Review of ECB decisions – legal protection in the Euro Area

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Overview

1. Introduction - disclosure and overview of presentation
2. Review of the ECB’s monetary policy decisions – including OMT
3. Review of supervisory decisions ECB – comparison with EBA and SRM
   (plus brief discussion of transparency for ‘banking union’)
4. Further issues for ‘banking union’ and for EMU
Disclosure

Benelux

Presenting in Luxembourg – Working for Belgian Competition Authority, Dutch University & EU central bank
Review of ECB decisions: judicial and administrative – State and Union

- Judicial review by CJEU (263 & 277 TFEU)
- Judicial review by national courts (preliminary rulings: 267 TFEU)
- Administrative review by ABoR (on which more later....)
- Administrative review by national competent authorities
Review of ECB monetary policy decisions - 1

- Case T-532/11 (Städter v ECB), Order of General Court of 16 December 2011, appeal rejected 15 November 2012 (Case C-102/12P)
  Challenge of ECB measures to widen eligibility criteria of collateral to ensure continued use of Greek, Portuguese and Irish government bonds in monetary policy operations of the Eurosystem rejected: request for review of legality submitted too late

- Case T 492/12 (Sven A. von Storch and Others v ECB), Order of the General Court of 10 December 2013, appeal pending (Case C-64/14 P)
  5,216 plaintiffs opposing the ECB’s announced Outright Monetary Transactions (OMT) – General Court held that OMT needed additional legal instruments and decisions subject to the discretion of the ECB to become operative – applicants not directly concerned in the sense of the fourth paragraph of Article 263 TFEU
Case T-224/12 (Alessandro Accorinti and Others v ECB); Order of the General Court (Fourth Chamber) of 25 June 2014

Accortini and over 200 fellow Italian holders of Greek government bonds argued they had been disadvantaged by ECB decision that made the eligibility of Greek government bonds for Eurosystem operations conditional upon a credit enhancement. (A specific guarantee executed by the Greek Government in favour of the ECB and the NCBs so as to avoid these members of the Eurosystem from undergoing envisaged debt write-down by Greece.) The Order provides a detailed and highly interesting unfolding story of the measures adopted in order to keep Greek government and financial system afloat, citing a Bloomberg news article and referring to an unpublished ECB decision (ECB/2012/NP6).
Review of ECB transparency decision

- Bloomberg Case, judgment of 29 November 2012 in Case T-590/10 (Gabi Thesing and Bloomberg Finance LP v ECB); appeal dismissed by Order of 6 February 2014 (Case C-28/13 P)
  - General Court rejected Bloomberg’s request for annulment of the ECB’s decision refusing access to a document on the use of derivates to conceal the extent of the Greek budgetary situation
  - General Court considered that disclosure would undermine the protection of the public interest as regards the economic policy of Greece (mandatory refusal ground of Article 4 (1) sub a of Decision ECB/2004/3)
  - On the ‘extent of the review of the legality of an ECB decision refusing public access to a document on the basis of the exception relating to the public interest: the ECB must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by that exception could undermine the public interest’
  - ‘[R]eview of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers’
  - Court considered that ‘the European financial markets were in a very vulnerable environment’.
Language of the review cases: French and German or Italian

(Bloomberg case available in all languages)

Editorial *Legal Issues of Economic Integration* 41-4 (forthcoming):

“(...) [the] availability [of the judgments] in French and the language of the applicants (German or Italian) only reduces much needed transparency. The Court should make translations in the *lingua franca* of the ESCB and of the financial markets available.”
OMT reference BVerfG

- Case C-62/14 (Gauweiler and Others v ECB) raises numerous issues
- Relationship between Union and State law – German constitutional law – EMU law issues – judicial restraint
- Issues of how government or parliament of a big EU State may respond to alleged breaches of sovereignty not to be discussed
- Primacy of Union law – even in the face of national constitutions
- Full discussion of Pringle and OMT case beyond today’s remit
ECB announcement, 26 July 2012

“Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.”

ECB President Mario Draghi,
London, 26 July 2012
SMP and OMT

Differences in programmes:
- Strict conditionality of OMT versus SMP
- Limited to short-end of yield curve (like monetary policy actions)
- Transparency: publication of OMT interventions
- OMT encompasses buying and selling
- Ex ante unlimited, effectively limited

OMT introduced to “eliminate unfounded fears regarding the reversibility of monetary union” and interference with the ECB’s monetary policy

- maintaining monetary transmission mechanism
- “the key interest rate had lost its key function” (of signalling monetary policy decisions and setting interest rate level in euro area, RS)
- “a currency can only be stable if its continued existence is not in doubt”
Arguments before national courts

- Arguments before national court by constituent elements of the Eurosystem

- Article 14.3 ESCB Statute: “The national central banks are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB.”

- Two legal reasons to consider national courts not competent to sit in judgment on the ECB’s actions:
  1. this goes against the way the EU has been established and the order between the CJEU and national courts (supremacy of EU law; Costa/ENEL Case 6/64), and
  2. hearing arguments from different central banks in the Eurosystem goes against independence which Treaty grants EU central banking system.
OMT issues - 1

Selected arguments for restrictive interpretation of OMT decision (*BVerfG* reference for a preliminary ruling 2728/13 §§ 79, 83, 99)

**Volume:** *ex ante* limitation would undermine OMT and would amount to undue interference by the courts in the discretion of the ECB to address stressed situations

**Bypassing conditionality EFSF/ESM:** ECB confirms conditionality rather than bypassing it

**Selectivity:** inherent in objective of restoring transmission mechanism which is not functioning in selected Member States only

**Interference with price formation:** too technical an interference with ECB discretion

**Creditor status (pari passu ranking, i.e. subject to debt cut):** maybe an acceptable alteration of the measure?
OMT issues - 2

- Inability to split surcharges on sovereign debt in ‘justified’ and ‘irrational’ components (BVerfG 2728/13 § 71)

  Interest rate levels not based on creditworthiness of Member State or credibility of their budgetary stance but clear speculation on the demise of the euro or <Grexit>; the mere fact that announcing OMT has made speculation die down shows this.

- Tolerance of disruption of monetary policy transmission mechanism if Member State does not comply with EFSF/ESM conditionality shows that OMT are not introduced for monetary policy effectiveness (BVerfG 2728/13 § 73)

  ECB is required to support economic policies in Euro Area – without the link to conditionality, OMT are likely to undermine economic policies // that a measure to restore singleness of monetary policy in very stressed circumstances may not be fully effective because implementation depends on <outside compliance> (with EFSF/ESM conditionality) doesn’t make it ultra vires.
Grant of financial assistance ‘clearly’ doesn’t fall within monetary policy (BVerfG 2728/13 § 65; quote from Pringle para 57)

Difference between financial assistance granted by ESM and secondary market purchases by ECB – sovereign bonds already issued on primary markets

Similarity of OMT with functions of the EFSF (Article (2) (1) (b) EFSF Framework Agreement) and ESM (Article 18 ESM Treaty) (BVerfG 2728/13 §§ 74-78)

Similarity of operations belies a difference in objectives: EFSF and ESM support seeks to re-establish the financial stability of the Euro Area; ECB seeks restoration of transmission mechanism of its single monetary policy
OMT issues - 4

- Support of economic policies by ECB doesn’t justify steering of economic policies by Eurosystem (BVerfG 2728/13 § 68)  
  
  *There is no steering but following of economic policies established by Ecofin Council and ESM Board of Governors in conjunction with IMF – OMT without conditionality would be truly out of bounds*

- Economic policy ‘essentially limited to coordination of Member States’ economic policies’ (BVerfG 2728/13 § § 63, 68, quoting Pringle para 64: “(...) Articles 2(3) and 5(1) TFEU restrict the role of the Union in the area of economic policy to the adoption of coordinating measures”)  
  
  *Incomplete and wrong assessment by CJEU: Article 122 (1) TFEU negated and ‘six-pack’ and ‘two-pack’ plus Fiscal Compact ignored*
ECB assumes political function of determining scope of Euro Area

(BVerfG 2728/13 § 72)

The ECB simply defends the scope of the Euro Area that was determined by politicians in accordance with Article 140 TFEU

This is a clear mandate for the guardian of the single currency
ECB Decision of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the European Central Bank (ECB/2014/39)
Quick succession of institutional changes in supervisory landscape

- 2010: European System of Financial Supervisors established: EBA, ESMA, EIOPA, ESRB
- 2012-2014: ‘Banking union’ established (more or less)
- Still, very complex structures, in ‘silos’ (banking, insurance, securities)
- Precarious legal bases:
  - Article 127 (6) TFEU – firm basis for operational tasks for ECB (René Smits, thesis, p. 358) but under German professorial attack (Europolis group)
  - Article 114 TFEU – less firm legal basis (Judgment 22 January 2014, Case C-270/12 (UK vs. European Parliament and Council) – ESMA short-selling judgment)
‘Banking union’: background

➢ ‘Banking union’= joint supervision by ECB and NCAs with ECB in the lead, plus EU-level resolution of banks, single rule book and deposit insurance; hence:

✓ Single Supervisory Mechanism (ECB + NCAs) – Regulation 1024/2013

✓ Single Resolution Mechanism – Regulation 806/2014 (and Agreement on the Single Resolution Fund [mutualisation of banks’ own contribution to resolution])

✓ Single rulebook: CRR 575/2013 and CRD IV 2013/36 (plus BRRD and more)

☐ Harmonised deposit insurance: Deposit Guarantee Directive 2014/49
EBA and ECB supervisory decisions - 1

Supervisory ‘reach’

- **European Banking Authority**: ‘override’ powers vis-à-vis State supervisors
- **European Central Bank**: direct supervisory decisions, and ensuring consistent and effective supervision in Single Supervisory Mechanism (= ECB + State supervisors)
Geographical scope

**European Banking Authority**: entire EU (28 Member States) / EEA (28+3)

**European Central Bank**: SSM participants, i.e. 18 (as of 1 January 2015: 19) Euro Area Member States plus any non-euro area Member State that enters into ‘close cooperation’ with ECB
Review panels

ÅEBA, ESMA, EIOPA: Joint Board of Appeal (JBoA) *
ÅECB: Administrative Board of Review (ABoR) **
commission administrative de réexamen / administrativer Überprüfungsausschuss /
administratieve raad voor toetsing / Comissão de Reexame

Judicial review by CJEU

* Articles 58-61 of Regulation 1093/2010 establishing EBA, as amended, and Articles 58-61 of Regulations 1094/2010 and 1095/2010 establishing EIOPA and ESMA, respectively

** Article 24 of Regulation (EU) No 1024/2013 (‘SSM Regulation’) and ECB Decision of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16)
Cross-sector versus single-sector review mechanism

**Sectors covered:**

Å**Joint Board of Appeal:** banking, securities, insurance, pension funds

Å**ABoR:** banking
Single Supervisory Mechanism (SSM)

· Review against National Competent Authority (NCA) decisions
· Whom to address (national review proceedings or ABoR/CJEU)?
Different approach to challenges:
internal review (ECB) vs. Joint Board of Appeal (EBA, ESMA, EIOPA)

- Independence of review and appeal the same
  
  Art. 24(4) SSM Regulation:
  “The members of the Administrative Board of Review shall act independently and in the public interest. (…)”
  
  Art. 59(6) EBA/ESMA/EIOPA Regulations:
  “The members of the Board of Appeal shall undertake to act independently and in the public interest. (…)”

- Legal expertise: ECB to provide ABoR with input; Joint Board of Appeal has its own expertise
  
  Art. 58 (2) EBA Regulation:
  “The Board of Appeal shall have sufficient legal expertise to provide expert legal advice on the legality of the Authority’s exercise of its powers.”
  
  Art. 6(3) ECB Decision 2014/16:
  “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”

- Suspension of contested decision: Joint Board of Appeal ESAs versus Governing Council ECB decides

- Prior venue required before going to Luxembourg?
  
  Prior appeal before Joint Board is required (Art. 61(1) EBA/ESMA/EIOPA Regulations)
  
  Review against ECB is optional, so direct appeal to ‘Luxembourg’ is possible (preamble and Article 19 Decision ECB/2014/16)
JBoA: interesting case law already

ÅSV Capital OÜ (24 June 2013 and 14 July 2014)
ÅStandard Rating (10 January 2014)
Administrative review against ECB

- ECB-internal review process
- “an optional review for persons to whom a decision of the ECB under Regulation 1024/2013 is addressed, or to whom such decision is of direct and individual concern, before bringing proceedings before the Court of Justice”
  (4th recital, preamble, ECB Decision 2014/16)
- Direct recourse to CJEU possible
  (Art. 24 (11) SSM Regulation and Art. 19 ECB Decision 2014/16)
- NB *prior* ‘review’ of *draft* supervisory decisions
  (Art. 31 SSM Framework Regulation*: right to be heard)

* Regulation ECB/2014/17 of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities (SSM Framework Regulation), OJ L 141/51, 14 May 2014.
Administrative Board of Review (ABoR)

- An ECB-internal review board
- 5 (+ 2 alternates) independent and experienced members, appointed by Governing Council for 5 years
- ECB to assist ABoR with legal expertise, also on ECB powers under SSM Regulation (Art. 6(3) Decision ECB/2014/16 establishing Board and setting out Operational Rules)
Administrative review proceedings - 1

- Applicant files notice of review within 1 month
- Applicant may request suspensive effect of review
- Suspension of decision *may* be granted by Governing Council upon Administrative Board of Review proposal if review request is admissible and not “obviously unfounded” and “immediate application of the contested decision may cause irreparable damage”
- Scope of review: “the relevant decision’s procedural and substantive conformity with Regulation 1024/2013” and limited to grounds submitted by applicant, so:
  - no application of wider principles or provisions (but Charter* applies)
  - no *ex officio* widening of review grounds

* Article 51 Charter of Fundamental Rights of the European Union (Official Journal of the European Union, C 326/391, 26 October 2012)
Administrative review proceedings - 2

- Administrative review only once: new decision after review can be contested in judicial review only
  (Art. 11(2) ECB Decision 2014/16 and Art. 24 (7) SSM Regulation)
- Closed oral hearing between applicant and ECB possible
- Evidence: written statements, witnesses, expert opinions
- Access to file except for confidential information (correspondence between ECB and NCAs possibly excluded)
  (Art. 20(3), (4), (5) ECB Decision 2014/16)
- Review opinions to be adopted by 3 of 5 Board members
  (Art. 24(3) SSM Regulation and Art. 16(3) ECB Decision 2014/16)
Administrative review proceedings - 3

- Non-binding opinion within 2 months of application to Governing Council: abrogate, maintain, amend decision
  
  (Article 7 SSM Regulation; Article 16 ECB Decision 2014/16)

- Supervisory Board receives opinion and prepares new decision for submission to Governing Council (Article 17 ECB Decision 2014/16)

- Review Board opinion, draft decision Supervisory Board, decision of the Governing Council notified to parties (Article 18 ECB Decision 2014/16)

- Costs in case of unsuccessful review applications! (Art. 21 ECB Decision 2014/16)
Single Resolution Mechanism (SRM): EBA-similar appeals procedure

- Similar appeals procedure arrangements for SRM
  (Art. 85 SRM Regulation*)
- Appeal Panel to be established
- Six week appeals period – one month: appeals decision
- Then, recourse to the CJEU

- Thus: approach to review of legal acts: EBA, SRM ↔ ECB

Different approaches to review?

- Will different institutional set-up lead to different approaches to administrative review of EBA and ECB decisions?
- ECB’s decisions are far more frequent and far-reaching
- Interplay between national and EU protection against SSM decisions
- Most interesting challenges when NCAs and ECB act
- See legal writing by, *inter alia*:
  - Raffaele D’Ambrosio, *Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings*, Quaderni di Ricerca Giuridica della Consulenza Legale, Banca d’Italia, Numero 74 – Dicembre 2013
  - Willem Bovenschen, Koen Holtring, Gijsbert ter Kuile, Laura Wissink, *Europees bankentoezicht (SSM) - Juridische en praktische perspectieven*, Nederlands tijdschrift voor Europees recht, 2013, No. 10
Mario Draghi, press conference, 1 August 2013: “(…) it would be wise to have (…) a richer communication of the rationale behind [the ECB’s] decisions”

Mario Draghi, Amsterdam speech (22 April 2014):
- unconventional measures require enhanced communication;
- “releasing a more complete account of the main arguments considered in our monetary policy deliberations, in a non-attributed form, will on balance serve to strengthen the Governing Council’s collegiate decision-making and communication. Such a release should naturally complement the real-time messages conveyed in the press conferences. It should offer additional information that improves understanding of our reaction function, with respect to the relevant medium-term horizon, while taking care to avoid triggering short-term market noise.”

ECB press release, 3 July 2014: “the ECB announces its commitment to publish regular accounts of the Governing Council’s monetary policy meetings, which is intended to start with the January 2015 meeting. The publication of the accounts will be timed so that the account of the previous meeting is published before the date of the next one.”

Focus on monetary policy: transparency instrumental to effectiveness of ECB monetary policy
ESCBA Statute on transparency

- Article 10.4: “The proceedings of the meetings shall be confidential. The Governing Council may decide to make the outcome of its deliberations public.”
- Background: multi-national environment, young central bank
- Central bank governors subject to diverse media and home base
- Governing Council is to act in European public interest only
Transparency and accountability

- Far-reaching accountability mechanisms in MoU with Ecofin Council and Interinstitutional Agreement with EP
- Due respect for professional secrecy and business secrets
- Chair-to-Chair confidential oral discussions behind closed doors
- EP gets “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” and GC objections to SB draft decisions to be reported
- Cooperation with a Parliamentary inquiry regulated in advance

Accountability breeds response-ability.
- Stephen R. Covey
‘Banking union’ accountability arrangements (1)

ECB-EP Interinstitutional Agreement

- “the conferral of supervisory tasks implies a significant responsibility for the ECB to contribute to financial stability in the Union, using its supervisory powers in the most effective and proportionate way”
- “any conferral of supervisory powers to the Union level should be balanced by appropriate accountability requirements” EP and Council “legitimised institutions representing the citizens of the Union and the Member States”
- Specification of reporting requirements
- Information hotline and FAQs at ECB with feedback of questions on SSM
- Specification of public and confidential hearings before EP
- Specification of responding to EP questions
- Confidentiality requirements for confidential information
- Safeguards for confidentiality of ECB documents
- Cooperation of ECB with EP Investigations (‘Committee of Inquiry’)
- Involvement in selection and appointment Supervisory Board and removal of Chair or Vice-Chair Supervisory Board (Article 26(4) SSM Regulation)
‘Banking union’ accountability arrangements (2)

**ECB-(Ecofin) Council MoU**

- “the conferral of supervisory tasks implies a significant responsibility for the ECB to contribute to financial stability in the Union, using its supervisory powers in the most effective and proportionate way”
- “any conferral of supervisory powers to the Union level should be balanced by appropriate accountability requirements”: EP and Council “legitimised institutions representing the citizens of the Union and the Member States”
- Covers accountability to Ecofin Council and Euro Group
- Similar reporting requirements as vis-à-vis the EP, plus some extra’s
- Specification of responding to Euro Group questions
- Confidentiality of ECB documents
- Involvement in selection and appointment Supervisory Board and removal of Chair or Vice-Chair Supervisory Board (Article 26(4) SSM Regulation)
Assessment of ECB transparency

- Voluntary openness in one area (monetary policy) and required openness in another (prudential supervision) require across-the-board transparency (payment systems oversight, bank notes issuance, foreign exchange reserve management)

- Balancing act between legislative requirements and policy injunctions

NB Transparency of (commercial) banking data: diverse or absent in ‘banking union’ – see Christopher Gandrud and Mark Hillerberg, *Supervisory transparency in the European Banking Union*, Bruegel Policy Contribution, 2014/01, January 2014
ECB’s welcome moves towards transparency

- The ECB is to follow an innovative interpretation of the applicable provision respecting its underlying rationale for confidentiality that the Treaty’s authors had in mind when they wrote Article 10.4 of the ESCB Statute (...)

- The Treaty acknowledges the multinational context in which the young ECB operates; linguistic and cultural differences are to be put aside as members of the ECB’s Governing Council meet – after all, they don’t have national mandates: they are Working for Europe.

**Holding central banks accountable**

Professional secrecy and information sharing

- “Nevertheless, where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be disclosed in civil or commercial proceedings.” (Article 4(5) Decision ECB/2014/39 – *Chinese Wall*)

Further ‘banking union’ issues - 1

- Clear directly applicable rules on mandatory information sharing?
  - Article 6(2) SSM Regulation versus Articles 53-62 CRD IV
- Translation of prudential texts in English
  - 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) SSM Regulation)
- Delimitation of supervisory remit (conduct of business)
- How ‘single’ is the single rulebook?
EU Economic and Financial Affairs (Sub-Committee A) for The United Kingdom Parliament Sub-Committee to ask if regulation is inconsistent across Europe

The Lords Sub-Committee investigating the EU financial regulatory framework will hear from the European Banking Authority, as well as the British Banking Association and JP Morgan, when they meet on Tuesday 14 October.

In its latest investigation, the House of Lords EU Economic and Financial Affairs Sub-Committee is reviewing the successes and failures of the current regulatory system.

The evidence session follows the confirmation of the appointment of Lord Hill as the new EU Commissioner for Financial Services, and the Sub-Committee will be asking witnesses to predict where they see any shortcomings in the existing framework which he would need to address.
Regulatory capture

- Transparency prevents (limits) ‘regulatory capture’
- ‘Supervisory capture’: speaking the language of the supervised to such an extent as to no longer have distance for effective oversight
- Besides such ‘blindness’, understanding needs of the supervised to the detriment of needs of society
- Also, forming a ‘club mentality’: national bias skews supervision

NB Financial sector specificity and executive psychological make-up

- Financial Times, 2 September 2014 letter to the editor (Financial industry is playground for psychopaths)
- Manfred Kets de Vries (INSEAD), The leadership Mystique (2001), The Psycho-path to Disaster: Coping with SOB Executives (2014) makes similar claims on psychopaths in executive positions (in all industries)
Further ‘banking union’ issues - 3

- Supervisory (‘regulatory’) capture
- Banking culture – need for change – customer-friendly and sustainable
“IMF director of legal affairs Sean Hagan, who moderated the debate, argued that by "focus[ing] too much on carrots and sticks" regulators risk creating a "culture of compliance" that is often associated with "circumvention".”

Moving away from a culture of compliance towards a culture of individual responsibility and accountability

Limits of regulation – personal transformation
Further EMU issues

- Eurobills, Eurobonds
- Euro Area Treasury
- Partial EU-funding of national unemployment benefits so that automatic stabilisers work across the Euro Area (Glienicker Gruppe)
- Strategic issues with inward investment (Angola, China)
  - See the Financial Times’ series on Chinese investments in Europe (Silk Road Redux)
- Cultural aspect of European integration – cf. Herman Van Rompuy Europe lecture, Leiden, 10 October 2014