

The Legal Foundations of the Banking Supervisor ECB

An assessment of its new „dual role“

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ECB as a Central Bank (Monetary Policy)

- “ Exclusive EU Competence by virtue of primary law (Art. 3 [1] lit. c TFEU)
- “ To be confined to Eurozone
- “ Ancillary functions for NCB within ESCB
- “ Primary decision-making body: Board of Governors
- “ Absolute independence

ECB as a Banking Authority

- “ Empowerment of EU by Treaty (Art. 127 [6] TFEU) to transfer competences upon ECB; some exclusive by virtue of secondary law (Art. 4 [1] SSM Reg.)
- “ Confined to Eurozone pursuant to SSM Reg. (plus MS in „close cooperation“)
- “ Ancillary functions for NCA (including NCB) within SSM
- “ Primary decision-making body: Board of Governors de lege, Supervisory Board de facto
- “ Independence

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ECB

Guidelines, instructions

NCA

„Exclusive“ Powers

- “ All CI (Art. 4] lit. a, c, Art. 6 [4]):
 - Authorization of C.I. (but not rejection of respective applications – Art. 14 [2])
 - Withdrawal of authorizations
 - Assessment of notifications regarding qualified holdings
 - Penalties (mostly)
- “ Important C.I.:
 - Reviews, compliance
 - Supervisory powers

... unless ECB decides to exercise powers (Art. 6 [5] lit. b)

Powers

Original? (arg. e Art. 127 [6] TFEU)
Delegated? (arg. e Art. 4, 6 SSM Reg.)

- “ All CI:
 - Rejection of applications for authorization
 - Macroprudential tasks according to Art. 5 (1)
- “ Less significant C.I.:
 - Reviews, compliance
 - Supervisory powers

ECB as a Banking Authority

Are the conferred powers “*specific tasks concerning policies relating to the prudential supervision of credit institutions*”?

Is participation of non-EU MS being declared voluntary in accordance with Art. 127 (6) TFEU?

Will the institutional balance be altered? (Meroni)

Is ECB independence in monetary matters (Art. 130, 282 [3] TFEU) granted?
Is price stability still the primary objective (Art. 127 [1] 1, 282 [2] 3)?

Is this “inversion of enforcement” compatible with the principles of conferral and democracy?

“ Empowerment of EU by Treaty (Art. 127 [6] TFEU) to transfer competences upon ECB; some exclusive by virtue of secondary law (Art. 4 [1] SSM Reg.)

“ Confined to Eurozone pursuant to SSM Reg. (plus MS in „close cooperation“)

“ Ancillary functions for NCA (including NCB) within SSM

“ Primary decision-making body: Board of Governors de lege, Supervisory Board de facto
“ Independence

“ ECB may apply EU law but also implementing national legislation (Art. 4 [3] SSM Reg.)

I. Legal Basis / Scope of the competence

(“*specific tasks concerning policies relating to the prudential supervision of credit institutions*”)

Evidence:

- “ All supervisory powers
- “ CIs affected
 - By relevance:
 - Absolute size: total assets > 30 bn. Euro
 - Relative size: total assets > 20% of MS GDP or one of three largest CIs of a MS
 - All others if ECB decides so (which it may anytime)
 - By number: ca. 120 in Eurozone
 - By cumulated assets: more than 75% of all bank assets (in D)

Neither tasks nor banks are „specific“ → doubts as to whether

(1) Art. 127 (6) TFEU permits for such extensive conferral

(2) Art. 127 (6) allows for virtually unconditional extension of ECB powers at its discretion

II. Lawfulness of General Confinement to Eurozone

“ Contra:

- Art. 127 (6) TFEU is part of chapter 2 – on Economic Policy -, but not among the provisions declared unapplicable to MS with a derogation (Art. 139 (2) lit. c TFEU)
- Prudential supervision of credit institutions relates to the internal market, encompassing all MS

“ Pro:

- Close connection with Art. 127 (5) TFEU, confined to Eurozone
- Limited efficiency of supervision without insight gained in credit policy

III. Independence and Price Stability

- “ As independence of central banks hampers democratic control it must be interpreted narrowly
- “ No extension of Art. 130 TFEU to Art. 127 (6) TFEU, as task is not conferred by Treaty or ESCB/ECB Statute and absence of control mechanisms may not be justified by price stability as primary objective here
- “ Art. 19 SSM Regulation nonetheless declares ECB and NCA independent in carrying out SSM tasks

→ Conclusions:

- (1) Independence in SSM task performance lacks a solid basis in Treaty and constitutional law
- (2) Monetary independence (and priority of price stability) prevails over supervisory independence
- (3) Mutual interference between supervision and monetary policy must be avoided, risk of „regulatory capture“ minimized
- (4) In any event, benefit of dual role for banking system must prevail over associated risks for effectiveness of monetary policy



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Situation I: Bank and/or system are stable

Low risk of mutual interference between policies

Risk is also contained through internal separation of functions (Supervisory Board/Governing Council, limited by Art. 129 (1) TFEU (but required by Meroni doctrine?))

Situation II: Bank and/or system are unstable, default possible

Risk of mutual interference if dual role of ECB extends to crisis

→ Conferral of resolution on distinct Board is consequential
But: ECB involvement in resolution, Art. 10, 13 SRM Reg. (etc.), remains problematic

IV. Rule of Law – Judicial Protection

- “ SSM entails sharing of powers (independently from formal assignment of competences)
 - “ Authorizations: NCA are competent to reject application, ECB to adopt positive decision (but fiction pursuant to Art. 14 (3) SSM Reg. will apply frequently)
 - “ Both NCA and ECB apply EU law as well as (implementing?) national statutes
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- “ Supervisory measures will invariably trigger lawsuits, a need for judicial protection exists
 - “ The SSM Regulation provides no sufficient guidance for supervised C.I. seeking judicial redress; delimitation between competences of national courts and ECJ is unclear (especially where institution seeks an authorization)
 - “ C.I. may only bring action for annulment against potential negative decision by ECB, as EU Law lacks action directed at positive decision (unlike national administrative procedure law)

→ Conclusions:

- (1) The SSM does not meet the requirements of effective judicial protection
- (2) The ECB should be empowered to adjudicate an authority to a specific action (and not just to becoming active)

V. Problems associated with „inverse enforcement“

Art. 4 (3) [1] SSM Reg.: „[T]he ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing these Directives“.

Some questions worth addressing:

- (1) Does this „inverse enforcement“ (where an EU authority acts on the basis of national statutes) comply with the founding Treaties, especially Art. 291 TFEU?
- (2) Are democratic standards respected (considering that application of the provisions on Union level and their non-application of national level has not been individually assented by the respective Parliaments)?
- (3) If so, would application of German law by the ECB (as a conferral of powers upon an EU authority) require the assent of the German Bundestag in every single case?
- (4) May Art. 4 (3) [1] SSM Reg. apply to „gold plating“ and what will otherwise become of the „overshooting“ national rules if unable to stand on their own?

Résumé

- “ The conferral of supervisory powers on the ECB may help stabilize the structurally imbalanced EMMU.
- “ Legally relevant conflicts associated with the mandate(s) of the ECB triggered by its new dual role have been contained or mitigated for the most part.
- “ However, from a legal perspective, the SSM and SRM are exemplary for the „creeping reform“ of the EU, with secondary law possibly adopted in excess of powers as the placeholder of treaty amendments deemed unavailable or inappropriate.
- “ The new administrative functions accrued to the ECB (and the Resolution Board) will require an adjustment of the EU’s judicial protection mechanism.