

Assessment of the SSM: a (relative) outsider's view

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Introduction

A. Legal issues

1. Competence, objectives
2. Application of national law by ECB
3. Review of supervisory decisions: who's liable?
4. Other legal issues

B. Cultural challenges



Competence: Article 127(6) TFEU

- Academic? Why relevant? Challenges against supervisory decisions may invoke lack of competence to enact SSM Regulation
- Clear competence to make ECB responsible for day-to-day operational tasks in prudential supervision: text, context and intention of Treaty authors
- Sufficient competence for additional decision-making provisions (Governing Council effectively 'rubber-stamping' Supervisory Board decisions)?
- Legal powers for extending sanctioning powers to area beyond original ECB tasks (Regulation 2532/98)?

Regulation 2532/98

- Preamble: “(3) Whereas infringements of the obligations arising from ECB regulations and decisions can arise in various fields of competence of the ECB”
- Article 3 (10) on coincidence of sanctioning under ECB’s and national competences (prudential supervision expressly mentioned)
- Article 3(2) – procedural rules: in line with SSM Regulation?
- Article 6(1): “In the event of a conflict between the provisions of this Regulation and the provisions of other Council Regulations enabling the ECB to impose sanctions, the provisions of the latter shall prevail.”

Objectives - 1

- ❑ Safety and soundness of credit institutions
(preamble paras. 17, 30, 65, Article 1)
- ❑ Stability of the financial system (idem)
- ❑ “full regard and duty of care to” unity and integrity of the internal market”
- ❑ Also a “duty of care” towards depositors?
 - > para. 30 preamble: “, thereby ensuring also the protection of depositors”
 - > relevant for assumption of supervisory liability vis-à-vis depositors
- ❑ Further objectives: “Since the objectives of this Regulation, namely setting up an efficient and effective framework for the exercise of specific supervisory tasks over credit institutions by a Union institution, and ensuring the consistent application of the single rulebook to credit institutions” (preamble para. 87)

Objectives - 2

- ❑ Consumers not found except in two paragraphs of the preamble:
 - Exclusion: “Supervisory tasks not conferred on the ECB should remain with national authorities. Those tasks should include (...) (...) and consumer protection.” (preamble para. 28)
 - Inclusion: “The ECB should cooperate, as appropriate, fully with the national authorities which are competent to ensure a high level of consumer protection and the fight against money laundering [*where’s terrorist financing?, RS*]” (preamble para. 29)
- ❑ Exclusion of payment services remarkable: this is a basic task
 - ❑ Compare Article 127(2), 4th indent, TFEU / Article 3.1, 4th indent, Statute (“to promote the smooth operation of payment systems.”) with preamble para. 28: “to supervise payments services”
 - ❑ ‘Systems’ vs. ‘services’? Cf. limited SEPA role for ECB, regrettably
- ❑ Further exclusions: prudential supervision of central counterparties (Article 1) and no discrimination on currency grounds: London (Article 1)

Application of national law - 1

- ECB to apply all relevant EU law and, where EU law consists of directives, “the national legislation transposing those Directives” – where a regulation grants Member States options, ECB to apply national legislation exercising those options (Article 4 (3))
- Preamble para. 34: “Such options should be construed as excluding options available only to competent or designated authorities. This is without prejudice to the principle of the primacy of EU law. It follows that the ECB should, when adopting guidelines or recommendations or when taking decisions, base itself on, and act in accordance with, the relevant binding Union law.” ????

Application of national law - 2

- ❑ Difficult demarcation line sometimes
- ❑ Different rules to be applied sometimes
- ❑ Linguistic capacities of ECB: working in Lithuanian, Portuguese, Dutch and Italian, to name but a few languages....
Will national competent authorities translate their rules in English?
- ❑ Whereas ECB is to guard against discrimination and to ensure “equal treatment of credit institutions with a view to preventing regulatory arbitrage” (Article 1)



Review of supervisory decisions: who's liable?

- ❑ Case law on liability for acts effected by national authority at instruction of EU (*Krohn*: who is “the true author of the decision from which the damage resulted”?)
- ❑ Clear demarcation line between ECB/NCA?
- ❑ ECB acting on basis of national law (implementing EU directives): complication
- ❑ Link with (full) supervisory liability

ECB instructing NCAs

□ Article 9 (1):

“To the extent necessary to carry out the tasks conferred on it by this Regulation, the ECB may require, by way of instructions, those national authorities to make use of their powers, under and in accordance with the conditions set out in national law, where this Regulation does not confer such powers on the ECB. Those national authorities shall fully inform the ECB about the exercise of those powers.”

□ Instructions: Articles 6(3) and (5), 7(1) and (4) [participating <outs>], 30 (5) [supervisory fees],

Paragraph 61 preamble

“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.

This should be without prejudice to the liability of national competent authorities to make good any damage caused by them or by their servants in the performance of their duties in accordance with national legislation.”

Supervisor's dilemma

- ❖ Early intervention? Shareholders will sue
- ❖ Late intervention? Depositors will sue
- ❖ Duty of care vis-à-vis depositors? (*Peter Paul* [ECJ], *Icesave* [EFTA], national case law, notably *Three Rivers Council vs. Bank of England*, but also *Vie d'Or*)
- ❖ Trend towards limiting supervisory liability

Other legal issues - 1

- ✓ ECB is to control entry to and exit from market
- ✓ ECB called in to ensure “supervision of the highest quality, unfettered by other, non-prudential considerations” (preamble, paras. 12 and 83)
- ❑ Do the arrangements laid down in Article 14 lead to such exclusive ECB control? NCA to submit draft authorisation decision to ECB but NCA to reject authorisation if not all conditions are met.
- ❑ How will ECB ensure that NCAs do not keep newcomers/mavericks out? Important for dynamism in banking market and reviving competitive conditions (*cf.* different mortgage rates D<>NL)

Other legal issues - 2

- **Mandatory** information exchange and full, appropriate information of ECB
- Information exchange dried up during crisis: (Fortis, Dexia, other cases)
- Some questions:
 - ❑ Are the requirements sufficient?
 - ❑ Paragraph 47 preamble, Article 6(2) and (5) (e))
 - ❑ Who determines which information is '**necessary**'?
 - ❑ Why isn't there a requirement for NCAs like the one for market parties subject to supervision (Article 10(2))?
 - ❑ Is there the equivalent in the SSM Regulation of the requirement vis-à-vis the EBA ("**The information must be accurate, coherent, complete and timely**")

Article 35 (draft) EBA Regulation

“At the request of the Authority, the competent authorities shall provide the Authority with all the necessary information in specified formats to carry out the duties assigned to it by this Regulation, provided that they have legal access to the relevant information. **The information must be accurate, coherent, complete and timely.**”

Or did I overlook something similar in the SSM regulation?

Other legal issues - 3

- MoUs: useful instruments? public?
- European Parliament / ECB arrangements for scrutiny of supervisory role and confidentiality of supervisory data: Article 20 (8) and (9) – cf. *Hillegom/Hillenius* Case 10/84, [1985] ECR 3947 and parliamentary scrutiny of Dutch central bank (crisis investigation and investigation into bank failures)
- Home/host responsibilities ('European passport')
- International relations: conservative attitude: “administrative arrangements with supervisory authorities, international organisations and the administrations of third countries (...) shall not create legal obligations in respect of the Union and its Member States.”

Other legal issues - 4

- Institutional issues
- Many other gems, undoubtedly.....





Cultural challenges

- ✓ Diversity (among staff and banks) & languages
- ✓ “Highly motivated, well-trained and impartial staff is indispensable to effective supervision” / geographical diversity (preamble, para. 79)
- ✓ Staff exchanges // conflicts of interest rules (‘capture’) (Article 31)
- ✓ “the ECB should have full regard to the diversity of credit institutions and their size and business models, as well as the systemic benefits of diversity in the banking industry of the Union” (preamble, para. 17)

Iceland calls in women bankers to clean up 'young men's mess'

By Sarah O'Connor
in Reykjavik

Iceland has turned to two women to rebuild its financial system after the banking empire built by its young, male business-schooled elite collapsed.

Elin Sigfúsdóttir and Birna Einarsdóttir are set to become chief executives of New Landsbanki and New Glitnir respectively, the nationalised banks created by the Icelandic government in the wake of the crisis.

One government minister said their appointments were an attempt to signal a new culture within the banking system.

Landsbanki, Glitnir and Kaupthing – infamous for their aggressive international expansion – collapsed last week under the weight of their debt, leaving the Icelandic economy on the brink of bankruptcy.

Recriminations have been fly-

ing in Iceland over who is to blame, with the British government a popular target.

But many have also criticised the young and predominantly male bankers whose “eyes became bigger than their stomachs”, as one banker conceded.

“Now the women are taking over,” said one government official. “It’s typical, the men make the mess and the women come in to clean it up.”

The government created New Landsbanki last week and put Ms Sigfúsdóttir in place. New Glitnir was being formed yesterday, with Ms Einarsdóttir widely expected to take the top job.

The banks’ new chief executives were both promoted from within the ranks of the failed banks: Ms Sigfúsdóttir has been head of corporate banking at Landsbanki since 2003 and Ms Einarsdóttir became head of domestic commercial banking at

Glitnir last summer. The women are expected to curb the bonus-driven risk-taking culture that has taken hold in Iceland over the past five years.

The nationalised banks will focus solely on domestic operations, keeping money flowing around Iceland’s hobbled economy. A New Kaupthing is also planned.

Their first task is to begin trading the Icelandic krona, an activity that all but ceased last week, leaving most Icelandic groups unable to pay suppliers.

The three failed banks’ foreign assets are being sold off but there is little idea how much money will be raised as they face fire-sale prices.

When asked if the new banks would return to foreign expansion, Geir Haarde, Iceland’s prime minister, said: “It’s too early to tell, but not in the same big way as before.”

....diversity among bankers
... and among supervisors?

Financial Times,
14 and 15 October 2008

A woman's work?

Gender matters less than common sense and perspective

Cometh the hour, cometh the man. Or the woman. In its moment of dire financial need, Iceland has put its faith in two women to lead its newly nationalised banks. Elin Sigfúsdóttir has taken the top job at New Landsbanki, while Birna Einarsdóttir is to become chief executive of New Glitnir.

However these appointments turn out, they have already fulfilled one of the government’s aims – together they signal a shift in banking culture that could not have been achieved by the appointment of any of their male colleagues, no matter how wise and sensible. They are an immediate and highly visible rejection of the testosterone-fuelled risk-taking that is the popular villain of the piece. The moves are also a reminder that a small country with a language not widely learnt outside its borders must make full use of all the talent within its 320,000-strong population.

Yet despite the academic research that suggests men are more likely to be over-confident investors than women are, trading

more actively but performing worse, this is not the time for a bout of gender wars over how we got into this mess. Instead, the culture change these appointments represent should make us think what qualities make a good banker.

The starting point is a less aggressive attitude to risk. The new landscape will offer less scope for risk-taking, especially in banks where the taxpayer has a significant say. So someone who is desperate to pull off the deal of the century will be bored to death, or a danger to the organisation and beyond, or both.

There also needs to be a broader sense of perspective. This may come from the levelling impact of family life; or from years of professional experience which provide a context even for the epoch-making events of recent weeks.

Above all, bankers must say goodbye to the “no fear” approach, which takes decisions on the basis that growth is all that matters. This works only on the basis that the good times will never stop. And we all know now that they have.

Gender diversity in finance industry – more balanced board room –

“Diversity in board composition should contribute to effective risk oversight by boards, providing for a broader range of views and opinion and therefore avoiding the phenomenon of group think.” (CRD IV Q&As)



Motto for future work

- ✓ “In its action, the ECB should comply with the principles of due process and transparency” (preamble, para. 58)