The ECB single supervisory mechanism and judicial review in the EU courts

Enrico Leone
Koen Platteau

Wednesday 05 & Thursday 06 October 2016
Introduction

- Introduction
- Functioning and decisions of the SSM
- Administrative Review (ABoR)
- Judicial Review
Banking Union

- Single Supervisory Mechanism (SSM)
- Single Resolution Mechanism (SRM)
- Uniform deposit guarantee *(not currently scheduled)*
SSM - Legal framework


- Single Supervisory Mechanism (SSM) comprises the ECB and the national competent authorities (NCAs) of participating Members

- Supervisory Principles of SSM: Use of best practices, Integrity and decentralisation, Homogeneity within the SSM, Consistency with the single market, Independence and accountability, Risk-based approach, Proportionality, Adequate levels of supervisory activity for all credit institutions, Effective and timely corrective measures
SSM – Functioning (1)

The distribution of tasks between the ECB and NCAs
SSM - Functioning (2)

Function of the joint Supervisory Teams

- Day-to-day supervision of significant institutions is conducted by Joint Supervisory Teams (JSTs).
- Each JST is led by a coordinator at the ECB
- NCA sub-coordinators of the JSTs are responsible for clearly defined thematic or geographic areas of supervision; they support the JST coordinator
SSM - Functioning (3)

The Supervisory Cycle

- Supervisory Policies
- Methodology and standards development
- SREP (RAS, ICAAP, ILAAP and Capital and Liquidity Quant. Meth.)
- Risk analysis
SSM - Functioning (4)

Decision-making within the SSM

[Diagram showing the process of decision-making within the SSM, including steps such as submitting a draft decision, Governing Council's approval or objections, Objection process, Mediation, Review, and the final Adoption.]
SSM - Conduct of supervision

- Authorisations (all credit institutions)
  - Granting of authorisations and acquisitions of qualifying holdings
  - Withdrawal of authorisations

- Supervision of significant institutions
  - Supervisory planning
  - Procedures for applications, requests and notifications
  - Right of establishment of credit institutions within the SSM
  - Internal models
  - Assessment of the suitability of members of management bodies
  - On-site inspections
  - Crisis management
  - Use of supervisory measures and powers
  - Enforcement and sanctions
The administrative Board of Review of the SSM (ABoR)

- Core characteristics of the administrative review
- Procedural aspects
- The case law
The administrative Board of Review of the SSM (ABoR)

Main Characteristics:

- Function
- Opinion for the Supervisory Board
- No prejudice to the right to bring proceedings before the Court of Justice of European Union (CJEU)
- Independency and expertise in the fields of banking or other financial services
ABoR - Procedural aspects

- Rules on the admissibility of the request
- Object of the review
- Suspension
- Hearings
- Decision
ABoR - The case law

Since its establishment in September 2014 and by 1 September 2016:

17 requests for review
13 opinions:
   6 proposing to maintain the initial decision (2 inadmissible)
   7 proposing to amend it
4 requests withdrawn

4 cases brought before the Court of Justice
ABoR - The case law

When is a bank significant?

What is a banking group?

Corporate governance of the credit institution

Interrelation between the ECB and NCAs powers
Judicial review of ECB decisions

Koen Platteau
Challenging ECB decisions in the EU Courts

Overview

- ECB decision-making powers subject to judicial review by the EU Courts
  - SSM has ushered in new era of potential procedures before EU Courts
  - Far reaching decision-making powers for ECB in SSM context
  - Possible exponential growth of appeal procedures

- The options for challenging ECB decisions
  - Which procedures are relevant?
  - How does it work?

- Overview of emerging body of case law involving ECB
Starting point

- Articles 282 – 284 TFEU: the ECB is one of the EU institutions …

- … subject to judicial review
  - Protocol No. 4 on the Statute of the ESCB and of the ECB
  - Article 35.1: “The acts or omissions of the ECB shall be open to review or interpretation by the Court of Justice of the EU in the cases and under the conditions laid down in the TFEU.”
  - Article 35.3: “The ECB shall be subject to the liability regime provided for in Article 340 TFEU.”
Relevant procedures

- Article 263 TFEU: annulment procedure
- Article 265 TFEU: failure to act
- Article 267 TFEU: preliminary ruling procedure relating to the interpretation of the Treaties and the validity and interpretation of acts of EU institutions
  - Questions raised in the context of procedures before national courts
- Articles 268 & 340 TFEU: compensation for damage caused by EU institutions
EU Court procedures – general features

- Two-tier system for direct actions (not for preliminary rulings)
  - General Court
  - Court of Justice: appeal on points of law only

- Actions do not have suspensory effect
  - Article 278 TFEU: Court may order suspension of contested act
  - Article 279 TFEU: Court may order interim measures
  - Threshold for suspension/interim relief is high: threat of serious and irreparable damage
    - Grant of suspensory/interim relief very exceptional

- Lengthy procedure (written and oral) and significant backlog
  - Average duration at General Court level 2 years
Annulment procedure

- **Features**

  - Only relates to legally binding acts
  - Short time-frame (2 months and 10 days) for filing application
  - Apart from EU institutions and Member States, natural or legal persons have standing
    - If addressee of an act
    - If not addressee: act must be of direct and individual concern
      - Concepts interpreted restrictively
      - In case of regulatory act of direct concern (and no implementation)
  - Grounds for annulment: lack of competence, infringement of essential procedural requirement, infringement of EU law or misuse of powers
  - Outcome (if successful): annulment of the act
    - Institution has to take action/adopt new act
Annulment procedure – ECB precedents

- Refusal decisions by ECB to grant access to documents
  - T-590/10, Bloomberg (29 November 2012)
  - T-376/13, VZK (4 June 2015)
  - T-251/15, Espirito Santo (pending)

- SSM: first appeal filed in March 2015
  - Case T-122/15, Landeskreditbank Baden-Wurtemberg (pending)
  - Supervised entity claims status of “less significant” entity under SSM and as a result contests supervision by ECB
  - Annulment application filed after Administrative Board of Review procedure
Annulment procedure – ECB precedents (2)

- Location clause central counterparty (CCP) clearing systems
  - T-496/11, UK/ECB (4 March 2015)

- ECB “Policy Framework”: CCPs above certain thresholds “should be” based in the euro area

- Interesting debate on admissibility
  - Policy Framework: challengeable act (legal effects/confirmatory act)?
  - Standing of UK as non-eurozone country?

- Court annuls for lack of competence
  - ECB’s competence limited to regulation of payment clearing systems (as opposed to securities clearing systems)
Annulment procedure – ECB precedents (3)

- Action inadmissible if the contested act cannot be imputed to ECB
  - Stability support programme for Cyprus
    - T-293/13, Theophilou e.a. (10 November 2014): action dismissed since ECB is not the author of the contested programme (confirmed upon appeal, C-10/15P e.a., 20 September 2016)
  - Restructuring banking sector in Cyprus
    - T-327/13, Mallis e.a. (16 October 2014): action against Eurogroup statements and ECB involvement in Eurogroup: action dismissed (confirmed upon appeal, C-105/15P e.a., 20 September 2016)
  - Greek banking crisis
    - T-368/15, Alcimos Consulting (14 July 2016): ECB decision but contested measures are result of decision adopted by Greek authorities: action dismissed
Preliminary ruling

- Questions about interpretation of EU Treaties or validity and interpretation of acts of EU institutions
- Context of litigation before national courts
- National court suspends procedure and refers questions to Court of Justice
- Decision of Court of Justice binds national judge
Preliminary ruling – ECB precedent

- C-62/14, Gauweiler e.a. (16 June 2015)
  - Constitutional actions in Germany relating to participation of Deutsche Bundesbank in the implementation of decisions on outright monetary transactions (OMT) by ECB
  - Questions on validity of ECB decisions: not covered by ECB mandate

- Validity confirmed
  - In view of objectives and instruments used, ECB measure falls within monetary policy
  - Proportionality test is satisfied and sufficient safeguards that measure will not lead to monetary financing in violation of Article 123(1) TFEU

- Comment on wide discretion of ECB and marginal review by Court (§68-69)
  - See also Case T-376/13, VZK (§53)
  - “In ECB we trust”
Damages claims

- Non-contractual liability: EU liable for damage caused by EU institutions or servants in the performance of their duties (Article 340(2) TFEU)
  - ECB liable for damage caused by ECB or servants in the performance of their duties (Article 340(3) TFEU)

- Court of Justice has jurisdiction for such damage claims

- Substantive law: “general principles common to the laws of the Member States”
Damages claims – ECB precedents

- Number of cases involving ECB, all in the context of banking crisis (Greece/Cyprus)
  - T-79/13, Accorinti e.a. (7 October 2015)
  - T-293/13, Theophilou e.a. (10 November 2014) and C-10/15P e.a. (20 September 2016)
  - T-368/15, Alcimos Consulting (14 July 2016)

- All claims dismissed
  - EU institutions pursued general interest objective (stability of the banking system in the eurozone) and measures not disproportionate
  - Alleged damage does not exceed limits of inherent risk

- Different in context of SSM?

- Alcimos: claim must be precise
Conclusion

- Emerging body of case law involving the ECB
  - Annulment procedures are most significant

- Marginal review where ECB enjoys wide discretion

- Lengthy procedure/interim relief exceptional
  - Appropriate in SSM context?
  - Limited number of cases so far
Questions?

simmons-simmons.com
elexica.com
Contact details

Enrico Leone  
Of Counsel  
Financial Markets  
T +44 20 7825 3093  
E enrico.leone@simmons-simmons

Koen Platteau  
Partner  
Dispute Resolution  
T +32 254 209 63  
E koen.platteau@simmons-simmons