers are limited to cases where institutions do not:

(i) supply the information requested by the SRB;

(ii) submit to the general investigation of the SRB;

(iii) comply with a SRB's decision adopted under Article 29 SRMR.

Sanctions provided for by national law transposing Articles 110 to 114 of the BRRD are applied by the NRAs, but in these cases the SRB may recommend the NRAs to take actions in order to ensure that appropriate penalties are imposed.

4.5. Close cooperation within the SRM

Under recital 15 SRMR, the regulation

> applies only in respect of banks whose home supervisor is the ECB or the national competent authority in Member States whose currency is the euro or in Member States whose currency is not the euro which have established a close cooperation in accordance with Article 7 of Regulation (EU) No 1024/2013. The scope of application of this Regulation is linked to the scope of application of Regulation (EU) No 1024/2013.

Not surprisingly, Article 4 of the SRMR gives no independent legal basis for the close cooperation within the SRM.

Article 4(1) SRMR rather mentions Article 2(1) SSMR, which, in turn, refers to Article 7 SSMR. It follows that participating MSs are, for the purposes of the SRM, not only those whose currency is the euro, but also those whose currency is not the euro, which have established a close cooperation in accordance with Article 7 SSMR.

In light of the above, Article 4 SRMR concentrates on the effects of the suspension or termination of close cooperation under the SSMR for the purposes of the SRMR.

More to the point, under Article 4(2) SRMR,

> Where close cooperation between a Member State and the ECB is suspended or terminated in accordance with Article 7 of Regulation (EU) No 1024/2013, entities established in that Member State shall cease to be covered by this Regulation from the date of application of the decision to suspend or terminate close cooperation.

Moreover, under Article 4(4) SRMR, the regulation

> shall continue to apply to resolution proceedings which are ongoing on the date of application of a decision as referred to in paragraph 2.

A detailed regime is provided for in case of termination of close cooperation with regard to the recoupment of the contributions transferred to the resolution fund.

Article 4(3) SRMR reads as follows:

> In the event that the close cooperation with the ECB of a Member State whose currency is not the euro is terminated in accordance with Article 7 of Regulation (EU) No 1024/2013, the Board shall decide within three months after the date of adoption of the decision to terminate close cooperation, in agreement with that Member State, on the modalities for the recoupment of contributions that the Member State concerned has transferred to the Fund and any conditions applicable.
>
> Recoupments shall include the part of the compartment corresponding to the Member State concerned not subject to mutualisation. If during the transitional period, as laid down in the Agreement, recoupments of the non-mutualised part are not sufficient to permit the funding of the establishment by the Member State concerned of its national financial arrangement in accordance with Directive 2014/59/EU, recoupments shall also include the totality or a part of the part of the compartment corresponding to that Member State subject to mutualisation in accordance with the Agreement or otherwise, after the transitional period, the totality or a part of the contributions transferred by the Member State concerned during the close cooperation, in an amount sufficient to permit the funding of that national financial arrangement.
>
> When assessing the amount of financial means to be recouped from the mutualised part or otherwise, after the transitional period, from the Fund, the following additional criteria shall be taken into account:
>
> (d) the manner in which termination of close cooperation with the ECB has taken place, whether voluntarily, in accordance with Article 7(6) of Regulation (EU) No 1024/2013, or not;
>
> (e) the existence of ongoing resolution actions on the date of termination;
>
> (f) the economic cycle of the Member State concerned by the termination. Recoupments shall be distributed during a limited period commensurate to the duration of the close cooperation.
>
> The relevant Member State's share of the financial means from the Fund used for resolution actions during the period of close cooperation shall be deducted from those recoupments.

In the same vein, under Article 4(5) IGA:

> In case of termination of close cooperation with the ECB, contributions transferred by the Contracting Party concerned by termination are recouped in accordance with Article 4(3) of the SRM Regulation.

The rationale is explained in recital 112 SRMR:

> Where close cooperation of a participating Member State whose currency is not the euro with the ECB is terminated in accordance

with Article 7 of Regulation (EU) No 1024/2013, a fair partition of the cumulated contributions of the participating Member State concerned should be decided taking into account the interests of the participating Member State concerned and the Fund.

The SRMR, differently from what is established under Article 7 SSMR, provides for no institutionalised role of the SRB in the resolution decision-making process of credit institutions of MSs in close cooperation.

A plausible explanation could lie in the fact that, within the SRM, the decisions of the SRB, differently from what was provided for under the SSMR, are always implemented by the NRAs, so that there was no need to establish a specific mechanism aimed at instructing the NRAs in order to ensure compliance with the SRB decisions.

4.6. An overview of the SRM composite procedures

The allocation of tasks and powers to SRB and NRAs leads to the result that most of the SRM procedures are composite procedures, i.e. administrative procedures where an EU authority (the SRB) and the authorities of a Member State (the relevant NRAs) have distinct functions which are inter-dependent.

How the distribution of powers of proposal, decision-making and implementation is reflected in the identification of both the authority before which to ensure compliance with due process rules and the judge that has jurisdiction over the case will be examined in the Chapters **IX.A. The due process rules within the resolution procedures, the prevention and early intervention phases of the banking crises management** and **X.A. The administrative and judicial review of the decisions taken within the SSM and the SRM** respectively.

Below is a table of composite procedures in SRM.

SRM Composite Procedures*					
SRB's CONSULTA-TION of NRAs	**SRB's REQUEST or INSTRUCTION**	**NRAs' PROPOSAL or PREPARATION of decisions**	**SRB's DECISION**	**SRB's INSTRUCTION on the implementation of its decisions**	**NRAs' IMPLEMEN-TATION of SRB's decisions**
Art. 7 (4) (b) SRMR *Direct exercise of the powers on LSIs* Art. 9 (1) (a) FR			Art. 7 (4) (b) SRMR		

		Art. 7 (4) (b) SRMR *Direct exercise of the powers on LSIs*	Art. 7 (4) (b) SRMR		
Art. 8 (2) SRMR *Resolution planning* Art. 9 FR			Artt. 8 – 10 SRMR	Art. 10 (11) SRMR Art. 6 FR	Artt. 10 (12) – 29 SRMR Art. 6 FR
	Art. 8 (2) SRMR *Resolution planning* Art. 6 FR	Art. 8 (2) SRMR	Artt. 8 – 10 SRMR	Art. 10 (11) SRMR Art. 6 FR	Artt. 10 (12) – 29 SRMR Art. 6 FR
Art. 11 SRMR *Simplified obligation* Art. 9 FR			Art. 11 SRMR		
		Art. 11 (2) SRMR *Simplified obligation* Art. 9 FR	Art. 11 SRMR		
			Art. 12 SRMR *MREL*	Art. 12 (14) SRMR Art. 6 FR	Artt. 12 (14) – 29 SRMR
	Art. 13(3) SRMR *Draft preliminary resolution scheme*		Art. 18 (1) SRMR	Art. 18 (9) SRMR Art. 6 FR	Artt. 18 (9) – 29 SRMR
			Art. 18 (1) SRMR *Resolution scheme*	Art. 18 (9) SRMR Art. 6 FR	Artt. 18 (9) – 29 SRMR
			Art. 21 (1) SRMR *Write-down and conversion of capital instruments*	Art. 21 (8) SRMR Art. 6 FR	Artt. 21 (11) – 29 SRMR

			Art. 70 (2) SRMR *Individual ex-ante contributions* Art. 4 Reg. 2015/81/UE	Art. 5 Reg. UE/2015/81	Art. 5 Reg. UE/2015/81 Art. 67 SRMR
Art. 71 (2) SRMR *Extraordinary ex-post contributions*		Art. 71 (2) SRMR			Art. 67 SRMR

SRB's Recommendation	NRA's Decision
Art. 38 (8) SRMR *Penalties under Articles 110 to 114 BRRD*	*National law transposing Articles 110 to 114 BRRD*

* *Composite procedure involving both the SSM and the SRM authorities are not included in this box.*

5. *The resolution procedure*

5.1. *The conditions for the application of the resolution procedure*

Under Article 18 of the SRMR, the resolution procedure applies only where the following conditions are met:

(i) the entity is failing or is likely to fail;

(ii) having regard to the timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures, including measures by an IPS, or supervisory action, including early intervention measures or the write-down or conversion of relevant capital instruments, taken in respect of the entity, would prevent its failure within a reasonable timeframe;

(iii) a resolution action is necessary in the public interest.

5.2. The assessment of the 'failing or likely to fail' condition

5.2.1. The subjective scope of the ECB assessment

The ECB assesses that an entity is failing or likely to fail, after having consulted the SRB (Article 18(1) SRMR).

Also the SRB (executive session) may make this assessment after having informed the ECB/NCA, if it does not make its own assessment within 3 days (Article 18(1) SRMR).

The rationale of that provision is that of counterbalancing possible conflicts of interests of the supervisory authority.

As the text of Article 18 SRMR is not crystal clear, a problem arises here on the allocation of competences between the ECB and the NCAs.

A first issue is whether the ECB has to be considered competent to declare the failing or likely to fail with respect to less significant institutions as well. This view argues from (i) the ECB's task to withdraw the banking license with regard to all credit institutions and (ii) the possibility that the SRB would be competent to adopt the resolution scheme where the resolution action requires the involvement of the SRF, irrespective of the status as significant or less significant of the credit institution involved.

Nevertheless, is it worth noting that the competence to declare whether a credit institution is failing or likely to fail has to follow, as a rule, the allocation of the supervisory tasks within the SSM based on the significance or less significance of the credit institution concerned. Indeed, Article 114 TFEU, which is the legal basis for the SRM, cannot be used to confer new supervisory tasks on the ECB so that any interpretation of Article 18 SRMR must be compatible with the rule based on Article 127(6) TFEU. The ECB follows this second view.

A second and more specific issue is whether the ECB's competence includes at least, besides the significant credit institutions, all the cross-border groups irrespective of their status as significant or less significant. Indeed, Article 18 SRMR refers to Article 7(2), which, in turn, applies to both the significant credit institutions and the cross-border groups.

Nevertheless, while a literal reading of the text of Article 18 of the SRM Regulation suggests that the ECB would be responsible to make the failing or likely to fail assessments in relation to some less significant institutions, such reading does not take into account the limitations of the Union primary law described above.

In fact, a systematic interpretation of the legal framework suggests that the failing or likely to fail assessment for both less significant cross-border groups (Article 7(2)(b) SRM Regulation) and other less significant institutions (Article

7(4)(b) and (5) SRM Regulation) should be outside the ECB's direct competence and should be a competence of the NCAs, as the competent supervisory authorities for less significant institutions on the basis of Article 6(4) of the SSM Regulation.

5.2.2. Whether the ECB may declare the FOLTF also on qualitative grounds

In light of Article 18 SRMR, a further question arises as to whether a credit institution can be declared failing or likely to fail (FOLTF) on purely qualitative grounds.

The question can only be answered positively.

Indeed, pursuant to Article 18(4)(a) SRMR, the trigger for FOLTF is a situation where the entity in question

> infringes, or there are objective elements to support a determination that the institution will, in the near future, infringe the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the ECB.

The grounds for a licence withdrawal are harmonised under Article 18 of the CRD IV, which allows for both a qualitative and quantitative assessment.

5.2.3. The extraordinary public financial support and the interpretation of the solvency requirement

An additional question pertains to the interpretation of Article 18(4), first subparagraph, lit. (d), SSMR, reading as follows:

> …. the entity shall be deemed to be failing or to be likely to fail in one or more of the following circumstances:
>
> (d) extraordinary public financial support is required except where, in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability, that extraordinary public financial support takes any of the following forms:
>
> (i) a State guarantee to back liquidity facilities provided by central banks in accordance with the central banks' conditions;
>
> (ii) a State guarantee of newly issued liabilities; or
>
> (iii) an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an advantage upon the entity, where neither the circumstances referred to in points (a), (b) and (c) of this paragraph nor the circumstances referred to in Article 21(1) are present at the time the public support is granted.

In each of the cases referred to in points (i), (ii) and (iii) of point (d) of the first subparagraph, the guarantee or equivalent measures referred to therein shall be confined to solvent entities and shall be conditional on final approval under the Union State aid framework. Those measures shall be of a precautionary and temporary nature and shall be proportionate to remedy the consequences of the serious disturbance and shall not be used to offset losses that the entity has incurred or is likely to incur in the near future.

Support measures under point (d)(iii) of the first subparagraph shall be limited to injections necessary to address capital shortfall established in the national, Union or SSM-wide stress tests, asset quality reviews or equivalent exercises conducted by the ECB, EBA or national authorities, where applicable, confirmed by the competent authority…

Under this provision, the extraordinary public financial support is considered as a FOLTF trigger, except where, in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability, that extraordinary public financial support takes any of the forms singled out in points (i) to (iii) therein.

All these forms of public financial support are subject to the condition that the credit institution is solvent (second sub-paragraph of Article 18(4) SRMR), whilst only the precautionary public recapitalisation is subject to the further condition that the credit institution is also considered to be non FOLTF (first sub-paragraph, lit. (d), point (iii), of Article 18(4) SRMR).

A problem arises here as to whether, in the interpretation of the solvency requirement, the supervisory authority should follow a forward-looking or a point-in-time evaluation.

To the extent that it takes into account the business plan estimated losses or the losses assessed in an on-site inspection that have not yet had an impact on the prudential ratios, the forward-looking assessment of the solvency element runs the risk of overlapping the assessment of the non FOLTF one.

The forward-looking approach seems to be followed by the Commission's Directorate General on Financial Stability, Financial Services and Capital Markets Union and it is published in the EBA's web-site in the Single Rulebook Q&A session (Question ID: 2015_1777).

Question: What is a solvent institution in the context of Article 32(4) (d) of Directive 2014/59/EU(BRRD)?

EBA answer: Within the context of Article 32 of Directive 2014/59/EU (BRRD), the notion of solvent institution should be interpreted as referring to an institution which does not fall within Article 32(4) (a), (b), (c). However, it is understood that, as regards Article 32(4) (a), the concept of solvency does not refer to meeting conditions for authorisation that would relate to non-financial resources (such as systems and controls).

On the other hand, the point-in-time interpretation seems to be followed in the ECB's praxis on the assessement of solvency. In this vein, see the approach followed by the ECB in Monte dei Paschi di Siena case and referred to in the relevant Commission's decision on State aid (EC, Brussels, 4.7.2017 C(2017) 4690 final - State Aid SA.47677 (2017/N) – Italy New aid and amended restructuring plan of Banca Monte dei Paschi di Siena):

> *§. 2.1.6. The ECB's solvency statement*
>
> (22) On 28 June 2017, the ECB sent a letter to the European Commission which stipulated that at 31 March 2017 – on a consolidated level – the Bank had a CET1-ratio of 6.46% and a total capital ratio of 8.89%. The letter concluded that the Bank was solvent (at the day of sending the letter) from the point of view of compliance with the Pillar 1 minimum capital requirements – as per Article 92 of Regulation (EU) No 575/201331 ("CRR").

Moreover, the point-in-time interpretation appears to be in line with the criteria applied for the granting of ELA, as it results from the ECB Emergency Liquidity Assistance Agreement, 17 May 2017, § 4 ELA solvency criterion for credit institutions:

> A credit institution is considered solvent for ELA purposes if:
>
> – its Common Equity Tier 1, Tier 1 and Total Capital Ratio as reported under CRR on an individual (if applicable) and consolidated (if applicable) basis comply with the harmonised minimum regulatory capital levels (namely 4.5%, 6% or 8%, respectively); or
>
> – there is a credible prospect of recapitalisation - in case (a) is not met, i.e. the Common Equity Tier 1, Tier 1 and Total Capital Ratio, on an individual and/or consolidated basis, do not comply with the harmonised minimum regulatory capital levels (namely 4.5%, 6% or 8%, respectively) - by which harmonised minimum regulatory capital levels would be restored within 24 weeks after the end of the reference quarter of the data that showed that the bank does not comply with harmonised regulatory minimum standards; in duly justified, exceptional cases the Governing Council may decide to prolong the grace period of 24 weeks.

While acknowledging the complexity of the issue, a few general remarks must be made.

The forward-looking approach seems to be first of all in contrast with the literal interpretation criterion. Indeed, as under Article 18(4) SRMR the precautionary public recapitalisation is subject to both the solvency and non FOLTF requirements, the scope of each of these requirements cannot overlap. Moreover, overlapping the solvency element with the non FOLTF would turn

into subjecting the other two forms of extraordinary public financial support to the non FOLTF requirement, which is excluded by the wording of Article 18(4)(d) SRMR.

On the contrary, the point-in-time approach appears to be in line with the aim itself of the precautionary public recapitalisation as resulting form recital 59 SRMR, whereby it underlines that

> … the provision of extraordinary public financial support should not trigger resolution where, as a precautionary measure, a Member State takes an equity stake in an entity, including an entity which is publicly owned, which complies with its capital requirements. That may be the case, for example, where an entity is required to raise new capital due to the outcome of a scenario-based stress test or of the equivalent exercise conducted by macroprudential authorities which includes a requirement that is set to maintain financial stability in the context of a systemic crisis, but the entity is unable to raise capital privately in markets. An entity should not be considered to be failing or likely to fail solely on the basis that extraordinary public financial support was provided before the entry into force of this Regulation. Finally, access to liquidity facilities including emergency liquidity assistance by central banks may constitute State aid pursuant to the State aid framework.

A forward-looking assessment, which takes into account all the elements existing “at the time the pubblic support is granted” (see Article 18.4.d.iii, SRMR) – that is, at a time (the one in which the aid is paid) that follows the evaluation of solvency by the ECB – should be followed in the non FOLTF assessment and take into account the beneficial effects of the precautionary public recapitalisation. With the warning that this latter may only cover the capital shortages emerged in a stress test or in a AQR, provided that they are not losses that the entity has incurred or is likely to incur in the near future.

5.3. The adoption of the resolution scheme and the involvement of the Comminssion and the Council in order to avoid the Meroni constraints

The SRB, after assessing the other conditions (i.e. no alternatives «in close cooperation with the ECB» and the public interest), adopts the resolution scheme (Article 18(1) SRMR).

The scheme (Article 18(6) SRMR):

(i) places the entity under resolution;

(ii) determines the application of the resolution tools;

(iii) determines the use of the Fund to support the resolution action

The scheme shall follow the resolution plan unless, taking into account the circumstances of the case, the resolution objectives would be achieved more effectively otherwise.

The involvement of the Commission and the Council in the resolution procedure (Article 18(7) SRMR) is due to the Meroni concerns, as clarified by Recital 26 SRMR, reading as follows:

> the procedure relating to the adoption of the resolution scheme, which involves the Commission and the Council, strengthens the necessary operational independence of the Board while respecting the principle of delegation of powers to agencies as interpreted by the Court of Justice of the European Union.

Accordingly, the Commission may object to the scheme with regard to discretionary aspects and the Council (on a Commission proposal) with regard to the absence of the public interest.

Nevertheless, some problems of Meroni compliance still remain.

More to the point:

(i) criteria for the assessment of resolvability (Article 10(3), (4) e (5) SRMR) are based on undetermined legal concepts ("without giving rise to significant adverse consequences for financial system…") that would leave the capacity to determine when the bank is resolvable in the hands of the SRB;

(ii) the SRB's assessment (under Article 18(5) SRMR) that the public interest condition is not met would leave in the hands of the SRB the decision to not apply the resolution regime, without any involvement of the Commission and the Council;

(iii) the SRB's power to implement the resolution scheme with any necessary measure, where a NRA has applied it in a way which poses a threat to any of the resolution objectives (Article 29(2) SRMR), entails a margin of discretion sufficiently wide within the meaning of the Meroni's prohibition.

5.4. The scope of the assessment of the public interest test

The SRB's assessment on the conditions required for the public interest to be met raises further problems.

Up to now, the SRB's policy has been very restrictive on the occurrence of the public interest conditions and the consequent application of the resolution tools.

Recently, the SRB published a paper with the declared intent to describe the approach taken by the Board when performing the public interest assessment. While not representing a proper legal act, the paper may be a very useful reference to bring light on the Board practice concerning the public interest assessment.

It is a common view that, given the limitations of shareholders' and creditors' rights contained in the BRRD and SRMR package, the resolution tools should be applied – in lieu of the common insolvency procedures or the special regime of administrative liquidation provided for in some jurisdictions (see **Chapter VIII.C. Case-study: the compulsory administrative liquidation of Banca Popolare di Vicenza and Veneto Banca**) – only where they are necessary to pursue the objective of the financial stability.

Moreover, one of the key principles enshrined in the SRMR is that – within the SRM – decisions are to be taken by both the Board and the NRAs according to the same rules (recital 29 SRMR).

In order to apply the public interest condition coherently with its rationale, there is a need to look for a unique criterion of "the condition to avoid significant adverse effects on financial stability". Such a criterion should be applied consistently to all credit institutions within the SRM, whether they are significant or less significant.

Furthermore, the need to look (in the assessment of the public interest) for a unique criterion of "the condition to avoid significant adverse effects on financial stability" stems from the legal basis of the SRMR itself.

More to the point, as the SRMR is based on Article 114 TFEU, and the need, therein, to ensure the uniform application of the resolution rules, which, in turn, is essential for the completion of the internal market in financial services, both the SRB and the NRAs should look for a criterion which can be applied consistently to all credit institutions within the SRM.

This is all the more true considering that:

(i) the SRB's remit is not limited to significant credit institutions but also includes the LSIs (namely: all cross-border groups; LSIs in relation to which the ECB decided to directly exercise its supervisory powers; LSIs in relation to which the SRB itself decided to exercise its resolution powers; LSIs that MSs decided to subject to the SRB's resolution powers);

(ii) a different approach could lead to the counterintuitive conclusion that, within the same framework (the SRM), a LSI could be put under resolution whilst a significant one could be subject to common insolvency proceeding, only due to the difference in the frame of assessment of financial stability concerns;

(iii) contributions to the SRF are paid by both significant and less significant credit institutions on the assumption that even the latter

may be subject to the SRB's powers (Article 7(3), second sub-paragraph, SRMR).

5.5. *The procedure*

The Board shall transmit the resolution scheme to the Commission.

Within 24 hours, the Commission shall either endorse the scheme, or object to it with regard to the discretionary aspects.

Within 12 hours, the Commission may propose to the Council to object the scheme for lack of public interest, or to assess material modification of the recourse to the Fund proposed by the Commission.

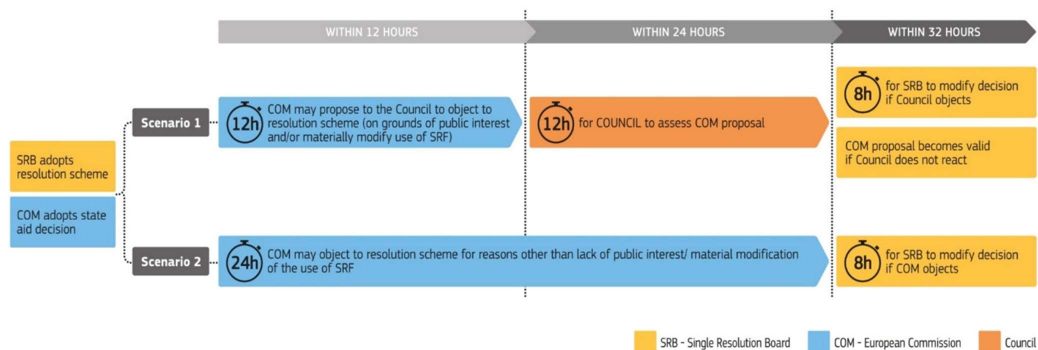
The scheme will be adopted, if the Commission and the Council do not object within 24 hours.

In case of objections, the SRB shall modify the scheme in accordance with them within 8 hours.

Where the Council objects on the ground of lack of public interest, the entity shall be wound up in accordance with national law (insolvency procedure).

Where amendments of the adopted scheme are necessary, they follow the same procedure.

Resolution procedure in the banking union*



* Source: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_6164

The resolution scheme is addressed to and effectively carried out by the NRAs.

The NRAs shall take all the necessary measures to implement it by exercising resolution powers provided for by the national law implementing the BRRD.

The SRB shall monitor the execution of the scheme.

The NRAs, for this purpose shall:

(i) cooperate with and assist the SRB;

(ii) provide information on the execution of the scheme;

(iii) submit to the SRB a final report on the execution of the scheme.

The SRB may give instructions to the NRAs regarding any aspect of the execution of the resolution scheme.

5.6. State aid control

Under Recital 29 SRMR,

> It is essential for the good functioning of the internal market that the same rules apply to all resolution actions, regardless of whether they are taken by the resolution authorities under Directive 2014/59/EU or within the framework of the SRM. The Commission should assess those measures under Article 107 TFEU.

In this sense, Recital 30 SRMR reads as follows:

> Where resolution action would involve the granting of State aid pursuant to Article 107(1) TFEU or as Fund aid, a resolution decision can be adopted after the Commission has adopted a positive or conditional decision concerning the compatibility of the use of such aid with the internal market. The decision of the Commission on Fund aid may impose conditions, commitments or undertakings in respect of the beneficiary. The conditions which may be imposed by the Commission may include, but are not limited to, burden-sharing requirements, including a requirement that losses are first absorbed by equity, and requirements as to contributions by hybrid capital holders, subordinated debt holders and senior creditors, including in accordance with the requirements of Directive 2014/59/EU; restrictions on the payment of dividends on shares or coupons on hybrid capital instruments, on the repurchase of own shares or hybrid capital instruments, or on capital management transactions; restrictions on acquisitions of stakes in any undertaking either through an asset or share transfer; prohibitions against aggressive commercial practices or strategies, or advertising support from public aid; requirements concerning market shares, pricing, product features or other behavioural requirements; requirements for restructuring plans; governance requirements; reporting and disclosure requirements, including as regards compliance with such conditions as may be specified by the Commission; requirements relating to the sale of the beneficiary or of all or part of its assets, rights and liabilities; requirements relating to the liquidation of the beneficiary.

For more details on the relationship between the resolution procedure and the State aid control see **Chapter VIII.D. State Aid Control in the Banking Sector and the Single Resolution Mechanism.**

6. The resolution tools

Resolution tools are listed in Article 22(2) SRMR and regulated under Articles 25 to 27 SRMR. According to Article 22(4) SRMR resolution authorities may apply the resolution tools "individually or in any combination", but the asset separation tool can be used only in combination with another tool.

The resolution tools are the following:

- the bail-in (Article 27 SRMR): it consists of the equity write-down and debt write-down or conversion. It is the main instrument applying the principle underlying the whole EU framework on banking crises, i.e: placing the burden on the shareholders and creditors. It can be used to recapitalise the institution or as a tool instrumental to other resolution tools (e.g. in order to reduce the claims transferred to a bridge bank);
- the bridge bank (Article 25 SRMR): it consists in creating or using an institution, partially or fully publicly owned, to which shares, assets and liabilities of the failing institutions are transferred. The tool aims at granting the continuation of the critical functions of the bank, in view of a sale to a market party, which is not available at the moment. It avoids "fire sales". The managers are appointed by the resolution authority;
- the sale of business (Article 24 SRMR): it is the sale of the bank or of a part of it (without the consent of the shareholders). The shares, assets and/or liabilities may be sold. This tool usually allows the account holders to retain the access to their accounts;
- the transfer to an asset and liability management vehicle (Article 26 SRMR): it is similar to the bridge bank tool; it usually entails the transfer to another entity (a temporarily created asset management vehicle) of the bad assets, which are gradaually disposed (in any case, the asset and liability management vehicle does not receive deposits). It is commonly known as the «bad bank» tool; as said before, it must always be applied together with another resolution tool.

Both in the case of bridge bank and sale of business, the failing institution (i.e. the remaining part) is subject to insolvency procedures (in Italy: the compulsory administrative liquidation).

7. *The resolution fund*

7.1. *The administration and use of the Fund by the SRB*

The SRB is responsible for the administration and the use of the resolution Fund.

The Fund is considered to be the resolution financial arrangement of the participating MS (Article 96 SRMR).

The SRB is the owner of the Fund (Article 67 SRMR). The Board's budget comprises two parts: Part I for the administration of the Board and Part II for the Fund (Article 58(3) SRMR).

The Fund is financed via ex-ante contributions from credit institutions authorised in the participating MS (Article 70 SRMR).

Each year the calculation of the contributions for individual institutions is based on (Article 70 SRMR):

(i) a flat contribution, that is pro-rata based on the amount of an institution's liabilities (excluding own funds and covered deposits), with respect to the total liabilities (excluding own funds and covered deposits);

(ii) a risk-adjusted contribution.

Contributions are raised by the NRAs and transferred to the Fund (Article 67 SRMR and Article 3 IGA).

By the end of an initial period of eight years, the available financial means of the Fund have to reach at least 1% of the amount of covered deposits of all credit institutions authorised in the participating MSs (Article 69 (1) SRMR).

Until the Fund reaches this target level (no later than eight years), the Board has to use the Fund in accordance with the provisions which designed a division of the Fund into national compartments corresponding to each participating MS as well as on a progressive merger of the different funds raised at the national level (Article 77(2) SRMR and Articles 4 and 5 IGA).

Where the available financial means are not sufficient to cover losses, costs or other expenses determined by its activation, the Fund shall be financed through ex-post contributions granted by authorised institutions in the participating MS; the total amount of the ex-post contributions shall not exceed three-times the ordinary annual ex-ante contributions (Article 71 SRMR).

The Board contracts alternative funding means, in the event that the ex-ante and ex-post contributions are not immediately accessible or do not cover the expenses incurred (Article 73 SRMR).

In the event that the amounts of the ex-ante contributions are not sufficient and that of the ex-post contributions and the alternative funding means are not immediately accessible, the Board may decide to make a request to voluntarily borrow for the Fund from resolution financing arrangements within non-participating MS (Article 72 SRMR).

The Board contracts for the Fund financial arrangements, regarding the immediate availability of additional financial means (including public financial arrangements) that shall be used where ex-ante and ex-post contributions are not sufficient (Article 74 SRMR).

Article 6(6) SRMR expressly states that

> decisions of the Board, the Council and the Commission shall neither require Member States to provide extraordinary public financial support nor impinge on the budgetary sovereignty and fiscal responsibility of the Member States.

Within the resolution scheme, the Board may use the Fund only to the extent necessary to ensure the effective application of the resolution tools, including:

(i) to guarantee the assets or the liabilities of the institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle;

(ii) to make loans to the institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle;

(iii) to purchase assets of the institution under resolution;

(iv) to make contributions to a bridge institution and an asset management vehicle (Article 76(1), lit. (a) to (d) SRMR).

The Fund may not be used directly to absorb the losses of an entity or to recapitalise such an entity (Article 76(3) SRMR).

Deposits are protected by the national DGSs, according to the specific provisions contained in Directive 2014/49/EU and in the BRRD.

The Fund may be used to make a contribution to the institution under resolution in lieu of the write-down or conversion of liabilities of certain creditors, when the bail-in tool is applied and the decision is made to exclude certain creditors from the scope of bail-in (Articles 76(1), lit. (f) and 27, paras. 6 ff., SRMR).

Moreover, in compliance with the no creditor worse off principle (Article 15(1), lt. (g) SRMR), the Fund may be used to pay compensation to shareholders or creditors if, following an evaluation pursuant to Article 20(5) they have incurred greater losses than they would have incurred, following a valuation pursuant to Article 20(16), in a winding up under normal insolvency proceedings (Article 76(1), lit. (e) SRMR).

7.2. *Whether the Resolution Fund impairs the overall budgetary responsibility of the German Bundestag*

In its decision of 30 July 2019 (2 BvR 1685/14, 2 BvR 2631/14), the BVerG held that the Resolution Fund does not impair the overall budgetary responsibility of the German *Bundestag*.

Indeed, the Court preliminary observes that the Fund provided for in Article 67 SRM Regulation: (i) is designed to rule out taxpayers' money; (ii) it is used for the resolution in the future of financial institutions and in order to establish joint liability of the latter, so that the funding for resolution is also ensured in cases where recourse to the owners and creditors is not sufficient; (iii) does not establish a liability of the participating Member States.

See § 294 of the judgement:

> Mit Hilfe des in Art. 67 SRM-VO geregelten Fonds soll eine Inanspruchnahme von Steuergeldern zur Abwicklung von Finanzinstituten für die Zukunft ausgeschlossen und eine gemeinschaftliche Haftung der Finanzinstitute in den teilnehmenden Mitgliedstaaten etabliert werden, die die Finanzierung einer Abwicklung auch in den Fällen sicherstellen kann, in denen eine Heranziehung der Eigentümer und Gläubiger nicht genügt (vgl. 73. Erwägungsgrund Satz 1, Satz 3 SRM-VO; BTDrucks 18/1340, S. 4 <zur BRRD>; BTDrucks 18/2150, S. 564 ff., 568; BTDrucks 18/3265, S. 185, 209 f.; BTDrucks 19/6418, S. 6). Eine Haftung der teilnehmenden Mitgliedstaaten wird dadurch nicht begründet (vgl. 21. Erwägungsgrund Satz 2 IGA, Art. 67 Abs. 2 Satz 2 SRM-VO). Der Fonds unterstützt den einheitlichen Abwicklungsmechanismus (Art. 1 UAbs. 2 Satz 2 SRM-VO) und ermöglicht es ihm, im Ausnahmefall Abwicklungsmaßnahmen zu finanzieren. Er ist für das ordnungsgemäße Funktionieren des einheitlichen Abwicklungsmechanismus unentbehrlich (vgl. 19. Erwägungsgrund Satz 1 SRM-VO; 11. Erwägungsgrund Satz 3 IGA) und soll dazu beitragen, eine einheitliche Verwaltungspraxis bei der Abwicklungsfinanzierung sicherzustellen sowie der Entstehung von Hindernissen für die Wahrnehmung der Grundfreiheiten oder einer durch divergierende nationale Vorgehensweisen bewirkten Verzerrung des Wettbewerbs im Binnenmarkt vorzubeugen (vgl. 19. Erwägungsgrund Satz 3 SRM-VO). Auch sollen Wettbewerbsnachteile für Kreditinstitute in Mitgliedstaaten geringerer Kreditwürdigkeit vermindert werden, nachdem sich Anleger im Hinblick auf die durch den Fonds bezweckte Entflechtung von Unternehmen und Staaten in weit geringerem Maße auf einzelstaatliche Hilfsmaßnahmen verlassen müssen (vgl. BTDrucks 18/1340, S. 6). Der Finanzierung des Fonds dienen die Regelungen der SRM-Verordnung über die Bankenabgabe (Art. 70, 71 SRM-VO).

Moreover, on the assumption that Article 114 (1) TFEU does not empower the European Union to levy taxes and para-fiscal charges such as special levies or

contributions,[4] the Court underlines that the bank levy is not based on the SRM Regulation, but – as far as Germany is concerned – on the German Restructuring Fund Act (*Restrukturierungsfondsgesetz*).

Likewise, the revenue raised through the bank levy is not transferred to the Fund on the basis of the SRM Regulation, but on the basis of the Intergovernmental Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund of 21 May 2014.

Thus, neither a violation of the European integration agenda nor an encroachment on the overall budgetary responsibility of the German *Bundestag* occurs.

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[4] See §§ 300 to 302 of the judgment: 300. (1) Art. 114 Abs. 1 AEUV ermächtigt die Europäische Union nicht zur Erhebung von Steuern und steuerähnlichen Abgaben wie Sonderabgaben oder Beiträgen. Das ergibt sich schon aus dem Wortlaut der Vorschrift, der von der „Angleichung der Rechts- und Verwaltungsvorschriften der Mitgliedstaaten" spricht, aber auch aus der systematischen Erwägung, dass die Finanzierung der Europäischen Union und ihrer Aufgaben ausschließlich über das in Art. 311 AEUV geregelte System der Eigenmittel zu erfolgen hat. Nach Art. 311 UAbs. 1 und UAbs. 2 AEUV stattet sich die Union mit den erforderlichen Mitteln aus, um ihre Ziele erreichen und ihre Politik durchführen zu können, wobei der Haushalt unbeschadet der sonstigen Einnahmen vollständig aus Eigenmitteln finanziert wird. Hieraus folgt, dass die Europäische Union als Staatenverbund, in dem die Mitgliedstaaten Herren der Verträge sind, nicht über die Ermächtigung verfügt, sich außerhalb des besonderen Gesetzgebungsverfahrens von Art. 311 UAbs. 3 Satz 1 AEUV eigene Finanzierungsquellen zur Deckung ihres Finanzbedarfs zu erschließen. Alle Eigenmittel der Europäischen Union müssen dieser vielmehr durch einstimmigen Beschluss der Mitgliedstaaten im Vorhinein zugewiesen werden. Die Inanspruchnahme eines eigenständigen Steuer- oder Abgabenerhebungsrechts wäre ein Handeln ultra vires.

301. Art. 311 UAbs. 2 AEUV schließt allerdings die Erzielung „sonstiger Einnahmen" nicht aus (vgl. zu der Vorgängerregelung des Art. 201 EWGV EuGH, Urteil vom 11. Juli 1989, Schräder/Hauptzollamt, C-265/87, Slg. 1989, I-2263 <2266 f. Rn. 10>). Dabei handelt es sich aufgrund des Vorrangs der Eigenmittelfinanzierung jedoch nur um Einnahmen, die auf einer der Europäischen Union zugewiesenen Einzelermächtigung beruhen, an die spezifischen Bedingungen des Einzelfalls anknüpfen, nicht in den allgemeinen Haushalt eingestellt und ausschließlich zu einem Zweck verwendet werden, der mit der sachlichen Kompetenzgrundlage vereinbar ist (vgl. Bauerschmidt, Der einheitliche Bankenabwicklungsmechanismus: Legalität und Legitimation einer neuartigen Konstruktion, in: Ders.//Müller/Siehr/Unseld, Konstitutionalisierung in Zeiten globaler Krisen, 2015, S. 347 <366 f.>). Um eine Umgehung von Art. 311 UAbs. 2 AEUV zu verhindern, muss der Begriff der sonstigen Einnahmen als Ausnahmeregelung zudem eng ausgelegt werden. Die „sonstigen Einnahmen" dürfen deshalb nicht dazu dienen, an die Stelle der vertraglich für den Haushaltsausgleich vorgesehenen Einnahmen zu treten (vgl. Bieber, in: v. der Groeben//, Europäisches Unionsrecht, 7. Aufl. 2015, Art. 311 AEUV Rn. 41). „Sonstige Steuern" scheiden als „sonstige Einnahmen" aus (vgl. Rossi, in: Vedder/Heintschel v. Heinegg, Europäisches Unionsrecht, 2. Aufl. 2018, Art. 311 AEUV Rn. 7).

302. „Sonstige Einnahmen" betreffen lediglich für den Haushalt unbedeutende Zahlungspflichten (vgl. Schoo, in: Schwarze/Becker/Hatje/ders., EU-Kommentar, 4. Aufl. 2019, Art. 311 AEUV Rn. 23), die – wie Gebühren, Buß- und Zwangsgelder – an die spezifischen Bedingungen des Einzelfalls anknüpfen, aber keine allgemeine Abgabenpflicht statuieren. Die „sonstigen Einnahmen" müssen primär einen Lenkungs- oder Sozialzweck erfüllen (vgl. Waldhoff, in: Calliess/Ruffert, EUV/AEUV, 5. Aufl. 2016, Art. 311 AEUV Rn. 12) und dürfen nicht vorrangig der Finanzierung von Aufgaben der Europäischen Union dienen.

See §§ 308 and 309 of the judgment:

> 308. Eine Beeinträchtigung der haushaltspolitischen Gesamtverantwortung des Deutschen Bundestages durch die SRM-Verordnung liegt ebenso fern. Zwar berührte ein eigenständiges Abgabenerhebungsrecht der Europäischen Union in der Tat die durch Art. 20 Abs. 1 und Abs. 2 in Verbindung mit Art. 79 Abs. 3 GG geschützte haushaltspolitische Gesamtverantwortung des Deutschen Bundestages, weil die Entscheidung über Einnahmen und Ausgaben der öffentlichen Hand als grundlegender Teil der demokratischen Selbstgestaltungsfähigkeit im Verfassungsstaat (vgl. BVerfGE 129, 124 <177>; 132, 195 <239 Rn. 106>; 135, 317 <399 f. Rn. 161>; 142, 123 <230 Rn. 211>) vom Bundestag dem Volk gegenüber verantwortet werden und dieser daher auch über die Summe der Belastungen der Bürgerinnen und Bürger entscheiden muss. Entsprechendes gilt für die wesentlichen Ausgaben des Staates, auf die die Bürgerinnen und Bürger mit der freien und gleichen Wahl einwirken wollen (vgl. BVerfGE 123, 267 <361>).
>
> 309. Da die Erhebung der Bankenabgabe und ihre Übertragung auf den Fonds nicht auf der SRM-Verordnung, sondern auf Entscheidungen des Bundestages beruhen, lässt sich eine Berührung der haushaltpolitischen Gesamtverantwortung des Bundestages jedoch nicht feststellen.

7.3. The path to the creation of a common public backstop for the Single Resolution Fund

When the Single Resolution Mechanism was adopted in 2013, Member States also agreed to develop a backstop to the Single Resolution Fund. This was intended as a last resort to be activated if the Single Resolution Fund's resources proved to be insufficient for capital or liquidity injections purposes. Member States also agreed that the backstop should be fiscally neutral over the medium term, so that any potential deployment would be recovered from the banking sector in the euro area.

While waiting for the creation of a sound public backstop for the SRF, and with the aim to provide the ESM with the power to directly assist financial institutions, on 8 December 2014, the ESM Board of Governors agreed on the adoption of a Direct Recapitalisation Instrument for the euro area banks, explicitly defining it as "*one of the building blocks of the EU Banking Union*".

According to Article 8 of the ESM *Guideline on Financial Assistance for the Direct Recapitalisation of Institutions*, the instrument cannot be used as a precautionary instrument, as defined in Article 32 of the BRRD, and it necessarily requires the application of the bail-in tool as a precondition for the intervention.

Within the limit of euro 60 bn, an ESM direct recapitalisation can be granted only to relevant financial institutions, which fulfill the criteria defined by Article 4 of the Guideline:

a. The institution(s) is, or is likely to be in the near future, in breach of the capital requirements established by the ECB in its capacity as supervisor, is unable to attract sufficient capital from private sector sources to resolve its capital problems and the bail-in conducted in accordance with Article 8 of this Guideline is not expected to address fully the capital shortfall. Private sector sources shall include tapping new market investors or existing shareholders.

b. The institution(s) concerned should have a systemic relevance or pose a serious threat to the financial stability of the euro area as a whole or of the requesting ESM Member. The systemic dimension of these institutions shall be assessed taking into account, primarily, their size, interconnectedness, complexity, and substitutability.

Other very demanding preconditions are set in order to activate the instrument, including the circumstance that the country where the institution is established must be unable to provide financial assistance itself to the institution concerned, without jeopardising its own fiscal sustainability or continuous access to the capital market. Moreover, any decision to use the Direct Recapitalisation Instrument entails conditionality, both for the bank concerned and the requesting country.

Such requirements have substantially prevented the tool from having any actual relevance or utilization so far.

The possibility to provide the SRF with a public backstop was considered also by the European Commission in the proposal for a Council regulation on the establishment of the European Monetary Fund (COM (2017) 827 final), presented on 6 December 2017.

According to the Explanatory Memorandum of the Commission proposal

> The provision of credit lines and guarantees to the SRB would be a totally new function for the EMF in comparison to the ESM's current objective and tasks. The combined amount of outstanding commitments for backstopping the SRF is subject to a ceiling of EUR 60 000 million. This ceiling can be increased. The Board of Governors in agreement with the non-euro Member States of the Banking Union should adopt the financial terms and conditions of such support to the SRB. To ensure a swift availability, the Managing Director shall be authorised to decide on the drawdown of the credit line or the provision of guarantees on liabilities of the SRB. In case the support is requested in relation to a resolution scheme, the SRB may ask such support before the adoption of the resolution scheme.

On 14 December 2018, the Euro Summit endorsed the "Terms of reference of the common backstop to the Single Resolution Fund", which will allow the European Stability Mechanism "to provide the common backstop on behalf of the euro area, in the form of a revolving credit line to the Single Resolution Fund (SRF)".

The backstop will replace the ESM Direct Recapitalisation Instrument, and will be able to cover all possible uses of the SRF according to the current regulation, including liquidity provision, subject to, where needed, adequate safeguards which have been discussed by Eurozone leaders throughout 2019.

On 6 December 2019, the ESM issued a "Draft Guideline on the Backstop Facility to the SRB for the SRF", based on the agreement reached by the Eurogroup on the ESM reform package. The legal basis for the Draft Guideline was provided by Article 18a(4) of the ESM Treaty, as amended by the draft Amending Agreement. According to Article 2 of the Draft Guideline, 'the Board of Governors may decide by mutual agreement, on the basis of a request by the SRB and of a proposal by the Managing Director, to grant a backstop facility to the SRB for the SRF, in the form of a revolving credit line under which loans can be provided.' The Board of Governors shall define by mutual agreement the key financial terms and conditions of the backstop facility (Article 2). It shall determine the backstop nominal cap and the maximum amount granted for each credit line (Article 3). The Draft Guideline sets an initial ten years' term for the facility, enabled to grant loans of an expected three years' maturity average. The Eurogroup Agreement and the Draft Guideline is subject to approval given by Member States in line with their national procedures.

8. *Information sharing, confidentiality and disclosure to criminal authorities. The MoU between the SRB and the ECB and between the SRB and the Commission*

Under Article 84 BRRD, the professional secrecy obligation does not preclude the exchange of information with resolution, supervisory and other authorities of different MSs.

Specific obligations to exchange information only apply to the NRAs and the NCAs with a view to facilitate the performance of their tasks under the BRRD and to the NRAs for groups resolution purposes (see Article 90 of the BRRD).

A different rule applies within the SRM.

The latter is a unitary system (see § 2.1).

This is the reason why the SRMR provides for a duty of cooperation in good faith and an obligation to exchange information aimed at allowing the effective and consistent functioning of the SRM.

The only conceivable limit is the compliance with the need-to-know principle.

With regard to the relationships between the SRB and the NRAs of non-participating MSs, the general rule applies again.

Indeed, Article 32(2) SRMR on the MoU between the SRB and the NRAs of non-participating MSs is clearly based on the assumption that the special SRM regime on close cooperation and obligation to exchange information does not apply.

Moreover, Article 30(7) SRMR stipulates that the SRB shall conclude a MoU with the ECB, the NCAs and the NRAs describing how they will cooperate in the exercise of their respective responsibilities (particularly in resolution planning, early intervention and resolution phases).

Up until now a MoU has been concluded only between the ECB and the SRB. The MoU is aimed at avoiding an unnecessary increase in the reporting burden of the institutions, as clearly laid down under its recital 8:

> The ECB and the SRB should collaborate to avoid an unnecessary increase in the reporting burden of the institutions. Any duplication in the collection of data should be avoided. Therefore, the SRB may require institutions to provide all information necessary for the performance of its tasks after making full use of all the information available to the ECB or to National Competent Authorities. For example, the SRB should be able to obtain, including on a continuous basis, any information necessary for the exercise of its functions, in particular information on capital, liquidity, assets and liabilities.

Moreover, based on the assumption that within the SSM and the SRM there is no need of additional MoUs, Recital 10 of said MoU provides that

> This MoU does not prevent the exchange of information within the SSM and SRM. Information received from the SRB by the ECB can be shared with the national competent authorities involved in the respective joint supervisory team and information received from the ECB by the SRB can be shared with the national resolution authorities involved in the respective internal resolution team.

Though the scope of the MoU follows that of the ECB and the SRB competences within the SSM and the SRM respectively, it is not perfectly aligned with the latter.

Not surprisingly, recital 9 of the MoU clarifies that:

> This MoU covers the cooperation and the exchange of information between the Participants with respect to all institutions directly supervised by the ECB. In addition, it covers all other cross-border

> groups or entities under direct responsibility of the SRB insofar as the ECB is exclusively competent to carry out tasks in accordance with Article 4(1)(a) and (c) of the SSM Regulation for prudential purposes…

Under Article 34(5) SRMR, the MoU shall not be deemed to infringe the requirement of professional secrecy. Moreover, under Article 34(6) SRMR where information requested by the Board is available to the ECB/NCAs/NRAs, it shall be provided to the Board.

One may infer:

(i) from Article 34(5) that, without said provision and the MoU, professional secrecy would have been applied;

(ii) from Article 34(6) that there is an obligation to provide to the SRB information requested where available.

In light of the above:

(i) professional secrecy does not forbid the exchange of information (within the frame of the MoU);

(ii) information available (to either SRM or SSM authorities) shall be provided to the SRB.

An additional MoU has been concluded between the SRB and the Commission in order to strengthen their cooperation under the SRM. The MoU specifies the duties of cooperation and exchange of information of the SRB and the Commission under Articles 13(1), 18(7) and (10) and 30 SRMR.

As mentioned in the preamble (lit. c, d and e):

> (c) Under Article 13(1) of the SRM Regulation, the SRB must notify the Commission of any information received from the ECB or national competent authorities ('NCAs') on early intervention measure that they require an institution or group to take or that the ECB or NCAs take themselves pursuant to Article 16 of Regulation (EU) No 1024/2013, to Article 27(1) or Article 28 or 29 of Directive 2014/59/EU ('BRRD'), or to Article 104 of Directive 2013/36/EU ('CRDIV');
>
> (d) Under Article 18(7) and (10) of the SRM Regulation, without prejudice to the powers of the Council, the Commission has the power to endorse or object to the resolution scheme adopted by the SRB and to obtain from the SRB any information which it deems to be relevant for performing its tasks throughout the resolution procedure;
>
> (e) Under Article 30 of the SRM Regulation, the SRB must inform the Commission of any action it takes in order to prepare for

resolution, and in the exercise of their respective responsibilities the SRB and the Commission must cooperate closely, in particular in the resolution planning, early intervention and resolution phases pursuant to Articles 8 to 29 and they must provide each other with all information necessary for the performance of their tasks.

The duties of cooperation and exchenage of information are specified in Article 8, reading as follows:

8.1 As a general principle, the SRB should inform the Commission when it is informed that the financial condition of an entity rapidly deteriorates. The Commission will progressively increase its involvement as the financial situation of an entity worsens. For the purpose of cooperation in resolution matters and having regard to the financial situation of the entity, without prejudice to the independence of the SRB, the SRB should provide sufficient time for the Commission to be able to analyse it and provide its views. The SRB should endeavour to take them into consideration as appropriate.

8.2 At any point in time preceding the Resolution Phase referred to in paragraph 8.3. and irrespective of the adoption of an early intervention measure, cooperation between the Participants includes, but may not be limited, to the following:

(a) The Participants immediately notify each other about any situation of a rapidly deteriorating financial condition of an Entity as defined in Article 27(1) BRRD, irrespective of an early intervention measure being considered for adoption or adopted. Where the Participants take action to address such a situation, they should inform each

other of the main issues and results of such actions. Where an Entity is in a situation as referred to in the previous subparagraph, the Commission may request additional information to that provided under previous subparagraph, which it considers relevant for preparing for a possible resolution stage. To that effect, the Participants should agree on detailed technical arrangements to exchange information with regard to possible resolution actions.

(b) The SRB immediately should inform the Commission of any requirement it intends to impose on an Entity in order to prepare for the resolution of that entity, following either the adoption of an early intervention measure or in the absence of an early intervention measure, following adoption of any other measure required by the ECB or the NCAs with respect to that Entity in line with Article 13(1).

8.3 In the Resolution Phase, which starts with the SRB notifying the Commission of its intention to prepare for resolution of an entity, cooperation between the Participants includes, but may not be limited to the following:

(a) The SRB informs the Commission of its intention to prepare for resolution. It also informs the Commission when it starts drafting a preliminary resolution scheme or imposes any requirement on the relevant national resolution authority to draft such scheme.

The SRB shares with the Commission information on any issues which are related to all discretionary aspects of the resolution scheme as well as the amount of the Fund use and the public interest test so as to allow for the Commission to take an informed decision endorsing the SRB resolution scheme under Article 18(7).

(b) The SRB ensures that the Commission is regularly informed on the work of the Crisis Management Team and sufficiently in advance of any relevant meetings of the Extended Executive Sessions, and is associated with the work of Crisis Management Team, as appropriate. In addition, the Participants inform each other, in due time, of all external meetings during the resolution phase in respect of the resolution of the entity concerned and as regards the outcomes of such meetings.

(c) The SRB will alert the Commission, in due time, of any scheduled meeting of a Resolution College, of a European Resolution college or of any other group or college performing the same functions, of which the SRB is chair or member, in which the resolution of the Entity is the subject-matter of discussion. In this context, the SRB will without delay and taking into account the circumstances of possible resolution of the Entity provide the Commission's representative at the Board with all the relevant information sufficiently in advance to the meeting of the Executive Session preparing the SRB intervention at the Resolution College.

Wherever a Resolution College, or a European Resolution College or any other group or college performing the same functions, of which the SRB is chair, is expected to perform one or more of the tasks listed under Article 88(1) (e), (f), (h) BRRD, the Commission will participate in its meetings in order to preserve its role under Article 18 of the SRM Regulation. Wherever a Resolution College, or a European Resolution College or any other group or college performing the same functions, of which the SRB is member, is expected to perform one or more of the tasks

listed above, the Commission will request to participate in its meetings in order to preserve its role under Article 18 of the SRM Regulation and the SRB will support its request.

(d) In any event, the SRB should inform the Commission of any information received from the competent authority regarding the possible declaration of failure or likelihood of failure of an Entity and about its intention to declare an Entity failing or likely to fail.

(e) With respect to Other Institutions, the Commission is informed and involved in accordance with the provisions of this Paragraph 8.3, from the moment the SRB considers likely that the Single Resolution Fund would be used.

(f) In case the SRB intends to modify a resolution scheme as provided under Article 28(3) of the SRM Regulation, which has been adopted in accordance with the procedure of Article 18 of the SRM Regulation, it informs the Commission at an early stage of its intention and of the reasons for such a modification in order to enable the Commission to make a preliminary assessment of the proposed revised scheme in due time and provide comments. The provisions set out in Paragraph 8.2 and 8.3 should apply mutatis mutandis.

As per Article 2(2) of the MoU, this latter

> does not cover the cooperation and exchange of information between the Participants in respect of the tasks to be performed by the Commission according to Article 19 SRM Regulation, in particular for the adoption of a decision by the Commission concerning the compatibility of the use of State aid or Fund aid with the internal market.

Under Article 84(6) of BRRD the professional secrecy is without prejudice to cases covered by national criminal law.

Despite Protocol 7 on the Privileges and Immunities of the EU, applicable to the SRB according to Article 80 SRMR, the rule of law principle currently referred to under Article 2 of TEU implies, in light of the CJEU case law, a duty of sincere cooperation, which binds not only national but also supranational authorities.

In light of the above, similarly to what was already said with regard to the ECB (see **Chapter I.A. The SSM: allocation of tasks and powers between the ECB and the NCAs and organisational issue, § 7**), the SRB has to be considered subject to a co-operation duty with national criminal investigatory authorities.

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Chapter VIII.B

Minimum Requirement for Own Capital and Eligible Liabilities

Marco Lamandini and David Ramos Muñoz

Summary: *1. Introduction – 2. Burden-sharing and its implications: bail-in and fundamental rights – 2.1. Bail-in of financial instruments and its difficulties – 2.2. Bail-in, burden-sharing, and their fundamental rights implications – 2.2.1. Is the right to property a direct threat to burden-sharing? – 2.2.2. Bail-in eligible instruments and procedural perspective – 2.3. Preliminary conclusions – 3. MREL in the context of bank resolution planning*

1. Introduction

The concept of “Minimum Requirement for own capital and Eligible Liabilities” (MREL) sits atop the new system of banking law. If the lessons from the 2008-2009 crisis had to be encapsulated in one sentence, it would be “too big to fail (no more, we hope)”. If reckless behaviour was to be discouraged, moral hazard was to be avoided, and prudence to be fostered, banks had to be self-sufficient in terms of resources. If a crisis struck, funds had to come from the bank’s investors (bail-in), rather than from the government (bail-out). Yet, this feat could not be avoided without endangering the system: the solution of writing off equity and debt instruments looks good in theory, but if we were to apply the logic of bankruptcy law, many claims may enjoy the same status, and should be written off *pari passu*, but the disruptive effect may be incomparably larger in some cases (e.g. deposits or derivatives) than in others (e.g. senior bonds), not to mention the divergences between different insolvency laws.

The requirement for banks to build up a MREL was developed, initially, by the Financial Stability Board (FSB) for globally systemically relevant banks (G-SIIs) and incorporated in the FSB’s TLAC term sheet of 2015. Directive 2013/59/EU (BRRD) followed similar principles, but with European specificities. Further convergence with TLAC has been reached at a second stage with Directive 2019/879/EU (BRRD2) and Regulation 2019/876 (CRR2), which introduced (more stringent) minimum TLAC requirements for G-SIIs and a different calibration of MREL requirements for 4 different categories of banks (G-SIIs with a TLAC Pillar 1 requirement; top-tier banks with more than 100 billion in assets, with a minimum statutory (Pillar 1) MREL; not top-tier banks, nonetheless selected by the competent resolution authority as likely to pose systemic risk in case of failure and thus subject to the same treatment of top-tier banks, and other banks with a case by case Pillar 2 MREL requirement).

The basic idea of MREL is simple and sensible: to try to anticipate the problems that may arise in an *ex post* enforcement setting and identify a layer of debt that can be bailed-in quickly and, if not painlessly, at least not disruptively. Yet, despite the simplicity and sensibility of the idea, its implementation is inevitably complex, and must be reasonable and proportionate in order not to lose sight of the way MREL interplays with other tools. MREL took its place in an already existing (and already complicated) system of rules and principles.

To provide a succinct yet comprehensive explanation that captures this narrative, the present chapter is divided into three more sections. Section 2 analyses the intellectual foundations of MREL at the level of principles: the concept of burden-sharing, its relationship to fundamental rights, such as property, and some difficulties in its implementation in light of rules on bankruptcy ranking and priorities. Section 3 then proceeds to explain how the concept of MREL draws lessons from the clash of principles and tries to give rise to a system where resolution problems are anticipated and dealt with in the planning stage, and how this inevitably gives rise to other, sometimes difficult, trade-offs.

2. *Burden-sharing and its implications: bail-in and fundamental rights*

The 2008-2009 financial crisis (and the following EU bank-sovereign crisis) forced Member States to accept the idea that not only banks could go bankrupt, but that they should, at least if a measure of discipline was to be instilled into the market. A constant recourse to bail-out breeds moral hazard. The answer in the Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism (SRM) has been the bail-in tool (art. 43 and ff. and 59 of Directive 2014/59/EU; art. 21, 27 of Regulation 806/2014, "SRM Regulation"). Before it was implemented, the initial term of choice was the more neutral "burden-sharing", introduced in the European Commission's Banking Communication on State Aid of 2013.

In this Section, at first, we will examine the potential difficulties arising from the bail-in tool (2.1), then we will discuss the fundamental rights challenges, which were dealt with in the case law framed in the pre-BRRD/SRM framework (2.2). Finally, we will draw some general conclusions, which help provide the context for the relevance of MREL (2.3).

2.1. *Bail-in of financial instruments and its difficulties*

Bail-in is part of the toolkit of instruments that resolution authorities can use when a bank crosses the point-of-non-viability (PONV), i.e. it is found Failing-or-Likely-to-Fail (FOLF) and there is no alternative solution available (art. 32(1) BRRD, art. 18(1) SRM Regulation). It consists in the write-down and conversion of capital and debt instruments (art. 43, 59 BRRD; art. 21, 27 SRMR) in levels sufficient to ensure that the bank is viable and can continue its activity, to find, at least, a private sector purchaser (art. 38 BRRD, art. 25 SRMR), or to be quite certain that a transfer of its assets and liabilities to a bridge bank (art. 40 BRRD, art. 26 SRMR) will ensure a posterior purchase or the continuation of the activity.

However, rather than just *any* tool, bail-in can be considered *the* tool that more fully expresses the resolution framework's underpinning philosophy that moral hazard should be avoided, and that no bank should be too-big-to-fail.

This pre-eminence can be seen in several details: (a) first, the bail-in tool has the longest and most detailed regime of all the resolution tools by far (art, 43-55, 59 and 108 BRRD compared to 38-39, 40-41, 42); (b) second, the write-down and conversion of capital and debt instruments is the only mechanism that can be used either in resolution or without putting a bank in resolution, i.e. also in cases where it will save the bank from resolution (art. 59 BRRD, art. 21 SRMR); (c) third, the provision is the only one accompanied by a regime, whose goal is not to regulate the use of the tool in a crisis-management situation, but to *anticipate, plan and prepare* for its use in a way that is swift and efficient, i.e. the MREL regime, which is discussed in this chapter (art. 45 BRRD, art. 12 SRMR).

To fully understand the need for such planning provisions, in the first place, we need to anticipate the problems that an unplanned application of the bail-in tool can cause. A careful reading of bail-in provisions shows that the main cause of concern is not the application of the bail-in tool itself, but the *instruments* or *liabilities*, over which it may apply, and the sequence that may be used to apply it. Considering that the alternative scenario to resolution would be the bank's liquidation under national insolvency laws, it is wise for the approach in resolution not to unnecessarily depart from the approach of insolvency laws when it comes to the ranking and priorities of the instruments.

A starkly different treatment in resolution from what would be expected upon insolvency could provide grounds for a claim of discriminatory treatment. The drafters of the BRRD and SRM rules were aware of this, and, for purposes of the "bail-in sequence", i.e. the order in which the different instruments should be written-down or converted, they make a reference to the rules applicable in case of insolvency through the insisted reference to the so called "no-creditors-worse-off" (NCWO) principle (art. 48(1)(d) and (e) BRRD).

Problem solved, right?

Not quite, because the rules that represent exceptions to this are numerous and relevant:

(i) First, the writing-down and conversion, in accordance with the hierarchy of claims under insolvency, takes place only *after* the conversion of CET1, Tier 1 and Tier 2 instruments, which are bailed-in in the order stipulated by resolution rules, regardless of what insolvency laws, or corporate liquidation rules may say.

(ii) Second, and crucial, together with rules on the bail-in sequence, resolution rules also regulate the bail-in exclusions (art. 44 (2) BRRD, art, 27 (3) SRMR), which include liabilities such as covered deposits, secured liabilities, liabilities resulting from a bank clients' assets, or from the bank's fiduciary capacity, or to employees and tax authorities (which are often preferred liabilities in insolvency), but also short-term liabilities, and liabilities associated to the provision of critical services (art. 44 (2) (e), (f) and (g) (ii) BRRD; art. 27(3)(e), (f) and (g)(ii) SRMR), which (together with deposits) are considered ordinary liabilities in insolvency and are excluded *ex novo* by resolution rules. The difficulty with this is not only in the newly excluded liabilities,[1] but also in the fact that the logic of bail-in is *different* from the logic of insolvency rules. One excludes some liabilities (i.e. leaves them *out*), whereas the other merely puts them *up* in the ranking. Furthermore, the

[1] It is worth noting that article 108 BRRD modifies domestic insolvency rules to ensure that eligible bank deposits rank high in the insolvency hierarchy (i.e. above ordinary liabilities) and thus reduces the friction between a resolution and an insolvency scenario. However, this does not happen with short-term liabilities or liabilities of trade creditors that provide critical services.

fact that resolution rules introduce the concepts, without fully relying on domestic insolvency law for purposes of gap-filling means that the interpretative weight shifts towards resolution rules, and thus away from domestic insolvency law, which creates more potential for divergence.

(iii) Third, and also important, resolution rules empower resolution authorities to exclude other liabilities from bail-in, when this can result in contagion or make resolution more difficult.

The presence of these elements ensures that, in case there is any doubt about the status of a specific type of liability, there is a potential for friction. Resolution authorities may decide to interpret resolution rules in a way that classifies a specific instrument as Tier 1-2, even if, in an insolvency scenario, it might have ranked higher than equity or hybrid instruments, they may make a controversial decision as to what amounts to a "secured liability" or about the method to classify a certain class of liabilities as having a maturity shorter than 7 days. The tension may be even greater if resolution authorities decide to leave out of bail-in certain liabilities that, despite not belonging to the list of excluded liabilities, can be disruptive for the system, e.g. liabilities arising from a liquidity-management arrangement or a hedging arrangement using derivatives.

This shows that, despite the EU legislators' concern about the alignment between resolution and insolvency, there is unavoidable room for friction.

In light of this, three questions stand out:

(i) first, whether a writing-down and/or conversion of instruments constitutes a disproportionate interference with the property rights of the holders of those instruments, especially looking backwards to the legacy of the quite wide stock of bail-in eligible liabilities whose treatment current holders could not expect when they subscribed or acquired the instruments on the secondary market;

(ii) second, what happens when the holder of an instrument is treated differently from the holder of another, despite the fact that they would have been treated equally under the applicable national insolvency law;

(iii) third, how important it is for the holders of those instruments to be duly informed of the decision, to have an opportunity to present their case, and what kind of redress they can have, when financial stability is at stake.

Now we turn to address these questions.

2.2. Bail-in, burden-sharing, and their fundamental rights implications

The fundamental rights implications of bail-in, bank resolution and crisis-management must be drawn from case law that was decided before the BRRD

or SRM frameworks were adopted. Still, the main features are general enough to be relevant today. The main difference is that, in the absence of resolution rules, the decision to impose losses on shareholders and creditors was adopted pursuant to the discretionary decision of public authorities. The first "framework" of sorts which stipulated the need of burden-sharing in general terms was the Commission Banking Communication, where it stated that its approval of a bank rescue would be conditional upon the fact that part of the funding to rescue the bank would come from the writing-off or conversion of shareholders and creditors' rights.

The full-fledged version of this measure is the bail-in tool, but when the BRRD and the SRM Regulation were adopted there were two alternative readings of the tool, as well as the principle (burden-sharing) underpinning it: (i) bail-in is a "neutral" tool, where the law imposes no losses on shareholders and creditors, the bank is simply worth less if not nothing at the point of non-viability, and the holding of shareholders and creditors simply has to be adjusted; (ii) bail-in is a measure to deter moral hazard, which means that shareholders and creditors' interests have to be sacrificed to impose some discipline. It is not difficult to notice that the first reading simply means a recognition of losses, whereas the second is an imposition of losses. This can result in major differences in terms of fundamental rights protection.

First, we will try to answer whether the right to property represents a threat to burden-sharing (2.1.1). Second, we will discuss which other fundamental rights can be problematic for burden-sharing and bail-in (2.1.2).

2.2.1. Is the right to property a direct threat to burden-sharing?

One should justify burden-sharing and bail-in as a mere way to acknowledge the losses that the bank itself has suffered, regardless of the action of public authorities. However, the law's narrative also emphasises the need to ensure that investors "bear" or "suffer" the burden. An investor could then argue that, since public authorities, far from concerned about her losses, are trying to make an example of her, the rules have changed, resulting in an interference with her property.

The courts' answer, though, has not been sympathetic so far, in light of precedents such as *Dennis Grainger and Others v the United Kingdom ("Grainger")*, by the ECtHR, and *Tadej Kotnik and Others v Državni zbor Republike Slovenije ("Kotnik"), Gerard Dowling and Others v Minister for Finance ("Dowling")"*, and *Ledra Advertising Ltd and Others v European Commission and European Central Bank ("Ledra")*, by the CJEU.

Grainger involved the crisis management of Northern Rock, which was nationalised. Upon calculating compensation for shareholders, the independent valuer was expressly instructed to assume that no financial assistance would be extended to the bank (*Grainger,* paras. 11, 21, 23), which, the expert concluded, resulted in zero compensation. The ECtHR accepted all of the UK's arguments

that the government had a wide margin of appreciation in this field (*Grainger*, para. 39), that zero compensation was a consequence of the bank's losses and not of government intervention (*Grainger*, para. 40), that public authorities were not obliged to cover the debts of a private institution and that the government's decision was justified by the need to avoid moral hazard and thus was far from being "manifestly without reasonable foundation" (*Grainger,* para. 42).

Kotnik and *Dowling* analysed the Commission's Banking Communication, which for the first time formulated a *policy* (i.e. not an individual decision) on burden-sharing (Banking Communication paras. 40 – 46). The CJEU held that (i) shareholders or debtholders of a bank cannot harbour the 'legitimate expectation' that the bank would receive financial assistance (*Kotnik,* paras. 63-66); (ii) a transitional period for the States to adjust to this regime was not necessary, since no legitimate expectation had been created, and even if it had, *the objective of ensuring the stability of the financial system while avoiding excessive public spending and minimising distortions of competition* would qualify as the type of overriding policy interest that would justify the exclusion ofany transitional period; and (iii) the burden-sharing measures indicated in the Banking Communication did not constitute an illegal interference with property rights, because they were not the source of the losses of shareholders and no one would suffer greater losses than under insolvency proceedings (*Kotnik*, paras. 78-79). To this effect, the No-Creditor-Worse-Off (NCWO) principle (Banking Communication para. 46), which states that any loss by creditors in resolution *vis-à-vis* what they would have received in insolvency must be compensated, was of critical importance (*Kotnik*, para. 77).

We share the Courts' conclusions, but some of the reasons are controversial. Notably, in the first instance, the separation between the "interference with property rights", the violation of legitimate expectations and the restrictive interpretation of such "legitimate expectations", which can only arise when there are *"precise, unconditional and consistent assurances, originating from authorised, reliable sources"* (*Kotnik*, para. 62). If that is the benchmark, there are few investors to rely upon and their property rights amount to little. Second, the causal connection between investors' losses and the bank's insolvency, which assumes that it is the bank's fault after all (*Grainger*, para. 40; *Kotnik,* paras. 74-75). Yet, authors argue that there are banks that are simply illiquid yet solvent, and that differentiating between them is extremely difficult (Goodhart, 2008). Third, at times, the rulings seem to justify a bank intervention followed by burden-sharing measures on the existence of "macro" disturbances and systemic risk (*Dowling*, para. 50), which, nevertheless, raises the question of whether it would be possible to effect a bail-in of a bank that is failing-or-likely-to-fail (FOLF) where there is no "serious disturbance" in the economy.

Finally, in *Konstantinos Mallis and Others v European Commission and European Central Bank ("Mallis")* and *Ledra,* the CJEU considered the impact of measures adopted by Cyprus and imposed in exchange for an aid package by the European Stability Mechanism (ESM), with the European Commission and the ECB being the main players inside the ESM. In *Mallis*, the Court dismissed

the case on grounds of lack of imputability of the conduct to EU authorities. In addition, in *Ledra,* the Court held that the write-down and conversion of debt instruments, including the conversion of a 37,5% of Cyprus Popular Bank's uninsured deposits into shares with the promise of a buy-back of shares if the bank went overcapitalised, did not constitute "a disproportionate and intolerable interference impairing the very substance of the appellants' right to property", in light of the imminent risk of financial losses in case of the banks failure (*Ledra,* paras. 73-74). Again, regardless of the conclusion, which looks sound, the Court did not explain *why* 37,5% with a buy-back promise was reasonable, and what would be the yardstick in a different case.

2.2.2. Bail-in eligible instruments and procedural perspective

The general conclusion of the above cases is that burden-sharing is not contrary to property rights and that insolvency is a good benchmark to measure investors' acceptable losses (NCWO principle) (art. 73-75 BRRD). Beyond that, however, it is hard to draw guidance for the future. One key element that was not discussed in the decisions is the existence (or absence) of equal treatment between banks or investors. This argument was alleged (i.e. differences between treatment of Northern Rock, on one hand, and RBS and HBOS), but not pursued in the ruling (*Grainger*, para. 32). Had the difference in treatment been proven, public authorities would have been in a more defensive position, forced to argue LoLR's fully discretionary nature to the point of arbitrariness. Differences in treatment led the Austrian Constitutional Court to annul the Austrian Federal Act on Restructuring Measures for Hypo-Alpe-Adria-Bank International AG (HaaSanG), which provided that the supplementary capital and subordinate debt instruments held by third parties would expire, *provided* that they matured before 30 June 2019, together with all their guarantees (by the State of Carinthia): the Court agreed with the CJEU and the ECtHR that the expiry of claims was not *per se* an expropriation, and it used insolvency as the benchmark to establish the value of claims, but it found that the distinction between claims maturing before and after 30 June 2019 was untenable.

A second set of considerations that opens a risky way to challenge bank interventions concerns the *procedural* angle, where some of the few precedents seem to support that courts are readier to exercise closer scrutiny, as the ECtHR did in *Credit and Industrial Bank v the Czech Republic ("Credit v Czech Republic"),* and *Capital Bank AD v Bulgaria ("Capital v Bulgaria").* Both cases were characterised by the intervention of individual banks (Credit and Industrial Bank, and Capital Bank) to mitigate spill-over effects that would have resulted from insolvency, but which resulted in drastic measures, such as the removal of management in *Credit and Industrial Bank*, and the withdrawal of the bank's license, followed by a declaration of insolvency and winding up in *Capital Bank*. In both cases it was not possible to challenge the intervention (*Credit v Czech Republic,* para. 69; *Capital v Bulgaria*, paras. 27-33), in *Credit and Industrial Bank* because the board was replaced by an authority-appointed administrator,

which left the former board without standing to sue (*Credit v Czech Republic,* para. 58).

The plaintiffs alleged both "property" and "access to justice", but the Court's reasoning was the same for both rights. In both cases the arguments were very similar (*Capital v Bulgaria,* para. 134): neither Czech nor Bulgarian courts had acted as courts "with full jurisdiction" (*Credit v Czech Republic,* paras. 71-72; *Capital v Bulgaria,* paras. 109, 135). In *Credit and Industrial Bank*, the entity's board should have lodged an appeal *before* they were formally divested of their powers, which was impossible (*Credit v Czech Republic,* paras. 69-70).[2] In *Capital v Bulgaria*, the rules precluded review by the courts, and the decision by an administrative body could replace a court ruling (*Capital v Bulgaria*, paras. 105-109).

Furthermore, in *Capital v Bulgaria* the Court did not limit itself to find a *prima facie* interference, but went on to analyse whether the measures were proportionate. The State made the usual argument that financial stability was at stake, but the Court retorted that, as special as the banking business may be, this could not justify a total absence of review by an independent body, which could, conversely, aggravate the crisis. Strict time limits could have helped protect the public interest (*Capital v Bulgaria*, para. 113).

Previous cases, such as *Adorisio v The Netherlands*, where Dutch authorities expropriated the investors in a Dutch bank, have shown that human rights courts are ready to be deferential to public authorities, as long as there is an opportunity for review: in that case the deadlines for lodging an appeal were very short (10 days), the plaintiffs could access the report of an independent firm (on which the decision of intervention was based) only in redacted form and were allowed to examine the statement of defence by the Minister the afternoon before the hearing (*Adorisio v The Netherlands,* para. 41). Still, the ECtHR did not see that judicial protection rights had been impaired, because the applicants put up an effective challenge (*Adorisio v. The Netherlands,* para. 101) and the Administrative Jurisdiction Division had access to the full report (*Adorisio v The Netherlands,* para. 109).

2.3. Preliminary conclusions

The above analysis shows that:

(v) property rights as such do not result in an absolute obstacle to burden-sharing through the bail-in of debt and equity instruments;

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[2] A similar situation was recently echoed in the case-law of the CJEU: the CJEU held that shareholders may have an interest in bringing proceedings (order of 12 September 2017, *Trasta Komercbanka v. European Central Bank*, T-247/17, EU:T:2017:623, para. 57) when the bank itself would not have standing. This was compounded by the fact that, according to the ECtHR's findings, in the process of review envisaged in the procedural laws, "it is not the role of the courts to examine the substantive reasons for which the compulsory administration has been imposed or subsequently extended. Moreover, consistently with this limited role, the procedure before the court is exclusively written and takes place in private, without a hearing and without the possibility of opposition from the management of the bank".

(vi) other principles, such as non-discrimination, can result in such a challenge; and

(vii) from a procedural perspective, courts were so far ready to be quite deferential, provided there is actual review and the parties affected have an opportunity to present their case.

By way of principle, this is reassuring, but only slightly so. Consider the case of cross-border banks, especially large banking groups, which may have issued large amounts of financial instruments (in the hands of the public) as well as have multiple intra-group claims. Considering that the status of different instruments may starkly differ between jurisdictions (typically, intra-group claims), qualitatively similar claims can receive a drastically different treatment. If courts in the country of the relatively worse-off creditors are asked to enforce the bail-in decision and creditors challenge the measures for being discriminatory, what should the benchmark of comparison be? If the crisis-management decision has to be implemented quickly to restore confidence to the market, is it realistic to presume that courts will have the time necessary to consider these nuanced questions?

Thus, although the courts' deferential attitude was useful at a first stage, where the priority was to base burden-sharing measures on firm footing in terms of policy, i.e. as something not *per se* contrary to fundamental rights, this is only a first step. Fundamental rights are not only relevant to establish the ultimate bulwarks that protect individual parties from interference by public authorities' actions. *Their second key function is to establish the justificatory channels that should orient such action*. In this respect, the ECtHR is not well-suited to provide the proper interpretative framework, since it is only competent to hear human rights cases, whereas *the CJEU is competent to hear the fundamental rights angle, but also to examine the substantive statutory law. As such, it is uniquely placed to weave the logic of fundamental rights into the fabric of bank resolution, which is filled with open – textured references, open to cross-fertilization (see art. 31 and 34 BRRD).*

After a series of decisions where the CJEU simply granted burden-sharing a solid legal basis, it may adopt a less accommodating stance on substantive (non-discrimination) and procedural (duty to state reasons, judicial protection) safeguards. Otherwise, it may witness that domestic courts step in to fill the void. As we said above, this is risky in a context where the whole system of EU bank resolution is grounded on the automatic mutual recognition on a cross-border basis (art. 66 BRRD).

Recent experience shows that domestic courts are often reluctant to follow the spirit of the rules and ready to cling to weak arguments to refuse recognition, as in the case of the English commercial court in *Goldman Sachs International v Novo Banco SA* ("*Goldman Sachs v Novo Banco")*, corrected by the Court of Appeal (*Goldman Sachs v Novo Banco,* paras. 24-34) and the Supreme Court,

and the decision of the Munich court in the *Bayern LB v Hypo Alpe Adria ("Hypo Alpe Adria")* case, which was not corrected.

The problem is that if cases make their way up to the Supreme or Constitutional courts and there is truly a difference in treatment, the CJEU might be facing challenging preliminary references (in a best-case scenario) or annulment decisions (in a worst-case one) from several Member States.

In the past the CJEU has been vehement in concluding that EU rules, that are clear in their content and leave no discretion to Member States, cannot be circumvented by referring to national constitutions, but in this scenario the Court might face a storm if it tells national courts that they cannot protect their citizens from violations of due process, or non-discrimination.

3. MREL in the context of bank resolution planning

The above section illustrates what happens whenever the focus of bank resolution falls exclusively on crisis-management: burden-sharing is demanded to avoid moral hazard, the decision to bail-in capital and debt is adopted quickly to avoid spillover effects, maybe leaving out the instruments that could be a source of contagion, which means that a greater burden is shouldered by certain creditors who are "discriminated" and litigation follows with uncertain results.

Having that scenario in mind, is there anything that can be done?

The answer is a certain "yes": one can plan for this eventuality, and make sure that, should the day come, there will be no uncertainty around the bail-in of capital and debt instruments… hence the MREL and similar concepts. We will examine those concepts, and discuss the calculation of MREL, and its difficulties. Then, we will focus on the divergent conceptions that arose in the different EU countries out of a single concept, the EU efforts to further harmonise the matter and the challenges ahead.

Resolution rules include *ex post* tools, such as bail-in, which are deployed once the entity enters a critical stage, but also, and critically, rules that stipulate the need for an *ex ante planning* for the entity's 'recovery' (art. 5-9 BRRD) and 'resolution' (art. 10-18 BRRD). Resolution planning, in particular, means drafting a 'living will', where resolution authorities anticipate relevant obstacles to resolution, arising from the corporate structure (which may be too complex), financial arrangements (e.g. centralised liquidity management, financial derivatives etc.) ask the entity to remove them and devise a clear resolution strategy, including the use of one or more tools. This means that, if bail-in is the chosen tool, as it is for many banking groups, other than a clear corporate structure and operational arrangements, the entity must have a layer of capital and debt instruments to ensure loss absorption and recapitalisation.

Since the idea is to ensure that such loss absorption and recapitalisation (through the writing-off and/or conversion of the capital and debt instruments) is swift and uncontroversial, it would be useful if a consensus emerged about the kind of instruments that may be used, to make them easily identifiable in the market.

On a global level, where the focus is on Global Systemically Important Financial Institutions (G-SIIBs), the key concept is the Total Loss-Absorbency & Capitalization (TLAC), used by the Financial Stability Board (FSB) in its Term Sheet.

At an EU-level, the key concept is MREL, which applies to all banks (art. 45 and recital (80) BRRD). With the BRRD2 and CRR2 amendments, however, MREL is differently calibrated. ForTLAC requirement applies and the MREL framework is adapted accordingly. In turn, subordination requirements are differently imposed upon two groups of banks: G-SIIs, top-tier banks and other banks chosen by the competent resolution authority as likely to pose systemic risk (collectively Pillar 1 banks) are subject to a non-adjustable Pillar 1 MREL requirements (higher for G-SIIs, lower and identical for top-tier and other selected banks), that must be met with own funds instruments and eligible liabilities subordinated to all claims arising from excluded liabilities. They must concurrently ensure that the subordinated MREL resources are equal to at least 8% of total liabilities and own funds (TLOF), unless otherwise authorised by the competent resolution authority subject to conditions. All other banks shall be subject to a Pillar 2 discretionary subordination requirement only upon decision of the resolution authority to avoid the breach of the no-creditor-worse-off (NCWO) principle, following a bank-specific assessment carried out as part of resolution planning. Such a discretionary Pillar 2 may also be imposed on selected Pillar 1 banks, on top of the Pillar 1 requirements, if their resolution strategy shows unaddressed impediments to resolvability or is not credible enough. Calibration is further adapted by BRRD2, by introducing a MREL requirement based on the leverage ratio to complement the already existing risk-based MREL expressed as a percentage of the total risk exposure amount. Furthermore, the recapitalisation amount may be adjusted upwards and downwards to ensure, for instance, a market confidence charge.

Despite all these technical complexities (at the implementation level), the basic idea of MREL is simple and it is to use eligible debt and equity to absorb losses and recapitalise the bank: part of the instruments would be written off to absorb losses, and then the rest would be converted into equity to ensure that the levels of equity enable the entity to continue critical functions without taxpayer support, or, specifically in the case of MREL, that the level of Core Equity Tier 1 (CET1) left after the conversion is compliant with prudential rules (art. 45(6) BRRD).

Despite their common conceptual core, TLAC and MREL offer some differences, such as:

(i) *Scope of application.* TLAC applies to G-SIIBs, MREL to all banks.

(ii) *Uniformity.* TLAC is a single common requirement (it assumes bail-in as a resolution strategy). MREL is calculated on a case-by-case basis, considering the institution's risk profile and resolution strategy, among other things (art. 45(6) BRRD). Thus, a low-risk bank should need less MREL, a bank whose resolution strategy is liquidation would need very little. Since MREL levels need to ensure a compliant CET1, and this is a risk–weighted ratio, MREL levels will vary. Moreover, the calculation of MREL must take into account the size, business model, funding model and risk profile of the institution, the potential contribution of the Deposit Guarantee Scheme and the adverse impact of the institution's failure on financial stability.

(iii) *Calculation.* There are some differences in the eligibility of debt, since TLAC-eligible debt has to be subordinated to non-TLAC, whereas MREL has not (which affects the numerator); and in the assets to calculate the requirement, since TLAC uses risk-weighted assets (RWAs) and the assets used to comply with the leverage ratio (TLAC levels are calculated with reference to both), whereas MREL uses total liabilities and own funds as a reference (art. 45(1) BRRD). However this difference was partially overcome by BRRD2 with the introduction of the new Pillar 1 MREL requirements for the Pillar 1 group of banks.

(iv) *Relationship with prudential requirements.* TLAC is integrated with prudential requirements, whereas MREL enjoys separate treatment under the resolution framework (FSB, 2015), which also means a potential for developing different interpretative criteria for difficult cases.

(v) *The relative size of the debt and equity amounts used to comply with the requirement.* Debt is 'expected' to be at least 33% of TLAC (FSB, 2015), whereas there is no minimum expectation in the case of MREL, which can be complied with fully with equity.

The potential frictions and misalignments led to review MREL rules and adopt new ones at an EU level, to ensure that the TLAC standard was complied with.[3]

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[3] Council *Conclusions on a roadmap to complete the Banking Union* 17 June 2016 no. 7 (a) highlighted the amendments to implement TLAC standard and reviewing the minimum requirement for own funds and eligible liabilities (MREL)'. See EU Commission Proposal for a Directive amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC. Brussels, 23.11.2016 COM(2016) 852 final 2016/0362 (COD).

The key consequence of TLAC/MREL is that *not all bail-in eligible liabilities will be TLAC/MREL-eligible*. Bail-in can be disruptive if used over 'operational' liabilities, such as those resulting from funding, liquidity, or hedging (e.g. derivatives) arrangements.

Thus, TLAC/MREL rules try to ensure that only 'clean' liabilities are used to plan for the entity's resolution, through several requirements.

(a) First, the rules include a list of criteria that the instruments have to comply with to be eligible: (i) They have to be fully paid-up. (ii) They have to be unsecured. (iii) They cannot be subject to set-off/netting. (iv) They must have 1-year remaining maturity. (v) They cannot be redeemable. (vi) They cannot be directly or indirectly funded by the resolution entity or related party.

(b) Second, the rules introduce a list of excluded liabilities, which includes deposits, derivatives, non-contractual liabilities (including taxes) preferred liabilities (including secured liabilities) and other bail-in-excluded liabilities.

A final consideration is that the TLAC standard expressly provides for the possibility to rely on different subordination mechanisms to comply with it (FSB, 2015).

These are: (i) 'contractual subordination', whereby the specific debt instrument indicates that it is subordinated, in case of insolvency or resolution, to instruments of ordinary debt; (ii) 'statutory subordination', i.e. ear-marking debt that is junior in the insolvency ranking; (iii) 'structural subordination', i.e. creating a group structure where (operating) subsidiaries hang from a 'clean' holding company, which has no major liabilities other than capital and debt instruments that are issued for purposes of bail-in, which means that there will be no frictions arising from the relationship between bail-in eligible liabilities and other liabilities.

TLAC rules, being a semi-prudential standard, try to ensure a seamless transition between the instruments that form part of the Basel Framework and those that will be used in resolution to ensure a continuity of compliance. MREL rules, being anchored in the resolution framework, are less explicit.

Finally, EU rules make no room for the allocation of capital and debt across banking groups (so called pre-positioning). MREL rules stipulate a calculation of requirements both at consolidated and individual level, but there is little in the rules about a smart allocation of instruments across the group to ensure that losses are absorbed and entities recapitalised as they should, and that there are no bottlenecks.

This lack of specification can constitute a source of interpretative difficulties. This was also witnessed by the first decision on a MREL determination adopted by the SRB Appeal Panel (case 8/2018), where the crux of the problem revolved around a MREL determination below the 8% 'total liabilities including own

funds' (TLOF). The concern raised in that case was that, lacking an *ex ante* ammunition of MREL liabilities sufficient to reach the 8 % TLOF, there could be a risk that, even if necessary, at the point of non-viability, the resolution could not rely on any contribution of the SRF, because, as provided for in Article 44(4) and 44(5) BRRD, the fund contribution can occur only when:

> a contribution to loss absorption and recapitalisation equal to an amount of not less than 8% of the total liabilities, including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in Article 36, has been made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other eligible liabilities through write down, conversion or otherwise.

However, the Appeal Panel held that the 8% TLOF threshold can be reached not only via MREL instruments but also through other bail-in eligible liabilities, even if they do not qualify as MREL, provided that these additional bail-in eligible liabilities were not excluded from bail-in. This proved to be the case, in that appeal, with regard to not-covered and not-preferred deposits.

In turn, the Appeal Panel considered that, in the MREL determination, a case-by-case and proportionate approach must be adopted. Specifically, it was held that the principle of proportionality must guide in properly calibrating the MREL requirement to ensure that the MREL target of the relevant credit institution (measured against its risk weighted assets) compares in a balanced way with the average national banks and the average Banking Union banks, and is duly calibrated to the bank's size, business model and risk profile.

To back-test this, the Appeal Panel decision considered that:

> A possible scenario that would in fact make the MREL determination adopted with the Appealed Decision insufficient, would be an increase of risk-weighted assets (hereinafter "RWA") by 45% which uses as reference the 2014 EBA stress tests. The Board stressed, however, that this is a quite unlikely assumption in the current circumstances and that in the 2016 EBA stress tests the average increase of RWA in the adverse scenario was 10% and for the [other] participating G-SIIs was below 20%. (...) The Appeal Panel further points out that the Board has appropriately shown that the MREL calibration in the present case is consistent with the O-SII buffer set for the same Relevant Credit Institution (0.75% of RWA) as set by the competent macro-prudential authority on the basis of the systemic risk posed by the Relevant Credit Institution and for which there are no indications by the same authority that it has to be increased. The Board further clarifies that in the calculation of the MREL requirement for the Relevant Credit Institution both the O-SII and other

> macro-prudential measures are automatically included. In this context, based upon the elements brought to its attention, the Appeal Panel holds that there are no reasons to reject the Board's argument that, in such circumstances, an increase of MREL to 8% of TLOF would most likely imply a disproportionate approach vis-à-vis peers active in the [same national] market but also in the Banking Union and could possibly have unintended consequences of serious distortion of the competitive level playing field.

This shows that, albeit MREL rules provide a clear method for the calculation of eligible capital and debt levels, these rules are also open for interpretation on some relevant aspects. This can be a source of tension between the entity and the resolution authority, as well as among the resolution authorities themselves. It is no surprise that in 2019 the BRRD2, also in response of this finding of the AP, introduced for Pillar 1 banks the additional requirement establishing that, as noted above, subordinated MREL resources shall be equal to at least 8% of total liabilities and own funds (TLOF), unless otherwise authorised by the competent resolution authority subject to conditions.

Furthermore, different countries may have chosen different strategies to ensure compliance with MREL. In the following pages, we will illustrate, first, how, in an initial stage, the open-textured nature of MREL rules provided room for divergent approaches, and how the EU legislators had to step in again, to further harmonise the rules.

The basic idea underpinning MREL is simple: to ensure that bail-in is easier to execute. Yet, this imposes a burden on banks, which, when we transcend the scope of G-SIIBs (which MREL does) can result in an unpalatable choice between (a) closing shop or being acquired by a larger rival; or (b) using whatever strategy is available to comply with MREL that does not involve issuing new amounts of equity and debt. It is not surprising that, once banks (or whole banking sectors) find themselves in this conundrum, their plight will be taken up by their Member State as its own and translated into a specific MREL-compliance strategy.

In the initial stages of BRRD-SRM, this is what Member States did, using the openness of the rules.

Germany and Italy, for example, followed a strategy of *statutory subordination*, which consisted in amending the *insolvency ranking* of *existing* debt instruments. Germany's amended rules provided that, in case of insolvency, senior unsecured bonds and similar debt instruments would be subordinated to every other senior instruments (including "operational" liabilities, which constituted the main concern) (Section § 46f (5) *et seq.* German Banking Act, "*Kreditwesengesetz"*). Italy chose the opposite way, and gave preferential status to *all* bank deposits, including large corporate deposits and interbank deposits (modifications to art. 91 Leg. Decree No. 385/1993), and thus a statutory *privilege*, rather than subordination strategy.

The advantage of this approach is that German/Italian banks could comply with MREL with their long-term non-operational debt without issuing new debt. The ECB concluded that German rules made senior debt TLAC/MREL compliant, but ineligible for ECB operations (CON/2015/31), and was more cautious about TLAC-eligibility of Italian banks' senior debt, because some operational liabilities, such as derivatives, would still rank *pari passu* with senior unsecured bank debt (CON/2015/35), which meant that (i) they could be bailed-in simultaneously with bank bonds, thus wreaking havoc in the market, or (ii) they could be excluded on an *ad hoc* basis using resolution authorities' powers, thus opening the possibility of a challenge based on discriminatory treatment.

Interestingly, since both countries chose to amend their *insolvency* law, they introduced a relative harm to some ordinary creditors without having to compensate them, i.e. due to the NCWO principle, which states that creditors have to be compensated if they are treated worse than under insolvency rules (CON/2015/31). Still, by affecting existing rights, these measures could be challenged as a retroactive interference with property. In the case of Italy there would be less grounds, since the rules privilege certain types of liabilities, rather than harming others. German rules, on the other hand, blatantly subordinated ordinary liabilities. Yet, in this case the argument is that, by interfering with an ongoing process, the rules would not be a case of strict retroactivity (*echte Rückwirkung)*, but of 'not real retroactivity' (*unechte Rückwirkung*) and would be backed by German Supreme Court's case law, which, in 2014, accepted the statutory introduction of collective action clauses (CACs) in outstanding bonds.

The strategy differed in Spain and France, who introduced a new type of 'Tier 3 debt', which, upon resolution, would be senior to Tier 2 debt, but junior to other senior debt (e.g. art. L 613-30-3 French Financial and Monetary Code; Additional Provision 14th, Spanish Act 11/2015), such as derivatives, non-covered deposits, and other operational liabilities. This approach mixes 'contractual subordination', as the debt must include specific contract provisions, and 'statutory subordination', since the actual enforcement is supported by specific statutory provisions on the debt ranking (art. 151 II and III of LOI n° 2016-1691). The advantage of the Tier-3 approaches is their legal certainty and 'fairness', as investors can know their status from the moment they subscribe; its disadvantage is that they are costly (CON/2016/7).

The existence of different national strategies can cause problems in cross-border cases. Imagine the case of an entity issuing bonds under a subordination clause and others under a non-preferred status clause subject to the laws of a Tier-3 country, such as Spain (subordination) or France (non-preferred), but where the entity is subject to the rules of a statutory subordination country, such as Germany or Italy. Should non-preferred bonds be bailed-in before ordinary bonds, despite German law makes no distinction? What would the result be if the applicable insolvency law were France's? Would France treat

subordinated Spanish bonds differently from French Tier-3, despite the fact that they both fulfil the same function, or would they be deemed "equivalent"?

The risk of uncertainty led to further efforts to harmonise the rules on insolvency ranking (Directive 2017/2399, "Directive on Insolvency Hierarchy of Unsecured Debt Instruments"). In addition to the already existing deposit preference, the new rules regulate a new kind of senior debt with 'non-preferred' status and the following conditions: (i) maturity of at least 1 year; (ii) no features typical of derivatives; and (iii) explicit reference in contractual documentation to the insolvency ranking (new art. 108(2) BRRD as drafted by Directive 2017/2399). Following the French approach, the rules introduce a new EU-wide Tier-3 debt which would rank below ordinary unsecured debt and above the CET1, Tier 1 and Tier 2 instruments (new art. 108(2) and (3) BRRD).

This was accompanied by transitional provisions: (i) the rules that ensure the application of insolvency law to debt issued before the entry into force of the new provisions (new art. 108(4) BRRD); (ii) for debt issued under the laws of countries like France, that had already adopted a 'domestic Tier-3 debt', the rules that give this debt the same ranking as 'EU Tier-3 debt' (new art. 108(5) BRRD); and (iii) for debt issued under the laws of countries like Germany or Italy, which split unsecured debt into two or more rankings, or changed the ranking of some instruments in relation to others, the rules that say that those States *may* give the lowest ranking category of ordinary debt the same ranking as 'EU Tier-3 debt' (new art. 108(7) BRRD).

Doubts remain as to what a State may do, or what happens if it does not modify its rules, as well as the interpretative margin left for State authorities, even if the rules are the same.

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EU Legal references: Recitals 79 and 80 and Article 45 BRRD; Recitals 83 and 84 and Article 12 SRMR; Directive (EU) 2017/2399 of the European Parliament and of the Council of 12 December 2017 amending Directive 2014/59/EU as regards the ranking of unsecured debt instruments in insolvency hierarchy.

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Chapter VIII.C

Case-study: the compulsory administrative liquidation of Banca Popolare di Vicenza and Veneto Banca

Cristiano Martinez

Summary: *1. The procedure: triggers and features – 2. Selected issues – 2.1. Liquidation and resolution rules – 2.2. Involved dimensions of "public interest"*

1. *The procedure: triggers and features*

In late June 2017, two Italian significant institutions (Banca Popolare di Vicenza and Veneto Banca, jointly the "Veneto SIs"), after being declared failing or likely to fail (FoLtF) by the ECB, were wound up under the Italian law insolvency proceeding for credit institutions,[1] *i.e.* compulsory administrative liquidation. The option of resolution was set aside, since the SRB had not identified a public interest in proceeding in that direction.

As already explained (see **Chapter VIII.A. The SRM: allocation of tasks and powers between the SRB and the NRAs and organisational issues**), resolution applies only when all the following conditions are satisfied:

(i) the entity is FoLtF;

(ii) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures, including measures by an IPS, or supervisory action, including early intervention measures or the write-down or conversion of relevant capital instruments, taken in respect of the entity, would prevent its failure within a reasonable timeframe (so called "no alternative measure" test);

(iii) a resolution action is necessary in the public interest (so called "public interest" test).

On 23 June 2017, the ECB made the FoLtF declaration in respect of the Veneto SIs,[2] identifying that they were breaching certain requirements and had "*no credible options to restore* [their] *capital position*", thus infringing "*the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the competent authority*". Therefore, such institutions were deemed to be failing in the near future pursuant to Article 18(1)(a) and 18(4)(a) of the SRMR.

On the same day, the SRB decided[3] not to place the Veneto SIs under resolution. In particular, the SRB:

(a) *positively* completed the no alternative measure test, also in light of the initiatives previously taken to cope with capital and liquidity difficulties, thus the condition for resolution under Article 18(1)(b) SRMR was satisfied;

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1 In this Chapter "banks" and "credit institutions" are treated as synonyms for ease of reference only. This is without prejudice to applicable differences in meaning.

2 See https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.2017_FOLTF_ITPVI.en.pdf and https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.2017_FOLTF_ITVEN.en.pdf.

3 See https://srb.europa.eu/sites/srbsite/files/srb-ees-2017-12_non-confidential.pdf and https://srb.europa.eu/sites/srbsite/files/srb-ees-2017-11_non-confidential.pdf.

(b) *negatively* fulfilled the public interest test, hence the condition for resolution under Article 18(1)(c) SRMR was not met.

Pursuant to Article 18(5) SRMR, a resolution action is treated as being in the public interest if (i) it is necessary for the achievement of, and is proportionate to one or more of the resolution objectives and (ii) winding up of the credit institution under normal insolvency proceedings would not meet those resolution objectives to the same extent.

The resolution objectives set out under Article 14 SRMR are the following: (a) to ensure the continuity of critical functions; (b) to avoid significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline; (c) to protect public funds by minimising reliance on extraordinary public financial support; (d) to protect depositors covered by Directive 2014/49/EU and investors covered by Directive 97/9/EC; (e) to protect client funds and client assets.

Unless provided for otherwise, such objectives are of equal significance and are to be balanced, as appropriate, to the nature and circumstances of each case.

In the case of the Veneto SIs, the SRB assessed that (see decisions SRB/EES/2017/11 and SRB/EES/2017/12):

(a) such institutions were not providing critical functions whose discontinuation could determine disruptive effects on essential services or the financial stability in Italy, also due to the limited number of clients and the acceptable manner and reasonable time by which said services could be replaced;

(b) their failure, on a standalone basis, was not likely to result in significant adverse effects on financial stability in Italy, because of the ongoing decrease in the business volume, the limited national market share, the relatively low interconnections with other financial institutions and the absence of a predictable significant impact of failure at national level (as opposed, possibly, to regional level);

(c) there was no specific need to protect public funds by minimising reliance on extraordinary public financial support;

(d) the Italian compulsory administrative liquidation of the Veneto SIs could protect depositors covered by Directive 2014/49/EU, investors covered by Directive 97/9/EC, clients' funds and assets essentially to the same extent as resolution, through (as the case may be) a transfer of assets/liabilities, DGS guarantee and/or ring-fencing.

The SRB's decisions were addressed to the Italian NRA (the Banca d'Italia) "*in order* [for the same] *to take all the necessary measures for* [their] *implementation*".

In light of the SRB's assessment, the conditions for compulsory administrative liquidation under Italian law were satisfied.

Given the extreme urgency to place the Veneto SIs under liquidation by means of an orderly process and within a very slim timeframe (*i.e.* a week-end), special law provisions were enacted on 25 June 2017 (Law Decree No. 99/2017 subsequently converted into Law No. 121/2017).

The Law Decree considered that, absent such special rules, the liquidation of the Veneto SIs would affect the value of their businesses, causing severe losses for unsecured creditors, sudden crunch of corporate and household credit and repercussions on production, employment and social environment. Such measures were specifically aimed at preventing a serious disturbance in the economy of the reference geographical area of said institutions.

In broad terms, the envisaged liquidation structure[4] contemplated, after temporary continuation of operations, the transfer of part of the institutions' businesses to a purchaser to be selected by means of a competitive procedure. Such transfer would not include, *inter alia*, certain liabilities (*e.g.* eligible capital instruments) and would be followed by a due diligence. Based on the outcome of the due diligence, the purchaser could also sell some (*e.g.* highly risky) assets back to the Veneto SIs. Non-performing loans and certain non-transferred assets would be subsequently assigned by the Veneto SIs to an asset management company (Società per la Gestione di Attivita' - S.G.A. S.p.A.).

The Law Decree also derogated from a number of law provisions in order to facilitate the consummation of the transactions under the designed procedure. Furthermore, it envisaged the granting of State aid to be authorised by the European Commission to support the fulfilment of the procedure and mitigate the effects of the institutions' exit from the market.

On 24 June 2017, the Italian State notified the European Commission of its plan to grant State aid to wind the Veneto SIs down (so called "liquidation aid") and requested the relevant authorisation under Article 107(3)(b) TFEU and the Commission's communication on State aid rules, supporting measures to banks during the financial crisis (2013/C 216/01, so called "2013 Banking communication").

[4] For further details see https://www.bancaditalia.it/media/notizie/2017/Nota-Venetobanca-e-BPV.pdf.

Article 107(3)(b) of the Treaty exceptionally allows for State aid to remedy a serious disturbance in the economy of an EU Member State. The 2013 Banking communication was adopted on that legal basis before and in contemplation of the start of the SRM.

The liquidation aid is allowed under the 2013 Banking communication since EU "Member States should encourage the exit of non-viable players [from the market], while allowing for the exit process to take place in an orderly manner so as to preserve financial stability" (§ 65). However, liquidation aid is subject to certain conditions, among which the most important is the so called "burden sharing": "In cases where the bank no longer meets the minimum regulatory capital requirements, subordinated debt must be converted or written down, in principle before State aid is granted. State aid must not be granted before equity, hybrid capital and subordinated debt have fully contributed to offset any losses" (§ 44).

Pursuant to Article 3.1(a) of Law Decree No. 99/2017 the necessary burden sharing was ensured through the provision that the capital items and instruments under Article 48(1)(a)(b)(c)(d) BRRD issued by the Veneto SIs would not be transferred to the identified purchaser, *i.e.*: Common Equity Tier 1 items, Additional Tier 1 instruments, Tier 2 instruments and subordinated debt that is not Additional Tier 1 or Tier 2 capital. As a consequence, the relevant holders would bear such institutions' losses in accordance with the claims hierarchy in liquidation.

Meanwhile, at the end of a competitive procedure, Intesa Sanpaolo S.p.A., an Italian significant institution, was selected as the purchaser of the Veneto SIs' assets to be transferred.

On 25 June 2017, the European Commission approved the Italian aid measures.[5]

In particular, the Commission pointed out that "Italy considers that State aid is necessary to avoid an economic disturbance in the Veneto region as a result of the liquidation of BPVI and Veneto Banca, who are exiting the market after a long period of serious financial difficulties. The Commission decision allows Italy to take measures to facilitate the liquidation of the two banks: Italy will support the sale and integration of some activities and the transfer of employees to Intesa Sanpaolo. Shareholders and junior creditors have fully contributed, reducing the costs to the Italian State, whilst depositors remain fully protected."

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[5] See http://europa.eu/rapid/press-release_IP-17-1791_en.htm

Banca d'Italia proposed to the Ministry of Economy and Finance to wind the Veneto SIs up under compulsory administrative liquidation. This was approved through decrees No. 185, 186 and 187 of 25 June 2017.

Such ministerial decrees determined, *inter alia*, the immediate start of the liquidation procedure and the inherent formalities in accordance with the designed structure, the temporary continuation of the business until the transfer of some assets from the Veneto SIs to Intesa Sanpaolo and further terms and conditions for such transfer and for the access to the liquidation aid.

The Veneto SIs and Intesa Sanpaolo entered into the sale and purchase agreement of part of the businesses on 26 June 2017. The transfer was simultaneously performed.

Then, upon a proposal of Banca d'Italia, on 19 July 2017, the ECB withdrew the banking licenses of the Veneto SIs pursuant to Article 18(c)(d)(e) of CRD IV and Article 14 of the Italian Consolidated Banking Law.

On 22 February 2018, by implementation of Law Decree No. 99/2017, the Ministry of Economy and Finance supplemented the legal environment for the assignment to (ring-fenced asset compartments of) SGA S.p.A. of certain assets of the Veneto SIs, notably non-performing loans and high-risk credits. The assignment occurred in multiple tranches in the course of the following months.

SGA S.p.A. is held to pay the Veneto SIs the consideration for the assignment as a function of any amount collected from time to time under the assigned assets.

The procedure is still ongoing.

2. *Selected issues*

The case of the Veneto SIs solicits at least the following observations.

2.1. *Liquidation and resolution rules*

The interaction between resolution and "*normal insolvency proceedings*" (like the compulsory administrative liquidation) is not entirely smooth. Although such proceedings share harmonised rules on triggers (*i.e.* FoLtF test, no alternative measure test, public interest test),[6]

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[6] For the sake of completeness the triggers for compulsory administrative liquidation under the Italian Consolidated Banking Law exceed in number the triggers for resolution.

they are not conducted under fully harmonised EU procedural rules.[7]

Harmonisation only relates to resolution. Procedural rules for insolvency proceedings may differ significantly across Member States.

This means that, so far, the European legislator has considered harmonisation of rules (*i.e.* resolution) to be necessary only to the extent that the objectives at stake in the context of bank crisis management could be jeopardised. Such objectives (*i.e.* the "resolution" objectives) are summarised in the formula of "public interest".

To the extent that there is no such a risk of jeopardy, crisis management rule fragmentation has not represented an issue *per se* for the European legislator so far.

More in detail, it is worth noting that the selection criterion between resolution and normal insolvency proceedings is spelled out under recitals 45 and 46 of the BRRD (similarly, recitals 58 and 59 of the SRMR): "[a] failing institution should in principle be liquidated under normal insolvency proceedings" (recital 45) and "[t]he winding up of a failing institution through normal insolvency proceedings should always be considered before resolution tools are applied" (recital 46); "[h]owever, liquidation under normal insolvency proceedings might jeopardise financial stability, interrupt the provision of critical functions, and affect the protection of depositors. In such a case it is highly likely that there would be a public interest in placing the institution under resolution and applying resolution tools rather than resorting to normal insolvency proceedings" (recital 45).

A clear preference is expressed by the European legislator in favour of normal insolvency proceedings, which are governed by national non-harmonised legal frameworks. Such liquidation rules, in certain countries, coincide with the national insolvency provisions applicable to all companies, while, in other countries, they are designed for banks only. Italian law contemplates special

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[7] Along these lines, see Report from the Commission to the European Parliament and the Council on the application and review of Directive 2014/59/EU (Bank Recovery and Resolution Directive) and Regulation 806/2014 (Single Resolution Mechanism Regulation) of 30 April 2019, available at http://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-213-F1-EN-MAIN-PART-1.PDF. In particular: "The resolution regime constitutes a "carve-out" from general insolvency proceedings applicable under national laws"; "[a]t present, national insolvency laws applicable to failing banks are largely not harmonised, and the application of the insolvency rules at national level vary between Member States"; "[t]he differences between insolvency regimes across the Banking Union may be a source of challenges and complexity for the resolution authority". For these reasons, the European Commission "launched a study to get a better understanding of these issues. The aim of the study will be to provide a basis for the analysis of divergences in the insolvency frameworks for banks under different national laws and to assess the interactions between these frameworks and the resolution rules. *The study should also identify potential policy options for harmonisation, including the possible introduction of administrative liquidation proceedings in the EU"*. In this token, see also a recent proposal described in Banca d'Italia, *Towards a framework for orderly liquidation of banks in the EU, Notes on Financial Stability and Supervision*, No. 15, August 2019, by A. De Aldisio, G. Aloia, A. Bentivegna, A. Gagliano, E. Giorgiantonio, C. Lanfranchi and M. Maltese.

rules for banks (and other financial sector institutions) which means that they shall be wound up under compulsory administrative liquidation.

Compulsory administrative liquidation therefore remains under a purely national dimension that is not regulated by the BRRD/SRMR. Such liquidation procedure, *inter alia*, allows the NRA-appointed liquidation trustees to use a high degree of discretion in choosing the appropriate tools, actions, etc. The trustees must only maximise the liquidation proceeds and minimise risks. They are compelled to treat creditors fairly and to respect claim hierarchy and priority (Article 90, Paragraphs 2 and 3, and Article 91, Paragraph 11, of the Consolidated Banking Law).

In principle, liquidation actions and tools could even coincide with one or more resolution actions and tools, as was the case of the Veneto SIs[8]: indeed the liquidation structure comprised the sale of business to Intesa Sanpaolo and a transfer of non-performing assets to the asset management company SGA S.p.A.

Such potential overlap of tools and actions between normal liquidation and resolution should not, however, come as a surprise: firstly both procedures target the same objectives, secondly the first choice should be liquidation, except for when it is not appropriate to achieve the aforesaid goals.

In the case of the Veneto SIs, the SRB ruled the public interest for resolution out, substantially because it deemed that, in light of the existing circumstances, risks and Veneto SIs' business model, the compulsory administrative liquidation would serve the "resolution" purposes to the same extent as the resolution.

In this connection it is important to note that, once the SRB had made its assessment on (the absence of) public interest for resolution, the NRA could not reassess it. That is why the NRA's proposal to start the compulsory administrative liquidation of the Veneto SIs was the only possible way forward.

In conclusion, the case of the Veneto SIs shows that the choice between normal insolvency proceedings and resolution under the public interest test must be made, *inter alia*:

- by comparing the tools and actions provided by the BRRD/SRMR and national law, respectively, for resolution and normal insolvency proceedings applicable to credit institutions;
- in light of the degree to which such tools and actions may achieve the "resolution" objectives;
- in accordance with the pecking order legally provided (i.e. liquidation first, unless non-appropriate for the "resolution" objectives).

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[8] See Banca d'Italia, Banca d'Italia, *Towards a framework for orderly liquidation of banks in the EU, Notes on Financial Stability and Supervision,* No. 15, August 2019, § 2 and 3.2 relating to the consummation of so called 'purchase and assumption (P&A) transactions' in the context of liquidation, either in favour of an existing purchaser (sale of business) or of a newly incorporated vehicle (bridge bank).

2.2. Involved dimensions of "public interest"

In the case at hand, it may be observed that three dimensions of the "public interest" came at stake.

The first one, as said, was assessed by the SRB through the public interest test for resolution. The second one was considered by the European Commission when it decided whether to authorise the liquidation aid (even though the 2013 Banking communication does not literally refer to a "*public interest*"). The third one is structurally inherent to the compulsory administrative liquidation for banks.

It is helpful to start from the last one: the Italian legislator has generally identified a public interest in the management of bank crises. This is related to the specific business run by banks and its potentially crucial economic, financial and social impact. As a consequence, the insolvency proceeding designed for such companies deviates from ordinary insolvency proceedings for enterprises in a number of aspects. In this view, it is fair to say that compulsory administrative liquidation always reflects the consideration by the legislator of a public interest in the smooth and orderly management of bank crises, maximising collection of proceeds and minimising risks. Furthermore, it is fair to say that a public interest is present in every procedure aimed at solving a bank crisis, be it a national insolvency proceeding for banks or a resolution procedure.

The public interest for resolution, instead, is placed in a different perspective, as it only points to the "resolution" objectives: to ensure the continuity of critical functions; to avoid a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline; to protect public funds by minimising reliance on extraordinary public financial support; to protect depositors covered by Directive 2014/49/EU and investors covered by Directive 97/9/EC; to protect client funds and client assets.

In this view, the public interest for resolution is to be evaluated through the prism of the resolution objectives set out under the BRRD/SRMR. The following must be considered against those objectives: (i) whether the resolution action is necessary and proportionate to achieve them (in whole or in part) and (ii) whether the national insolvency proceedings for banks is not an eligible substitute for resolution action, in terms of achievement of those resolution objectives. The public interest for resolution only arises when in a given case of resolution, as designed by the authority, resolution is required to ensure the resolution objectives and may not be adequately replaced by a liquidation procedure.

In other terms, the public interest for resolution is specific to a given case (a given bank, given circumstances, one or more envisaged resolution actions and tools); the public interest underlying the compulsory administrative liquidation is of a general nature and emerges from the mere fact that a bank crisis must be coped with. This means that even when the specific public interest for resolution is excluded by the resolution authority, the aforesaid general public interest is nevertheless unquestionable.

Finally, in the case of the Veneto SIs, a third dimension of public interest relates to the State aid that was provided in the context of the compulsory administrative liquidation. State aid is not a necessary element of all liquidation procedures, hence this perspective of public interest only needs to be assessed in the cases where State aid is specifically contemplated.

The State aid was granted in accordance with the 2013 Banking communication. Such communication sets out the conditions where public support in favour of the financial sector might be considered by the European Commission to be compatible with the internal market under Article 107(3)(b) of the Treaty on the functioning of the European Union, *i.e.*: when aid is granted "to remedy a serious disturbance in the economy of a Member State".

The 2013 Banking communication clearly states (§ 7) that financial stability is an "overarching objective", thus it is important to maintain "as a safety net, the possibility for Member States to grant crisis-related support measures". As to the liquidation aid, the communication points out that such form of support is aimed at accompanying "the exit of non-viable players, while allowing for the exit process to take place in an orderly manner so as to preserve financial stability" (§ 65).

The relation between financial stability and failure of banks is clarified in the following terms (§ 25): "Credit institutions exhibit a high degree of interconnectedness in that the disorderly failure of one credit institution can have a strong negative effect on the financial system as a whole. Credit institutions are susceptible to sudden collapses of confidence that can have serious consequences for their liquidity and solvency. The distress of a single complex institution may lead to systemic stress in the financial sector, which in turn can also have a strong negative impact on the economy as a whole, for example through the role of credit institutions in lending to the real economy, and might thus endanger financial stability".

Therefore, the public interest relevant to the liquidation aid relates to the public interest for the stability of the financial system, that *might* be endangered by a bank's disorderly failure. In this respect, it is quite evident that there is a connection between such public interest and the "resolution" objectives: indeed, the public interest for State aid assumes, at least indirectly and in part, the potential threats that "resolution" objectives also try to address (*e.g.* interruption of critical functions and contagion to the financial system).

In such a perspective, both the assessment of the public interest for liquidation aid and the assessment of the public interest for resolution would consider similar risks stemming from bank failure.

However, the respective dimensions of public interest remain separate. In the case of the public interest for resolution, such risks are considered *for the specific purpose* of verifying whether resolution is necessary and proportionate to manage them and whether liquidation could be equivalent to resolution in this view. The analysis of public interest for State aid instead considers *whether those risks are such* that they can generate a serious disturbance in the economy of a Member State and, if so, public support is justified.

The 2013 Banking communication does not imply that the system is *always* endangered by bank failures *to a degree* that makes State aid necessary: otherwise the European Commission would not reserve its discretion in considering State aid compatible with the Treaty on a case by case basis. Not all bank failures require and justify state aid.

In the case of the Veneto SIs, however, the interaction between the European Commission's assessment for State aid purposes and the SRB's assessment for resolution shows some interesting elements.

The Commission endorsed the granting of liquidation aid, assuming a risk of economic disturbance in Italy. According to the 2013 Banking communication it is fair to infer, although it was not declared by the Commission, that, in the case at hand, the Commission identified a non-negligible risk of repercussions of the Veneto SIs' failure on the financial system (namely, in the Veneto region) due to the dimension and interconnectedness of the business and functions performed by such banks.

The SRB excluded the need for resolution also based on an alleged absence of significant adverse effects to the financial stability in Italy and of critical functions whose discontinuation could have disruptive effects in Italy. Here the SRB seems to have a view divergent from the one of the European Commission.

How should such apparent inconsistency be considered?

In terms of process, it is useful to note that the applicable legal framework does not provide for a specific form of coordination between the European Commission and the SRB with regard to their respective assessments. Therefore, it seems that in principle the Commission may well have a view that does not entirely coincide with the SRB's stance.

All in all, as explained, such assessments serve two different purposes, thus in principle they would not strictly require procedural coordination. At the same time, it is noteworthy that the 2013 Banking communication was adopted in contemplation of the establishment of the SRM, thus fine tuning of the procedural rules under such communication could be appropriate to enhance its alignment with the functioning of the SRM.

Besides, a need for coordination could arise not only from a procedural standpoint, but also with regards to the specific merits of the two assessments.

It is superfluous to reiterate that the liquidation aid may only be granted when a bank is liquidated. It is also true that the SRB's assessment determines whether a bank should be resolved or *liquidated* and, only in the latter case, *liquidation* aid comes into play.

In the context of the SRM, as seen, the liquidation option is followed when resolution is discarded on the grounds that liquidation can ensure the achievement of the applicable "resolution" objectives (one or more) at least to the same extent as resolution.

Only once the path of liquidation is chosen, the European Commission may authorise such aid in the face of a serious disturbance to the economy of a Member State as a consequence of a bank's failure. Said situation would likely presuppose that the bank concerned has a material size in terms of assets, business, operations, connections, etc.

As a first step, the SRB will obviously consider *how* to adequately pursue such objectives *by reference to the specific condition and features* of the bank that is FoLtF.

In the case of the Veneto SIs, *in relation to the continuity of critical functions and the avoidance of significant adverse effects on financial stability* (*i.e.* two of the resolution objectives), the SRB excluded a potential disruption or a significant adverse effect of such banks' failure on essential services or the financial stability in Italy. *In relation to the other resolution objectives* the SRB considered that liquidation was equivalent to resolution.

Liquidation was then selected as the applicable path. Liquidation aid was envisaged. The European Commission authorised it also taking into account that "Italy considers that State aid is necessary to avoid an economic disturbance in the Veneto region as a result of the liquidation of BPVI and Veneto Banca".

A risk of disruption or significant adverse effect in Italy was ruled out at SRB's level. After that, a risk of economic disturbance in the Veneto region of Italy was instead identified at the European Commission's level. This might create the impression that the two assessments are somehow contradictory.

This impression can be hardly removed altogether, but it can be mitigated based on the following observations.

Neither the SRB nor the European Commission excluded that the Veneto SIs' failure could cause *a* disruption, significant adverse effect or serious disturbance. This remark indirectly calls again into consideration the public interest rationale for which compulsory administrative liquidation was designed by the Italian legislator (as explained above in this paragraph 2.2): any bank failure entails the need for its smooth and orderly management in the public interest.

A risk of contagion, disruption and threat to the financial stability thus always exists. In the case of the Veneto SIs, the SRB and the European Commission only circumscribed it *at a regional level*.

According to the SRB, such a possible mainly regional dimension of the anticipated adverse effects was not a sufficient ground to impose resolution, while it could be adequately addressed through liquidation. According to the European Commission, that possible mainly regional dimension was a sufficient ground to anticipate a serious disturbance to the economy within the territory of a Member State justifying the authorisation of the liquidation aid.

The SRB and the European Commission therefore drew the pertinent conclusions according to the respective responsibilities. In this perspective, the

SRB's and the European Commission's statements are substantially coinciding to a significant extent and reveal not to be openly contradictory.

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EU legal references: Article 107(3)(b) TFEU, Recitals 45 and 46 of the BRRD, Recitals 58 and 59 and Article 18 of the SRMR, Article 18(c)(d)(e) of CRD IV, 2013 Commission's Banking communication (2013/C 216/01).

National legal references: Articles 14 and 80 ff. of the Italian Consolidated Banking Law; Articles 17 and 20 of Legislative Decree No. 180/2015; Law Decree No. 99/2017 converted into Law No. 121/2017.

Other official documents: *Report from the Commission to the European Parliament and the Council on the application and review of Directive 2014/59/EU (Bank Recovery and Resolution Directive) and Regulation 806/2014 (Single Resolution Mechanism Regulation),* 30 April 2019, available at *http://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-213-F1-EN-MAIN-PART-1.PDF*; SRB's decisions SRB/EES/2017/11 and SRB/EES/2017/12 available, in non-confidential versions, at https://srb.europa.eu/sites/srbsite/files/srb-ees-2017-12_non-confidential.pdf and https://srb.europa.eu/sites/srbsite/files/srb-ees-2017-11_non-confidential.pdf; European Commission's decision of 25 June 2017 approving Italian measures to facilitate the liquidation of Banca Popolare di Vicenza S.p.A. and Veneto Banca S.p.A. under national insolvency law (see press release at https://europa.eu/rapid/press-release_IP-17-1791_en.htm); the Italian's Ministry of Economy and Finance decrees No. 185, 186 and 187 of 25 June 2017.

Literature: Asimakopoulos, I.G., The Veneto Banks Resolution: It Shall Be Called 'Liquidation' in *European Company Law,* 2018, Vol. 15, no. 5, p. 156 ff.; Banca d'Italia, *Towards a framework for orderly liquidation of banks in the EU, Notes on Financial Stability and Supervision*, No. 15, August 2019, by A. De Aldisio, G. Aloia, A. Bentivegna, A. Gagliano, E. Giorgiantonio, C. Lanfranchi and M. Maltese; Bodellini, M., Greek and Italian 'Lessons'on Bank Restructuring: Is Precautionary Recapitalisation the Way Forward? in *Cambridge Yearbook of European Legal Studies*, Volume 19, December 2017, pp. 144 ff.; Capolino, O., The Single Resolution Mechanism: Authorities and Proceedings in *The Palgrave Handbook of European Banking Union Law* (edited by M. P. Chiti and V. Santoro), 2019, p. 247 ff.; Clarich, M., La disciplina del settore bancario in Italia: dalla legge bancaria del 1936 all'Unione bancaria europea in *Giurisprudenza commerciale*, 2019, 1, p. 32 ff.; Giulietti, W., Tecnica e politica nelle decisioni amministrative "composte" in *Diritto amministrativo*, 2017, 2, p. 327 ff.; Grünewald, S., Legal challenges of bail-in in *ECB Legal Conference 2017, Shaping a new legal order for Europe: a tale of crises and opportunities*, p. 287 ff.; Lener, R., Profili problematici delle nuove regole europee sulla gestione delle crisi bancarie in *Banca impresa societá*, 2018, 1, p. 13 ff.; Merler, S., *Critical functions and public interest in banking services: Need for clarification?*, study of the Economic Governance Support Unit for the ECON committee of the European Parliament, November 2017, available at *http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614479/IPOL_IDA(2017)614479_EN.pdf*; Posada Rodríguez, M., Los denominados procedimientos comunes en el marco del Mecanismo Unico de Supervisión, in *Cuestiones controvertidas de la regulación bancaria*, edited by José Carlos González Vázquez, J.C. and Colino Mediavilla, J.L., Madrid, 2018, pp. 91 ff..; Santa Maria, L. and Mazzocchi, F., Rights and remedies of credit institutions and investors in the Banking Union (supervision and resolution) in *Diritto del commercio internazionale*, 2018, 4, p. 845 ff..

Chapter VIII.D

State Aid Control in the Banking Sector and the Single Resolution Mechanism

Andrea Vignini

Summary: *1. Introduction – 2. State Aid Regulation in the Banking Sector: a pre-crisis assessment – 3. The European Commission and the financial crisis: the primacy of economic stability – 4. The Commission's Banking Communication (2013) – 5. The CJEU Judgment in Kotnik and the relation between the Banking Communication and the new BRRD and SRMR – 6. Government financial stabilization tools ('GFSTs') in the SRM – 7. The role of DGS in managing banking crises – 8. Case-study: Judgment of the General Court T-98/16 Tercas Italian Republic and Others v European Commission*

1. *Introduction*

The global financial crisis left an unprecedented mark on the European social, economic and institutional system, causing a dramatic employment crisis and challenging the fragile European governance. In a context of political decision-making uncertainty at a supranational level, with a resurgence of a strong intergovernmental approach in the crisis management by the EU leaders, the European Commission (EC) emerged along with the European Central Bank as the only European institution capable of defending the interests of the whole European Union and safeguarding the cohesion of the continent.

Before the introduction of the European Banking Union, the EU was in lack of a centralised system to manage banking crises. Thus, until the Great Recession, the EU framework has been characterised by a two-faceted system to control public support to the banking sector, relying, on the one hand, on the aid granted by Member States (MSs) in favour of their national champions and, on the other hand, on the European Commission exercising its duties on State Aid control and enforcement on MSs' interventions. The financial emergency stressed this consolidated model, pushing the EC to develop new criteria to coordinate the trillions of liquidity and guarantees provided by the MSs to sustain their national banking sectors, in order to prevent the collapse of the continent's economy.

2. *State Aid Regulation in the Banking Sector: a pre-crisis assessment*

For decades, the European Economic Community has avoided the application of competition rules in the regulation of the banking sector. A slight change in the approach of EU institutions towards banking competition came in the '70s, after the creation of the European Monetary System, when the European Commission started to consider as necessary the extension of the competition control over some specific banking activities.[1] However, it was only in 1981 that the Court of Justice of the European Union (CJEU), in denying the nature of 'enterprise charged with the management of services of general economic interest' of the German bank *Zuechner*,[2] allowed the application of Articles 85 and 86 of the EEC Treaty (TEEC) to the banking firms, paving the way to the enforcement of competition rules on credit institutions.

Before the advent of the global financial crisis, the EC had never adopted communications specifically addressed to the banking sector. Since the beginning of the '90s, the Commission has applied to credit institutions the 'Community Guidelines on State aid for rescuing and restructuring firms in difficulty' [1994], designed to control public support in favour of almost all the types of undertakings

1 European Commission, *Second Report on Competition Policy*, April 1973.

2 Court of Justice of the European Communities, *Zuechner vs Bayerische Vereinsbank*, Case 172/80, 14 July 1981.

covered by Article 87 TEEC. The leading case witnessing this 'one-size-fits-all' attitude is represented by the EC decision in *Crédit Lyonnais* [1998].[3] In deciding on France's aid in favour of the bank, the Commission acknowledged that an efficient and competitive market for credit institutions is feasible only by guaranteeing the orderly liquidation of non-viable firms. Indeed, maintaining credit institutions with insufficient profit margins in business 'artificially results in serious distortions of competition', ultimately weakening the rest of the banking system and also leading 'to major distortions in the allocation of funds and consequently to disfunctioning in the economy as a whole'.

The same approach characterised the very first decisions of the EC in managing the financial support granted by the MSs at the dawn of the subprime crisis. Relying on the amended version of the 'Community Guidelines' [2004],[4] the Commission authorised the first restructuring programs on the basis of Article 107, paragraph 3, letter c), according to which an aid may be considered to be compatible with the internal market, if it is granted 'to facilitate the development of certain economic activities or certain economic areas', given that 'such aid does not adversely affect trading conditions to an extent contrary to the common interest'. Thus, the provision allowed the MSs to intervene in favour of their credit institutions to preserve competitiveness in the banking sector. The most relevant decision regarding this phase of the crisis is the liquidity assistance provided by Germany to *Sachsen LB*, considered by the Commission as compatible with State aid rules also thanks to significant private participation in the restructuring program.[5]

3. *The European Commission and the financial crisis: the primacy of economic stability*

In recent years, many scholars have written about the development of the European Commission's approach to State aid regulation in the banking sector during the global financial crisis. To coordinate the countless recovery programs set out by Member States (MSs) during the period 2008-2013 (which amounted to € 5058 bn in October 2012), the EC adopted six communications (the so-called 'crisis communications'), defining new criteria for the approval of rescue packages. The most remarkable innovation in the EC's State aid enforcement was certainly the primacy accorded to the interest in safeguarding economic stability in the assessment of the compatibility of the MS's support with the internal market, in case of severe financial distress suffered by a MS. Relying on Article 107 (3) (b) TFEU, according to which an aid can be

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[3] European Commission, Commission's decision of 20 May 1998, concerning aid granted by France to the Crédit Lyonnais group, 98/490/EC, 8 August 1998.

[4] European Commission, Community Guidelines on State aid for rescuing and restructuring firms in difficulty, 2004/C 244/02, 1 October 2004.

[5] European Commission, Commission's decision of 4 June 2008 on State aid C 9/08 (ex NN 8/08, CP 244/07) implemented by Germany for Sachsen LB, 2009/341/EC, 24 April 2009.

considered compatible with the internal market if itis necessary ‘to remedy a serious disturbance in the economy of a Member State’, for the first time the Commission designed specific rules to control State aid in the banking sector, aimed at ensuring a quick and efficient authorisation process for the restructuring programs. An approach that led some scholars to talk about an ‘instant state aid law’ enforcement, practiced by the European Commission to avoid a collapse of the EU and the Eurozone in those dramatic years.

The purpose of the following passages is to analyse the relationship between the State aid control and the banking sector, in the context of the Single Resolution Mechanism, specifically introduced to break the ‘diabolic loop’ between the sovereign debt crisis and the insolvency of financial institutions. Most of the principles and rules contained in the new framework provided to manage bank difficulties are rooted in the crisis communication, either as a result of successful development or as a reaction to a negative outcome in State aid regulation for the banking sector experienced during the European financial breakdown. Given the thousands of academic contributions written on the role of the EC during the crisis, we will take for granted the relevant comments made by several authors on the topic, devoting instead the rest of the section to analysing the most relevant provisions contained in the SRM framework regarding State Aid control. As a premise, we will consider some significant features contained in the Commission’s Banking Communication of 2013, the last act adopted by the EC that regulates public support to financial institutions, which is still in force.

4. The Commission’s Banking Communication (2013)

Acknowledging that the divergent funding costs between banks operating in different MS posed a threat to the integrity of the single market and risked ‘undermining the level playing field which State aid control aims to protect’, on 30 July 2013 the European Commission published the so-called ‘Banking Communication’ (‘BC’), with the aim of composing and renewing the rules defined during the financial crisis.[6] The BC is a complex document, resulting from five years of bank crisis management, anticipating the Banking Recovery and Resolution Directive (BRRD)[7] and the Single Resolution Mechanism

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6 European Commission, Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (‘Banking Communication’), 2013/C 216/01, 30 July 2013.

7 European Parliament and Council of the European Union, 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, 12 June 2014.

Regulation (SRMR).[8] With the adoption of the BC, the European Commission took off its role of 'emergency legislator' for the banking sector, replacing the Crisis Communication of 2008 and setting the main principles to control state aid in favour of financial institutions.

The BC is relevant for having refined the burden-sharing requirement for the approval of restructuring programs. Indeed, while during the crisis the EC's effort was focused on approving MS's rescue packages as soon as possible, trying to avoid a deterioration of economic stability, under the BC a State willing to provide support to its financial institutions needs to adequately show that every measure necessary to minimise the involvement of public resources has been taken, before the authorisation can be provided. Thus, since 'State support can create moral hazard and undermine market discipline' (paragraph 40), public aid should only be granted on terms which involve adequate burden-sharing by existing investors, namely shareholders, hybrid capital holders and subordinated debt holders (paragraph 41). An exception to the burden-sharing requirement can be made 'where implementing such measures would endanger financial stability or lead to disproportionate results' (paragraph 45). In any case, the involvement of private investors needs to respect the 'no creditor worse off' principle, according to which 'subordinated creditors should not receive less in economic terms than what their instrument would have been worth if no State aid were to be granted' (paragraph 46).

Justified by the persistence of a potential threat to economic stability, during the crisis the EC has made structural changes in the assessment, regarding the presence of selective advantage and the compliance with the market economy investor principle (MEIP), when examining public financial support to the banking sector.

Regarding the selective advantage requirement, the EC acknowledged the uniqueness and specificity of the banking sector, in comparison with other economic activities, in the field of State aid regulation. Indeed, while the insolvency of firms can usually represent a beneficial increase in the market share of its competitors, the collapse of a financial institution normally generates negative spillover effects for the other market operators, potentially compromising economic stability. For this reason, in the lack of a centralised European economic policy, scholars have recognised the pivotal role played by the European Commission in coordinating hundreds of MSs' rescue packages, aiming at preventing the MSs from distorting the level competitive playing field in the EU, while safeguarding financial stability at the same time.

Considering the MEIP criterion, it is worth noting that, during the crisis, the primacy accorded to the interest in safeguarding economic stability have almost

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[8] European Parliament and Council of the European Union, Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, 30 July 2014.

neutralised its assessment. Indeed, as recognised by the Commission, in case of systemic financial distress, it is nearly impossible for any private operator to engage in profitable market interventions: (i) first, because any investment made through the acquisition of failing institutions has uncertain business outcomes, especially considering the large amount of non-performing loans held by the purchased banks, typically associated with the deterioration of the economic environment; (ii) second, because it is unlikely to have a private operator carrying out interventions for an amount comparable to the MSs' ones.

5. *The CJEU Judgment in Kotnik and the relation between the Banking Communication and the new BRRD and SRMR*

The introduction of the BRRD and the SRMR opened a new era in the management of banking crises, designing a new role for public support in favour of credit institutions in the Eurozone. Given that 'the different incentives and practices of Member States in the treatment of creditors of banks under resolution and in the bail-out of failing banks with tax payers' money have an impact on the perceived credit risk, financial soundness and solvency of their banks and thus create an unleveled playing field' (Recital 3, SRMR), the European legislator put a significant effort in providing new rules to reduce MSs public financing of bank failures 'to the greatest extent possible' (Recital 1, BRRD). However, despite the centralisation (at the Eurozone level) of resolution powers in the Single Resolution Board ('SRB') and the creation of a Single Resolution Fund ('SRF') financed by banks' private contributions, the BRRD and the SRMR still allow MSs to take part in managing banking crises, and require the EC to exercise its assessment over many operations involving public support and even non-state support (e.g. the SRF's one) to credit entities. For these reasons, it is necessary to focus our reflections on the relation between the rules introduced by the EC in the Banking Communication and the provisions designed by the SRM, especially in the context of resolution. As we have already mentioned, the Banking Communication aimed at anticipating the introduction of some principles, which were part of the new EU approach to banks failures management, to guarantee a smooth transition towards the creation of a Single Resolution Mechanism ('SRM'). Nevertheless, the BRRD and the SRMR recall in various provisions the need to comply with State Aid rules, implying the application of the *acquis communitaire* that regulates State Aid control, which the BC is certainly part of. Thus, many scholars devoted their analysis to the nature of the BC and its enforcement after the implementation of the SRM.

On 19 July 2016, the CJEU gave (implicitly) a significant statement on the issue, rendering its judgment in the case C-526/14, *Tadej Kotnik and others v*

Državni zbor Republike Slovenije ('*Kotnik*'),[9] in which a part of the reasoning was foreshadowed by the Opinion of AG Wahl, released on 18 February 2018.[10]

The case concerned the request for a preliminary ruling proposed by the Slovenian Constitutional Court ('*Ustavno sodišce*'), regarding the validity and interpretation of the BC's provisions requiring the application of the 'burden-sharing' principle in banks restructuring and resolution (paragraph 40-46 of the Communication). On 17 December 2013, the Slovenian Central Bank ('*Banka Slovenije*'), in line with the rules contained in the Slovenian banking law ('*ZBan-1*') implementing the BC's provisions, adopted measures to recapitalise and support the liquidity of *Nova Ljubljanska banka, Nova Kreditna banka Maribor e Abanka Vipa*, in order to restore their viability and to further ensure the smooth liquidation of *Factor banka* and *Probanka.* On the following day, the European Commission authorised financial support to the five credit institutions.[11]

With the first question, the *Ustavno sodišce* asked the CJEU if the BC had to be regarded 'as binding on Member States seeking to remedy a serious disturbance in the economy by granting State aid to credit institutions'. Further, with the second question the Slovenian Constitutional Court asked the Judge of Luxembourg if the 'burden-sharing' requirements enforced by the EC were 'compatible with Articles 107 TFEU, 108 TFEU and 109 TFEU, in so far as they exceed the Commission's competence, as defined in those FEU Treaty provisions on State aid'. Incidentally, it is worth noting the attention put by the reference court on the de facto binding effects of the BC ('Having regard to the legal effects actually produced by the Banking Communication', with the precise wording of the first question), which witnessed the decisive role of the Commission DG Competition in enforcing State Aid rules, as perceived by the Slovenian public authorities.

The AG Wahl's Opinion on the case anticipated the CJEU reasoning in the judgment. According to AG Wahl, 'the assessment of the compatibility of specific aid measures with the internal market in principle falls within the exclusive competence of the Commission' which 'enjoys broad discretion' (paragraph 35), in line with the principle of conferral set by Article TEU. However, in this field, the EC 'has no general legislative power' and 'is not empowered to lay down general and abstract binding rules governing, for example, the situations in which aid may be considered compatible because it is aimed at remedying a serious disturbance in the economy of a Member State'. Thus, any 'such body of binding rules would be null and void' (paragraph 37). Consequently, the EC's Communications must be considered mere soft law

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[9] Court of Justice of the European Union, *Tadej Kotnik and Others v Državni zbor Republike Slovenije*, Case C-526/14, 19 July 2016.

[10] Court of Justice of the European Union, *Opinion of Advocate General Wahl*, Case C-526/14, 18 February 2018.

[11] European Commission, State aid: Commission approves rescue or restructuring aid for five Slovenian banks, Press Release, 18 December 2013.

measures, useful to ensure legal certainty, transparency and equal treatment for market operators, used by the Commission to announce 'how it intends to make use, in certain situations, of the aforementioned discretion' (paragraph 38).

In the Judgment, the Court, confirming the AG's findings, acknowledged that 'the effect of the adoption of the guidelines contained in that communication is equivalent to the effect of a limitation imposed by the Commission on itself in the exercise of its discretion, so that, if a Member State notifies the Commission of proposed State aid which complies with those guidelines, the Commission must, as a general rule, authorise that proposed aid'. At the same time, 'the Member States retain the right to notify the Commission of proposed State aid which does not meet the criteria laid down by that communication and the Commission may authorise such proposed aid in exceptional circumstances' (paragraph 43). These conclusions endorsed the relevant interpretation on the application of 'burden-sharing' provisions made by AG Wahl in its Opinion, according to which 'from a legal point of view, a Member State might be able to show that, despite the lack of burden-sharing (or the non-fulfilment of any other criterion laid down in the Banking Communication), aid to an ailing bank still meets the requirements of Article 107(3)(b) TFEU. Situations can indeed be imagined, in addition to those already provided in the Banking Communication itself, in which a government might show that the rescue and restructuring of a bank is, for example, less costly to the State, as well as quicker and easier to manage, if no burden-sharing measure vis-à-vis all or some of the investors referred to in the Banking Communication is adopted' (paragraph 44 of the Opinion).

The *Kotnik* case concerned the nature and the legal effects of the Banking Communication, which was adopted when the EU was lacking a framework designed to provide uniformity in the banking crises management, namely the Single Resolution Mechanism. Today, that framework exists and, even though its developments are still in progress, it represents the rules of primary EU law applicable to public interventions granted to the banking sector.

The BRRD and the SRMR define procedures and requirements to resolve credit institutions in the Eurozone. In this sense, every time the restructuring and resolution programs involve public financing, the Directive and the Regulation empower the Commission to assess the compatibility of the intervention with State aid rules. Considering, *inter alia*, some SRMR relevant provisions, Article 18 states that *emergency liquidity assistance* provided by central banks, State guarantees of newly issued liabilities and precautionary recapitalisation measures, adopted in a context of an extraordinary public financial support, 'shall be conditional on final approval under the Union State aid framework' (paragraph 4, letter d). Article 19 follows along the same lines, which prevents the resolution scheme to take place before 'the Commission has adopted a positive or conditional decision concerning the compatibility of the use of such aid with the internal market' (paragraph 1). Finally, when the resolution program defined by the SRB involves the use of the SRF, the Commission 'shall assess whether the use of the Fund would distort, or threaten to distort,

competition by favouring the beneficiary or any other undertaking so as, insofar as it would affect trade between Member States, to be incompatible with the internal market', basing its evaluation on 'the criteria established for the application of State aid rules as enshrined in Article 107 TFEU' (paragraph 3).

As we can infer from the above-mentioned provisions, in harmonising the rules on resolution procedures, the European legislator only limited public support in favour of banks, without excluding it. In allowing (in particular circumstances) public financing of credit institutions, the new framework continued to involve the EC in exercising State aid control over the interventions, even extending its assessment over those carried out by the SRB. Consequently, given the non-binding nature of the Banking Communication and the partial overlapping of its provisions with the BRRD-SRMR system, we can conclude that the Banking Communication maintains a 'guidance' role for MSs in adopting rescue packages, but only with reference to the passages which are inconsistent with EU primary law.

6. *Government financial stabilization tools ('GFSTs') in the SRM*

In designing the new SRM framework, the European legislator provided Member States with the possibility to intervene with their public financial support also after the resolution procedure has been triggered. According to recital (8) of the BRRD

> Resolution of an institution which maintains it as a going concern may, as a last resort, involve government financial stabilisation tools, including temporary public ownership.

In this sense, the European legislator acknowledged the potential damages to economic stability and the destruction of firms' value that the resolution's activation could produce, providing national authorities with the power to grant extraordinary public financial support through additional financial stabilisation tools, namely (i) the 'public equity support tool' and (ii) the 'temporary public ownership tool'. In the words of Article 56 ('Government financial stabilisation tools') 'for the purpose of participating in the resolution of an institution' and with the aim to 'avoid its winding up, with a view to meeting the objectives for resolution referred to in Article 31(2) in relation to the Member State or the Union as a whole'

> The government financial stabilisation tools shall be used as a last resort after having assessed and exploited the other resolution tools to the maximum extent practicable whilst maintaining financial stability, as determined by the competent ministry or the government after consulting the resolution authority.

Considering the nature and the conditions defined for the activation of the instruments:

(i) under the public equity support tool (Article 57 BRRD), Member States may 'participate in the recapitalisation of an institution […] by providing capital to the latter in exchange for the following instruments, subject to the requirements of Regulation (EU) No 575/2013: (a) Common Equity Tier 1 instruments; (b) Additional Tier 1 instruments or Tier 2 instruments'. In carrying out the recapitalisation, Member States shall ensure that: (a) the intervention complies with national company law; (b) the recapitalised institutions are managed on a commercial and professional basis 'to the extent that their shareholding in an institution or an entity' allows; (c) their holding in the institution or an entity is 'transferred to the private sector as soon as commercial and financial circumstances allow'.

(ii) Member States may take an institution or an entity into temporary public ownership (Article 58 BRRD), making one or more share transfer orders in which the transferee is a nominee or a company wholly owned by the Member State. As for the public equity support tool, MSs shall ensure that the holdings 'are managed on a commercial and professional basis and that they are transferred to the private sector as soon as commercial and financial circumstances allow'.

The use of GFSTs constitutes 'extraordinary public financial support', allowed only in presence of a 'very extraordinary situation of a systemic crisis'. Thus, it shall be conditional on (a) a private sector's involvement in the losses, with a contribution to loss absorption and recapitalisation equal to an amount not less than 8 % of total liabilities including own funds of the institution under resolution, made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other eligible liabilities through write down, conversion or otherwise (the 'minimum loss absorption requirement'); (b) a prior and final approval under the Union State aid framework.

In this sense, recital (57) of the BRRD specifies that

> When the Commission undertakes State aid assessment under Article 107 TFEU of the government stabilization tools referred to in this Directive, it should separately assess whether the notified government stabilisation tools do not infringe any intrinsically linked provisions of Union law, including those relating to the minimum loss absorption requirement of 8 % contained in this Directive, as well as whether there is a very extraordinary situation of a systemic crisis justifying resorting to those tools under this Directive while ensuring the level playing field in the internal market. In accordance with Articles 107 and 108 TFEU, that

assessment should be made before any government stabilisation tools may be used.

7. *The role of DGSs in managing banking crises*

As part of the Banking Union ('BU') framework, Deposit Guarantee Schemes ('DGS') were asked to exercise a new role in managing banking crises and were provided by Directive 2014/49/EU ('DGSD') with new powers to ease the effects of banks insolvency and to prevent them from failing.[12] Having extended their traditional 'paybox' function to (1) resolution financing, DGSs were further enabled (2) to intervene in preventing members' financial distress and in designing alternative ways to avert their orderly liquidation.

(1) First, the BRRD required the DGSs to give their contribution in resolution financing.

As a consequence of the specific attention to deposits' protection envisaged by the BU framework, and in order to avoid financial instability, the BRRD strongly discourages the involvement of deposits in managing banking crises.

On the one hand, Directive 2014/59/EU explicitly recommends the resolution authorities to 'give consideration to the consequences of a potential bail-in of liabilities stemming from eligible deposits held by natural persons and micro, small and medium-sized enterprises above the coverage level' of euro 100.000 provided for in Directive 2014/49/EU. Furthermore, Article 44(2) BRRD expressely excludes covered deposits from the liabilities which the resolution authorities can involve in exercising the write down and the conversion powers.

On the other hand, the BRRD calls the DGSs to neutralise the losses in case the resolution activation would affect covered deposits. In this sense, Article 109 ('Use of deposit guarantee schemes in the context of resolution') stipulates that

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[12] In November 2015, the Commission proposed the creation of a European deposit insurance scheme ('EDIS') for bank deposits in the euro area, as the third pillar of the banking union. The EDIS proposal builds on the system of national deposit guarantee schemes (DGS) regulated by Directive 2014/49/EU. The rationale of the EDIS would be to reduce the vulnerability of national DGS to large local shocks, ensuring that the level of depositor confidence in a bank would not depend on the bank's location and weakening the link between banks and their national sovereigns (European Commission, *A stronger Banking Union: New measures to reinforce deposit protection and further reduce banking risks*, Press release, 24 November 2015). According to the European Commission 'EDIS would apply to deposits below €100 000 of all banks in the banking union. When one of these banks is placed into insolvency or in resolution and it is necessary to pay out deposits or to finance their transfer to another bank, the national DGS and EDIS will intervene. The scheme will develop in different stages and the contributions of EDIS will progressively increase over time. At the final stage of the EDIS set up, the protection of bank deposits will be fully financed by EDIS, supported by a close cooperation with national DGS' (European Commission, European deposit insurance scheme. A proposed scheme to protect retail deposits in the banking union, available at https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union/european-deposit-insurance-scheme_en). Because of the strong resistance to its creation opposed by many Member States (and in particular by Germany), at the moment the EDIS is still far from becoming a reality in the context of the Banking Union framework.

> 1. Member States shall ensure that, where the resolution authorities take resolution action, and provided that that action ensures that depositors continue to have access to their deposits, the deposit guarantee scheme to which the institution is affiliated is liable for:
>
> (a) when the bail-in tool is applied, the amount by which covered deposits would have been written down in order to absorb the losses in the institution pursuant to point (a) of Article 46(1), had covered deposits been included within the scope of bail-in and been written down to the same extent as creditors with the same level of priority under the national law governing normal insolvency proceedings; or
>
> (b) when one or more resolution tools other than the bail-in tool is applied, the amount of losses that covered depositors would have suffered, had covered depositors suffered losses in proportion to the losses suffered by creditors with the same level of priority under the national law governing normal insolvency proceedings.
>
> In all cases, the liability of the deposit guarantee scheme shall not be greater than the amount of losses that it would have had to bear had the institution been wound up under normal insolvency proceedings […].

The provision needs to be coordinated with Article 108, which introduced the 'depositor preference' rule, according to which eligible deposits of natural persons and small-medium enterprises ('SMEs') have a higher priority under national law than ordinary creditors, in case of an insolvency procedure. In this sense, Article 108 further strengthened the protection of covered deposits and 'deposit guarantee schemes subrogating to the rights and obligations of covered depositors in insolvency', ensuring them an even higher priority than the ranking provided for natural persons and SMEs.

(2) Second, Directive 2014/49/EU envisaged an effective DGSs' role in preventing and avoiding banking failures. Indeed, according to Article 11(3) of the Directive, 'Member States may allow a DGS to use the available financial means for alternative measures in order to prevent the failure of a credit institution', given that 'the costs of the measures do not exceed the costs of fulfilling the statutory or contractual mandate of the DGS' ('least cost' principle) and other specific conditions are met.

Notwithstanding the explicit conferral made by the DGSD, this possible use of DGSs has been sharply limited in recent years because of the denial opposed in 2015 by the European Commission ('EC') to the intervention of the Italian Fondo Interbancario di Tutela dei Depositi ('FITD') in favour of Cassa di Risparmio di Teramo ('Tercas'), which was considered as State aid,

incompatible with the internal market. Recently, the CJEU gave its long-awaited word on the case.

8. *Case-study: Judgment of the General Court T-98/16 Tercas Italian Republic and Others v. European Commission*

After many years of uncertainty, on 19 March 2019, the General Court finally annulled the Commission's decision, rendering a judgment which is undoubtedly relevant from many perspectives. Indeed, the ruling represents a benchmark on the use of DGSs after the introduction of the BRRD and the DGSD, as it (implicitly) defines the principles according to which a national DGS can intervene in banking crises without breaking EU State aid law.

Moreover, the ruling contradicts the European Commission's interpretation of the role of the Italian FITD in the measure for the benefit of Tercas, excluding that the Bank of Italy ('BoI') had exercised any control over the operation. In this respect, the EU competition authority's opposition was critical for the Italian Republic because, at the time, the FITD was contemplating bailing out four regional banks (namely Banca Etruria, CariFerrara, CariChieti, and Banca Marche). The unexpected prohibition on the use of the FITD suddenly pushed the Italian authorities to find a way to rescue the financial institutions in trouble by quickly introducing the new rules on banking resolution, with the consequent disastrous impact on the confidence of savers and depositors that we all know.

(i) Tercas-Cassa di Risparmio della Provincia di Teramo S.p.A. was the holding company in a banking group (Tercas) operating in the South of Italy, put under special administration by the Italian Ministry of Finance on 30 April 2012. On 1 July 2014, the FITD submitted a request of authorisation to the BoI to grant a support intervention to Tercas, which was authorised by the BoI on 7 July 2014. With the following acquisition of the bank by Banca Popolare di Bari ('BPB'), the special administration of Tercas came to an end and the BPB appointed the new directors and auditors on 1 October 2014.

(ii) On 23 December 2015, the Commission adopted the Decision on Tercas, stating the unlawfulness of the aid granted by the Italian DGS on 7 July 2014. The EU competition authority recognised the nature of State resources and the imputability to the Italian Republic of the FITD's financial assistance, because of the alleged control exercised by the BoI on the intervention. In order to show the existence of a permanent control of the BoI over the activities carried out by the FITD, the Commission gave relevance to the set of powers conferred to the Bank of Italy by the Italian Banking Act, and, in particular, to the BoI's authorisation of the FITD's

interventions and the approval of its by-laws. Moreover, the competition authority recognised an indicator of the public control also in the prerogatives conferred to the special administrator of the bank, appointed by the BoI.

(iii) The Italian Republic, BPB and the FITD, with the intervention of the Bank of Italy, challenged the Commission's position. The applicants brought actions for annulment against the decision, alleging the infringement of Article 107 TFEU for the erroneous reconstruction of the facts concerning *inter alia* the public nature of the resources and the imputability to the State of the contested measures.

(1) In order to assess the 'imputability to the State' of the intervention, the Court examined whether the public authorities were involved in the financial support granted to Tercas.

First, in considering whether the FITD was entrusted with a public mandate to intervene in favour of Tercas through measures alternative to the reimbursement of the depositors, the CJEU stated that those interventions are carried out only in the interest of the FITD's contributors. Moreover, it recognised that no domestic provision obliges the FITD to adopt those measures in any form, given that it is an autonomous choice of the members to decide if, when and how financial support, in the way of an alternative measure, can be granted. In this case, the fact that the private interest of the participants can coincide with the public interest of depositors' protection and financial stability cannot constitute itself as a proof of any involvement of the public authorities in the adoption of the contested measure, as affirmed by the Commission.

Second, concerning the autonomy of FITD when deciding on the intervention, the CJEU underlined that the FITD is a private consortium of banks, which acts on behalf and in the interest of its participants. Considering the Bank of Italy's authorisation of the FITD's intervention, the CJEU acknowledged that the power to approve the financial support granted by the scheme must be considered just as one of the supervisory prerogatives conferred to the Bank of Italy, in order to safeguard the sound and prudent management of the banks and the stability of the financial system. Thus, the Bank of Italy has no power to order the adoption or the execution of the measure, as proved by the fact that, after the authorisation received by the Authority, the FITD did not ultimately undertake the first support intervention in favour of Tercas.

(2) The Court finally considered whether or not the FITD's financial support was granted through State resources. As a premise, the CJEU stated that, according to Article 107 TFEU and to its settled case-law (namely Stardust Marine), the notion of 'State resources' is intended to cover, in addition to advantages granted directly by the State, those granted through a public or private body appointed

or established by that State to administer the aid. Furthermore, Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings. Thus, even if the sums used are not permanently held by the Treasury, the fact that they constantly remain under public control and therefore available to the competent national authorities, is sufficient for them to be categorized as ‘State resources’.

In the judgement, the General Court acknowledged that the FITD’s assistance resulted from an expressed will of its participants, autonomously deciding: a) to entrust the DGS with the power to carry out alternative interventions, through the approval of its by-laws; b) to finance the assistance specifically granted to Tercas, pursuing their own private interest in avoiding the more expensive depositors reimbursement in case of an orderly liquidation.

In its reasoning, the CJEU concluded that the Commission did not sufficiently prove that the resources were under control and at disposal of the Italian public authorities. In particular, the Commission gave no evidence of the fact that, even though the FITD’s resources were certainly private and administered by the governing bodies of the consortium, the Italian Republic had exercised a dominant influence over the DGS in carrying out the financial support granted to Tercas.

For these reasons, given the fact that the Commission failed to prove that the intervention was imputable to the State and financed through State resources, the Court annulled the contested decision without assessing the other conditions provided by Article 107 TFEU and ordered the EC to pay the costs of the proceedings.

On 29 May 2019, the European Commission decided to appeal against the General Court’s decision. Thus, the CJEU will give its final say on the filed case C-425/19.

As we can infer from the ruling, the DGSs’ preventive and alternative interventions do not constitute State aid, unless the Commission proves that the conditions set out in Article 107 TFEU (as defined by the CJEU case-law) are met. This conclusion confirms the wording of Paragraph 63 of the Commission’s Banking Communication (2013), according to which ‘Interventions by deposit guarantee funds to reimburse depositors […] do not constitute State aid’, so that they may constitute state aid only ‘to the extent that they come within the control of the State and the decision as to the funds’ application is imputable to the State’. In the ruling, the Court denied the imputability to the Italian Republic of the aid and the public nature of the resources used by the DGS, acknowledging that the supervisory powers exercised by the Bank of Italy did not envisage any actual nor permanent control over the FITD’s interventions.

As stated by Andrea Enria, Chair of the ECB Supervisory Board, the judgment opens new scenarios, considering that ‘(...) the potential role of DGSs in playing a function in cases of banks that go into difficulty in a pre-emptive fashion could be a very important change in the overall framework’. However, having considered (a) the need for the DGSs to

respect the 'least cost' principle when deciding on a preventive or alternative intervention and (b) the primacy in the insolvency ranking accorded to the Schemes by the newly introduced provisions on 'depositor preference', it is unlikely to expect a spread in DGSs' interventions just as a consequence of the judgement. Only time will tell if the DGSs will be able to play an important role in managing banking crises in the coming years.

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Chapter VIII.E

EU and Italian case law on the ex-ante contribution to the Resolution Funds

Michele Cossa and Eugenio Mancini

Summary: *1. Introduction: the legal background – 2. Case Law: Credito Fondiario – 3. Case Law: ICCREA – 4. Case Law: State Street Bank International*

1. Introduction: the legal background

Within the new framework on banking crises management, Member States are allowed to grant their public financial support in favour of distressed banks only in specific circumstances and always alongside the involvement of the private sector.

In addition to the "internal" financing measures (see chap. VIII.A, par. 7), the Single Resolution Fund ('SRF') is the main source for "external" private financing to resolution procedures, granted by the banking sector. Indeed, even if it is controlled and directed by the Single Resolution Board, the SRF is supplied by contributions from supervised institutions.

During the preliminary debate regarding the introduction of the Banking Union, many policy makers supported the idea that the private sector was meant to bear the burden of the banking activity's negative externalities (i.e. the costs of banking crises). Indeed, in the 2010 communication on resolution funds,[1] the Commission explicitly supported the establishment of *ex-ante* resolution funds, as the most efficient in order (see pag. 2):

> to mitigate the burden on taxpayers and minimize – or better still eliminate – future reliance on taxpayer funds to bail out banks.

The Commission explained that (see pag. 3):

> political support is growing for applying the so-called 'polluter pays' principle, known from environmental policy, also in the financial sector so that those responsible for causing it will pay for the costs of any possible future financial crisis.

On these theoretical and political premises, the BRRD provided for the establishment of the national resolutions funds.

Article 67 of the SRMR designed the Single Resolution Fund as composed of the credit institutions' contributions raised and transferred by the national resolution authorities. In the SRM, the authority in charge of calculating contributions to the Single Resolution Fund is the Single Resolution Board (Article 70 (2) SRMR and Article 5 (1) SRMR).

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[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the European Central Bank - Bank Resolution Funds, 25 May 2010, COM(2010) 254.

Moreover, Article 70 SRM defines the criteria used to calculate the SRF's contributions. The provision basically replicates, for the SRF, the content of Article 103(2) BRRD, concerning national funds.

Article 70 SRMR also refers to the delegated acts adopted by the Commission pursuant to Article 103 BRRD (see Regulation No 2015/63). Moreover, in applying the Regulation No 2015/63 for the purpose of calculating the contribution, the Board complies with the implementing provisions laid down in the Council implementing regulation No 2015/81.

The Regulation No 2015/81 sets out various rules concerning the relationship between the SRB and the NRAs with regard to the process of calculation and notification of the amount due by each credit institution.

In particular,

– according to Article 4:

> …the Board shall calculate the annual contribution due from each institution … after consulting the ECB or the national competent authorities and in close cooperation with the national resolution authorities…;

– according to Article 5:

> The Board shall communicate to the relevant national resolution authorities its decisions on calculation of annual contributions of the institutions authorised in their respective territories. After receiving the communication referred to in paragraph 1, each national resolution authority shall notify each institution authorised in its Member State of the Board's decision on calculation of the annual contribution due from that institution;

– lastly, according to Article 6:

> the Board shall set out the data formats and representations to be used by the institutions to report the information required for the purpose of calculating the annual contributions in order to enhance the comparability of the reported information and the effectiveness of processing the information received.

As it can be easily understood, the matter regarding the contributions to the Fund foreshadows a high risk of potential litigation.

In the early functioning of the SRM, the main issue that arose (having considered a process which, as seen above, involves the intervention of both the European and the national authorities) was that of identifying the challengeable measures and, consequently, the competent courts.The aforementioned provisions have not provided sufficiently clear indications in order to avoid uncertainties.

2. *Case Law: Credito Fondiario*

On June 2016, Credito Fondiario s.p.a. lodged an appeal before the Italian administrative court of first degree (TAR Lazio), asking for the annulment of the Bank of Italy's acts requiring ordinary contributions to the SRF for 2016.

The application relied on two pleas: (i) first, the alleged lack of adequate reasoning in the adoption of the acts; (ii) second, the claimed error of calculation of the contributions amount. Credito Fondiario asked for the suspension of the decision as a precautionary measure.

The Bank of Italy, as defendant, raised one preliminary objection, concerning the lack of jurisdiction of the Italian courts. Although formally addressed against the Bank of Italy's acts, the appeal actually contested the amount of the contribution transferred to the SRF. The object of the judgment regarded the legitimacy assessment of a decision taken by an agency of the European Union (the SRB).

In the Bank of Italy's opinion, its letters notifying the amount of the levy due, represented the mere communication of the content of decisions taken by the SRB, in relation to which the NRA has no power of intervention whatsoever, but rather a simple obligation to notify the concerned institution. It followed that Bank of Italy's notes did not have binding nature. Indeed, it was noted that the decisions adopted by the Board were not - and could not be - integrated in any way by Banca d'Italia.

Moreover, the applicant neither pointed out any material errors made by the Bank of Italy nor complained that the Bank of Italy had requested a contribution different from the one calculated by the SRB.

So far the TAR Lazio has decided only on the requested interim measure (suspension). It denied the suspension as 'no periculum in mora' (a present and actual risk related to the enforcement of the measure) occurred, but it did not decide on its jurisdiction. Thus, the trial is still pending.

On September 2016, Credito Fondiario filed an application based on Article 263 TFEU, seeking the annulment of the SRB's decision concerning its 2016 ex-ante contributions to the SRF. The defendant was only the SRB, but the Commission intervened in support of the defendant and Italy intervened in support of the applicant (T-661/16).

As far as we can understand from the publicly available documentation, the SRB maintained that the application was inadmissible, stating that the applicant was not the addressee of the challenged acts because only the NRA's decision was capable of producing legal effects vis-à-vis Credito Fondiario. In a nutshell, the SRB stance was the opposite of the one supported by the Bank of Italy, as it indicated the national act of implementation as the one and only decision to be challenged by any interested party.

The General Court (Order 19 November 2018) dismissed the application stating that it was time-barred. Indeed, according to Article 267 TFEU the judicial procedure shall commence within two months from the publication of the measure, or its notification to the plaintiff, or, in the absence thereof, the day on which it came to the knowledge of the latter.

The General Court took the view that the appellant had acquired knowledge of two SRB's decisions by means of the Bank of Italy's notes requiring the payment. Since then, even if the decision by the SRB was not notified, the applicant should have taken "*steps within a reasonable period*" to obtain the two decisions of the SRB. The Court deemed that a four-month period was not reasonable in the given circumstances.

On the jurisdiction, the General Court did not take a clear view, as some remarks may lead to the conclusions supported by the Bank of Italy in the national proceeding and opposed by the SRB in EU proceeding, while some other may lead to the opposite conclusion.

See points 30-32 of the Order:

> 30. En premier lieu, il ressort de la réglementation applicable en l'espèce, en particulier de l'article 54, paragraphe 1, sous b), et de l'article 70, paragraphe 2, du règlement no 806/2014, que tant l'auteur concret du calcul des contributions individuelles que l'auteur des décisions attaquées approuvant et ajustant ces contributions est le CRU. La circonstance qu'il existe une coopération entre le CRU et les ARN ne modifie pas cette constatation.
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> 31. En second lieu, il convient de relever que, quelles que soient les variations terminologiques existant entre les versions linguistiques de l'article 5 du règlement d'exécution (UE) 2015/81 du Conseil, du 19 décembre 2014, définissant des conditions uniformes d'application du règlement no 806/2014 (JO 2015, L 15, p. 1), les organes auxquels le CRU, auteur des décisions fixant les contributions ex ante, adresse celles-ci sont les ARN et non les banques. Les ARN sont, de fait et en exécution de la réglementation applicable, les seules entités à qui l'auteur des décisions en cause est tenu d'envoyer celles-ci et, donc, en dernière analyse, les destinataires de ces décisions au sens de l'article 263, quatrième alinéa, TFUE.
>
> 32. Le constat que les ARN ont la qualité de destinataires des décisions du CRU au sens de l'article 263, quatrième alinéa, TFUE est d'ailleurs corroboré par le fait qu'elles sont, dans le système mis en place par le règlement no 806/2014 et conformément à l'article 67, paragraphe 4, de ce règlement, chargées de la collecte des contributions individuelles auprès des banques.

Credito Fondiario appealed against the General Court Order to the ECJ. The ECJ (decision of 5 March 2020, in case C-69/19) dismissed the appeal, which was mainly grounded on a alleged error in law by the General Court in determining the date in which the entity became aware of the contested decision.

3. *Case Law: ICCREA*

By decisions adopted between 2015 and 2017, the Bank of Italy sought from Iccrea – a bank which at the time of the case simply headed a network of credit institutions and whose only object was to support the operations of cooperative credit banks in Italy[2] – the payment of ordinary, extraordinary and additional contributions to the Italian national resolution fund.

Furthermore, through a communication of 3 May 2016, the Bank of Italy sought from Iccrea, for the year 2016, payment to the SRF of an *ex ante* contribution determined by a decision of the SRB of 15 April 2016. By a communication of 27 May 2016, the Bank of Italy corrected the amount of the latter contribution, following a decision of the Board on 20 May 2016.

In the assumption that it had to be considered as the de facto parent undertaking of some Italian cooperative banks, Iccrea brought an action against those decisions and those communications of the Bank of Italy before the TAR Lazio. In that action, Iccrea also sought a determination of the appropriate means of calculating the sums actually payable and the repayment of sums which it considered wrongly paid.

Iccrea claimed, in essence, that the Bank of Italy misinterpreted Article 5(1) of the delegated Regulation No 2015/63 which stipulates that, under certain conditions, intra-group liabilities are exempted from the calculation of the contribution.

More to the point, it claimed that, in order to calculate the contributions at issue in the main proceedings, the Bank of Italy took the liabilities linked to the relationships between Iccrea and the cooperative credit banks into account, even though those liabilities should have been excluded from that calculation through an application, by analogy, of the provisions of that same regulation on intragroup liabilities.

Iccrea claimed that the misinterpretation also led the Bank of Italy to fail to identify, in the communication of data to the Board, the particular features of the integrated system in which Iccrea operated and thus led to an error in the calculation of the *ex ante* contribution to the SRF for the year 2016.

In those circumstances, the TAR Lazio decided to stay the proceedings and to refer to the Court of Justice for a preliminary ruling.

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[2] Iccrea now heads a group of cooperatives banks according to the Law No 49/2016 on the Italian cooperative banking group.

The TAR Lazio sought, in essence, to ascertain whether Article 103(2) of the directive 2014/59 and Article 5(1)(a) and (f) of Delegated Regulation 2015/63 must be interpreted as meaning that the liabilities arising from transactions between a second-tier bank[3], the members of a grouping which consists of it and the cooperative banks to which it supplies various services, are excluded from the calculation of the contributions to a national resolution fund that are the subject of Article 103(2) of that directive.

The ECJ (case C-414/18, Iccrea Banca) held that the provisions mentioned above were to be interpreted as meaning that said liabilities (which arise from transactions between a second-tier bank, the members of a grouping that comprises it and the cooperative banks to which it supplies various services, but where it does not control those banks) are not excluded from the calculation of the contributions to a national resolution fund (subject of Article 103(2) of that directive).

Before dealing with the substance of the preliminary ruling, the ECJ focused on certain aspects of its admissibility, which cannot be separated from the solution of the following question: that is to say, who has jurisdiction over the decisions taken by the SRB following a composite procedure where the NRAs intervene.

The ECJ considered that the matter had to be examined by distinguishing between two aspects. The first one concerns the interpretation of Article 5(1) of the delegated Regulation No 2015/63 in light of the directive No 2014/59 to the extent that it is relevant for the calculation of the contributions to the national resolution funds. The second one concerns the interpretation of the same provision to the extent that it is relevant for the calculation of the contributions to the SRF.

As already mentioned, the Court decided on the substance of the first aspect only, whilst with regard to the second one, it ruled that the calculation of the contributions to the SRF fell, under EU law, outside the jurisdiction of the national courts, so that the latter were not entitled to refer to the ECJ for a preliminary ruling.

The Court considered both the leg of the procedure where the Bank of Italy intervenes before the adoption of the SRB's decision and where the Bank of Italy is called to merely apply that decision.

Applying the principles enshrined in the Fininvest/Berlusconi judgment to the specific subject of mixed procedures governed by the SRMR, the Court held, as for the first leg, that (see §§ 47-48):

> 47. ...it is plain that, with respect to the calculation of the *ex ante* contributions to the SRF, the Board exclusively exercises the final decision-making power and that the role of the national resolution authorities is confined, as stated by the Advocate General in points 40 and 41 of his Opinion, to providing operational support to the

[3] I.e., a bank not directly operating with the public.

> Board. While those authorities may, accordingly, be consulted by the Board in order to facilitate the determination of the amount of the *ex ante* contribution payable by an institution and while they must, in any event, cooperate with the Board to that end, the findings that they might, in particular cases, make at that time on the situation of an institution cannot in any way be binding on the Board.
>
> 48. Consequently, the EU Courts alone have jurisdiction to determine, when reviewing the legality of a decision of the Board setting the amount of the individual *ex ante* contribution to the SRF of an institution, whether an act adopted by a national resolution authority that is preparatory of such a decision is vitiated by defects capable of affecting that decision of the Board, and no national court can review that national act (see, by analogy, judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, paragraph 57).

Moreover, the Court clarified that (see §§ 49-50):

> 49. That conclusion cannot be called into question by the statement, in recital 120 of Regulation No 806/2014, that national judicial authorities should be competent to review the legality of decisions adopted by the resolution authorities of the Member States in the exercise of the powers conferred on them by that regulation.
>
> 50. That statement must be understood, as observed by the Advocate General in point 54 of his Opinion, having regard to the division of jurisdiction arising from primary law, to which moreover recital 120 of that regulation refers in mentioning the exclusive jurisdiction of the Court of Justice of the European Union to review the legality of the decisions adopted by the Board, as pertaining only to national acts that are adopted as part of a procedure in which that regulation has conferred on the national resolution authorities a specific decision-making power.

Finally (see § 53):

> If a national court were to issue an order obliging a national resolution authority to behave in a particular way when intervening prior to the adoption of a decision of the Board on the calculation of the *ex ante* contributions to the SRF, that would undermine that concept of a single judicial review while creating a risk that findings, in one and the same procedure, of that national court might diverge from those of the EU Courts which might, subsequently, be called upon to assess, as an ancillary matter, the legality of that intervention when examining an action for annulment, under Article 263 TFEU, brought against that decision of the Board (see, to that effect, judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, paragraph 50).

With regard to the second leg of the procedure, first of all the Court held that (see §§ 57-59)

> 57. It follows from the foregoing that, after the adoption of a decision of the Board on the calculation of the ex ante contributions to the SRF, the task of the national resolution authorities is solely to notify and give effect to that decision.
>
> 58. In that context, having regard to the specific powers of the Board… those authorities do not have the power to re-examine the calculations made by the Board in order to alter the amount of those contributions and they cannot therefore, after the adoption of a decision of the Board, review, to that end, the extent to which an institution is exposed to risk.
>
> 59. Likewise, if a national court were to be able, as envisaged by the referring court, to annul the notification, by a national resolution authority, of a decision of the Board on the calculation of the ex ante contribution of an institution to the SRF, on the ground of an error in the evaluation of that institution's exposure to risk on which that calculation was based, that would call into question a finding made by the Board and would ultimately impede the execution of that decision of the Board in Italy.

The Court further recalled that although neither the NRA nor the national court can take decisions that conflict with a decision of the SRB, the national court may refer to the ECJ for a preliminary ruling where the outcome of the procedure pending before it depends on the validity of the decision of the SRB.

Nevertheless, in order to avoid the circumvention of the time limits for appeals before the General Court, the possibility for a person to rely, in an action brought before a national court, on the invalidity of provisions contained in a measure of the European Union (which constitutes the basis of a national decision concerning that person), presupposes that either that person has also brought an action for the annulment of that EU measure within the prescribed time limits, or that person has not done so, as a result of not having a right to bring such an action.

As Iccrea was empowered to bring such an action (the SRB's decisions, though addressed to the Bank of Italy, were unquestionably of direct and individual concern to Iccrea), despite it brought it out of time (see the decision of the General Court of 19 November 2018 in the case T-494/17), the SRB's decisions shall be valid.

That Icrrea was directly and individually affected by the SRB's decisions is clearly explained in § 67 of the judgment, reading as follows:

> The decisions of the Board on the calculation of the *ex ante* contributions to the SRF for the year 2016 directly produce effects on the legal situation of

> Iccrea Banca in that they determine the amount of the *ex ante* contribution to the SRF that Iccrea Banca is required to pay. Further, those decisions do not, as is clear from paragraphs 55 to 58 of the present judgment, leave any discretion to the Bank of Italy, which must raise, from Iccrea Banca, a contribution corresponding to the amount determined by those decisions with respect to that institution, and which therefore has no power to alter that amount.[4]

In conclusion (§ 73):

> … it is not for the referring court to assess, in the main proceedings, the compatibility of decisions of the Bank of Italy with the rules governing the calculation of the *ex ante* contributions to the SRF, since that court cannot, under EU law, either give a ruling on acts of the Bank of Italy preparatory to that calculation, nor impede the raising, from Iccrea Banca, of a contribution corresponding to the amount determined by acts of the Board which have not been found to be invalid.

[4] In the same vein see the decisions of the General Court of 28 november 2019 in Case T-323/16 (§§ 35 ff.), Case T-365/16 (§§ 55 ff.) and Joined Cases T-377/16, T-645/16 and T-809/16 (§§ 50 ff.). See, in particular, §§ 50 to 55 of the GC's judgment in Case T-323/16, reading as follows: "50. Or, il ressort de la jurisprudence que même lorsque l'acte contesté, pour produire des effets sur la situation juridique des particuliers, implique nécessairement que des mesures d'exécution soient adoptées, la condition d'affectation directe est néanmoins regardée comme étant remplie si cet acte impose des obligations à son destinataire pour son exécution et si ce destinataire est tenu, de manière automatique, d'adopter des mesures qui modifient la situation juridique du requérant (voir, en ce sens, arrêt du 7 juillet 2015, Federcoopesca e.a./Commission, T-312/14, EU:T:2015:472, point 38 et jurisprudence citée). 51. En effet, comme l'a rappelé M. l'avocat général Wathelet dans ses conclusions dans l'affaire Stichting Woonpunt e.a./Commission (C-132/12 P, EU:C:2013:335, point 68 et jurisprudence citée), l'absence de marge de manœuvre des États membres annihile l'absence apparente de lien direct entre un acte de l'Union et le justiciable. En d'autres termes, pour empêcher l'affectation directe, la marge d'appréciation de l'auteur de l'acte intermédiaire visant à mettre en œuvre l'acte de l'Union ne peut être purement formelle. Elle doit être la source de l'affectation juridique du requérant. 52. En l'espèce, en premier lieu, il ressort de la réglementation applicable et, en particulier, de l'article 54, paragraphe 1, sous b), du règlement no 806/2014, ainsi que de l'article 70, paragraphe 2, du même règlement, que tant l'auteur concret du calcul des contributions individuelles que l'auteur de la décision approuvant ces contributions est le CRU. La circonstance qu'il existe une coopération entre le CRU et les ARN ne modifie pas cette constatation (ordonnance du 19 novembre 2018, Iccrea Banca/Commission et CRU, T-494/17, EU:T:2018:804, point 27). 53. En effet, seul le CRU est doté de la compétence de calculer, « après consultation de la BCE ou de l'autorité compétente nationale et en étroite coopération avec les [ARN] », les contributions ex ante des établissements (article 70, paragraphe 2, du règlement no 806/2014). Par ailleurs, les ARN ont une obligation découlant du droit de l'Union de percevoir lesdites contributions telles qu'établies par la décision du CRU (article 67, paragraphe 4, du règlement no 806/2014). 54. La décision du CRU établissant, en vertu de l'article 70, paragraphe 2, du règlement no 806/2014, les contributions ex ante revêt donc un caractère définitif. 55. Par conséquent, la décision attaquée ne saurait être qualifiée de mesure de nature purement préparatoire ou de mesure intermédiaire, dès lors qu'elle fixe définitivement la position du CRU, au terme de la procédure, sur les contributions".

4. *Case Law: State Street Bank International*

On 14 November 2019, the First Chamber of the Court of Justice issued its final decision[5] on a preliminary ruling procedure concerning the *ex ante*/ordinary and *ex post*/extraordinary contributions to the Italian national resolution fund.[6]

The facts of the case concerned a German-based credit institution, namely State Street Bank International GmbH (hereinafter «SSB»), which operated until 5 July 2015 in Italy through its controlled company, State Street Bank S.p.A. (hereinafter «SSB Italy»).

From 6 July 2015, SSB Italy merged by acquisition with SSB, and the latter continued to operate in Italy trough a branch.

By notes of November 2015 and April 2016, the Bank of Italy – in its capacity of national resolution authority according to Article 3 of the BRRD – requested payment of *ex ante* and *ex post* contributions for the year 2015 from SSB.[7]

SSB brought an action for annulment of those requests before the Italian administrative court, which thus decided to stay the proceeding and refer a preliminary ruling before the CJEU.

The Court of Justice tackled two main issues, concerning respectively the *ex ante* and the *ex post* contributions.

Regarding the first issue, the Court stated that the merger by acquisition of a credit institution with a parent company in another Member State during the contribution period,[8] shall be considered as a 'change of status' under Article 12, para. 2, of Delegated Regulation (EU) 2015/63,[9] as such definition is wide enough to encompass any kind of change in the legal or factual situation of an institution.

As a consequence, the mentioned merger had no impact on the institution's obligation to fully pay the *ex ante* contributions for 2015.

Moreover, according to the Court, it was worth noting that, at the time of the merger, the national resolution authority and the national resolution fund were not yet formally established and the contribution had not yet been calculated. Indeed, Delegated Regulation (EU) 2015/63 was binding in its entirety and directly applicable in all Member States at the date of the mentioned merger, and its Article 20 provided for transitional provisions in order to adapt the deadlines for the collection of ordinary contributions for the first contribution year (*i.e.* 2015).

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5 Judgment of the Court of 14 November 2019, *State Street Bank International*, C-255/18, EU:C:2019:967.

6 Pursuant to Articles 100, 102-104, 130 of the BRRD and Articles 4, 14 and 20 of Delegated Regulation (EU) 2015/63.

7 Respectively, for EUR 1,275,606.00 and EUR 3,826,819.00.

8 Which led to the circumstance that the acquired credit institution ceased to be under the supervision of the national authority.

9 Which states that "a change of status of an institution, including a small institution, during the contribution period shall not have an effect on the annual contribution to be paid in that particular year".

As for the second issue, the Court stated that, according to Article 104 of the BRRD, an institution located in one Member State, which merged by acquisition with a parent company established in another Member State on a date prior to the establishment of an extraordinary contribution by the national resolution authority of the first Member State, is not required to pay that contribution.

In this sense, the Court pointed out that the date at which *ex post* contributions are to be levied depends on the date of the resolution operations which gave rise to the deficit in the national fund.

Ex post contributions cannot therefore be planned in the same way as *ex ante* contributions, which are calculated with reference to the accounting information regarding the latest approved and certified financial statements available before 31 December of the year preceding the contribution period and are collected in respect of the calendar year in which they are imposed.

In addition to this, according to the Court, the main criteria to be taken into account in requiring *ex post* contributions (*i.e.* the institution's financial capacity and its exposure to risk of financial failure) could have not been calculated due to the fact that SSB Italy ceased to be under the supervision of the national authority at the time of the request.

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EU Legal references: Articles 5, 67, 70 of the SRMR; Article 103 of the BRRD; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the European Central Bank - Bank Resolution Funds, 25 May 2016, COM(2010) 254; Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements, OJ L 11, 17.1.2015, p. 44; Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to ex ante contributions to the Single Resolution Fund, J L 15, 22.1.2015, p. 1**.**

CJEU case law: ECJ, 5 March 2020, *Credito Fondiario v SRB*, ECLI:EU:C:2020:178; ECJ, 3 December 2019, *Iccrea*, C-414/18 ECLI:EU:C:2019:1036; ECJ, 14 November 2019, *State Street Bank International*, C-255/18, EU:C:2019:967; GC, 28 November 2019, *Banco Cooperativo Español v CRU*, Case T-323/16, ECLI:EU:T:2019:822; GC, 28 November 2019, *Portigon v CRU*, T-365/16, ECLI:EU:T:2019:824; GC, 28 November 2019, *Hypo Vorarlberg Bank v CRU*, Joned Cases T-377/16, T-645/16 and T-809/16, ECLI:EU:T:2019:823; GC, 19 November 2018, T-661/16, *Credito Fondiario v SRB*, ECLI:EU:T:2018:806; GC, 19 November 2018, T-14/17, *Landesbank Baden-Württemberg v SRB*, ECLI:EU:T:2018:812.

Literature: Hadjiemmanuil, C., Bank Resolution Financing in the Banking Union, in *LSE Legal Studies Working Papers*, 6/2015, No 6/2015; Nieto, M. J., Bank Resolution and Mutualization in the Euro Area, in *European Economy, Banks, Regulation, and the Real Sector*, 2016/2; Ciraolo, F., *Il finanziamento "esterno" delle crisi bancarie*, Padova, 2018; Rulli, E., Fondi di risoluzione "obbligatori": se non il contribuente, chi paga il costo della crisi bancaria?, in *Analisi Giuridica dell'Economia,* 2016, n. 2.

Chapter IX

The due process rules within the resolution procedures, the prevention and early intervention phases of the banking crises management

Raffaele D'Ambrosio

Summary: *1. The regime applicable to the resolution procedures – 2. The regime applicable to the sanctioning powers of the SRB – 3. The regime applicable to decisions on recovery plans, early intervention measures and structural measures*

1. The regime applicable to the resolution procedures

Unlike Article 22 of the SSM and the several provisions contained in the Framework regulation, no provisions of the SRMR, with the only exception of that on the sanctioning procedure, expressly provide for due process rules.

Nevertheless, as for the SRB's decisions, due process rights can be based on Article 41(2) of the Charter of fundamental rights of the European Union. This Article applies to all EU institutions and bodies and provides for "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken".

However, within the SRM, the protection of due process rights may conflict, to a much greater extent than in SSM, with the stability of the financial system as a whole.

This may lead to a balancing of interests and a sacrifice of due process rights in favour of the objective of preserving financial stability. This could be compatible with the general principles of Union law, provided that it turns into a limitation and not an elimination of these rights and that judicial protection of the persons concerned is ensured.

This statement needs to be better stated.

First, the assumption is acceptable only with regard to the resolution procedure under Article 18 SRMR, in order to ensure that it is carried out expeditiously.

It makes less sense with regard to proceedings relating, for example, to the preparation of the resolution plans, including the phase on the assessment of resolvability, or the determination of MREL. Some SRMR rules, although not expressly providing for the protection of a genuine right to be heard, seem to confirm this assumption, together with the practice followed so far by the SRB with regard to some of its decisions.

Indeed, under Article 8(8) SRMR, the SRB may require institutions to assist it in the drawing up and updating of the resolution plans. Moreover, Article 10, paras 7 to 10, SRMR stipulates that: (i) where the SRB determines that there are substantive impediments to resolvability it shall address a report to the institution; (ii) the institution shall propose to the Board possible measures to address or remove the impediments; (iii) should those measures do not work, the SRB shall adopt a decision instructing NRAs to require the institution to take any of the measures listed in paragraph 11. Furthermore, under Article 12(13) SRMR, any SRB's determination on MREL shall be made in parallel with the development and maintenance of the resolution plan and presumably following the same procedure and dialogue with the institution therein.

As to the practise of the SRB, see the 7th SRB Banking industry dialogue meeting (SRB MREL policy, Process and timeline, December 2018) and the SRB's decision of 17 March 2020, determining whether compensation needs to

be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular Español S.A. have been effected, both published in the SRB's website.

With specific regard to the resolution procedure under Article 18 SRMR, what seems possible is only a postponement of the exercise of the right to be heard, as its complete elimination would violate the Charter of fundamental rights. A postponement would instead be compatible with Article 52 of the Charter, as it would preserve the essence of the due process rights while fostering the general interest of financial stability.

This assumption is also grounded on the following additional arguments.

First, Recital 121 SRMR requires that SRMR has to be interpreted and implemented in accordance with the general principles provided for in the Charter.

See Recital 121, which reads as follows:

> This Regulation respects the fundamental rights and observes the rights, freedoms and principles recognised in particular by the Charter, and, in particular, the right to property, the protection of personal data, the freedom to conduct a business, the right to an effective remedy and to a fair trial and the right of defence, and should be implemented in accordance with those rights and principles.

Second, Article 29 SRMR stipulates that the NRAs shall implement the Board's resolution decisions in compliance with the safeguards provided for in the BRRD and in accordance with the conditions laid down in the national law transposing it.

Third, the Framework for the practical arrangements for the cooperation within the SRM refers to the safeguards provided for by the BRRD and to the conditions laid down in the national laws transposing the BRRD (see Article 10).

As for the Italian legal framework, the case law of the administrative courts has so far recognised the constitutionality of rules restricting the rights of defense in the context of the compulsory administrative liquidation of credit institutions, in the assumption that they were aimed at ensuring the protection of savings under Aticle 47 of the Italian Constitution. The same problem arises with regard to the resolution procedures under Articles 3(5), 32(7), 34(3) of the Italian Legislative Decree No 180/2015 and should presumably be solved in the same way. It is difficult to say whether such restrictions on the rights of defence are also compatible with the Charter.

It is not clear at what stage the postponement of the right to be heard should take place.

According to the general principles applicable to composite procedures, such a postponement should take place at the stage before the SRB, in so far as the NRAs have no discretion in enforcing its resolution decisions.

However, the foregoing provisions and recitals of the SRMR would seem to suggest that the exercise of the right to be heard has to be postponed until the national stage of the procedure.

2. The regime applicable to the sanctioning powers of the SRB

Article 40 SRMR ensures a right to be heard and a right to have access to files to the addressees of the Board's decisions imposing fines and/or periodic penalty payments.

Access to files is subject to the legitimate interests of other persons in the protection of their business secrecy and does not extend to confidential information or internal preparatory documents of the Board.

Under Article 40 SRMR

> 1. Before taking any decision imposing a fine and/or periodic penalty payment under Article 38 or 39, the Board shall give the natural or legal persons subject to the proceedings the opportunity to be heard on its findings. The Board shall base its decisions only on findings on which the natural or legal persons subject to the proceedings have had the opportunity to comment.
>
> 2. The rights of defence of the natural or legal persons subject to the proceedings shall be fully complied with during the proceedings. They shall be entitled to have access to the Board's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or internal preparatory documents of the Board.

Differently from what provided for in the SSM Framework Regulation, the framework for the practical arrangements for the cooperation within the SRM contains no rule of separation between the investigative and the decision-making functions.

Moreover, no specific rule is provided for in the SRMR with regard to the full jurisdiction of the CJEU on the Board's sanctioning decisions.

3. The regime applicable to decisions on recovery plans, early intervention measures and structural measures

The ECB and the NCAs may adopt decisions on recovery plans and apply early intervention measures under the SSMR/SRMR and national law transposing

CRD IV/BRRD (**see Chapter VII.A. Recovery plans, early intervention measures and structural measures**).

Decisions on recovery plans are governed by Articles 6 and 8 BRRD and by provisions of national law transposing the BRRD.

Article 13 SRMR refers, in turn, to measures under Article 16(1) SSMR, Article 104 CRD IV and Articles 27(1), 28 and 29 BRRD (most of them mimic, in turn, Pillar 2 decisions).

The NCAs (and, as the case may be, the ECB) may also apply the set of structural measures under some relevant national laws.

A problem arises here as to which procedural regime applies to decisions on recovery plans, early intervention and structural measures, whether the one under the SSMR/national law transposing CRD IV or the one under national law transposing BRRD.

With regard to the ECB's decisions on recovery plans and early intervention and (as the case may be) structural measures, the safeguards applicable (right to express one's view; access to files) are those contained under Article 22 SSMR and Articles 25 ff. of the Framework Regulation.

Indeed, said rules apply to all ECB decisions adopted in accordance with Article 4 SSMR, including those "in relation to recovery plans, and early intervention… and, only in the cases explicitly stipulated by relevant Union law for competent authorities, structural changes" (Article 4(1)(i) SSMR).

As per Article 22 SSMR, the right to be heard may be temporarily waved where urgent action is needed in order to prevent significant damage to the financial system.

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EU Legal references: Articles 41 and 52 of the Charter of fundamental rights; Article 22 SSMR; Articles 25 ff. of the Framework Regulation; Recitals 121 and Articles Article 10, paras 7 to 10, 12(13), 18, 21(1), 29, 40 of the SRMR; Recital 88 of the BRRD; Article 10 of the Framework for the practical arrangements for the cooperation within the SRM.

National Legal references: Articles 3(5), 32(7), 34(3) of the Italian Legislative Decree No 180/2015.

Other official documents: SRB's decision of 17 March 2020, determining whether compensation needs to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular Español S.A. have been effected; 7th SRB Banking industry dialogue meeting (SRB MREL policy, Process and timeline, December 2018).

PART THREE

ADMINISTRATIVE AND JUDICIAL REVIEW AND LIABILITY ISSUES

Chapter X.A

The administrative and judicial review of the decisions taken within the SSM and the SRM

Raffaele D'Ambrosio

Summary: *1. The administrative review of the decisions taken by the ECB as supervisory authority – 2. The administrative review of the SRB's decisions – 3. The judicial review of the SSM supervisory decisions – 4. The judicial review of the resolution decisions*

1. *The administrative review of the decisions taken by the ECB as supervisory authority*

The addressees of any ECB's supervisory decision adversely affecting them may request a review of said decision by an ECB's internal body, the Administrative Board of Review (ABoR) (Article 24(1) SSMR and ECB's ABoR Establishment Decision).

The request for review shall not have suspensory effect.

However, the Governing Council, on a proposal by the ABoR may, if considered appropriate given the circumstances, suspend the application of the contested decision (Article 26(8) SSMR).

The request for review is without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties (Article 26(11) SSMR).

The ABoR is bound to the grounds relied upon by the applicant in its notice of review (Article 10(2) ABoR Establishment Decision).[1]

The ABoR assesses the procedural and substantive conformity of the ECB's decisions with the SSMR (Article 24(1) SSMR and Article 10(1) ABoR Establishment Decision) and has to respect the margin of discretion left to the ECB to decide on the opportunity to take those decisions (recital 64 SSMR).

Article 24(1) SSMR stipulates that:

> The ECB shall establish an Administrative Board of Review for the purposes of carrying out an internal administrative review of the decisions taken by the ECB in the exercise of the powers conferred on it by this Regulation after a request for review submitted in accordance with paragraph 5. The scope of the internal administrative review shall pertain to the procedural and substantive conformity with this Regulation of such decisions.

As per Article 10(1) ABoR Establishment Decision

> In accordance with Article 24(1) of Regulation (EU) No 1024/2013, the scope of the internal administrative review shall cover the relevant decision's procedural and substantive conformity with Regulation (EU) No 1024/2013.

Under Recital 64 SSMR

> The ECB should provide natural and legal persons with the possibility to request a review of decisions taken under the powers conferred on

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[1] Decision of the ECB of 14 April 2014 concerning the establishment of the Administrative Board of Review and its Operating Rules (ECB/2014/16).

> it by this Regulation and addressed to them, or which are of direct and individual concern to them. The scope of the review should pertain to the procedural and substantive conformity with this regulation of such decisions while respecting the margin of discretion left to the ECB to decide on the opportunity to take tho*se decisions*. For that purpose, and for reasons of procedural economy, the ECB should establish an administrative board of review to carry out such internal review. To compose the board, the Governing Council of the ECB should appoint individuals of a high repute. In making its decision, the Governing Council should, to the extent possible, ensure an appropriate geographical and gender balance across the Member States. The procedure laid down for the review should provide for the Supervisory Board to reconsider its former draft decision as appropriate.

Some doubts have been raised as to whether the ABoR's review should be deemed as extended to all the aspects of the legality of any ECB's supervisory decision or be confined to the mere conformity to the SSM rules.

The ABoR's review is an *ex tunc* review (i.e.: as matters stood when the ECB first acted); though subsequent developments are irrelevant, the ABoR might wish to consider whether it is wise to share its appreciation thereof with the SB.

At the end of the review process, the ABoR will express an opinion that the SB shall take into account with the aim of promptly submitting a new draft decision to the Governing Council's tacit consent (Article 24(7), first period, SSMR).

As the ABoR's decisions are mere internal opinions addressed to the SB, it comes as no surpise that (differently from what was provided for under Article 60(7) of the EBA's founding regulation and under Article 85(10) of the SRMR with regard to the ESAs' BoA and the SRM Appeal Panel respectively) they are not made public.

Nevertheless, it is worth noting that in its Report on the SSM (see p. 5), the Commission comes to the conclusion that

> It would be useful to take advantage of the growing jurisprudence developed by the ABoR by ensuring more transparency over the work undertaken by the ABoR, for instance through publication on the ECB's website of summaries of ABoR decisions and with due observance of confidentiality rules.

Under Article 24(7), first period, SSMR

> After ruling on the admissibility of the review, the Administrative Board of Review shall express an opinion within a period appropriate to the urgency of the matter and no later than two months from the receipt of the request and remit the case for preparation of a new draft decision to the Supervisory Board. The Supervisory Board shall take into account the opinion of the Administrative Board of Review and shall promptly submit a new draft decision to the Governing Council…

The SB's new draft decision may take into account other elements in addition to those brought by the applicant and assessed by the ABoR (Article 17(1) ABoR Establishment Decision).

Under Article 17(1) ABoR Establishment Decision

> The Supervisory Board shall assess the Administrative Board's opinion and propose a new draft decision to the Governing Council. The Supervisory Board's assessment shall not be limited to examination of the grounds relied upon by the applicant as set forth in the notice of review, but may also take other elements into account in its proposal for a new draft decision.

Under Article 24(7), second period, SSMR

> The new draft decision shall abrogate the initial decision, replace it with a decision of identical content, or replace it with an amended decision. The new draft decision shall be deemed adopted unless the Governing Council objects within a maximum period of ten working days.

Differently from what is provided for with regard to the obligation of the EBA and the SRB to comply with the ESAs' BoA and the SRM Appeal Panel, neither the SB nor the GC are bound by the ABoR's decision.

The fact that ABoR's decisions are not binding on the GC is in line with the SSM constitutional constraints of not prejudicing the GC's prerogatives in the field of monetary policy.

Indeed, the GC's right to object to the new decision adopted by the SB following the ABoR's opinion for monetary policy concerns needs to be preserved.

By contrast, the reason why the ABoR assessment should not be binding on the SB remains unclear.

For further details on the administrative review of the decisions taken by the ECB as supervisory authority see **Chapter X.A. Nature and role of the Administrative Board of Review.**

2. The administrative review of the SRB's decisions

The SRMR (Articles 85 to 86) provides for two types of situations:

(i) those where the review of the resolution measures adopted by the SRB involves a necessary intervention of the Appeal Panel (AP), which could be followed by an action before the General Court;

(ii) those where decisions of the SRB can be directly appealed to the CJEU.

Decisions subject to the previous intervention of the AP are the following (Article 85(3) SRMR):

(i) decisions on measures to address/remove substantive impediments to resolvability;

(ii) decisions on simplified obligations for certain institutions;

(iii) decisions on MREL;

(iv) decisions on the application of penalties;

(v) decisions on the determination/collection of *ex ante* and *ex post* contributions to the SRF;

(vi) decisions on the access to documents.

Decision on resolution schemes are not included within those subject to the previous intervention of the AP and are therefore to be directly appealed to the CJEU.

Differently from what is provided for with regard to the ABoR's review of the ECB's decisions:

(i) the AP has the power to confirm the SRB's decisions or remit the case to the latter (Article 85(8) SRMR);

(ii) the SRB shall be bound by the decision of the AP and shall adopt an amended decisions regarding the case concerned (Article 85(8) SRMR).

Similarly, to the request of review to the ABoR, the appeal lodged to the AP has not suspensive effects, but, differently from what it is provided for in Article 24 SSMR, the suspension of the contested decision falls within the remit of the AP (Article 85(6) SRMR).

Although not explicitly stated, the intensity of the review carried out by the AP is shaped along the lines of the CJEU's review of legality.

An overview on the case-law of the SRB's Appeal Panel may be found in Chapter X.C. **The administrative, quasi-judicial review of the decisions taken by the SRB. The cases decided so far by the Appeal Panel. Substantive and procedural issues.**

3. The judicial review of the SSM supervisory decisions

The allocation between national courts and the CJEU of the judicial review of the SSM decisions follows the allocation of the supervisory powers between the NCAs and the ECB.

As there are uncertainties on the allocations of supervisory powers within the SSM (as it is the case for the sanctioning powers and the so-called national powers; for further details on these topics see **Chapter I.A. The SSM: Allocation of tasks and powers between the ECB and the NCAs and organisational issues** and **Chapter IV.A. The involvement of the NCAs in the ECB's supervisory proceedings**) it is still not crystal clear which court is empowered to review some SSM decisions.

In cases of composite administrative proceedings (see **Chapter IV.A. The involvement of the NCAs in the ECB's supervisory proceedings, § 4** and **Chapter VI.A. The safeguards applicable to the ECB supervisory and sanctioning procedures, § 3**), establishing which court is empowered to review both the final decisions and the internal acts is conditional upon the discretion that the decision-making authority enjoys in the adoption of the final decision.

In this vein see the Judgment of the CJEU in Case C-219/17 Silvio Berlusconi and Another v Banca d'Italia and Others (see **Chapter IV.B. Case-study: ruling of the ECJ C-219/17 *Fininvest and Berlusconi***).

To sum up, the Court draws a clear distinction between two situations:

(i) the situation where the EU institution has only limited or no discretion, so that the NCA's act is binding on the EU institution, and

(ii) the situation where the EU institution exercises, alone, the final decision-making power without being bound by an NCA's act.

In the first case, it falls to the national courts to rule on any irregularities that may vitiate such a national act, making a reference to the Court for a preliminary ruling where appropriate.

In the second case, it falls to the EU Court of Justice not only to rule on the legality of the final decision adopted by the EU institution, but also to examine any defects vitiating the preparatory acts or the proposals of the NCA that would affect the validity of that final decision.

The Court observes that the ECB has exclusive competence to decide whether or not to authorise the proposed acquisition of qualifying holdings in a credit institution, which is laid down in the context of the SSM, for the effective and consistent functioning of which the ECB is responsible.

Consequently, the EU Courts alone have jurisdiction to determine, as an incidental matter, whether the legality of the ECB's decision is affected by any defects of the preparatory acts adopted by the NCA. The legality of those acts cannot be reviewed by the national courts.

The review on the ECB supervisory acts is limited to the legality of the acts themselves pursuant to Article 263 TFEU.

As the CJEU's review involves complex economic assessments, it is useful to refer to the Court's case law in the context of competition law.

In these cases, the CJEU has traditionally adopted a limited standard of review, limiting its review to an assessment of compliance with procedural requirements, to the sufficiency of the statement of reasons, to the correct assessment of the facts and inexistence of manifest errors or misuse of power by the Commission.

Nevertheless, in recent cases, the Court displayed a somehow more intrusive and proactive economic assessment of the sustainability of the legal reasoning at stake.

See ECJ, Telefónica SA and Telefónica de España SAU v European Commission, C-295/12, 10 July 2014, § 54

> Accordingly, the Court of Justice has already stated that, whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the EU judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. The EU judicature must, among other things, not only establish whether the evidence put forward is factually accurate, reliable and consistent, but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (*Commission* v *Tetra Laval* EU:C:2005:87, paragraph 39; *Chalkor* v *Commission* EU:C:2011:815, paragraph 54; and *Otis and Others* EU:C:2012:684, paragraph 59).

In the same vein see also ECJ, Commission of the European Communities v Tetra Laval BV, C-12/03 P, 15 February 2005, § 39.

See, in the field of monetary policy, the Gauweiler case (C-62/14), §§ 67 to 69:

> 67. … the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives (…).
>
> 68. As regards judicial review of compliance with those conditions, since the ESCB is required… to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion (…).
>
> 69. … where an EU institution enjoys broad discretion, a review of compliance with certain procedural guarantees is of fundamental importance. Those guarantees include the obligation for the ESCB to examine carefully and impartially all the relevant elements of the

situation in question and to give an adequate statement of the reasons for its decisions.

Under Article 261 TFEU, regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the CJEU unlimited jurisdiction with regard to the penalties provided for in such regulations.

The full jurisdiction on the ECB sanctions is provided for in Article 5 of the regulation No 2532/98, but not in Article 18(1) and (7) of the SSM Regulation.

In the absence of a special provision, the rule contained in Article 263 of the TFEU on the review of the mere legality of EU acts should therefore apply also to the ECB sanctions under Article 18 SSMR.

The unlimited jurisdiction of the Court is nonetheless required by the case law of the ECtHR and of the CJEU as regards penalties having a *coloration pénale*, as an element of the right to an effective judicial remedy.

To the extent that the penalties and the sanctions under Articles 18(1) and 18(7) SSMR are to be considered as criminal in nature, the absence of a specific rule on the full jurisdiction should be considered as a violation of the right to an effective judicial remedy.

Under Article 4(3) SSMR the ECB shall apply the Union law and, where Union law is composed of directives, it shall apply national law transposing those directives.

In principle, the tasks of EU Courts do not include the interpretation of national law. That is a matter for the courts of the Member States.

However, in applying European Union legislation questions on the substance and interpretation of national law may arise.

Under the settled case law of the CJEU, the scope of national laws, regulations or administrative provisions must be assessed in light of the interpretation given to them by national courts. This view is confirmed by the first General Court's decision on the application of national law by the ECB (GC, *Caisse régionale de crédit agricole mutuel v. ECB*, Joined cases T-133/16 to T-136/16, § 84).

Nevertheless, the General Court seems to challenge this settled stance of the ECJ where it affirms that in the absence of decisions by the competent national courts, it is for the Court to rule on the scope of national law (GC, Crédit Mutuel Arkéa, T-712/15, § 132, and T-52/16, § 131; see **Chapter II.A. The application of national law by the ECB**).

As for the supervisory tasks conferred on the ECB's exclusive competence (licensing and qualifying holdings), national courts run the risk to never be involved in the interpretation of the relevant national rules. Further doubts arise about the possibility to ask for review of national constitutional courts

(on this topic see again **Chapter IV.B. Case-study: ruling of the ECJ C-219/17 *Fininvest and Berlusconi***, § 5) or for the preliminary ruling of the ECJ.

4. The judicial review of the resolution decisions

The allocation between national courts and the CJEU of the judicial review of the SRM decisions follows the allocation of the resolution powers between the NRAs and the SRB.

See recital 120 SRMR

> The SRM brings together the Board, the Council, the Commission and the resolution authorities of the participating Member States. The Court of Justice has jurisdiction to review the legality of decisions adopted by the Board, the Council and the Commission, in accordance with Article 263 TFEU, as well as for determining their non-contractual liability. Furthermore, the Court of Justice has, in accordance with Article 267 TFEU, competence to give preliminary rulings upon request of national judicial authorities on the validity and interpretation of acts of the institutions, bodies or agencies of the Union. National judicial authorities should be competent, in accordance with their national law, to review the legality of decisions adopted by the resolution authorities of the participating Member States in the exercise of the powers conferred on them by this Regulation, as well as to determine their non-contractual liability.

In some cases, decisions of the SRB need to be previously challenged before the AP (Articles 83(3) and 86 SRMR).

Nevertheless, decisions on resolution schemes are not included within those subject to the previous intervention of the AP and shall therefore be directly appealed to the CJEU.

Moreover, in the event that the SRB has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the CJEU in accordance with Article 365 TFEU (Article 86(3) SRMR).

Furthermore, the CJEU shall have jurisdiction in any dispute on contractual and non-contractual liability of the SRB (Article 87 SRMR).

Both decisions taken by the AP and, where there is no right of appeal to the latter by the SRB, are subject to the review of the CJEU in accordance with Article 263 TFEU.

In the absence of an express provision on the full jurisdiction in accordance to Article 261 TFEU, this holds true also for the sanctions adopted by the SRB under the SRMR.

Like the review of the SSM decisions, the review of the SRM decisions involves complex economic assessments and it is subject, as such, to the criteria laid down in the CJEU's case law in the context of competition law.

As most of the decisions of the SRB are implemented through NRAs' decisions (see **Chapter VIII.A. The SRM: Allocation of tasks and powers between the SRB and the NRAs and organisational issues, § 4.6** and **Chapter IX. The due process rules within the resolution procedures, the prevention and early intervention phases of the banking crises management, § 1**), a question arises as to whether and what extent a SRB's act may be challenged before the national courts.

The answer to that question is conditional upon the margin of discretion the NRAs enjoy in the implementation of SRB's decisions.

Should the NRAs have no margin of discretion, both the SRB and NRAs' decisions are expected to be challenged before the CJEU.

Applying the principles enshrined in the Fininvest/Berlusconi judgment to the specific subject of mixed procedures governed by the SRMR, the Court held, in the judgment C-414/18, Iccrea Banca, that (§ 48):

> … the EU Courts alone have jurisdiction to determine, when reviewing the legality of a decision of the Board setting the amount of the individual *ex ante* contribution to the SRF of an institution, whether an act adopted by a national resolution authority that is preparatory of such a decision is vitiated by defects capable of affecting that decision of the Board, and no national court can review that national act…

Should the NRAs enjoy a margin of discretion, the possibility of plaintiffs challenging the validity of a SRB's act before the national courts would not be excluded.

Nevertheless, in such an event national courts would have to submit a request for preliminary reference to the CJEU.

Resolution measures adopted by the national resolution authorities may be challenged before the national courts, on the basis of the national procedural rules.

However, as regards the standard of review undertaken by the national courts, recital 89 of the BRRD apparently introduces some limitations regarding the intensity of the review to the extent that it suggests that the "complex economic assessments made by national resolution authorities" in the context of crisis management should not go to waste and that national courts should use it as a basis to review the relevant measures.

This notwithstanding, the complex nature of those assessments should not prevent the national courts from examining whether the evidence relied upon by the resolution authority is factually accurate, reliable and consistent, whether

that evidence contains all the relevant information which should be taken into account in order to assess a complex situation and it is capable of substantiating the conclusions drawn therefrom.

A specific problem arises as to whether the FOLTF assessment by the supervisory authorities are capable of being challanged in court.

In its decision of 6 May 2019 (T-283/18, Bernis and Others v ECB), the General Court held that the ECB's assessment of FOLTF must be considered as a preparatory measure in the procedure, which is designed to allow the SRB to take a decision regarding the resolution of the bank in question and cannot form the subject of an action for annulment for that reason. Indeed (see § 34 of the GC's order), the ECB

> … has no decision-making power within the framework for the adoption of a resolution scheme. Under recital 26 of Regulation No 806/2014, while the ECB and the SRB must be able to assess whether a credit institution is failing or is likely to fail, the SRB has the exclusive power to assess the conditions required for a resolution and to adopt a resolution scheme if it considers that all the conditions are met. In addition, it follows expressly from Article 18(1) of Regulation No 806/2014 that it is for the SRB to assess whether the three conditions set out in that provision are met. While the ECB does have the power to send an assessment with regard to the first condition, namely whether the entity is failing or is likely to fail, this nevertheless constitutes a mere assessment, which does not in any way bind the SRB.

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Legal references: Recitals 60, 61 and 64 and Article 24 SSMR; Recital 120 and Articles 85 to 86 SRMR; Article 89 BRRD; Decision of the ECB of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Ruules (ECB/2014/16), OJ L 175, 14.6.2014, p. 47; Appeal Panel of the Single Resolution Board, Rules of Procedure (consolidated version as of 10 April 2017).

Case law: ECJ, 3 December 2019, C-414/18, Iccrea Banca, ECLI:EU:C:2019:1036; ECJ, 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023; GC, 6 May 2019, T-283/18, Bernis and Others v ECB, ECLI:EU:T:2019:295; ECJ, 10 July 2014, Telefónica SA and Telefónica de España SAU v European Commission, C-295/12, ECLI:EU:C:2014:2062; ECJ, 15 February 2005, Commission of the European Communities v Tetra Laval BV, C-12/03 P, ECLI:EU:C:2005:87.

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Court of Justice of the European Union in *The Palgrave Handbook of European Banking Union*, p. 105 ff.;; Prek, M. and Lefèvre, S., 'The EU Courts as "National" courts: National Law in the EU Judicial Process', (2017) 54 *Common Market Law Review* p. 369-402; VV.AA, Judicial review in the Banking Union and in the EU financial architecture Conference jointly organised by Banca d'Italia and the European Banking Institute, in *Quaderni di ricerca giuridica della Consulenza Legale della Banca d'Italia*, 84, Rome, June 2018; Voordeckers, O., Administrative and judicial review of supervisory acts and decisions under the SSM, in *The enforcement dimension of the Single Supervisory Mechanism (SSM). The Interplay Between Administrative and Criminal Law* edited by Silvia Allegrezza, Part. II, Chapter I, Wolters Kluwer, 2020, pp. 114 ff..

Chapter X.B

Nature and role of the Administrative Board of Review

Concetta Brescia Morra

Summary: *1. The legal basis and core characteristics of the administrative review in the SSM Regulation – 2. The operating procedures of the ABoR – 3. The legal implications of the ABoR's "opinion" – 4. The scope of the review – 5. The nature and the role of ABoR in the SSM – 6. Conclusions*

1. The legal basis and core characteristics of the administrative review in the SSM Regulation

The SSM Regulation provides for an internal administrative review of the ECB's decisions in the supervisory field carried out by a new body, the Administrative Board of Review (hereinafter ABoR).

According to Article 24 of the SSM Regulation, any natural or legal person may request a review of a decision taken by the ECB in the exercise of the powers conferred on it by the SSM Regulation, if that decision is addressed to that person or is of a direct and individual concern to that person. The procedures are regulated by the ECB's decision of 14 April 2014 (ECB/2014/16).[1]

The request for review can be filed after the decision has been formally adopted by the ECB. The ECB decision-making process in the banking field is complex: the planning and execution of the tasks conferred on the ECB are undertaken by the Supervisory Board, which is set up under the SSM Regulation and which proposes to the Governing Council of the ECB a complete draft decision to be adopted by that body. The Governing Council does not formally ratify or approve the draft decision. The decision is deemed adopted unless the Governing Council objects to the Supervisory Board's proposal within a period of ten days.[2]

The ABoR shall express an opinion within two months from the receipt of the request, and remit the case to the Supervisory Board for the preparation of a new draft decision. The opinion is not binding on the Supervisory Board. The latter shall take into account the opinion of the ABoR and shall promptly submit a new draft decision to the Governing Council. The initial decision is abrogated and then replaced either by an identical decision or by an amended decision.

The review is without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties. No action may be brought before the Court of Justice against the opinion of the ABoR. If the applicant decides to appeal the decision of the Governing Council that is made after the ABoR has issued its opinion, the ABoR's opinion becomes public as part of the ECB's proceedings before the Court.

The structure of the ABoR as outlined by the European legislator highlights the aim of setting up a body composed of independent experts in the banking supervisory field.

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[1] Decision of the European Central Bank of 14 April 2014 concerning the establishment of the Administrative Board of Review and its Operating Rules (ECB/2014/16).

[2] The governance structure of the ECB in the banking field is due, on the one hand, to the need to provide tools to address potential conflicts of interest between monetary policy and banking supervision and, on the other hand, to the regulatory constraints imposed by the Treaty which identifies the Governing Council as the only decision-making body of the ECB.

The ABoR is composed of five members, who may be replaced by one of two alternates under certain conditions.

The members of the Administrative Board and the two alternates must be individuals of high repute who are Member State nationals and have a proven record of relevant knowledge and professional experience, including supervisory experience, to a sufficiently high level in the fields of banking or other financial services.

According to Article 24 of the SSM Regulation, the members are to act independently and "in the public interest". Rules are provided to ensure that the ABoR's members are independent of the ECB (and of the national competent authorities), as well as of potential applicants.

To ensure that the members are independent of the authorities, notwithstanding the fact that they are appointed by the Governing Council of the ECB, the Regulation provides that the members should not be current staff of the ECB, nor current staff of competent authorities or other national or Union institutions, bodies, offices or agencies that are involved in carrying out the tasks conferred on the ECB by the SSM Regulation. Moreover, Article 24 expressly underlines the fact that the members of the Board are not to be bound by any instructions from the ECB. This latter provision, along with rigorous procedural rules on how the ABoR functions, constitutes a substantial guarantee that the deliberations of the ABoR are free from potential interference from the ECB offices.[3]

According to Article 6 of the ECB's decision (ECB/2014/16), the Secretary of the Board is the same as the Secretary of the Supervisory Board. "The Secretary shall be responsible for preparing the efficient examination of reviews, organising the Administrative Board's pre-hearings and hearings, drafting the respective proceedings, maintaining a register of reviews and otherwise providing assistance in relation to the reviews". The role played by the Secretariat could raise doubts about the independence of the ABoR. However, the operating rules can limit this risk by ensuring that the decision-making process allows the members to make the final decision based on their own independent assessment.

2. *The operating procedures of the ABoR*

Under the SSM Regulation, as implemented by the ECB's decision (ECB/2014/16), the operating rules of the ABoR are typical of a judicial body. The procedure is clearly divided into two parts: the investigation phase, which includes the possibility of holding an oral hearing, and the deliberation phase.

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[3] See on this point Lamandini, M., Ramos, D. and Solana, J., *The ECB Powers as a Catalyst for Change in EU Law: Part 2: SSM and Fundamental Rights*, in *Columbia Journal of European Law*, 2016, p. 61, arguing that the ABoR falls short of having "institutional independence" because of the lack of binding powers over the ECB and the lack of "an appearance of independence", given that the Board is part of the ECB's structure.

Formalising the proceedings into distinct phases and laying down strict procedural rules ensures that the right of due process is respected and that a truly independent assessment is made by the ABoR.

The investigation phase starts with the receipt of a notice of review from an applicant and ends after the oral hearing, if a hearing is called. On receipt of a notice, the Chair must designate among the Board members a rapporteur for the review, taking into account the specific expertise of each member of the Board (Article 8 of ECB/2014/16). During the investigation phase, the case rapporteur conducts the investigation and all the members of the Board examine in detail the admissibility of the review and the points raised by the applicant in the request.

The first two points examined are the admissibility of the application and the need for suspension. The Board first has to rule on the admissibility of the request, before examining whether it is legally founded. The request must be submitted by a natural or legal person to whom an ECB's decision is addressed or for whom such a decision is of direct and individual concern.[4]

As in court proceedings, the ABoR's assessment is limited to the examination of the grounds relied upon by the applicant as set forth in the notice of review. By contrast, the Supervisory Board may take other elements into account in its proposal for a new draft decision (Article 17 of ECB/2014/16). This rule highlights the fact that the ABoR has a limited mandate: to review an ECB's decision on request, limiting its review to the issues raised by the applicant. The ECB's position is different – it has to pursue the general objectives entrusted to it by the SSM Regulation in the exercise of its supervisory powers over banks; in light of this, it can change its original decision on the basis of a new assessment of the case. The ABoR's role is not to replace or second-guess the ECB as a supervisory authority. Only a manifest violation of law, even if not highlighted in the request of the applicant, must be brought by the ABoR to the Supervisory Board's notice to protect the obligation of the administration to act legally.

The second point to be examined is the need for suspension. The ABoR may propose to the Governing Council the suspension of its contested decision, if the request for review is admissible and not obviously unfounded and the ABoR

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[4] Article 24(5) of the SSM Regulation and Article 7 of the ECB's decision on the operating rules of the ABoR. Given that the rules about standing are the same as those provided by the Treaty on having standing before the CJEU (Article 263(4) TFEU), the principles established in the case law of the Court are very important to define the conditions for the admissibility of a request for review made to the ABoR. According to the case law of the CJEU (See case Judgment of 15 July 1963 in case 25/62, *Firma Plaumann & Co v Commission*, EU:C:1963:17. For an extensive commentary on the point, see Witte, A., *Standing and Judicial Review in the New EU Financial Markets Architecture*, in *Journal of Financial Regulation*, 2015, No. 1, pp. 1-37.), a contested decision is of direct concern to an applicant if that decision directly affects the legal situation of the applicant, or influences his or her material situation or has a foreseeable impact on his or her legal position. According to the settled case law, a legal act of an EU institution or agency is of individual concern when it affects specific natural or legal persons by reason of certain attributes peculiar to them, or by reason of a factual situation that differentiates them from all other persons and distinguishes them individually in the same way as the addressee.

considers that the immediate application of the contested decision may cause irreparable damage.

A very important stage of the investigation phase is the oral hearing. Article 14 of the ECB's decision (ECB/2014/16) states that the ABoR may call for an oral hearing where it considers this necessary for the fair evaluation of the request; both the applicant and the ECB will be requested to make oral representations at such hearing. The hearing is useful to give the applicant the opportunity to be heard by the ABoR and to allow the ECB to give a better explanation of the reasons underlying the contested decision.

The second phase of the review is the deliberation phase, which starts immediately after the hearing and ends with the adoption of an opinion by the ABoR members. As underlined above, it is crucial that the deliberations, which include the conclusions reached on the request for review, the drafting of and voting on the opinion, are carried out by the ABoR with full independence. The ECB services do not participate in this final phase of the proceedings. The Board decides on the basis of a majority of at least three of its five members.

The many similarities between proceedings before the ABoR and those before a judicial body could lead to the conclusion that the ABoR could be classified as a "quasi-judicial" body. The non-binding nature of its decisions and the fact that its proceedings are a phase of the ECB's decision-making process (a phase that could take place only in case of a request for review), however, should lead to dismiss this classification. The procedural rules that replicate those on judicial decisions are imposed by the SSM Regulation merely to ensure a fair evaluation of the applicant's rights.

3. The legal implications of the ABoR's opinion

The ABoR's opinions are not binding on the Supervisory Board and the Governing Council. This solution is the result primarily of the political decision not to change the Treaty to create the SSM, and to respect the Treaty provisions that lay down that the Governing Council is the only decision-making body of the ECB. Therefore, it was not possible for the new body (not established by the Treaty but set up by a Regulation) to issue opinions that were binding on the Governing Council. Moreover, given the "independence" of the ECB and its special status as one of the European Union institutions, it is difficult to conceive of a body composed of "outside experts" binding the decision-making power of the Governing Council.[5]

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[5] See Harlow, C. and Rawlings, R., *Process and Procedure in EU Administration*, Hart publishing, Oxford/Portland, Oregon, 2014, p. 294 (footnote 22), who in commenting on the review procedure of the decisions of the ECB by the ABoR, say "Yet another convoluted procedure in the face of the Bank's entrenched constitutional position".

Although it is not binding, the ABoR's opinion is a relevant step in the decision-making process of the ECB because the Supervisory Board "shall take into account the opinion" of the ABoR (Article 24(7) SSM Regulation) and shall in any case promptly submit a new draft decision to the Governing Council. The opinion must propose whether the initial decision should be abrogated, replaced with a decision of identical content or with an amended decision. In the latter case, the opinion should contain proposals for the necessary amendments (Article 16(2) ECB/2014/16). The new draft decision abrogates the initial one. This means that the ABoR is part of the decision-making process of the SSM.

Moreover, the ABoR's opinion "shall be notified to the parties" (Article 24(9) SSM Regulation) and, accordingly, if the parties affected by the ECB's decision bring an appeal before the CJEU, the arguments of the ABoR will be disclosed in court. In the judgement *Landeskreditbank Baden-Württemberg Förderbank v ECB*,[6] the General Court acknowledged the opinion of the ABoR "finding the ECB's decision to be lawful" (para. 6). The judgement takes into account the arguments contained in the ABoR's opinion on each claim raised by the applicant as part of the decision-making process of the ECB. For instance, in para. 34 the Court recalls "As stated in para. 31 above, a reading of the contested decision, read in the light of the Administrative Board of Review's Opinion, shows that the ECB considered that the application of the Article 70(1) of the SSM Framework Regulation could lead to the applicant's not being classified as a significant entity" (on this point see more extensively para. 6). Therefore, the outcome of the "internal administrative review" carried out by the ABoR does not have only a purely preparatory and preliminary character in the decision-making process of the ECB.

4. The scope of the review

The ABoR carries out an internal administrative review pertaining to "the procedural and substantive conformity with this Regulation" of the decision taken by the ECB in the prudential supervisory field (Article 24(1) SSM Regulation).

The reference to "substantive conformity" implies that the ABoR's review is not limited to whether there was an infringement of an essential procedural requirement, which would be primarily the right of the addressee of the decision to be heard, the right of defence during the proceedings, and the duty of the ECB to provide adequate reasons for its decision (see Article 21 of the SSM Regulation on the "due process for adopting supervisory decisions"). The ABoR must also check that in substance the decision complies with applicable law, including the prudential provisions contained in the SSM Regulation. Despite Article 24 outlines a broad mandate, some limits are established in the same SSM

[6] Judgment of 16 May 2017, case T-122/15, *Landeskreditbank Baden-Württemberg Förderbank* v *European Central Bank*, EU:T: 2017:337.

Regulation. According to Recital 64, when the decision taken by the ECB involves a margin of discretion, the ABoR should respect "the margin of discretion left to the ECB to decide on the opportunity to take those decisions".

Considering the complex legal framework, to understand the limits on the scope of the ABoR's review it is useful to point to the CJEU's "limited standard of review". When the Union Courts review the legality of a complicated "economic assessment" made by the Commission or another institution and the institution concerned has a "broad discretion" the review will be confined to whether the procedural requirements were complied with, the statement of reasons was sufficient, the facts were correctly set out; whether there was any manifest error of assessment and a misuse of powers.[7] In line with the case law of the Court of Justice, the role of the ABoR is to check the conformity of the ECB's decision with the Union law, having regard not only to procedural and legal principles, but also to the prudential provisions contained in the SSM Regulation.[8] When the decision taken by the ECB involves a margin of discretion (for instance when a certain level of capital requirements is set for a bank), the ABoR is bound to limit its review to establishing whether the contested decision was vitiated by a manifest error or misuse of power and whether it clearly exceeded the boundaries of the ECB's discretion.

Regardless of the letter of the law, we believe that the scope of the ABoR's review is not limited to assessing the conformity of the ECB's decision with the SSM Regulation. The ABoR's mandate includes an evaluation of the legality of the ECB's decision according to Union law, and, where the Union law is composed of Directives, according to national legislation transposing those Directives. The role of the ABoR in verifying the ECB's compliance with the general principles of EU law, such as those of equal treatment, non-discrimination, duty to state the reasons for a decision and proportionality, is crucial.[9] Most of these principles are expressly referred to in the SSM Regulation (Recitals nos. 30, 58, 59, 81, 86; Articles 1(1) and 22(2)). Moreover, to consider the ABoR merely as a body with the limited mandate of assessing the conformity of the ECB's decisions with the SSM Regulation would undermine the main purpose for which this body of internal review was established, that is to prevent the ECB from carrying out acts that are voidable in court. Recital 64 of the SSM Regulation explicitly states that the ECB should establish an Administrative Board of Review "for reasons of procedural economy".

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[7] See the references to the case law of the CJEU in footnotes 62, 63, 64, 65.

[8] See the Annual Report of the ECB, *Banking Supervision*, 2016.

[9] A different opinion is expressed by Wymeersch, E., *The Single Supervisory Mechanism or 'SSM', Part One of the Banking Union*, in *Financial Law Institute Working Paper Series*, WP 2014-01, Universiteit Gent, January 2014, p. 55 (footnote 6). He states that, because of the literal wording of Article 24(1) of the SSM Regulation, which limits the scope of the ABoR's review to the "procedural and substantive conformity with this regulation", other grounds, such as conformity with Union law in general or unequal treatment, discrimination, lack of reasons or *ultra vires* "would be excluded from the board's mandate".

5. *The nature and the role of ABoR in the SSM*

The ABoR is an organ of the ECB because it is part, albeit only following a request by a third party, of the decision-making process of the ECB.

The General Court Judgment in case T-122/15 seems to share this interpretation. The Court concluded that "in so far as the contested decision ruled in conformity with the proposal set out in the Administrative Board of Review's Opinion, it is an extension of that opinion" (para. 127 of the Judgment). Moreover, the Court deems the ABoR's opinion of great importance in order to assess the plea of the appellant regarding the infringement by the ECB of the obligation to state reasons. Para. 125 of the judgment upholds "in the present case, the ABoR's Opinion is part of the context of which the contested decision forms part and may therefore, be taken into account for the purpose of determining whether that decision contained a sufficient statement of reasons". Then, the Court concludes that the explanations contained in the ABoR's opinion may be taken into account for the purpose of determining whether the contested decision contains a sufficient statement of reasons.

The ABoR's is an administrative body and cannot be regarded as a court or a tribunal, even if the operating procedure adopted is "quasi-judicial". The administrative role of the body is expressly acknowledged by the Regulation in the name "Administrative Board of Review" and in the description of the body as established "for the purposes of carrying out an internal administrative review of the decisions taken by the ECB in the exercise of the powers conferred on it by this Regulation" (Article 24(1), SSM Regulation).

6. *Conclusions*

The aim of the ABoR is, on the one hand, to offer to parties who are affected by the ECB's decision and who argue that the decision was taken in violation of the law an additional occasion to be heard and to defend their rights before a body composed of independent experts. It is a complementary remedy to the judicial one. Moreover, the administrative review presents the advantage of being completed within a short time, without affecting the time for an appeal before the Court of Justice[10] and at low cost.[11]

On the other hand, the ABoR's review protects the interests of the public administration in operating in full compliance with the law and not implementing acts that are voidable in court.

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[10] After the end of the administrative proceedings before the ABoR, the Governing Council takes a new decision, even if identical to the decision appealed, which guarantees the applicant the right to a period of two months to appeal to the Court.

[11] See the guide to the costs of the review, on the ECB website: www.bankingsupervision.europa.eu.

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Legal references: Recital 64 and Article 24 SSMR; Decision of the European Central Bank of 14 April 2014 concerning the establishment of the Administrative Board of Review and its Operating Rules (ECB/2014/16).

Literature: Harlow, C. and Rawlings, R., *Process and Procedure in EU Administration*, Hart publishing, Oxford/Portland, Oregon, 2014; Lamandini, M., Ramos, D. and Solana, J., *The ECB Powers as a Catalyst for Change in EU Law: Part 2: SSM and Fundamental Rights*, in *Columbia Journal of European Law*, 2016; Witte, A., Standing and Judicial Review in the New EU Financial Markets Architecture, in *Journal of Financial Regulation*, 2015, No. 1, pp. 1-37; Wymeersch, E., *The Single Supervisory Mechanism or 'SSM', Part One of the Banking Union*, in *Financial Law Institute Working Paper Series*, WP 2014-01, Universiteit Gent, January 2014.

Chapter X.C

The administrative, quasi-judicial review of the decisions taken by the SRB. The cases decided so far by the Appeal Panel. Substantive and procedural issues

Marco Lamandini and David Ramos Muñoz

Summary: *1. Introduction – 2. Decisions on contributions – 3. Decisions on access to documents in connection with the Banco Popular resolution – 4. Decision on a Minimum Requirement of Eligible Liabilities (MREL) determination.*

1. *Introduction*

The experience of the AP seems to confirm that expert's review is appropriate in the context of resolution as well. The AP has adopted so far more than thirty decisions on the merit that are considered below in some detail.

They can be grouped into three main classes:

(a) decisions on administrative contributions to the SRB expenses or on ex ante contributions to the resolution fund;

(b) decisions on access to documents in the context of a resolution decision;

(c) a decision on a MREL determination.

2. *Decisions on contributions*

The AP very first decisions after the starting of its operation on 1 January 2016 were of inadmissibility. With several decisions of almost identical nature, the AP dismissed as inadmissible several appeals filed against the SRB's requests for payment of *ex ante* contributions to the SRF.[1] The AP noted that they fell outside its remit, which comprises only the enumerated subject-matters expressly listed in Article 85 SRMR.

The very first decision in the merit was adopted in November 2016 and concerned provisional contributions to the SRB administrative costs for the years 2015 and 2016 requested by the SRB according to Article 65 SRMR and delegated Commission Regulation No 1310/2014.

In this case the AP partially sided with the appellant and remitted the case to the Board. The factual background was as follows. A SRB's letter of March 2015 required from all significant banks (those included in the list, published by the ECB on the ECB website on 4 September 2014, of the SIs taken under the ECB's direct supervision pursuant to Regulation No 1024/2013) the payment of provisional instalments for contributions to the SRB administrative costs. This was contested by one of the addressees, noting that the appellant had meanwhile undergone 'resolution' under national law and had ceased to be a bank in July 2015. This was the occasion for the AP to clarify the *subjective scope of application of the SRMR* (something that was reiterated, albeit in different factual circumstances, also in cases 4 to 6/2018, as discussed below) to provisional contributions, albeit with wider implications.

The AP held indeed that the SRMR and Article 4 of delegated Commission Regulation No 1310/2014 limited their scope of application to the entities referred

[1] In cases 2/16 to 4/16 and 6/16 to 14/16 (decisions of 18 July 2016).

to in Article 2 SRMR, meaning that if a significant entity originally included in the ECB's list ceased to be such during the relevant period, it could not be required to contribute to the administrative costs of the SRB any longer.

To come to this conclusion, the AP acknowledged that, despite the clear reference to the ECB's list in Commission Regulation No 1310/2014 identifying by name the entities subject to provisional contributions, the proper scope of the Commission Regulation and of the SRMR should be determined in light of the proper construction of their purpose and scope. The AP acknowledged that settled case law of the CJEU requires that a regulation adopted by a Union institution is presumed to be lawful and accordingly remains fully effective as long as it has not been found to be unlawful by the Court, because the power to declare the invalidity of an act of a Union institution belongs exclusively to the CJEU.[2] The AP clearly recognised that this principle also imposed upon itself, as on all other persons subject to Union law, the obligation to apply Commission Regulation as it stands and as long as it was not declared invalid by the Court.[3] The AP acknowledged that as the invalidity of an act of a Union institution cannot be declared by national courts[4] or by national administrative or supervisory authorities,[5] the same cannot be done by Union bodies,[6] including authorities dealing with administrative appeal procedures.[7] The AP further noted that, according to settled case-law, the only exception is where the act is tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the legal order of the Union and must be treated as having no legal effect, even provisional, that is to say it must be regarded as legally non-existent.[8] This exception can however apply only in (very) extreme situations.

Based upon the foregoing, the AP acknowledged therefore that the Board was obliged to apply Regulation No 1310/2014 as it stood.

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2 Judgment of 6 October 2015, C-362/14, *Schrems*, EU:C:2015:650, at paragraph 61; judgment of 22 June 2010, C-188/10 and C-189/10, *Melki and Abdeli*, EU:C:2010:2016, at paragraph 54.

3 Judgment of 13 February 1979, 101/78, *Granaria*, EU:C:1979:38, paragraphs 4 and 5; judgment of 7 June 1988, 63/87, *Commission v Greece*, EU:C::1988:285, paragraph 10; judgment of 5 October 2004, C-475/01, *Commission v Greece*, EU:C:2004:585, paragraph 18; judgment of 13 February 1979, 101/78, *Granaria*, EU:C:1979:38, paragraphs 4 and 5; judgment of 7 June 1988, 63/87, *Commission v Greece*, EU:C:1988:285, paragraph 10; judgment of 5 October 2004, C-475/01, *Commission v Greece*, EU:C:2004:585, paragraph 18.

4 *Schrems*, paragraph 62; judgment of 28 April 2015, C-456/13, *T&L Sugars* EU:C:2015:284, paragraphs 45 to 48; judgment of 3 October 2013, C-583/11, *Inuit Tapiriit Kanatami*, EU:C:2013:625, paragraphs 92 and 96; judgment of 10 January 2006, C-344/04, *IATA*, EU:C:2006:10, paragraphs 27 to 30; judgment of 22 October 1987, C-314/85, *Foto-Frost*, EU:C:1987:452, paragraphs 14 to 17.

5 *Schrems*, at paragraph 52; *Granaria*, paragraph 6; judgment of 14 June 2012, C-533/10, *CIVAD*, EU:C:2012:347, paragraph 43.

6 Judgment of 30 September 1998, T-13/97, *Losch*, EU:C:T:1998:230, paragraph 99; judgment of 30 September 1998, T-154/96, *Chvatal*, EU:T:1998:229, paragraph 112.

7 Judgment of 12 March 2014, F-128/12, *CR v Parliament*, EU: F:2014:38, paragraphs 35, 36 and 40; judgment of 17 September 2008, T-218/06, *Neurim Pharmaceuticals v OHIM*, EU:T:2008:379, paragraph 52; judgment of 12 July 2001, T-120/99, *Kik v OHIM*, EU:T:2001:189, paragraph 55.

8 Judgment of 5 October 2004, C-475/01, *Commission v Greece*, EU:C:2004:585, paragraph 19; Judgment of 22 November 2011, T-275/10, *mPAY24 v OHIM*, EU:T:2011:683, paragraph 26.

Nonetheless, the Appeal Panel found that the relation between Articles 2(1) and 4(1) (3), on one side, and Articles 3(d), on the other side, of Commission Regulation No 1310/2014 was a matter of interpretation that could be decided without implicating (or declaring) the unlawfulness of Regulation No 1310/2014.

In particular, the AP held that, in the face of a case not expressly contemplated by Regulation No 1310/2014 (whose treatment was to be granted to an entity originally subject to the SRMR which subsequently ceased to be a bank), special attention should be paid to the fact that among the possible interpretative options of the ambiguous wording of Regulation No 1310/2014, it should be adopted the one that would better deliver its *effet utile*,[9] i.e. that is more proportionate and consistent with the finality of this Regulation which, in the AP's view, is to make (only) *regulated* entities contribute to the functioning of the Board. This functional interpretation would preserve the validity of the Regulation.

In other words, the Appeal Panel held that, in the silence of the Regulation No 1310/2014, the Regulation itself could not be interpreted as if the list published on the ECB website on 4 September 2014 could crystallise the status of any entity listed therein for the entire provisional period, where during such period the entity had lost its original status. This interpretation was justified by the need to avoid the imposition of (even provisional) economic burdens and other regulatory duties specific to regulated entities on legal persons that no longer fall within the scope of the SRMR (and, in this particular case, no longer need to be resolved in case of failure under the rules of the SRMR).

A final point addressed by the AP was whether the request for contribution issued by the Board in 2015 could legitimately embrace the entire year 2015, while the appellant had ceased to be a regulated entity in July 2015.

The Appeal Panel acknowledged that the debit note issued by the SRB in early 2015 was expressly meant to "cover the contributions to the administrative expenditures of the Board for the years 2014 and 2015" and that this was consistent with the SRMR provision that contributions should relate to an *annual* budgetary cycle (in this way linking the determination of the contributions to the Board's budgeted administrative expenditures: Articles 58(1) and 59(1); in turn the SRMR expressly *qualifies* the contributions as "*annual*" also in the case of contributions due for the period before the Board becomes fully operational: Article 65(5)(c)).

Accordingly, the Appeal Panel held that the Commission Regulation could legitimately be construed, as the Board did, as setting contributions for a full calendar year.

The AP noted however that, *de lege ferenda*, also a different approach – providing for a *pro rata temporis* calculation – would ultimately be justified and could still be adopted by the Commission with the delegated regulation

[9] Judgment of 14 October 1999, C-223/98, *Adidas,* EU:C:1999:500.

meant to govern the final system of contributions. This *pro rata* system was punctually adopted by the subsequent Commission Regulation No 2361/2017 of 14 September 2017 on the final system of contributions (showing an EC law-making partnership with the AP decision).

In 2018 the AP decided three other cases on contributions to its administrative expenses, this time requested and calculated for the year 2018 based upon the Commission Delegated Regulation No 2361/2017, which had meanwhile repealed the Delegated Regulation No 1310/2014 and put forward the final system of contributions to the administrative expenditures of the SRB[10].

According to the Delegated Regulation No 2017/2361, in 2018 the SRB was required to calculate the Administrative Contributions for 2018 as well as the *final* Administrative Contributions for the years 2015 to 2017, in accordance with the final methodology provided by the Delegated Regulation No 2017/2361.

In case 4/2018, the appellant argued that in February 2018 following a declaration of the ECB that the appellant was failing or likely to fail, the SRB took a decision not to place the appellant under resolution; the appellant was liquidated under national law. The appellant argued that, following this decision, the SRB ceased to provide it with any service and thus it was no longer subject to the SRM and should not pay administrative contributions to the SRB from such a date. Therefore, the appellant requested the SRB to recalculate its individual contribution for 2018 including only the month of January instead of the entire year.

In line with its previous decision of November 2016, the AP noted that pursuant to Article 2(a), the SRMR applies to all "*credit institutions established in a participating Member State*" within the meaning of Article 2(3) of Council Regulation (EU) No 1024/2013 and that when the SRB took and notified the decision on the determination of administrative contributions the appellant was established as a credit institution in a participating Member State.

Therefore, despite the decision adopted by the SRB on February 2018 whereby the Board determined that a resolution action was not necessary in the public interest pursuant to Article 18(5) SRMR, the appellant was still a licensed credit institution as defined in Article 4(1) of Regulation (EU) No 575/2013 until July 2018 and until that date it was liable to pay administrative contributions.

The AP noted that the determination of the individual administrative contributions follows specific pre-defined criteria as set out under Delegated Regulation No 2017/2361. These are non-discretionary criteria (which comprise for instance the size of the entity and its risk model). Any additional factor which

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[10] OJ L 337, 19.12.2017, p. 6.

is not mentioned in such exhaustive list of non-discretionary criteria – like the fact that the credit institution is likely to fail and must be liquidated under the applicable national insolvency laws – can therefore not be considered.

As the appellant ceased to be a credit institution since July 2018 and was therefore no longer an entity referred to in Article 2 of Regulation EU No 806/2014, the AP held that, according to Article 7(1) Delegated Regulation No 2361/2017 which adopted, as noted above, the *pro rata temporis* system, administrative contributions for the year 2018 should be re-calculated and paid by the appellant on a *pro rata temporis* basis by reference to the number of full months during which it fell under the scope of Article 2 SRMR (i.e. six full months).

The AP further noted however that, since this event occurred after the adoption of appealed decision and the filing of the appeal, such change of status of the Appellant could not support a finding that the appeal was founded. At the time of adoption of the appealed decision, the Board was correct in calculating the administrative contributions due by the appellant for the year 2018 beyond the date of February 2018. As a consequence, in the AP's view, the new circumstance occurred in July 2018 should be taken into account by the Board according to Article 7(4) of Delegated Regulation No 2361/2017 in the course of the future recalculation of the 2018 administrative contributions cycle, unless the parties had earlier agreed upon practical arrangements to prevent a payment from the appellant for the entire year 2018 which should then be partially reimbursed by the Board later on.

In case 5/2018, under the provisional system of Delegated Regulation No 1310/2014, instalments on administrative contributions were invoiced and paid by the (at the time) appellant's controlling entity. In September 2017, a group restructuring occurred within the appellant's group and such original controlling entity ceased to be its controlling entity and a financial holding company within the meaning of Article 4(1)(Nr. 20) of the Regulation (EU) No 575/2013, as it ceased to have a credit institution among its subsidiaries.

The appellant claimed that the change occurred within the group structure triggered a change in the addressee of the obligation to pay administrative contributions pursuant to Article 7(1) of Delegated Regulation No 2361/2017 and Article 2 SRMR.This had implications on the settlement of the balance due to be paid as final contribution for the years 2015-2017 against the provisional instalment already paid by the former controlling entity.

In particular, the appellant argued that administrative contributions were due by the appellant only as of 1 September 2017, whereas all prior administrative contributions, including the difference due after the payment of the provisional instalments for the period from November 2015 to September 2017, were due by the former controlling entity. Accordingly, the appellant, that in the meantime settled the payments requested in the contributions notice (including such balance referred to the provisional period), demanded the reimbursement of the payment made with respect

to the administrative contributions for the financial years 2015, 2016 and 2017. Moreover, the appellant claimed that, with regard to the administrative contributions payable as of 1 September 2017, their annual calculation for the year 2018, as based on data reflecting the Appellant's group situation as of 31 December 2016, was "*disproportionate and not appropriate*", because the calculation on the relevant data as of September 2017 would be "*significantly lower*".

The AP held that the appellant, being a credit institution as defined in Article 4(1) of Regulation (EU) No 575/2013 and in the SSM Regulation, was due to pay also the balance requested by the Board concerning the years 2015-2017.

To come to this conclusion the AP noted that pursuant to Articles 8(1) and 5(4) of Delegated Regulation No 2361/2017, the SRB is required to raise administrative contributions from the so called 'contributions debtors' which, in case of groups, shall pay the contributions for the entire group. According to Article 2(3) of Delegated Regulation No 2361/2017, 'contributor debtor' is the entity that qualifies as 'fee debtor' for the group under Article 4 of Regulation (EU) No 1163/2014, i.e. the entity that must pay the supervisory fees to the SSM. Such entity was the appellant. In the Appeal Panel's view, this final system for the identification of the entity which must pay the final administrative contributions, applies not only to the contributions due from 2018 onwards but also to the final payments to be made in order to settle the difference still due for administrative contributions in the provisional period. Finally, the AP dismissed the objection to the calculation of the annual administrative contributions due for 2018, noting that it was done in compliance with Article 5(1) of Delegated Regulation No 2361/2017.

In case 6/2018, the appellant had been the subject of comprehensive restructuring and noted that the closure of its voluntary winding up was planned for 2020. In this process, the appellant received funding from the German Deposit Guarantee Scheme. The appellant argued that these specific circumstances were not taken into consideration by the SRB when calculating the administrative contributions. Based upon the foregoing, the appellant argued that making itself liable for the payment of the Administrative Contributions would in practice mean to impose such a burden, although indirectly, on the German banks members of the Deposit Guarantee Scheme, which however had already contributed to the administrative expenses of the SRB pursuant to Article 65 SRMR.

The AP dismissed the appeal noting that the appellant was still a licensed credit institution as defined in Article 4(1) of Regulation (EU) No 575/2013 and was therefore liable to pay administrative contributions and that occurrences like those claimed by the appellant as justifications for its reimbursement request, namely the financial support received by the Appellant from the Deposit Guarantee Scheme, do not account for exemption from the obligation to pay such contributions.

3. *Decisions on access to documents in connection with the Banco Popular resolution*

The AP decided in several rounds (with six decisions on 28 November 2017;[11] a decision on 23 March 2018;[12] eleven decisions on 19 June 2018;[13] three decisions on 28 February 2019;[14] four decisions on 11 April 2019;[15] three decisions on 29 April 2019;[16] three decisions on 19 June 2019[17]) a significant number of cases on access to documents in connection with the Banco Popular resolution.

Despite their apparently narrow and rules-based context,[18] these cases are illustrative because they could not be decided without weighing against each other values such as financial stability and democratic accountability. More specifically, transparency, democratic accountability and judicial review were the guiding principles of the decisions. They were weighted against financial stability risks in the first place, and also against risks of jeopardising commercial interests of the entities implicated in the resolution or decision-making process of the institutions and agencies called to take action.

In broad terms, the question revolved around how much access had been granted by the SRB to shareholders or subordinated bondholders of a bank in resolution to the documents supporting the decision that resulted in their money loss. The answer of the AP was "not enough" and such an answer was given more than twice (also in respect of the subsequent decisions adopted by the SRB to comply with the Appeal Panel's decisions).

The Appeal Panel's decisions had to examine the SRB's refusal to disclose the documents in light of the right of "any citizen" to the disclosure of documents and discussed the general criteria to balance the right of access and the public interest.[19] One of the key aspects of the AP decision was its further argument that: (i) the conferral of powers to EU agencies is conditional upon their respect of fundamental rights and their being subject to judicial review, under article 47 of the EU Charter; and (ii) administrative safeguards, including access to documents or the duty to state reasons, are instrumental to effective judicial protection.

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[11] Decisions of 28 November 2017 in cases 38 to 43/17 and decisions 19 June 2018, in cases 44 to 56/17 accessible at srb.europa.eu.

[12] In case 2/18.

[13] In cases 44/17 to 54/17 (including joined cases 1/18 and 7/18)).

[14] In cases 3/18, 14/18, and 15/18 and 22/18.

[15] In cases 2212/18, 21/19, 3/19 and 4/19.

[16] In joined cases 9, 11, 13, 16/18 and 12/19; joined cases 10, 17 and 20/18; and case 5/19.

[17] In cases 18/18, 19/18 and 21/18.

[18] For a thorough discussion, compare René Smits, Nikolai BodenhoopBadenhoop, 'Towards a single standard of professional secrecy for supervisory authorities', passim.

[19] These included the need to interpret access exceptions narrowly; the fact that access is more restricted in case of administrative as opposed to legislative activity; the agencies' ability, for certain categories of documents, to rely on a general presumption that disclosure may harm the public interest; or their margin of discretion to value such a harm.

On these grounds, the Panel's exacting standard of review held that the SRB's refusal to access the valuation report *in its entirety* erred in law, since the report formed an integral and critical part of the resolution decision as well as a legal unity with it, and that there should have been at least a partial disclosure of the report.

The Panel also held that the SRB was only partly justified in refusing access to the resolution decision itself and that some parts of the resolution plan and of other relevant documents could be disclosed in a redacted non-confidential form, without endangering any public interest, in particular financial stability, also considering that the disclosure would take place months after the resolution decision was adopted.[20]

Similar conclusions in the balance between transparency, democratic accountability, judicial review, on the one hand, and protection of financial stability and supervisory activity, on the other hand, were reached almost in parallel by the CJEU in *Espirito Santo I,*[21] *BaFin v Ewald Baumeister,*[22] *UBS Europe,*[23] *Enzo Buccioni*[24] (where the Court departed from Advocate General Bot's opinion) and more recently in *Espirito Santo II*[25] *and Di Masi and Varoufakis v ECB*.[26]

The main findings of the AP on the merit are as follows.

The overriding principles which, in the AP's view, must guide in the assessment of the requests of access to documents related to the Banco Popular resolution in compliance with settled case-law of the CJEU are the following:

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[20] On documents exchanged with the ECB or the European Commission, the Panel agreed with the Board that they were protected as part of the deliberation process, under article 4 (3) of the Public Access Regulation.

[21] Judgment of 26 April 2018, *Espirito Santo Financial v. European Central Bank*, T-251/15, EU:T:2018:234. The case concerned an application pursuant to Article 263 TFEU for the annulment of an ECB's decision refusing in part to disclose certain documents concerning Banco Espírito Santo SA; the General Court found that the exception to disclosure could not be validly invoked, in the light of the information already disclosed by Banco de Portugal.

[22] Judgment of 19 June 2018, *BaFin v Ewald Baumeister*, C-15/16, EU:C:2018:464. In this case Mr Ewald Baumeister, an investor who suffered financial losses due to a Ponzi scheme organised by Phoenix, submitted to BaFin (the German financial supervisor) a request for access to certain documents concerning a financial entity supervised under MiFID. Since the Bundesanstalt refused to grant him access to those documents, Mr Baumeister brought proceedings before the German courts which then led to the referral for preliminary ruling.

[23] Judgment of 13 September 2018, UBS Europe and Alain Hondequin and Others v. DV and Others, C-358/16, EU:C:2018:715.

[24] Judgment of 13 September 2018, *Enzo Buccioni*, C-594/16, EU:C:2018:717.

[25] Judgment of 13 March 2019, *Espirito Santo Financial Group v European Central Bank*, T-730/16, ECLI:EU:T:2019:161.

[26] Judgment of March 2019, *Fabio De Masi and Yanis Varoufakis v. ECB,* T-798/17, EU:T:2019:154.

(a) the right of access is a transparency tool of democratic control of the European institutions, bodies and agencies and is available to all EU citizens irrespective of their interests in subsequent legal actions;[27]

(b) according to Regulation No 1049/2001 "the purpose of [the] Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access" (recital 4) and "in principle, all documents of the institutions should be accessible to the public" (recital 11). Regulation No 1049/2001 implements Article 15 TFEU which establishes that citizens have the right to access the documents held by all Union institutions, bodies and agencies (such right is also recognised as a fundamental right by Article 42 of the Charter of Fundamental Rights). However, certain public and private interests are also protected by way of exceptions and the Union institutions, bodies and agencies should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks (recital 11);

(c) in principle, exceptions must be applied and interpreted narrowly;[28]

(d) settled case-law permits Union institutions, bodies and agencies to rely, in relation to certain categories of administrative documents, on a general presumption that their disclosure would undermine the purpose of the protection of an interest protected by Regulation No 1049/2001.[29] Where the general presumption applies, the burden of proof is shifted from the institution to the applicant, who must be able to demonstrate that there will be no harm to the interest protected by Regulation No 1049/2001. This means in particular that the Union institutions, bodies or agencies are not required, when the general presumption applies, to examine individually each document requested in the case because, as the CJEU noted[30], "such a requirement would deprive that general presumption of its proper effect, which is to permit the Commission to reply to a global request for access in a manner equally global". At the same time, though, settled case law clarifies that, since the possibility of relying on general presumptions (that apply to certain categories of documents), instead of examining each document individually and specifically before refusing access

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[27] Judgment of 13 July 2017, *Saint-Gobain Glass Deutschland*, C-60/15, EU:C:2017:540, paragraphs 60 and 61 and in particular judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 20.

[28] Judgment of 17 October 2013, *Council v. Access Info Europe*, C-280/11, EU:C:2013:671, paragraph 30.

[29] Judgment of 28 June 2012, *Commission v. Edition Odile Jacob,* C-404/10, EU:C:2012:393; judgment of 21 September 2010, *Sweden and Others v. API and Commission,* C-514/07 P, EU:C:2010:541; judgment of 27 February 2014, *Commission v. EnBW*, C-365/12 P, UE:C:2014:112; judgment of 14 November 2013, *LPN and Finland v. Commission,* C-514/11 P and C-605/11 P EU:C:2013:738; judgment of 11 May 2017, *Sweden v. Commissio*n, C-562/14 P, EU:C:2017:356.

[30] in *LPN and Finland v. Commission,* Joined Cases C-514/11P and C-605/11P, cited above, paragraph 68.

to it, would restrict the general principle of transparency (laid down in Article 11 TEU, Article 15 TFEU and Regulation No 1049/2001), "the use of such presumptions must be founded on reasonable and convincing grounds";[31]

(e) when determining whether disclosure is prevented by the application of one of the relevant exceptions under Regulation No 1049/2001, the EU institutions, bodies and agencies enjoy in principle a margin of appreciation (due to the open-textured nature of at least some of the relevant exceptions). Review is then limited, according to settled case law, to verify whether procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and there has been a manifest error of assessment or a misuse of powers[32]; in any event, the actual viability of judicial review must be ensured.[33]

The AP further considered to what extent the lapse of time since the date of the Banco Popular resolution could be considered relevant to the effect of disclosure of the relevant documentation. As to an alleged non-compliance with Article 88(1) SRMR, the AP noted that the purpose of this provision is to avoid conflicting duties for individuals bound by professional secrecy obligations of Article 88 SRMR in combination with Article 339 TFEU, on the one side, and legally required (e.g. by a procedural order of a court) to disclose information subject to professional secrecy requirements in legal proceedings, on the other side. Article 88(1) SRMR, in the AP's view, does not mean that the Board is required – purely upon the request of an appellant – to waive all confidentiality claims in case that an appellant chooses to start proceedings in relation to the requested documents.

Finally, the AP further noted that all these fundamental rights, including the fundamental right of property, are duly taken into account by the SRMR and are to be considered duly respected in the resolution context insofar as (i) the resolution action is lawfully adopted when a bank is failing or likely to fail in accordance with the SRMR provisions, (ii) the resolution is implemented at the point of non-viability of the resolved entity in compliance with all the SRMR requirements and (iii) compensation to affected shareholders or subordinated bondholders is provided according to Article 20 SRMR, if the conditions of "no creditor worse off" set out in the SRMR are not met and they receive in the resolution context a treatment which is less favourable than the one they would receive in normal insolvency proceedings.

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[31] Judgment of 25 September 2014, *Spirlea v. Commission*, T-306/12, EU:T:2014:816, paragraph 52.

[32] Judgment of 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 53; judgment of 29 November 2012, *Thesing and Bloomberg Finance v ECB*, T-590/10, EU:T:2012:635, paragraph 43.

[33] Judgment of 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, at paragraphs 79-81.

As to the compliance with the fundamental right to an effective judicial protection under Article 47 of the Charter, the AP noted that the subsequent disclosures made by the SRB also in response to the AP's decisions offered the information needed to initiate legal proceedings to enable courts to conduct a review of the Banco Popular's resolution actions. Thus, the public dimension of judicial accountability had been respected without unduly undermining the protection of the interests enshrined in Article 4(1) and (2) of Regulation No 1049/2001. The AP further noted that, should any further disclosures individually be needed by the court to determine on the matter, they can be ordered in the specific proceedings and at the level of the European courts, also in the form of an order to the SRB to deposit confidential versions of the necessary documents only for the eyes of the court or in the form of questions to the Board, whose answer will complement the information publicly available.

Some of these cases of the "Banco Popular saga" on access to documents, however, offered to the AP the opportunity to delve into some additional issues, either procedural or substantive, which is worth briefly mentioning here below.

The AP addressed in some cases the question of the language of the procedure.

The AP noted for instance in cases 18 and 19/18 that the appellant used the Spanish language, which was the language of the proceeding leading to the appealed decision, and the Board used the English language, on the assumption that such appealed decision (i.e. the confirmatory decision adopted under Regulation No 1049/2001) had been delivered in English, being English the working language of the SRB. For this reason the Board claimed that English was the language of the contested decision in accordance with Article 5(2) of the Appeal Panel's Rules of Procedure.

In the face of this difference in interpretation between the parties as to the language of the appeal, the Appeal Panel considered appropriate to ensure that translations into Spanish of the Board's response and rejoinder were provided to the appellant and that the appellant could use Spanish throughout the entire appeal and at the hearing.

The AP further noted that, although the appealed decision had been notified to the appellant by the Board in English allegedly with a Spanish courtesy translation, it would have expected the confirmatory decision (adopted in accordance with Regulation No 1049/2001) originating from a proceeding in Spanish to be in the Spanish language. Spanish was indeed the language of the initial confirmatory requests of the appellant.

Since the two appeals in cases 18 and 19/18 concerned the alleged non-compliance by the Board with a previous decision adopted by the AP in cases 47/17 and 52/17 respectively, the AP also noted that the official language of its decision in the cases 47/17 and 52/17 was Spanish, although for reasons of expediency (considering that the internal working language of the Appeal Panel is English and the it cannot rely on translation services comparable to those of the CJEU) the English version of the AP's decisions was notified to the Parties

immediately after their adoption, with a note clarifying that the official text of the decisions wasthe one in Spanish, which would follow as soon as available.

As anticipated, in the latter cases and in cases 2/18 and 3/18, the AP addressed also the question of admissibility of an appeal against a Board's decision adopted in order to comply with a previous AP's decision remitting the case to the Board itself.

The AP held that the revised confirmatory decision adopted upon remittal replaces the originally appealed confirmatory decision and therefore only such revised confirmatory decision can be deemed to have legal effects vis-à-vis the appellant once adopted. This makes moot any appeal against the original decision and grants full competence to the AP to hear the appeal on the revised confirmatory decision because, in the Appeal Panel's view, its decision to remit a case to the SRB is, functionally similar to the annulment of a Union measure by the CJEU.

As set out in Article 85(8) SRMR, when the Appeal Panel remits the case to the SRB, "the Board shall be bound by the decision of the Appeal Panel and it shall adopt an amended decision regarding the case concerned"; this indicates, in the Appeal Panel's view, that the revised decision adopted upon remittal is a new decision that must be in full compliance with the AP's remittal decision, as it is also the case when a decision of a Union agency is annulled by the CJEU and the Union agency wishes to replace such act which has been annulled with a new one in order to comply in good faith with the annulment judgment.

In the AP's view, this would not create room for a vicious circle of permanent requests for reviews by the AP of the same Board decision and its subsequent amendments, nor legal uncertainty which may jeopardise the recourse to the Court of Justice. Indeed, in the AP's view, considering the margin of appreciation pertaining to the Board's assessment on the merits, it is unlikely that a Board's decision adopted to comply with the Appeal Panel's decision should constitute the basis for an endless cycle of appeals. The risk of circular reviews is thus minimal.

Conversely, the possibility of an appeal against a revised confirmatory decision can be useful to point to possible errors committed in good faith by the Board when implementing the decision of the AP, or to clarify the AP's view as regards the nature of the requested revision of the Board. This minor iteration, far from hindering legal certainty and the appellant's rights, enhances both.

At the same time, the AP held that Article 90(3) SRMR refers to "decisions taken by the Board under Article 8 of Regulation (EC) No. 1049/2001" and the language of the provision does not exclude those decisions which have been taken in order to comply with its previous decision to remit the case to the Board. The right to an effective judicial remedy is not jeopardised by such an interpretation. On the contrary, this interpretation grants the appellant the same procedural guarantees which are granted by Article 90(3) with respect to the original confirmatory decision and to the subsequent revised confirmatory decisions.

It is worth noting that the AP took the opportunity to underscore, in this respect, that no parallel can be drawn with the ABoR's practice because the power of review conferred upon the AP is different (and works differently) from the one conferred upon the ABoR by Article 24 SSMR.

As already noted, unlike the Single Resolution Board, the Supervisory Board of the SSM, when preparing the new draft decision to be submitted to the ECB Governing Council, is not bound by the ABoR's decision. Article 24(7) SSMR expressly clarifies that: "The Supervisory Board shall take into account the opinion of the Administrative Board of Review and shall promptly submit a new draft decision to the Governing Council. The new draft decision shall abrogate the initial decision, replace it with a decision of identical content, or replace it with an amended decision".

In the AP's view, this means that, in the SSM context it would be contradictory to allow for a further review by the ABoR of the new draft of final decision prepared by the Supervisory Board, since such draft decision and the final decision adopted by the Governing Council of the Bank are legally free to derogate from the ABoR's opinion. The opposite is true in the SRM context. A possible review by the AP of the Board's amended decision adopted upon remittal appears to be the most cost-efficient and timely way to ensure effective compliance with the AP's decision, as required by its binding nature.

Based upon the foregoing, the AP concluded that an appeal against an amended decision adopted by the Board upon remittal by the AP is in principle admissible, although – as specified by the AP in its decision of 23 February 2018 in case 2/18 - the actual grounds for such an appeal must be assessed separately and strictly in light of the specific terms of the compliance by the Board with the first decision by the AP. This means that the appeal can only concern those documents for which the AP has remitted the case to the Board and cannot extend, as a *de novo* review, to all the other documents or parts thereof for which the AP found that the Board acted in compliance with Regulation No 1049/2001. This also means that its decision was adopted respecting the applicable procedural rules and the duty to state reasons and stated accurately the facts without incurring in any manifest error of assessment or of misuse of powers.

The AP further noted that such an appeal on the non-compliance with a previous remittal decision cannot challenge *de novo* the revised confirmatory decision in relation to the documents for which the AP has remitted the case to the Board, e.g. claiming an integral disclosure of such documents (ignoring that the remittal decision determined that the Board was not obliged to make an integral disclosure and that a disclosure with some parts still redacted would also comply with Regulation No 1049/2001).

As to procedural issues, it is finally worth pointing out that the AP found it appropriate to ensure expediency and procedural economy in order to (i) consolidate several appeals filed by the same appellant in respect to different confirmatory decisions, and to (ii) stay some pending proceedings so as to wait

for the compliance by the Board with previous AP's decisions which (although adopted vis-à-vis different appellants) could have (and in fact had) implications also for pending appeals, because they could (and did) lead to further disclosure of documents whose access was sought in the pending appeals. In the same context, the AP invited the Board to adopt on its own initiative a revised confirmatory decision also in the pending appeal and then allowed the appellant to extend the appeal to such revised confirmatory decision within the same proceedings, where the appellant itself wished to do so. Several appellants did.

As to the content of the appeal, the AP adopted a stricter standard in relation to the clear illustration of the grounds of appeal where the appellant was represented by a law firm, as in case 2/18. In that situation, the AP held that the appeal (which was filed to complain about an alleged non-compliance by the Board with a previous AP's decision in case 38/17) was unclear and in seeming contradiction with the principles stated by the AP in its previous decision vis-à-vis the same appellant.

The AP noted once again that the appellant could not reiterate in a subsequent appeal a request for integral disclosure of documents which was already dismissed by the AP's decision in case 38/17 and that such a request makes the new appeal devoid of purpose and thus inadmissible.

Moreover, the AP held that for an appeal to be admissible, the basic legal and factual particulars on which the appeal is based must be indicated coherently and intelligibly in the notice of appeal.[34] This demanding standard was applied with proportionality when the appellant was not represented by a law firm. In that case the AP, in the face of an appeal unclear in its grounds, issued directions to the appellant to complement the appeal according to Article 14 of the Rules of Procedure, making clear that a failure to do so would lead to the dismissal of the appeal.[35]

In case 5/19 (filed by the same appellant whose appeal against a different Board's decision was dismissed on these procedural grounds in case 22/18) the AP noted that, although this appeal could be better specified, its content could nonetheless be considered sufficient to allow the Board and the Appeal Panel to understand the claims raised by the appellant. The AP expressly referred to the circumstance that the appeal was filed without the legal assistance of any law firm, that no legal assistance is required under the Rules of Procedure to have access to the Appeal Panel, and that in this case (unlike in case 22/18) the appellant endeavoured to clarify as much as it could the claims that the use by the Board of the exceptions provided for in Regulation No 1049/2001 was contested.

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[34] Judgment of 2 March 2010, T-70/05, *Evropaïki Dynamiki v EMSA*, EU:T:2010:55, paragraph 78; judgment of 14 December 2005, T-209/01, *Honeywell International*, EU:T:2005:455, paragraphs 53 to 56.

[35] Cases 22/18 and 12/18. Both appeals were at the end dismissed because the appellants failed to appropriately complement the grounds of appeal.

Finally, another matter of detail was the distinction, which had to be drawn in some appeals, between access to documents and request of information, stating clearly that, under access to documents rules and pursuant to the case law of the General Court, an institution, agency or body is not obliged to create a document that does not exist,[36] and they can rely on a rebuttable presumption that, indeed, the document does not exist.[37] If the document does not exist, Regulation No 1049/2001 is not applicable, because it does not provide any right to information which is not reflected in a document produced or held by the relevant EU body.

This principle was reiterated in a recent decision of 19 June 2019 in case 21/18, which also exemplified how matters of minute detail can have an important impact on matters of principle as well as the need to tailor some solutions to the specificities of the case. The background was as follows: the resolution decision in the Banco Popular case was based on a provisional valuation delivered by an independent expert. The Board considered that, despite the literal reading of Article 20 SRMR, which requires that an ex-post valuation is performed as soon as possible,[38] such *ex-post* definitive valuation was not necessary because the resolution tool adopted (sale of business) was a market mechanism to set the price, which could replace the provisional valuation. Furthermore, if the problem lied with a potential harm to the interest of shareholders by the bail-in *vis-à-vis* what would have happened in insolvency, this could be addressed by means of the valuation for purposes of determining no-creditor worse-off treatment (Valuation 3).[39]

The appellant challenged before the GCEU the Board's decision not to perform an *ex-post* definitive valuation in case T-599/18 and made a parallel request to the Board to access any document consisting in an economic assessment by the independent expert (including but not limited to provisional assessments, drafts, final drafts, conclusions or final reports) concerning a definitive ex-post valuation of Banco Popular as well as any documents by the European Commission authorising the Board not to carry out an ex-post definitive valuation, or alternatively, refusing to grant such an authorisation. The Board refused access to these documents and its confirmatory decision was appealed

[36] In cases 14 and 15/18, for instance, the AP noted that, although the definition of 'document' to the effect of Regulation No 1049/2001 must not be interpreted restrictively due to the wide encompassing wording of Article 3, letter a) of Regulation No 1049/2001 (which qualifies as 'document' "*any content*" "*whatever its medium*" "concerning a matter relating to the policies, activities and decisions falling within the institution's sphere", specifying at the same time that such content can either be written or stored in electronic form (simply) recorded in any visual or audio-visual way), once a European institution, body or agency asserts that a document does not exist, according to settled case law, it is not obliged to create a document which does not exist. Judgment of 11 January 2017, *Typke v. Commission*, C-491/15 P, EU:C:2017:5 at paragraph 31.

[37] Judgment of 23 April 2018, *Verein Deutsche Sprache v. Commission*, T-468/16, EU:T:2018:207.

[38] Article 20 (10) – (11) SRMR.

[39] Article 20 (16) SRMR.

before the AP. The AP took the opportunity to address from this particular angle the implications of *Meroni* case-law on the SRB's resolution action.[40]

The AP recalled its previous decisions where it stated the general principle that access to documents received from or exchanged with EU institutions could be kept confidential and that, more generally, there was also the need to protect the internal deliberations of an institution, body or agency.[41] Yet, this appeal was different, especially because the request of access to documents had to be read in light of the action for annulment lodged before the General Court, where it challenged the validity of the decision not to consider the ex-post valuation as a violation of Article 20(11) SRMR.The AP also argued that pursuant to Article 20(15), since the ex-post valuation is an integral part of the Resolution Decision, if there was any room for a discretionary decision not to order the definitive valuation, this decision should have been endorsed by the Commission in light of the *Meroni* case-law,[42] absent which there would be a violation of the constitutional limits to delegation of powers existing within the EU.

The AP could not decide on the issue of whether *Meroni* had been complied with, but since its meaning was key to frame the relevance of the request to access documents, it clarified that the *Meroni* case-law needs to be understood in light of the most recent judgment of 22 March 2014, *United Kingdom v European Parliament and Council*[43] *where the Court of Justice expressly accepted that powers can be delegated to European agencies, like ESMA (which also includes the SRB), provided that such delegation is subject to certain limits which make their exercise amenable to judicial review, in light of the objectives established by the delegating authority. The power to apply rules to specific (and complex) factual situations, in the AP's view, did not necessarily amount to a discretionary power implying policy choices, which is what was considered an illegitimate exercise by an agency in Meroni*.[44] Thus, in the absence of a different pronouncement by the EU Courts, the SRMR takes account of the *Meroni* case-law by requiring that the resolution decision is adopted through a resolution scheme prepared and transmitted by the Board and endorsed by the European Commission, and that the valuation under Article 20 is an integral part of the resolution decision. Yet,

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[40] For the constitutional implications of *Meroni* and *Romano in the EMU context,* compare Koen Lenaerts, 'EMU and the EU's constitutional framework', 2014 *European Law Rev*. 753

[41] In the AP decisions of 28 November 2017 and 19 June 2018 it was stated that access to the documents received or exchanged with the ECB or the European Commission for internal use as part of the file and deliberations could be legitimately refused by the Board according to Article 4(3) of Regulation 1049/2001 and 4(3) of the Public Access Decision *if no overriding public interest in disclosure was shown, as it happened to be in those cases*. The Appeal Panel referred to this effect also to the Opinion of Advocate General Bot of 12 December 2017 in *BaFin v Ewald Baumeister* C-15/16, EU:C:2017:958

[42] Judgment of 6 April 1962, *Meroni v High Authority*, C-21/61 EU:C:1962:12

[43] C-270/12, EU:C:2014:18, paragraphs 44 to 50.

[44] Thus, Union agencies like the SRB, when endowed with rules-based powers of direct intervention, by necessity must assess how facts and circumstances relate to (and fall within) the relevant rules to the effect of the adoption of individual decisions. Where it is not the case, such agencies would not be able to contribute meaningfully to the achievement of their role within the Union. Such individual decisions are then entirely subject to judicial review.

this applies to the resolution decision itself, while there is no SRMR provision dealing with a decision *not to* perform the ex-post valuation, and thus the role of the European Commission, if any, would not be explicit. This background of principles together with the considerations of judicial protection under article 47 of the Charter of Fundamental Rights of the European Union, provided the context for the decision in case 21/18 to ascertain whether the documents whosedisclosure is requested in the appeal fall within one or more exceptions under Regulation No 1049/2001 and whether there was an overriding public interest in the disclosure of the requested documents.

This helps to illustrate the conundrum of this decision. On the one hand, the exception applicable to documents received from other institutions and bodies as well as the oneapplicable to "internal" documents are grounded on important principles, which try to protect the smooth functioning of institutions, agencies and mechanisms, that is even more important when these are of recent creation. Acritically disclosing internal communications or exchanges of communications would endanger that. On the other hand, considerations about the discretionary/non-discretionary exercise of delegated powers by EU agencies and on the existence/non existence of a formal endorsement of the European Commission, represented by the *Meroni* doctrine, are of fundamental importance in determining whether or not there is an overriding public interest in the disclosure of documents. The decision-making process by the Board and the European Commission need to be as transparent as possible, especially when adopting decisions that are not expressly regulated by the SRMR, but which are considered by the Board necessary to ensure a proper implementation consistent with its overarching principles and finalities.

Thus, the AP found a way to clarify the point without ordering the disclosure of internal documents. It asked specific questions to the Board to this effect and then noted that, with its written answers, the Board clarified that the European Commission had not issued any authorisation, nor any endorsement of the Board's decision not to perform the ex-post valuation. The Board also clarified that *''the Board does not hold in its possession a draft or final ex-post valuation 2 from Deloitte from the period between June 2017 and August* 2018'', i.e. there was no definitive *ex post* valuation in draft or final form. In its decision the AP further acknowledged that the Board's statement was not contradicted by the internal documents which were reviewed by the AP. Since it was clear that there was no authorisation or endorsement issued by the European Commission, nor refusal to grant an authorisation of the Board's decision, nor valuation by the expert, this clarification, in the AP's view, fully satisfied the public interest in the transparency of the process in light of the *Meroni* case-law.

This in turn resulted in the inadmissibility of the appeal with regard to the specific documents requested and its dismissal with regard to the internal communications. Without a document with an authorisation (or refusal) by the Commission and without a document with an expert (definitive *ex post*) valuation the distinction between requests for document disclosure and requests for

information outlined above applied again. An institution, body or agency stating that a document does not exist can rely on a rebuttable presumption that there is no document and is not obliged to create the document if it does not exist.The appeal was thus inadmissible. To the extent that the appeal might be interpreted as a request for disclosure of the internal exchanges of communication between the Board and the European Commission, with the clarification offered above there was no longer an overriding public interest that could justify the disclosure of internal documents.

4. Decision on a Minimum Requirement of Eligible Liabilities (MREL) determination

A third line of action of the AP concerned the MREL. The AP adopted in this respect only one decision on 16 October 2018[45], but this is another telling example of a decision based on the adjudication of values and policies adopted at a time of divisive political discussions on the BRRD revision of the minimum MREL ammunition (also this decision was to some extent illustrative of a lawmaking partnership between quasi-judicial review and policy-makers).

The Appeal Panel held that a discretionary determination of the Board to require a MREL below 8% of total liabilities including own funds (TLOF) was justified in the factual circumstances to ensure that, in accordance with the principle of proportionality, the MREL requirement is calibrated in a way that the target of the relevant credit institution, *measured against its risk weighted assets*, compares in a balanced way with the average national banks and the average Banking Union banks and is duly proportionate to the bank's size, funding and business model and risk profile and to the adverse impact of the institution's failure on financial stability also to prevent competitive distortions.

For further details on this decision see **Chapter VIII.B. Minimum Requirement for Own Capital and Eligible Liabilities.**

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Legal references: Article 85 SRMR; Appeal Panel of the Single Resolution Board Rules of Procedure (consolidated version as of 10 April 2017).

[45] Decision 16 October 2018, in case 8/18, accessible at srb.europa.eu.

Chapter X.D

Case-study: Challenging an ECB's bank's license withdrawal by a bank and its shareholders. Who can act?

(Joined Cases C-663/17 P, C-665/17 P and C-669/17 P, *ECB v Trasta Komercbanka and Others*)

Eugenio Mancini

Summary: *1. Background – 2. The Order of the General Court – 3. The Opinion of the Advocate General – 4. The Judgment of the Court of Justice*

1. Background

The facts of the case concerned Trasta Komercbanka (hereinafter «Trasta» or the «Bank»), a Latvian bank whose authorisation was withdrawn by the ECB on 3 March 2016 after a proposal issued by the Finanšu un kapitāla tirgus komisija (Financial and Capital Market Commission of Latvia, hereinafter «FCMC»).

As Latvian law on credit institutions provides for the immediate liquidation of banks whose authorisation has been withdrawn, the Vidzeme District Court of Riga initiated the liquidation proceeding of Trasta and appointed a liquidator proposed by the FCMC.

According to that Latvian law, the liquidator replaced the former board of directors and assumed their duties, rights and powers. On 17 March 2016, the liquidator revoked the power of attorney previously granted by Trasta's former board of directors.

On 13 May 2016 Trasta, represented by the lawyers authorised by the former board of directors before 17 March 2016 and revoked by the liquidator, brought an action for annulment of the ECB's decision to withdraw the banking licence before the General Court. The same action was brought also by Trasta's shareholders.

On 29 September 2016, the ECB submitted a plea of inadmissibility pursuant to Article 130(1) of the Rules of Procedure of the General Court in respect of both the actions brought by Trasta and its shareholders.

2. The Order of the General Court

The General Court, in the Order No T-247/16, partially upheld the plea of inadmissibility raised by the ECB.

It rejected the Trasta's claim as inadmissible and upheld the shareholders' claim as admissible; by stating – respectively – that: (*i*) Trasta should have acted through the liquidator, due to the fact that the power of attorney granted by the former board of director was effectively revoked; and (*ii*) the shareholders bear an interest in bringing proceeding and are *directly* and *individually* concerned by the ECB's decision.

More specifically, as for the shareholders' individual concern *vis-à-vis* the ECB's decision, the General Court stated that:

> 53. According to case-law, an applicant must show that it has a legal interest in bringing proceedings separate from that possessed by an undertaking which it partly controls and which is concerned by a European Union measure. Otherwise, in order to defend its interests in relation to that measure, its only remedy lies in the exercise of its rights as a member of the undertaking which itself has a right of action.

55. In the present case, shareholders are effectively prevented from exercising their rights as shareholders if […] the powers of the company's management bodies have been transferred to a liquidator who cannot be influenced by the internal legal remedies of the company which are usually available to shareholders. Accordingly, the shareholders of TKB are not able to exercise their rights as members in order to get TKB to bring an action.

57. Accordingly, shareholders are, in the present case, precluded from exercising their rights as members in order to safeguard the interests of the company. Consequently, the solution adopted by the General Court in the case-law referred to in paragraphs 53 and 54 of the present order may not be applied, by analogy, to the present case and it is therefore necessary to hold that the shareholders have an interest in bringing proceedings.

On the other hand, as for the shareholders' direct concern *vis-à-vis* the ECB's decision the General Court stated that:

> 65. As regards the question whether the contested decision directly affects the legal situation of the shareholder applicants, the General Court has already ruled that shareholders cannot be regarded as directly and individually concerned by a decision in so far as it does not, of itself, affect the substance or extent of the rights of the shareholders, either as regards their proprietary rights or the ability, conferred on them by those rights, to participate in the management of the company […].
>
> 66. In the present case, since the contested decision has the effect of withdrawing TKB bank's authorisation and, accordingly, of preventing it from achieving its object and having an economic activity, it directly affects the legal position of the shareholder applicants.
>
> 67. Because of the intensity of its effects, the decision necessarily affects the substance and extent of their rights. In the first place, the right to receive dividends from the profits of a commercial company which is no longer authorised to carry on its business activities necessarily becomes illusory. Secondly, the exercise of voting rights or the right to take part in the management of the company becomes essentially formal, since the effect of the contested decision is to prohibit TKB from achieving its objects.

This Order was contested by the ECB (C-663/17), the European Commission (C-665/17) and Trasta as well as its shareholders (C-669/17), on the sole issue of the admissibility of a judicial challenge.

3. *The Opinion of the Advocate General*

On 11 April 2019, Advocate General (hereinafter also the «AG») Juliane Kokott gave her Opinion (EU:C:2019:323). She advised the Court of Justice to find Trasta's claim admissible and the shareholders' claim inadmissible, subverting the General Court's decision.

As for the admissibility of Trasta's claim, the AG firstly examined

> 41. […] whether the General Court was right to rule […] that the legal protection sought by the bank, namely the annulment of the decision to withdraw its licence, can be effectively achieved by reference to the person of the liquidator.

In this regard, the AG started exploring a preliminary question and namely whether Union law, contradicting domestic law, can justify the maintenance of the power of attorney granted by the former board of directors in order to bring an action of annulment against the ECB's decision. The Advocate General noted that:

> 45. The question whether a legal person is entitled to bring an action for annulment under the fourth paragraph of Article 263 TFEU against an EU act is solely a matter of EU law. However, because a legal person is not able to carry out procedural acts itself, its prospect of obtaining judicial protection before the European Union Courts is directly connected to the question of the determination of the authorised representative. This question is thus likewise a matter of EU law.
>
> 46. In the absence of relevant rules at Union level on the representation of legal persons, regard is had in principle to national law in order to determine the authorised representative. At the same time, however, the Court stresses that national legislation may not impair the right to effective judicial protection if and in so far as recourse is had to the provisions of national law for certain procedural requirements.

In light of such principle, the AG concluded that the possibility of an effective judicial review of the ECB's decision could also rely solely on domestic law. In this sense

> 48. […] the possibility of effective judicial review of the ECB's decision […] could even be entirely precluded by national law, for example if the liquidator did not have the power under the relevant domestic rules to bring an action for annulment. However, national law cannot have the final decision whether an EU act may be (effectively) reviewed in an individual case.

On the basis of other judgments in which the CJEU recognised the possibility for entities without legal personality – but addressee of an act issued by a European

institution – to challenge the act addressed to them, according to the AG a more general principle can be inferred:

> 52. […] that the European Union Courts certainly do not 'have their hands tied' in cases where the application of national law would mean that effective judicial protection cannot be granted. Rather they are also obliged to grant effective judicial protection in such cases.

Provided that, the AG thus examined whether in the factual situation an effective judicial protection could be deemed existent, if the action was brought by Trasta's liquidator. The Advocate General shared Trasta's view, according to which the right to an effective remedy would have been prevented by the following facts:

(i) the liquidator was appointed by the FCMC on whose proposal the ECB withdrew the banking licence, and thus he could not effectively represent the interest of the bank *vis-à-vis* those institutions;

(ii) the board of directors alone had been involved from the beginning in the process concerning the withdrawal of the banking licence, and the liquidator could not replace it at the stage of the proceeding; and

(iii) the liquidator would commit a breach of duty if he attempted to obtain the reinstatement of the licence and thus of the economic activities of the company whose business he was supposed to wind up.

Neither actions brought by shareholders in the interests of the Bank or in their own interests, nor an eventual legal action for damages could have been considered equally effective as actions brought by the Bank itself, due to otherness of shareholders' person *vis-à-vis* the Bank which they control (para. 85-87).

The AG consequently concluded that the General Court committed an error *in law* by stating that the legal protection sought by Trasta could have been effectively achieved by reference to the person of the liquidator. She consequently advised the Court of Justice to disregard the liquidator's power to revoke the power of attorney – setting aside Latvian law in order to give effect to Union law – and to declare admissible the action brought by the Bank's former board of directors.

As for the admissibility of shareholders' claim, according to the AG's view they did not bear an *interest in bringing proceedings* separate from the Bank's one.

More specifically, the AG explored whether shareholders could be deemed as having an interest *on their own*, or an interest in bringing proceedings *on behalf of the bank*.

As for the *first issue*, the AG did not share the General Court's opinion based on the infringement of shareholders' propriety rights, assuming that:

> 118. […] The criterion of direct concern also requires in this connection that the EU act in question must directly affect the legal situation of those parties and leave no discretion to the authorities responsible for implementing that act.

The AG noted that the status of shareholders under company law or their propriety rights were not directly affected by the withdrawal of the banking licence. Even if certain legal effects occurred following the liquidation of Trasta, such event took place after the withdrawal of the banking licence due to purely domestic provisions, and it was not in any way required by the Union law.

Consequently, the AG stated that:

> 120. The mere fact that the withdrawal of the authorisation jeopardises the object of the company and may thus be reflected in a loss in the value of shares is not sufficient to establish direct concern.
>
> 121. Furthermore, the interest which the shareholders in this case have in securing the future of the company is also not sufficiently separate from the bank's interest in retaining its licence.

As for the *second issue*, the AG noted that the General Court found that the shareholders should be considered as having an interest in bringing proceedings even though they were not seeking to defend an interest of their own but of the Bank. The General Court's assumption was based on the fact that shareholders in this case were not able to exert influence by which they could force an action on behalf of Trasta.

The AG however pointed out that, in cases where shareholders cannot show an interest separate from the one of the company to the annulment of a Union act, they cannot bring an action on behalf and in the interest of the company for the simple reason that the company itself has legal standing in this regard (Judgment of 17 July 2014, *Westfälisch-Lippischer Sparkassen-und Giroverband v. Commission*, T-457/09, EU:T:2014:683, paragraph 117).

As for the AG's opinion:

> 127. An exception to this principle could therefore be made […] not in cases where the shareholders' rights of participation are restricted, as the General Court held in paragraphs 54 to 56 of the order under appeal, but in cases where the company itself cannot (effectively) bring an action against the EU act in question.

Consequently, having recognised the admissibility of the action brought by the Bank (*rectius*, by means of its former board of directors), the AG concluded that

there was no need to depart from the principle according to which an action brought by shareholders is admissible only when they can show an interest of their own in bringing proceedings separate from the one of their company as addressee of the Union act.

4. The Judgment of the Court of Justice

On 5 November 2019, the Court of Justice's Grand Chamber gave its final word on the issue at hand (Joined Cases C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923), confirming what the Advocate General had already stated in her Opinion.

In its final decision, the Grand Chamber largely agreed with the AG's statement according to which an action brought by Trasta's liquidator in the interest of the Bank would not have ensured the same level of effectiveness of the action concretely brought by Trasta's lawyers, given the manifest evidences of conflict of interest listed in the AG's Opinion. It thus found Trasta's claim admissible.

As for the action brought by Trasta's shareholders, the Grand Chamber's judgment went a little further than what the AG has stated in her Opinion.

In relation to the shareholders' direct concern *vis-à-vis* the ECB's decision which, according to the General Court, shall be deemed justified due to the intensity of the contested decision's effects, the Court of Justice observed that:

> 108. First, by favouring an incorrect criterion, based on the 'intensity' of the effects of the decision at issue, the General Court did not, as it was required to do, determine whether that decision might have a direct effect on the legal situation of the shareholders of Trasta Komercbanka.
>
> 109. Secondly, as is correctly noted by the ECB and the Commission, the General Court was wrong to take account of the non-legal, economic effects of the decision at issue on the situation of the shareholders of Trasta Komercbanka.

In this sense, it stated that:

> 111. It is true that, following the withdrawal of its authorisation, Trasta Komercbanka is no longer in a position to continue its activity as a credit institution and, consequently, its ability to distribute dividends to its shareholders is questionable. However, the negative effect of that withdrawal is economic in nature; the right of shareholders to receive dividends, just like their right to participate in the management of that company, if necessary by changing its object, has in no way been affected by the decision at issue.

By recalling the statements already made by the AG in her Opinion about the purely domestic nature of Trasta's liquidation, the Grand Chamber consequently found the shareholders' claim inadmissible.

It remains to be seen how such judgment will be received by those judicial systems in which shareholders' claims against acts directly affecting the company's corporate bodies composition (*e.g.* the Italian extraordinary administration decisions) are traditionally admitted.

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CJEU case law: ECJ, 5 November 2019, Joined Cases C-663/17 P, C-665/17 P and C-669/17 P, Trasta Komercbanka AS**,** ECLI:EU:C:2019:923.

Literature: Sarmiento, D., The Trasta Judgment and the Court's New Approach on Standing Requirements in Actions of Annulment in Banking Supervision, in *The EU Law Live Blog*, 2019; Smits, R., Challenging a bank's license withdrawal by the ECB: can the bank act or can its shareholders? in *European law blog*, 2019.

Chapter X.E

Case-study: the Livret A cases

(Case T-733/16, *Banque Postale v ECB*; **Case T-745/16,** *BPCE v ECB*;
Case T-751/16, *Confédération Nationale du Crédit Mutuel v ECB*;
Case T-757/16, *Société générale v ECB*;
Case T-758/16, *Crédit Agricole v ECB*;
Case T-768/16, *BNP Paribas v ECB*)

Guido Crapanzano

Summary: *1. Facts of the cases – 2. The Court's ruling*

1. Facts of the cases

During 2015, well after the ECB started operating as a supervisory authority (November 2014), six French significant credit institutions applied for the exemption under Article 429(14) CRR.[1] This provision reads as follows:

> Competent authorities may permit an institution to exclude from the exposure measure exposures that meet all of the following conditions:
>
> (a) they are exposures to a public sector entity;
>
> (b) they are treated in accordance with Article 116(4);
>
> (c) they arise from deposits that the institution is legally obliged to transfer to the public sector entity referred to in point (a) for the purposes of funding general interest investments.

In summary, Article 429(14) CRR allows credit institutions, with the previous permit of the competent authority, to exclude from the basis on which the leverage requirement[2] is calculated ('exposure measure') some exposures (assets and off-balance sheet items) that the EU legislator considered worthwhile of a special treatment, because they contribute to the funding of general interest investments according to the applicable (EU or national) law. In order to mitigate

[1] At the same time, the banks applied for the waiver under Article 26 ('Outflows with inter-dependent inflows') of Delegated Regulation 2015/61 (LCR Regulation). This provision reads as follows:
«Subject to prior approval of the competent authority, credit institutions may calculate the liquidity outflow net of an interdependent inflow which meets all the following conditions:
(a) the interdependent inflow is directly linked to the outflow and is not considered in the calculation of liquidity inflows in Chapter 3;
(b) the interdependent inflow is required pursuant to a legal, regulatory or contractual commitment;
(c) the interdependent inflow meets one of the following conditions:
(i) it arises compulsorily before the outflow;
(ii) it is received within 10 days and is guaranteed by the central government of a Member State.»
Article 429(14) CRR on exemption from leverage requirement and Article 26 Delegated Regulation No 2015/61 on exemption from liquidity coverage requirement (LCR) partially overlap, as they give competent authorities the power – if conditions of both rules are in place – to exempt some exposures and their related inflows and outflows from both the leverage and liquidity coverage requirements.

[2] After the financial crisis of 2007, the Basel Committee on Banking Supervision (BCBS) strengthened the framework of prudential standards applicable to internationally active banks, previously known as Basel II. In December 2010 the BCBS published "Basel III: A global regulatory framework for more resilient banks and banking systems" (see BCBS (2010); a revised version of June 2011 is BCBS (2011). The Basel III framework has been enhanced further in December 2017: see BCBS (2017)). Amongst other new prudential standards, the BCBS introduced the leverage requirement, which is intended (*i*) to constrain leverage in the banking sector, thus helping to mitigate the risk of the destabilising deleveraging processes which can damage the financial system and the economy; and (*ii*) introduce additional safeguards against model risk and measurement error by supplementing the risk-based measure with a simple, transparent, independent measure of risk (see BCBS (2011), para. 16). On the BCBS leverage ratio framework, see also BCBS (2014) and BCBS (2016).

the prudential risks stemming from this exemption, the EU law imposed a few conditions for the authorisation to be granted.[3]

The banks that applied for the exemption issued the so-called *Livret A* and *Livret de Développement Durable et solidaire* (LDD) accounts, special tax-exempt savings accounts regulated by Articles L-221-1 to 221-9 of the *Code Monétaire et financier* (CoMoFi), the French legislation in the field of money and finance.

Under this regulated scheme, the deposits received by the banks on such savings accounts have to be transferred – at least in part – to the *Caisse des dépôts et consignations* (CDC), a French public sector entity under Article 4(1)(8) CRR. In turn, the CDC uses the money received to fund general public interest investments, especially social housing.

According to the applicable French law, should a saver withdraw the money held in the Livret A/LDD, the bank would pay it immediately and receive back the same amount from the CDC on some predefined settlement dates so as to limit the deferment to no more than 10 (working) days.

The debt of the CDC vis-à-vis each bank is backed by the statutory guarantee of the French Republic.

While the ECB granted the permits under Article 26 of Delegated regulation No 2015/61, it refused to grant the waivers under Article 429(14) CRR.

In its decisions on the waivers of leverage requirement, the competent authority recognised that conditions under Article 429(14) CRR were met with respect to all applicants. However, the ECB thought that said provision granted the competent authority the discretionary power to reject the applications. Despite the fulfilment of all the conditions, the scheme submitted by the banks entailed significant prudential risks in all the cases.

The ECB assessed that this was the case, taking into account several indicators: (*i*) the accounting treatment of the exposures to the CDC, which are still on the banks' balance because of the imperfect pass-through of the scheme; (*ii*) the fact that the banks would still be contractually obliged to reimburse depositors even in case of default of the CDC (and the French Republic); (*iii*) the adjustment period of 10 (working) days between the outcoming reimbursement to the depositors and the incoming payment from the CDC, which would expose the banks to deleverage and liquidity risks.

The banks brought several parallel actions for annulment (Article 263 TFEU) of the decision of the ECB before the EU General Court, pleading that:

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[3] Essentially, that (*i*) the credit risk stemming from the exempted exposures is very low (0% risk weight under the Standardised approach), because they are exposures to a public sector entity (under Article 4(1)(8) CRR) and guaranteed by a Member State (pursuant to Article 116(4) CRR), and (*ii*) those exposures arise from deposits that the institution is obliged to transfer to the public sector entity according to the applicable law.

(a) the ECB lacked the competence to exercise any discretionary power, as Article 429(14) CRR is a case of *compétence liée* (i.e., the decision of the competent authority is bound if all conditions required by the provision are fulfilled);

(b) the decisions were vitiated by several errors of law, as:

  (b1) the interpretation given by the ECB to Article 429(14) CRR would deprive it of any *effet utile*, because the provision does not consider the simple accounting treatment – i.e., the fact that the exposures are on-balance – as an obstacle to the waiver being granted; and

  (b2) when it assessed the adjustment period of 10 (working) days, the ECB failed to distinguish properly between leverage and liquidity risks;

(c) the decisions were vitiated by manifest errors of assessment, as the ECB failed to consider the highly theoretical character of a default of both the CDC and the French Republic; and

(d) the decisions were insufficiently motivated.

2. The Court's rulings

The Court upheld (some of) the pleas and annuled the ECB's decisions (see, among others, the decision of the General Court of 13 July 2018, T-733/16, *Banque Postale v ECB*).

First of all, after an examination of the history of Article 429(14) CRR and its literal, contextual and teleological meaning, the Court rejects the plea of lack of competence. In the opinion of the Court, the provision does not grant a *compétence liée* but a *compétence discrétionnaire*. According to the Court:

> 56. […] the implementation of Article 429(14) of Regulation No 575/2013 entails the reconciliation of two objectives: first, compliance with the logic of the leverage ratio, which requires that the calculation of that ratio include the overall exposure measure of a credit institution, without weighting by reference to the risk, and, second, consideration of the objective of the Commission, authorised in advance by the legislature, that, if necessary, certain exposures with a particularly low risk profile which are not the result of an investment choice made by the credit institutions are not relevant for the calculation of the leverage ratio and may therefore be excluded.
>
> 57. It must be stated that the recognition in favour of the competent authorities of a discretion when they implement Article 429(14) of Regulation No 575/2013 allows them to decide between those

> two objectives in the light of the particular characteristics of each individual case.
>
> 58. In the light of all of the foregoing, it must be concluded that Article 429(14) of Regulation No 575/2013 must be interpreted as conferring on the competent authorities a discretion to refuse to grant the derogation which it establishes even when the conditions set out in that provision are met.

On the substance, first of all the Court recalls its limited standard of review with respect to the exercise of discretion. According to the case law of the CJEU, the European judge cannot substitute its judgement with that of the EU Institution whose decision is challenged, but only assess if errors in law, manifest errors of appreciation or abuses of power have been committed. In addition, the Court can be asked to check if the EU Institution complied with the obligation to examine carefully and impartially all the relevant factors of the case.

In the opinion of the Court, the ECB made an error in law, as it deprived Article 429(14) from its *effet utile*.

According to the Court,

> 77. […] although the ECB is free within the framework of the exercise of the discretion recognised to it under Article 429(14) of Regulation No 575/2013 to grant or not to grant the derogation envisaged in that provision, the exercise of that freedom must not disregard the objectives pursued by that derogation and must not deprive it of its practical effect.
>
> 78. […] it must be considered that the objective of Article 429(14) of Regulation No 575/2013 consists in allowing the competent authorities to decide between, on the one hand, the rationale of the leverage ratio, which requires that when the exposure level of a credit institution is measured the risk presented by its exposures is disregarded and, on the other hand, the possibility that certain exposures with a particularly low risk profile which are not the result of an investment choice by the credit institution are not relevant for the calculation of the leverage ratio and may be excluded from it.
>
> 79. It necessarily follows that the ECB cannot rely on grounds that would make the possibility offered by Article 429(14) of Regulation No 575/2013 virtually inapplicable in practice, without depriving that provision of practical effect and disregarding the objectives that led to its introduction.

Indeed, the ECB refused the waiver on grounds that are inherent to Article 429(14):

> 82. An exposure is defined in Article 5(1) of Regulation No 575/2013 as ‘an asset or off-balance sheet item’. Accordingly, that

> definition necessarily includes the items on the assets side of a credit institution's balance sheet. Furthermore, since Article 429(14)(c) of Regulation No 575/2013 is concerned with exposures arising from deposits that the institution is legally obliged to transfer to a public-sector entity for the purposes of funding general interest investments, exposures which, by their nature, must appear on a credit institution's balance sheet rather than constituting off-balance sheet items are involved.
>
> […]
>
> 84. Accordingly, in so far as the exposures in respect of which Article 429(14) of Regulation No 575/2013 envisages the possibility that they will not be taken into account in the calculation of the leverage ratio of a credit institution must by their nature appear on the assets side of that institution's balance sheet, the consideration based on the fact that the exposures to the CDC are shown on the assets side of the applicant's balance sheet cannot validly justify the refusal to grant the requested derogation.

In addition, the ECB failed to examine the likelihood of a sovereign default:

> 89. Since Article 429(14) of Regulation No 575/2013 concerns only exposures to public-sector entities having a State guarantee, a refusal given on the theoretical ground that a State may be in a payment default situation, without consideration of the likelihood of such a possibility in the case of the State concerned, would amount to rendering the possibility envisaged by Article 429(14) of Regulation No 575/2013 virtually inapplicable in practice.
>
> 90. […] it is apparent from the contested decision that the ECB simply drew attention to the mere possibility of a payment default by the French State without examining the likelihood of such a default.
>
> […]
>
> 92. Nor, consequently, in so far as the ECB did not examine the likelihood of a payment default by the French State, can the reference in point 2.3.3(ii) of the contested decision to the volume of the applicant's exposures to the CDC justify in itself those exposures being taken into account in the calculation of the leverage ratio. That volume might be relevant only if, as a result of a payment default by the French State, the applicant could not obtain from the CDC the sums transferred as regulated savings and would have to have recourse to forced sales of assets.

The ruling also considers the relations between leverage and liquidity risks.

The reasoning comes from the recitals of the CRR, which help clarifying the purpose of the introduction of a leverage ratio along with capital requirements.

See Recitals 90 and 91 CRR.

> (90.) The years preceding the financial crisis were characterised by an excessive build up in institutions' exposures in relation to their own funds (leverage). During the financial crisis, losses and the shortage of funding forced institutions to reduce significantly their leverage over a short period of time. This amplified downward pressures on asset prices, causing further losses for institutions which in turn led to further declines in their own funds. The ultimate results of this negative spiral were a reduction in the availability of credit to the real economy and a deeper and longer crisis.
>
> (91.) Risk-based own funds requirements are essential to ensure sufficient own funds to cover unexpected losses. However, the crisis has shown that those requirements alone are not sufficient to prevent institutions from taking on excessive and unsustainable leverage risk.

The Court takes into account that the ECB granted the waiver under Article 26 of Delegated Regulation No 2015/61 to the cash inflows and outflows related to CDC exposures, thus acknowledging that the 10-day period is not at the origin of a liquidity risk.

According to the Court, the adjustment period can hardly give rise to excessive leverage risk, as such a risk can normally arise when the exposures concerned give rise to liquidity risk. In the opinion of the Court, the ECB also provided no justification on the fact that leverage risk can materialise when it is unlikely that liquidity risk does.

The ruling has never been appealed.

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EU Legal references: Recitals 90 and 91 and Article 429(14) CRR (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; in OJ L 176, 27.6.2013, p. 1) as introduced by Commission Delegated Regulation (EU) 2015/62 of 10 October 2014 amending Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to the leverage ratio (OJ L 11, 17.1.2015, p. 37); Article 26 of Commission Delegated Regulation (EU) 2015/61 of 10 October 2014 to supplement Regulation (EU) No 575/2013 of the European Parliament and the Council with regard to liquidity coverage requirement for Credit Institutions (OJ L 11, 17.1.2015, p. 1).

National Legal references: Articles L-221-1 to 221-9 of the *Code Monétaire et financier* (CoMoFi).

Other official documents: BCBS (2010), "*Basel III: A global regulatory framework for more resilient banks and banking systems*" (available at the following website: https://www.bis.org/publ/bcbs189_dec2010.htm); BCBS (2011), "*Basel III: A global regulatory framework for more resilient banks and banking systems*" (available at the following website: https://www.bis.org/publ/bcbs189.htm); BCBS (2014), "*Basel III leverage ratio framework and disclosure*

requirements" (available at the following website: https://www.bis.org/publ/bcbs270.htm); BCBS (2016), "*Frequently asked questions on the Basel III leverage ratio framework*" (available at the following website: https://www.bis.org/bcbs/publ/d364.htm); BCBS (2017), "*Basel III: Finalising post-crisis reforms*" (available at the following website: https://www.bis.org/bcbs/publ/d424.htm).

CJEU case law: General Court, 13 July 2018, T-733/16, *Banque Postale v ECB*, ECLI:EU:T:2018:477; General Court, 13 July 2018, T-745/16, *BPCE v ECB*, ECLI:EU:T:2018:476; General Court, 13 July 2018, T-751/16, *Confédération Nationale du Crédit Mutuel v ECB*, ECLI:EU:T:2018:475; General Court, 13 July 2018, T-757/16, *Société générale v ECB*, ECLI:EU:T:2018:473; General Court, 13 July 2018, T-758/16, *Crédit Agricole v ECB*, ECLI:EU:T:2018:472; General Court, 13 July 2018, T-768/16, *BNP Paribas v ECB*, ECLI:EU:T:2018:471.

Chapter X.F

The liability regimes within the SSM and the SRM

Raffaele D'Ambrosio

Summary: *1. Inferring the limitation of the ECB's liability from the Member States' laws on the legal protection of supervisors and the Court of Justice of the European Union's sufficiently serious violation criterion – 1.1. The SSM liability regime under Recital No 61 of the SSM Regulation and the Court of Justice's task to infer a legal protection for the ECB from the national legislations – 1.2. The trend towards the limitation of supervisors' liability within the Member States: the German, English and French-based liability regimes – 1.3. Whether and to what extent the rules on the legal protection of supervisors are compatible with the European Convention of Human Rights and with EU substantive banking legislation – 1.4. Towards a common criterion? – 1.5. Liability under EU Law: the sufficiently serious violation criterion and the ECB's task of protecting a multiplicity of interests within the SSM – 1.6. The singleness and unitariness of the SSM as a further element suggesting a limitation of liability for the ECB as supervisory authority – 2. The allocation of tasks, powers and liability between the ECB and the NCAs within the SSM – 3. The liability for damage caused to third parties by the ECB's staff and members of the ECB's bodies – 4. The allocation of liability between the SRB and the NRAs within the SRM – 5. Multiplicity of Central Banks' and Supervisors' mandates and liability issues.*

1. Inferring the limitation of the ECB's liability from the Member States' laws on the legal protection of supervisors and the Court of Justice of the European Union's sufficiently serious violation criterion

1.1. The SSM liability regime under Recital No 61 of the SSM Regulation and the Court of Justice's task to infer a legal protection for the ECB from the national legislations

Under Recital No 61 of the SSMR

> in accordance with Article 340 TFEU, the ECB should, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.

Similar rules are provided for under the European Supervisory Authorities (ESAs) Regulations with regard to the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA) respectively.

Nevertheless, apart from ESMA's responsibilities with regard to Credit Rating Agencies (CRAs) and a few other cases where ESAs are vested with specific powers over institutions, ESAs essentially do not enjoy direct supervisory powers.

Even where ESAs are exceptionally vested with specific supervisory powers, the need to limit their liability is not so imperious.

Indeed, ESAs basically lack discretionary power in the performance of their statutory duties, which is in line with the "Meroni doctrine" as developed in the CJEU's case law.

Indeed, one of the main reasons invoked in order to limit the supervisors' liability is the need to preserve their discretionary powers.

The case of the ECB and the NCAs is therefore apparently different from that of ESAs, since the former are entrusted within the SSM with broad discretionary decision-making powers in the performance of their supervisory tasks towards credit institutions.

The need to avoid specious lawsuits so as to preserve the ECB's and the NCAs' margin of manoeuvre is all the more stringent considering the multiplicity of interests that both the EU and national supervisors have to counterbalance in their decisions.

The second part of Recital 61 maintains the liability of the NCAs in accordance with their respective national legislations.

Principle No 2 of the 2012 Basel Core Principles for Effective Banking Supervision stipulates that

> the legal framework for banking supervision includes legal protection for the supervisor.

Essential criterion No 5 specifies, in turn, that

> laws provide protection to the supervisor and its staff against lawsuits for actions taken and/or omissions made while discharging their duties in good faith

and that

> the supervisor and its staff are adequately protected against the costs of defending their actions and/or omissions made while discharging their duties in good faith.

Consistently with said principle, there is a clear trend towards the limitation of supervisors' liability within the EU Member States, due to the need of granting their discretion.

Based on this trend, the CJEU may find some principles specifically applicable to supervisors' liability in the different EU Member States with the aim of ensuring a form of legal protection for the ECB as well.

In light of the above the CJEU would be expected to take into account the several specific rules on the legal protection of supervisors and, in the absence of such rules, the grounds on which the national courts base their reluctance to admit the supervisors' liability.

Indeed, both the national legislators and the national courts are prone to protect supervisors in the performance of their duties and to grant them the necessary margin of manoeuvre to counterbalance the several public interests they are in charge to protect.

This is particularly true in the field of EU banking law where, besides the protection of depositors' rights, there are other primary public interests that supervisors are in charge to safeguard, such as those of preserving the sound and prudent management of the credit institutions and the overall stability of the financial system.

Though there are still some divergences among the Member States' legal frameworks, these latter should not prevent the CJEU from choosing a common approach.

In its work of finding these principles common to the laws of the Member States, the CJEU could reach a fair compromise between the common law liability regimes for supervisors, based on the bad faith criterion, and the civil law liability ones, based on the gross negligence criterion.

1.2. The trend towards the limitation of supervisors' liability within the Member States: the German, English and French-based liability regimes

Liability regimes in EU countries show a clear trend towards a form of legal protection for supervisors, spanning from immunity from investors to limitation of liability to bad faith or gross negligence.

In the German literature, supervision of financial institution was traditionally undertaken in the interest of the public at large and not to protect individuals. The underlying idea - the so-called *Schutznormtheorie* - is that liability is to be denied where a particular claimant is not among those whom a specific legal rule is intended to protect, or where the legal rule is intended to protect the interest of the public at large rather than those of any private individual.

In light of the above, depositors and investors cannot have any tort claims against supervisors.

The 1984 legislation on credit institutions (amended in 1988) stated that banking supervision had to be exclusively undertaken in the public interest and was therefore intended to exclude claims from individuals. The German financial legislation of 2002 confirmed this view. Section 4(4) of 2002 Law on the Federal Institution for the Supervision of Financial Services corresponds to the provision of the 1984 Law as amended in 1988.

In the UK, liability of financial supervisors is confined to bad faith.

The statutory limitation from liability for damages was introduced in the UK under the 1987 Banking Act and was then confirmed by the 2000 Financial Services and Market Act, on the ground that the public interest is better served by an uninhibited watchdog than by a legally responsible one.

A similar provision is now to be found in the Financial Services Act of 2012 (Schedule 1ZA) which charges with prudential tasks the Prudential Regulation Authority, a subsidiary of the Bank of England, instead of the Financial Supervisory Authority.

As the immunity provided for under the 2000 Financial Services and Market Act (now under the Financial Services Act of 2012) is not applicable to acts undertaken in bad faith, claims against the supervisory authority are mainly based on the wilful tort of misfeasance in public office, which is the only traditional public law tort in English law.

Besides the remedies under EU law, in the BCCI case the claims against the Bank of England were based on the misfeasance in public office tort.[1]

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[1] See House of Lords, Three Rivers District Council and others v. Governor and Company of the Bank of England, WLR, 2000, 2 and UKHL, 2001, 16.

The tort consists in an exercise of power by a public officer in bad faith that causes loss to the claimant.

The most stringent form of the tort is targeted malice. It requires proof that the public officer has acted with the intention of injuring the claimant. The other is untargeted malice and occurs when the public officer acts in the knowledge that he is exceeding his powers and that in doing so he will probably injure the claimant.

The focus of the BCCI case was upon the second form (untargeted malice) of the mental requirement of the tort of misfeasance in public office.

The debate in the House of Lords concerned two questions: (i) the first pertained to the public officer's knowledge of the unlawfulness of his act; (ii) the second concerned the awareness of the consequences of that unlawful act.

The court ruled that: (i) on the knowledge of the illegality, the claimant must show that the officer acted with a state of mind of reckless indifference to the illegality; (ii) on the awareness of the consequences, the claimant must show that the public officer acted with a state of mind of recklessness about the consequences of his act in the sense of not caring whether these consequences would happen or not.

The new approach of the House of Lords in the BCCI case may reduce the differences in the protection granted to supervisors between the EU common law legal regimes for supervisors' liability and most of the EU civil law legal regimes (such as those in force in France and in other French-based legal frameworks), where the liability of supervisors is confined to the gross negligence.

Due to the complex and sensitive nature of financial supervision, the case law of the French *Conseil d'Etat* traditionally requires claimants - since the *Sieur Bapst* case of 1963 - to show *faute lourde* (gross negligence) in liability actions lodged against the State for the alleged defective financial supervision of the competent public authority.

Nevertheless, the *Sieur Bapst* case gave no definition of what *faut lourd* entails.

Some clarifications were made in the *Sieur d'André* case of 1964: not avoiding the crisis of a financial intermediary coupled with knowledge of the signlas of the crisis should meet the *faute lourde* criterion.

The standard of liability applied by the French Administrative Courts was particularly high.

This restrictive approach was temporarily abandoned by the *Cour Administrative d'Appel de Paris* in the *El Shikh* and *Kechichian* cases: the Court decided that the standard of *faute simple* (negligence) applied to the supervisory role of the *Commission Bancaire*.

Nevertheless, the ruling of the *Cour Administrative d'Appel* was immediately overturned by the *Conseil d'Etat* which confirmed the *faute lourde* approach.

The protective role of *faute lourde* in the area of financial supervision is therefore still deemed necessary in France in order to provide a margin of manoeuvre for the public bodies charged with supervisory powers, even though the *Conseil d'Etat* recognised the liability of the State for the unlawful conduct of the *Commission Bancaire*.

Liability regimes based on the gross negligence requirement were also introduced in most of the EU countries, including Italy.

Article 24(6-bis) of Italian Law No 262 of 2005, as amended by Article 4(2) of Legislative-Decree No 303 of 2006, stipulates that supervisory authorities and their staff are responsible only if their acts or omissions are shown to have been in bad faith or due to gross negligence.

Supervisors are often protected by courts irrespective of a specific rule limiting their liability.

Indeed, depositors may fall at any one of a number of hurdles as it clearly results from:

(i) the German *Schutznormtheorie* or the proximity requirement in common law;

(ii) the characterisation under the French *Conseil d'Etat* case law of some French supervisory authority's powers as quasi-judicial;

(iii) the reluctance to award compensation for pure economic loss in common law;

(iv) the difficulty to admit negligence liability for omissions in common law;

(v) the exclusion of liability in common law for the deliberate act of a legally responsible third party;

(vi) the difficulties when it comes to establishing that the supervisor is in fault, considering, among the others circumstances, its margin of manoeuvre;

(vii) the difficulties that the claimants will face (basically in French administrative courts) in establishing that the supervisor's fault was the cause of their loss.

Spanish supervisors are subject to the general liability regime.[2] Nevertheless, for the supervisor's liability to arise, the Spanish Courts requires that it acted arbitrarily, unjustifiably or illegally.[3]

In light of the above, the limitation of supervisors' liability is not only the subject of some specific rules in force in most of the EU (and non-EU) countries aimed at protecting the supervisory authorities from specious lawsuits, but it is also the effect of some general (though not common) principles of tort and administrative law applied in different Member States.

The overview above authorises the conclusion that the CJEU is entitled to find common rules and criteria for limiting the liability of the ECB while performing the tasks entrusted to it by the SSMR.

1.3. Whether and to what extent the rules on the legal protection of supervisors are compatible with the European Convention of Human Rights and with EU substantive banking legislation

Nevertheless, this conclusion is conditional upon the solution of the further problem of whether and to what extent the rules on the legal

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[2] See the Audiencia Nacional (22.05.2019 No 07130/2017). While excluding in the case at hand the Banco de España's liability, the Court clarifies that: "El artículo 32 y siguientes de la Ley 40/2015, de 1 de octubre, de Régimen Jurídico del Sector Público de la Ley 30/1992, que trae causa del artículo 106.2 de la Constitución, proclama el derecho de los particulares a ser indemnizados por las Administraciones Públicas correspondientes, de toda lesión que sufran en cualquiera de sus bienes y derechos, siempre que la lesión sea consecuencia del funcionamiento normal o anormal de los servicios públicos salvo en los casos de fuerza mayor o de daños que el particular tenga el deber jurídico de soportar de acuerdo con la Ley. En la interpretación de estas normas, con carácter general, el Tribunal Supremo ha declarado reiteradamente que para que nazca dicha responsabilidad, se requiere *"una actividad administrativa (por acción u omisión -material o jurídica-), un resultado dañoso no justificado y relación de causa a efecto entre aquélla y ésta, incumbiendo su prueba al que reclama; a la vez que es imputable a la Administración la carga referente a la existencia de la fuerza mayor cuando se alegue como causa de exoneración"* (Sentencias de 14 de julio y de 15 de diciembre de 1986, de 29 de mayo de 1987, de 17 de febrero y de 14 de septiembre de 1989, etc.). No se trata, por consiguiente, de una responsabilidad por culpa o por negligencia, sino de carácter objetivo, que surge al margen de la conducta desplegada por el autor del daño, pero siempre que ese daño sea consecuencia del funcionamiento de los servicios públicos, incluso cuando tal funcionamiento es normal".

[3] See the Audiencia Nacional (12.09.2018 No 06773/2016), quoting previous jurisprudence: "En el presente caso se ha de tener en cuenta que la parte recurrente invoca expresamente la responsabilidad patrimonial directa del Banco de España prevista en el artículo 25 del Reglamento Interno del Banco de España, por lo que, junto a estos principios de orden general, debemos tener en consideración la doctrina jurisprudencial sobre la responsabilidad patrimonial en el caso de organismos supervisores y, así, como hemos señalado en la Sentencia de fecha 11 de abril de 2018 -dictada en el recurso seguido ante esta Sección con el nº 582/2016-: '(...) el Tribunal Supremo establece que la existencia del organismo supervisor no supone per se la concurrencia de responsabilidad patrimonial en el caso de que se produzca una disfunción, en tales casos para que se pueda apreciar la existencia de responsabilidad patrimonial es necesario que en el ejercicio de su función el órgano supervisor haya actuado de forma arbitraria, injustificada o de forma contraria al Ordenamiento'".

protection for supervisors in force in EU Member States are compatible with (i) the European Convention of Human Rights (hereinafter ECHR) and the corresponding provisions of the Charter of fundamental rights, and (ii) the substantive EU banking legislation.

Under Article 6 of ECHR

> in the determination of his civil rights and obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The European Court of Human Rights (*Golder v. UK*, 21 February 1975, Application No. 4451/70, § 36) held that Article 6:

> secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal

and that it

> embodies the right to a court, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only.

Nevertheless, Article 6 of the ECHR cannot be used to create civil rights that do not exist under the substantive law of the State concerned. Since the rules limiting or excluding supervisors' liability cannot be considered as procedural ones, they do not fall within the scope of Article 6 of the ECHR.

See ECtHR, *Z and others v. United Kingdom,* 10 May 2001, Application no. 29392/95, § 87:

> The Court recalls its constant case-law to the effect that "Article 6 § 1 extends only to '*contestations*' (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law; it does not itself guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States.

The same holds true with regard to Article 52(3) of the Charter of fundamental rights.

A further problem arises as to whether and to what extent the rules on the legal protection of supervisors can be deemed compatible with the substantive EU banking law.

The key issue is whether and to what extent EU banking legislation confers rights on depositors that may be invoked by their relevant national courts.

In the *Peter Paul* case of 2004,[4] the ECJ stated that limitation of supervisors liability in German law was compatible with EU banking legislation on the assumption that banking directives did not contain any rule granting rights to depositors.

See §§ 38 to 47 of the decision:

> 38. In a number of the Recitals in the preambles to the directives referred to in the second question, parts (a) and (b), it is stated in a general manner that one of the objectives of the planned harmonisation is to protect depositors.
>
> 39. Furthermore, Directives 77/780, 89/299 and 89/646 impose on the national authorities a number of supervisory obligations vis-à-vis credit institutions.
>
> 40. However, contrary to the claims of Paul and others, it does not necessarily follow either from the existence of such obligations or from the fact that the objectives pursued by those directives also include the protection of depositors that those directives seek to confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities.
>
> 41. In that regard, it should first be observed that Directives 77/780, 89/299 and 89/646 do not contain any express rule granting such rights to depositors. 42. Next, the harmonisation under Directives 77/780, 89/299 and 89/646, since it is based on Article 57(2) of the Treaty, is restricted to that which is essential, necessary and sufficient to secure the mutual recognition of authorisations and of prudential supervision systems, making possible the granting of a single license recognized throughout the Community and the application of the principle of home Member State prudential supervision.

[4] ECJ, Case C-222/02, *Peter Paul and others v Bundesrepublik Deutschland*, ECR 2004 I-09425. It is worth noting that the *Peter Paul* judgment has not been revisited by the *Nikolay Kantarev* ruling (ECJ, 4 October 2018, C-571/16, Nikolay Kantarev v Balgarska Narodna Banka). It is true that in this case the ECJ ruled that "EU law precludes, in the context of an action such as that in the main proceedings, the right to damages from being subject to the intention of the national authority in question to cause the harm" (see § 128). Nevertheless, as the Court clearly underlined, the facts which gave rise to the case in the main proceedings may be distinguished from those giving rise to the judgment of 12 October 2004, *Paul and Others*. Indeed (see §§ 90 to 92): "90. It is clear from the judgment of 12 October 2004, *Paul and Others* (C-222/02, EU:C:2004:606) that, where national law has established a deposit-guarantee scheme, Directive 94/19 does not preclude national legislation which limits individuals from claiming damages for harm sustained by insufficient or deficient supervision on the part of the national authority supervising credit institutions or from pursuing State liability under EU law on the ground that those responsibilities of supervision are fulfilled in the general interest. 91. In the present case, the referring court wishes to know whether a Member State may be held liable for an incorrect transposition of Directive 94/19 and for an incorrect implementation of the deposit-guarantee mechanism set out in that directive. 92. In that regard, it should be noted that, according to settled case-law, the principle of State liability for loss and damage caused to individuals as a result of breaches of European Union law for which the State can be held responsible is inherent in the system of the treaties on which the European Union is based (judgment of 26 January 2010, *Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraph 29 and the case-law cited)".

> 43. However, the coordination of the national rules on the liability of national authorities in respect of depositors in the event of defective supervision does not appear to be necessary to secure the results described in the preceding paragraph.
>
> 44. Moreover, as under German law, it is not possible in a number of Member States for the national authorities responsible for supervising credit institutions to be liable in respect of individuals in the event of defective supervision. It has been submitted in particular that those rules are based on considerations related to the complexity of banking supervision, in the context of which the authorities are under an obligation to protect a plurality of interests, including more specifically the stability of the financial system.
>
> 45. Finally, in adopting Directive 94/19 the Community legislature introduced minimal protection of depositors in the event that their deposits are unavailable, which is also guaranteed where the unavailability of the deposits might be the result of defective supervision on the part of the competent authorities.
>
> 46. Under those conditions, as pointed out by the Commission and the Member States which submitted observations to the Court, Directives 77/780, 89/299 and 89/646 cannot be interpreted as meaning that they confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities.
>
> 47. In the light of the foregoing, the answer to the second question must be that Directives 77/780, 89/299 and 89/646 do not preclude a national rule to the effect that the functions of the national authority responsible for supervising credit institutions are to be fulfilled only in the public interest, which under national law precludes individuals from claiming compensation for damage resulting from defective supervision on the part of that authority".

That was similarly held by the House of Lords in the BCCI case. In the House of Lords's view the first banking directive

> placed duties of cooperation on the competent authorities where a credit institution was operating in one or more member state other than that in which its head office was situated. But it stopped short of prescribing any duties of supervision to be performed by the competent authority within each member state. It is not possible to discover provisions which entail the granting of rights to individuals, as the granting of rights to individuals was not necessary to achieve the results which were intended to be achieved by the directive.[5]

[5] *W.L.R.*, 2000, 2, 1257.

Under both these judgments the supervisory powers that directives entrust on the national authorities vis-à-vis credit institutions were deemed as being only aimed at ensuring the sound and prudent management of the credit institutions.

Nevertheless, protection of depositors and/or investors is included within the purposes of the Directive on deposit guarantee schemes (Recital 14),[6] the ESAs regulations[7] and the SSMR (Recital 30) and it is still the paramount goal of EU legislation on financial markets.[8]

Substantive EU legislation on financial markets is intended to protect investors not only when safeguarding the interests of individual investors is the exclusive or overarching objective of a directive or a regulation, as in the case of legislative acts on prospectuses and investment services, but also when these legislative acts are meant to safeguard collective interests within multiple objectives, as in the case of banking legislation.

Under the latter, the protection of depositors is neither the only nor the overarching interest safeguarded by EU legislation, the others being at least the sound and prudent management of credit institutions and the overall stability of the financial system.

The circumstance that EU banking law grants rights to depositors, while preventing the complete immunity of supervisors towards them, is not incompatible with a certain level of limitation of supervisors' liability.

Indeed, a degree of limitation of supervisors' liability is a fair compromise between the need to protect the rights of depositors and the need to ensure that supervisors enjoy the necessary margin of discretion in the performance of their task of counterbalancing all the interests protected by EU law.

1.4. Towards a common criterion?

In light of the above, the CJEU could infer the common principles applicable to the ECB's liability only from the Member States legal frameworks providing a limitation of supervisors' liability, since the immunity towards depositors is incompatible with EU banking law and the absence of any limitation of liability is in contrast with the duty of supervisors to counterbalance depositors' rights with the protection of other primary public interests.

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6 Directive 2014/49/EU on deposit guarantee schemes (O.J. 2014, L 173/149).

7 Regulations on ESA include the protection of depositors and investors in the main tasks of financial supervisory authorities as it emerges from: (i) Article 1, paragraph 5, let. f; (ii) Article 8.1, lit. h; (iii) Article 9, paragraph 1; (iv) Article 26.

8 See Article 5, paragraph 1, of Directive n. 2003/71/EU (O.J. 2003, L 345/64) on the prospectus to be published when securities are offered to the public or admitted to trading. See also Directive 2014/65/EU (the so-called MIFID2; O.J. 2014, L 173/349): Recitals No 3, 4, 39, 42, 45, 51, 74, 77, 86, 87 and 151, and Articles 16(3), (8) and (9), 23, 34 to 30, 74(2) and 75.

Common principles on supervisors' liability should be drawn by the CJEU from the national legal systems based on bad faith and gross negligence.

The broad interpretation of the House of Lords and of the Supreme Court of Ireland of misfeasance in public office approaches the gross negligence criterion as restrictively applied in the French *Conseil d'Etat's* jurisprudence.

1.5. Liability under EU Law: the sufficiently serious violation criterion and the ECB's task of protecting a multiplicity of interests within the SSM

The legal protection of the ECB in its capacity of supervisory authority can be also derived by the CJEU from the sufficiently serious violation criterion applied to the liability of EU institutions.

The sufficiently serious violation criterion applies not only to the legislative acts of EU institutions, as traditionally laid down in CJEU case-law,[9] but also to the administrative ones.

See ECJ, Case C-352/98, Laboratoires Pharmaceutiques Bergaderm SA v. Commission of the European Communities, §§ 39-47:

> 39. The second paragraph of Article 215 of the Treaty provides that, in the case of non-contractual liability, the Community is, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its institutions or by its servants in the performance of their duties.
>
> 40. The system of rules which the Court has worked out with regard to that provision takes into account, *inter alia,* the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question (Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 43).
>
> 41. The Court has stated that the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage *(Brasserie du Pêcheur and Factortame,* paragraph 42).
>
> 42. As regards Member State liability for damage caused to individuals, the Court has held that Community law confers a

[9] See ECJ, Case C-5/71, Zuckerfabrik Schöppenstedt v Council ECR, 1971, 975.

right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties *(Brasserie du Pêcheur and Factortame,* paragraph 51).

43. As to the second condition, as regards both Community liability under Article 215 of the Treaty and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion *(Brasserie du Pêcheur and Factortame,* paragraph 55; and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* v *Germany* [1996] ECR 1-4845, paragraph 25).

44. Where the Member State or the institution in question has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see, to that effect, Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 28).

45. It is therefore necessary to examine whether, in the present case, as the appellants assert, the Court of First Instance erred in law in its examination of the way in which the Commission exercised its discretion when it adopted the Adaptation Directive.

46. In that regard, the Court finds that the general or individual nature of a measure taken by an institution is not a decisive criterion for identifying the limits of the discretion enjoyed by the institution in question.

47. It follows that the first ground of appeal, which is based exclusively on the categorisation of the Adaptation Directive as an individual measure, has in any event no bearing on the issue and must be rejected".

As regards the supervisor's administrative activity, a sufficiently serious violation occurs when the supervisor manifestly and gravely disregards the limits of its discretionary powers.[10]

The circumstance that the rules embodied in EU banking law, including the SSM Regulation, protect a multiplicity of interests, has an influence on the assessment of the seriousness of the violation.

As clarified in Recital 30 SSMR, in its capacity as both micro- and macro-prudential supervisory authority, the ECB carries out the new tasks conferred upon

[10] This criterion has been followed by the ECJ starting from the Bergaderm case.

it by the Regulation referred to with a view to ensuring the safety and soundness of banks, the stability of the financial system and the unity and integrity of the internal market, thereby ensuring the protection of depositors and improving the functioning of the market.

The multiplicity of interests that the ECB must protect and counterbalance under the SSMR amplifies its margin of manoeuvre, which will turn the sufficiently serious rule into an effective mean to counter the risk of excessive claims against the ECB.

1.6. The singleness and unitariness of the SSM as a further element suggesting a limitation of liability for the ECB as supervisory authority

Within the SSM, both the ECB and the NCAs are subject to identical supervisory duties, which are performed on the basis of the same set of information and sometimes (as per Articles 14 and 15 SSMR) following the same assessment.

It would therefore be inconsistent with this framework for the ECB and the NCAs to be subject to different liability regimes.

Moreover, no limitation of its liability may induce the ECB to over-rely on the NCAs enjoying a grater degree of legal protection in their respective national legal frameworks, which in turn may *de facto* distort the allocation of supervisory powers and responsibilities within the SSM.

2. The allocation of tasks, powers and liability between the ECB and the NCAs within the SSM

The allocation of liabilities to the ECB and the NCAs within the SSM is fundamentally aligned with the allocation of tasks and, as the case may be, with the allocation of responsibilities and powers.

As regards the granting or refusal of banking licenses, three cases can be distinguished:

(i) non-compliance with the requirements provided for in EU and national law; since only the NCAs can reject an authorisation, only the NCAs can be liable;

(ii) compliance with the requirements needed for granting authorisations; since the ECB has the final say following an NCA's proposal, both the ECB and the NCAs may be liable, with the exception of the license for performing investment services, where the NCAs are exclusively competent and therefore exclusively liable;

(iii) withdrawal of an authorisation; the ECB may withdraw a banking license on its own initiative or acting upon a proposal by a NCA taking

full account of the justification it gives. In the first case only the ECB is liable, in the second both of them may be liable.

This notwithstanding, it is worth noting that the decision to grant or refuse the authorisation is not discretionary.

Not surprisingly, national courts are reluctant to admit liability of supervisors in such cases.

Authorisation to acquire qualifying holdings is under the ECB's ultimate responsibility, though the NCAs are competent to assess acquisition based on the criteria exclusively set out in EU banking law. It follows that both the ECB and the NCAs may be liable.

Nevertheless, it is worth noting that the criteria laid down in Article 23 of Directive 36/2013/EU are very strict, so that, apart from cases of patent violation of these criteria, it would be difficult for supervisors to be held liable for damages while assessing the good repute of the qualifying shareholders of credit institutions.

As regards on-going prudential supervision, whilst as a rule the allocation of liability is basically aligned with that of supervisory tasks, there are cases where it is not crystal clear which is the authority responsible for the relevant task.

To name but a few:

(i) under the SSMR the day-to-day verification of banking activity is an NCAs's task, but under the SSMFR this task is carried out by both the NCAs and the ECB under the latter's coordination;

(ii) conversely, ensuring compliance with the organisational requirement and internal control arrangements is an ECB's task, but under their respective national laws the NCAs may be responsible for ensuring that these requirements and arrangements grant a high level of consumer protection and prevent money laundering.

In the cases referred to above, claimants are expected to sue for damages both the ECB and the NCAs.

Differently from what happens in the phase of granting, refusing or withdrawing banking licences, in on-going prudential supervision the supervisory authority enjoys a large degree of discretion so that, for liability to arise, it is expected to disregard the limits imposed to its margins of manoeuvre.

The mere fact that the authority does not react to the problems discovered within a financial institution does not, in itself, lead to liability.

In light of the national case law, liability may occur when the supervisor:

(i) failed to take any action notwithstanding its knowledge of serious difficulties within the institution;

(ii) took inadequate measures (gave an ultimate warning only, without further action, despite the existence of serious irregularities);

(iii) was not consistent in its action (first ordered an institution to recapitalise, then softened its request).

In the field of macro-prudential supervision, given the criterion on the allocation of competences under article 5 SSMR (see **Chapter I.A. The SSM: allocation of tasks and powers between the ECB and the NCAs and organisational issues, § 3.2.2**., and **Chapter I.B. The SSM's macroprudential tasks and their relationship with the ESRB's mandate**), both the national authorities and the ECB may be held liable in case of inaction.

Moreover, it should be taken into account that bilateral coordination procedures under Article 5 SSMR are subject to multilateral coordination procedures under the ESRB regulation.

Consequently, if the ECB adopts a macro-prudential decision following an ESRB's warning or recommendation, the concurrent liability of the Union (the ESRB has not legal personality and therefore cannot be held liable) cannot in principle be excluded.[11]

In the *Krohn v Commission* case,[12] the CJEU ruled that where EU law empowers the Commission to give mandatory instructions to a national authority and this latter complies with the Commission's instructions, the Commission and not the national authority is liable in an action for damages.

See the Case Krohn, § 23:

> moreover, the information submitted by the parties and their arguments before the Court make it clear that the Commission's telex messages of 23 November and 21 December 1982 were intended as an effective exercise of the power conferred upon it by the provisions and that their effect was to instruct the Bundesanstalt to refuse the import licences at issue if no satisfactory reply was given to the requests for information made to Krohn.

In light of the above, where the ECB is empowered to give mandatory instructions to an NCA or to issue regulations under which the NCAs shall perform their tasks and the relevant NCA acts in compliance with the ECB's instructions and regulations, the ECB may be held liable in an action for damages.

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[11] The ESRB has not legal personality and cannot therefore be held liable in Courts.

[12] See ECJ, Case C-175/84 Krohn&Co Import Export (Gmbh & Co KG) v Commission, ECR, 1986, 753.

However, compliance with an ECB's instruction or regulation will not necessarily trigger the ECB's liability, where the NCA enjoys a certain discretion over how such instructions should be followed or regulations implemented (see **Chapter VI.A. The safeguards applicable to the ECB supervisory and sanctioning procedures, § 3**).

Following the *Krohn v Commission* ruling, whilst in cases under (i) both the NCAs and the ECB should be liable, in case under (ii) only the ECB should be liable.

It is worth noting that in the assessment of the scope of the NCAs' margin of discretion where complying with the ECB's instructions under Article 6(5)(a) SSMR, an important role may be played by the jurisprudence. Under this respect see the different views taken by the ECJ in the L-Bank case and the German Federal Constitutional Court in its judgement of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 on the allocation within the SSM of tasks and powers pertaining the supervision of less significant credit institutions.

Nevertheless, in the absence of any CJEU judgments the specific question whether and to what extent the *Krone* rule could be applied to the relationship between the ECB and the SSM is still open.

As illustrated above, the allocation of liabilities to the ECB and the NCAs is conditional upon the distribution of tasks, responsibilities and powers between them, and upon which authority has effective control over their performance.

In the event of a concurrence of the ECB and the NCAs' tasks or of misalignment between the ECB's tasks and the NCAs' powers, it may be difficult to ascertain whether it is the liability of the ECB, the NCA or both that has been incurred.

As a consequence, an applicant claiming damages may choose to bring an action against the ECB (before the CJEU), against the NCA (before the national court) or against both the ECB and the NCA in parallel.

Given the uncertainty about the application of most of SSMR provisions, the latter solution is the most likely.

Under the CJUE *Kampffmeyer*[13] judgment, in a situation of concurrent liability, the applicant must first exhaust its alleged right to damages under national law and then seek damages for non-contractual liability against the EU.[14]

It is difficult to say to what extent this stance of the case law of the CJEU is in line with the other one that, as for composite procedures, establishes the

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[13] ECJ, Joined Cases 5, 7 and 13-24/66, Kampffmeyer and Others v. Commission, ECR 1967 245.

[14] In Unifrex, the EU Court referred to the need to exhaust national remedies where those remedies give effective protection to the individuals concerned and are capable of leading to compensation for the damage alleged. See ECJ, Case C-281/82, Unifrex v. Commission and Council, §§ 11-12, ECR 1984.

exclusive jurisdiction of the EU courts with regard to defects of the NCAs' endo-procedural acts.

When an action for damages is brought before a national court against an NCA which acted on the basis of an ECB's regulation or instruction, the national court may consider the need to require the CJEU to give a preliminary ruling under Article 267 TFEU for the interpretation of the ECB act.

The national court may only rule on the non-contractual liability of the NCA and not on that of the ECB, which is the exclusive competence of the CJEU.

3. *The liability for damage caused to third parties by the ECB's staff and members of the ECB's bodies*

In accordance with Article 340 TFEU, the ECB should make good any damage caused by its servants in the performance of their duties.

However, as a result of the interaction between the ECB and the NCAs within the SSM, situations may arise in which the staff of the NCAs carry out their duties under the ECB's coordination.

A question therefore arises here as to whether and to what extent the ECB may be held liable for damages caused by persons acting on its behalf, other than its own staff and members of its own bodies, such as the members of Joint Supervisory Teams (JSTs) or On-site Inspection Teams (OSITs) appointed by the NCAs (see **Chapter IV.A. The involvement of the NCAs in the ECB's supervisory proceedings, §§ 3.2 and 3.3**).

The members of the ECB's organs and the ECB's staff enjoy the immunities from legal proceedings in the territory of EU Member States for all acts performed in their official capacity under Protocol 7 on the privileges and immunities of the EU.[15] In light of the above, it is the ECB and not its staff or the members of its bodies that is liable towards the injured third parties, as the case may be.

A question arises as to whether Protocol 7, adopted when the European Communities were conceived as mere international organisations and in order to

[15] Under Article 22 of Protocol 7 this latter "shall also apply to the European Central Bank, to the members of its organs and to its staff, without prejudice to the provisions of the Protocol on the Statute of the European System of Central Banks and the European Central Bank". It is not clear whether immunities under Protocl 7 also apply to NCAs' members of JSTs or OSITs acting under the ECB's coordination and, as they case may be, by virtue of which provision, whether the general one under Article 11(a) or that under Article 10. Article 10 states that "customary privileges, immunities and facilities" are granted to representatives of Member States taking part in the work of the Union's institutions, their advisers and technical experts, and to members of the advisory bodies of the Union. Against this backdrop, national members of ECB's organs could be tantamount to "representatives of Member States taking part in the work of the Union's institutions". The strict interpretation of the rules on immunities seems nonetheless to lead to the conclusion that they cannot be extended to NCAs' staff.

protect them within the Member States' national jurisdictions, should be made compatibile with the new EU constitutional order and the rule of law principle enshrined in Article 2 TEU.

Nevertheless, immunity may be waived by the ECB where it considers that the waiver is not contrary to its institutional interests.

Should immunity be waived, the ECB's staff and the members of its bodies may be directly asked for damages by the injured parties.

Should immunity not be waived, the ECB's staff and the members of its bodies may be held liable towards the ECB, where this latter has been condemned to pay damages.

Since the Governing Council is the only formal decision-making body of the ECB, it cannot avoid its liability in the event of damage caused to third parties by an ECB's supervisory decisions.

Nevertheless, the liability of the Supervisory Board for the adoption of the ECB's supervisory decisions cannot be excluded by the fact that legally the Supervisory Board does not take binding external decisions.

Indeed, the content of the ECB's supervisory decisions is predetermined by the Supervisory Board and the Governing Council (apart the general decision under Article 6(7) SSMR and the macro-prudential decisions) cannot as a rule amend it, but object to it fundamentally (though not exclusively) on monetary policy grounds.

The Supervisory Board's contribution to the ECB's final decision may be therefore less or more material, depending on the features (general or particular) and the purpose (micro- or macro-prudential) of the decision.

Furthermore, it is worth noting that under CJEU's case law deficiency in the procedure, including those pertaining to the preparatory acts are tantamount to a breach of an essential procedural requirement, which as such may affect the validity of the final decision.[16]

Thus, where the unlawfulness of an ECB's supervisory decision is due to a Supervisory Board's proposal and that decision caused damage to its addressee or to third parties, the Supervisory Board cannot avoid its liability to the extent that it concurred in the adoption of the decision.

Whilst not vested with supervisory powers, the Executive Board is still the ECB's top administrative body responsible for the internal organisation and staff of the ECB.

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[16] See CFI, Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00, Artegodan GmbH and Others v Commission of the European Communities, § 197, ECR 2002, II-4945.

To the extent that the alleged ECB's inaction is the outcome of a defective organisation or, more precisely, the effect of an inadequate allocation of staff, resources or information, the Executive Board cannot avoid its liability.

4. The allocation of liability between the SRB and the NRAs within the SRM

As already mentioned under **Chapter VIII.A. The SRM: Allocation of tasks and powers between the SRB and the NRAs and organisational issues**, § 4:

(i) the SRB «shall be responsible for drawing up the resolution plans and adopting all decisions relating to resolution» (Article 7(2) SRMR) for significant banks (as defined in the SSM) and for cross border groups, irrespective of whether or not they are classified as significant under the SSM provisions;

(ii) the NRAs exercise the resolution tasks with regard to the less significant credit institutions (Article 7(3) SRMR) and enjoy the powers to assist the SRB in the performance of its resolution tasks by means of consultative, preparatory and implementing measures and to take the necessary action to implement the SRB's decisions (Article 29 SRMR);

(iii) the NRAs shall ensure compliance with guidelines, recommendations and instructions adopted by the SRB (Article 31 SRMR and Articles 10 to 13 of the framework for the practical arrangements for the cooperation within the SRM).

The allocation of liability between the SRB and the NRAs follows the allocation of the resolutions tasks.

Where the NRAs are called to implement the SRB's decisions, the principle contained in *Krohn v Commission* applies. Consequently, where EU law empowers the SRB to give mandatory instructions to an NRA and this latter complies with the SRB's instructions, the SRB and not the NRA shall be liable in an action for damages.

Under Article 87(4) SRMR, the SRB shall compensate the NRA for the damages which it has been ordered to pay by a national court or which it has, in agreement with the Board, undertaken to pay pursuant to an amicable settlement, that are the consequences of an act or omission committed by that NRA in the course of any resolution of entities under the Board's responsibility.

This obligation appears to be limited to the execution by the relevant NRA of a resolution scheme adopted by the SRB and shall not apply where the act or omission of that NRA constituted an infringement of the SRM Regulation, of another provision of Union law, of a decision of the Board, the Council or the Commission, committed intentionally or with manifest and serious error of judgement.

In line with the principle of the effective remedy, the rule should be read as applicable only to the relationships between the SRB and the NRAs and does not affect the right of the injured parties to appeal to the Court of Justice in order to obtain the compensation for damages directly from the SRB.

The SRB's liability is regulated by the general principles on the EU liability.

See Article 87(3) SRMR

> In the case of non-contractual liability, the Board shall, in accordance with the general principles common to the laws concerning the liability of public authorities of the Member States, make good any damage caused by it or by its staff in the performance of their duties, in particular their resolution functions, including acts and omissions in support of foreign resolution proceedings.

With regard to the NRAs' tasks and powers pertaining to the resolution of less significant credit institutions, the liability regime is that provided for under the relevant national law.

Article 3(12) BRRD stipulates that

> Member States may limit the liability of the resolution authority, the competent authority and their respective staff in accordance with national law for acts and omissions in the course of discharging their functions under this Directive.

Under Italian law (see Article 3(10) of the Legislative-Decree No 180 of 16 November 2015, which refers in turn to Article 24(6-bis), of Law No 262 of 2005), the liability of the NRA is limited to cases of gross neglicence and bad faith.

It is not crystal clear whether these forms of limitation of the NRAs' liability are in line with the Key Attribute No 2.6, requiring that

> The resolution authority and its staff should be protected against liability for actions taken and omissions made while discharging their duties in the exercise of resolution powers in good faith, including actions in support of foreign resolution proceedings.

5. *Multiplicity of Central Banks' and Supervisors' mandates and liability issues*

Central Banks may be charged with supervisory duties. Within the SSM, some NCAs are also NCBs. The ECB itself is both the EU central bank and the SSM leading supervisory autorithy.

Central Banks and supervisory authorities may even be charged with direct resolution responsibilities, under the conditions laid down under Article 3 BRRD. Moreover, they are involved in the resolution process, as they:

(i) assess the solvency of credit institutions as a condition to precautionary recapitalisations;

(ii) adopt early intervention measures;

(iii) assess the «failing or likely to fail» conditions.

Potential conflicts may arise between monetary policy and banking supervision.

Monetary policy operations may have an impact on banks' operating framework and activities (lending, investment, etc.). Central Banks in charge of supervision could lend to weak banks for fear that winding them up would trigger losses for Central Banks or could relax their monetary policy, generating an inflationary bias, so contributing to more risk-taking by banks and breeding future financial instability.

Potential conflicts may also arise between Central Bank's mandate and banks resolution. Bail-in may have an impact on financial stability (via contagion risk). But under Article 44(2) BRRD, resolution authorities shall not exercise conversion powers in relation to liabilities with a remaining maturity of less than seven days. The Key Attribute No 5.1 stipulates that in order to contain potential systemic impact, no loss should be imposed on senior debt-holders until subordinated debts have been written-off entirely.

Finally, conflicts may arise between supervisory and resolution tasks. In order to prevent the risk of conflict of intersts of supervisory authority, under the the BRRD and the SRMR both the NCAs/ECB and the NRAs/SRB have the power to assess whether a bank is failing or likely to fail (see Recital 41 and Article 32 BRRD; Recital 26 and Article 18 SRMR).

In order to prevent conflicts between monetary policy and supervisory tasks, the SSMR provides for a principle of separation (see Recital 65 and Article 25 of the SSMR).

To avoid conflicts of interest between resolution, supervision and any other functions, BRRD requires MSs to ensure that there is operational and organisational (staff/reporting lines) independence of the resolution mandate.

The separation of resolution functions basically does not imply a separate decision-making entity. Indeed under Article 3 BRRD, supervisory and resolution decisions may be imputed to the same body. A different choice has been taken under the SRMR: though there are still overlaps of competences, there is a clear distinction between the supervisory and the resolution authority.

Which allocation of powers would be preferable is hard to decide. While vesting different authorities with different mandates may lead to a risk of inaction or to overlaps of mandates, vesting a single authority with different mandates may lead to a risk of conflict of interests.

Balancing these different interests (price stability; overall stability and efficiency of financial system; safe and sound management of banks/other financial institutions; depositors and investors protection; resolution objectives, including avoiding a significant adverse effect on the financial system by preventing contagion), requires the single authority to be vested with a sufficient margin of manoeuvre and to enjoy a certain form of limitation of liability.

A possibile solution could be found at EU level in the CJEU's sufficiently serious violation criterion (see § 1.5). At national level, while monetary policy decisions are considered as fundamentally not justiciable by the courts (see the Italian Supreme Court SS.UU. No 1675/2006 on seigniorage and United States' Court of Appeals Eighth Circuit's, case *Horne v. Federal Reserve Bank of Minneapolis* 344 F. 2d 725, 1965), we can find only special rules applicable to the supervisory and resolution authorities with regard to the performance of their respective supervisory and resolution tasks (see §§ 1.2 and 4).

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EU Legal references: Article 340 TFEU; Article 52(3) of the Charter of fundamental rights; Article 6 of ECHR; Recital No 61 of the SSMR; Articles 6(3), 6(5)(a), 7(4), second sub-paragraph, 9(1), third sub-paragraph, and 18(5) SSMR; Article 87(4) SRMR; Article 5, paragraph 1, of Directive n. 2003/71/EU (O.J. 2003, L 345/64) on the prospectus to be published when securities are offered to the public or admitted to trading; Directive 2014/65/EU (the so-called MIFID2; O.J. 2014, L 173/349): Recitals No 3, 4, 39, 42, 45, 51, 74, 77, 86, 87 and 151, and Articles 16(3), (8) and (9), 23, 34 to 30, 74(2) and 75; Directive 2014/49/EU on deposit guarantee schemes.

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