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The procedural safeguards within the SSM and the SRM

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Outline

- ▶ The different features of the decision making process within the SSM and the SRM
- ▶ Safeguards applicable to the procedures for the adoption of SSM decisions
- ▶ Relationship between the ECB and the NCAs within the SSM procedures
- ▶ The problem of the application of the safeguards provided for in the Charter to the SRM procedures



The different features of the decision making process within the SSM and the SRM

- ▶ The allocation of competences within the SRM basically mimics the one provided for in the SSMR
- ▶ As a consequence, in both the SSM and the SRM it is possible to identify (on the basis of the status of the credit institutions concerned) the decisions taken at EU and national level respectively
- ▶ Nevertheless, unlike the ECB decisions, the SRB decisions need to be implemented by NRAs acts addressed to credit institutions



The different features of the decision making process within the SSM and the SRM

- ▶ Under the SSMR, the general rule for allocating competences between ECB and NCAs is based on the status of the credit institutions concerned
- ▶ Under the SRMR, the SRB is vested with the power to adopt (with regard, in general, significant credit institutions) the resolution scheme according to the resolution plan
- ▶ Specific resolution tools and measures are adopted by the NRAs according to the resolution scheme
- ▶ The SRB may apply specific resolution tools only where NRAs do not comply with its decisions



The different features of the decision making process within the SSM and the SRM

- ▶ As ECB is competent to adopt specific supervisory decisions, the SSMR and the SSM framework regulation provide for specific rules on due process
- ▶ On the contrary, a part from the cases of fines and periodic penalty payments directly applied by the Board (Article 40), the SRMR provides for no specific rules on due process...
- ▶ ...the general rules on the access to the Board's files (Article 90(4) SRBR) being instrumental to the right of appeal



The different features of the decision making process within the SSM and the SRM

- ▶ Article 40 of the SRMR ensures to the addressees of the Board's decisions to impose fines and periodic penalty payments the right to be heard and the right to have access to files
- ▶ The framework for the practical arrangements for the cooperation within the SRM provides for no rule of separation between investigative and decision-making functions



The different features of the decision making process within the SSM and the SRM

- ▶ When adopting decisions related to institutions falling into the SRB's competence, NRAs must follow the SRB's instructions
- ▶ Article 29 SRMR (implementation of SRB's decisions by NRAs) refers to the safeguards provided for in the BRRD, which are aimed at protecting third parties (mainly shareholders and creditors)
- ▶ The framework for the practical arrangements for the cooperation within the SRM provides for no specific rules on due process, but only refers (Article 10) to the safeguards provided for by the BRRD



The different features of the decision making process within the SSM and the SRM

- ▶ Moreover, Article 10 of the framework refers to the conditions laid down in the national laws transposing the BRRD
- ▶ As a consequence, in order to verify which safeguards apply to the addressees of resolution decisions, national laws must be considered
- ▶ Italian law on resolution of banks waves due process rules provided for by the general law on administrative proceedings (Articles 3(5), 32(7), 34(3) Legislative Decree No 180/2015)
- ▶ The addressees of resolution decisions may only appeal them *ex post* before the Court

Safeguards applicable to the procedures for the adoption of the SSM decisions

- ▶ ECB's/NCAs' obligation to abide by the general principle of Union law and the fundamental rights provided for in the Charter
- ▶ Increasing safeguards as we move from (micro-prudential) supervisory procedures to procedures aimed at imposing penalties having a “coloration pénale”
- ▶ Definitions of supervisory decisions, administrative measures and administrative penalties



Safeguards applicable to the procedures for the adoption of the SSM decisions

- ▶ Safeguards applicable to procedures aimed at adopting micro-prudential decisions: motivation of decisions; right to express one's view; access to files (Article 22 SSMR)
- ▶ Right to be heard may be temporary waved where urgent action is needed in order to prevent significant damage to the financial system
- ▶ A part from the motivation, these safeguards do not apply to procedures aimed at adopting macro-prudential general decisions (Article 22 SSMR, Article 41 Charter)

Safeguards applicable to the procedures for the adoption of the SSM decisions

- ▶ Are there additional safeguards for procedures aimed at adopting the administrative measures?
- ▶ The uncertain application of the rule of law/*lex mitior*
- ▶ The uncertain application of the principle of separation between investigative and decision-making functions

Safeguards applicable to the procedures for the adoption of the SSM decisions

- ▶ Additional safeguards applicable to the administrative penalties
- ▶ The protection of personal data in case of publication of penalties applied by NCAs to natural persons (Article 68(2)(a) CRD4)
- ▶ The uncertain application of the principle of full jurisdiction of the CJEU to the ECB pecuniary penalties under Article 18(1) SSMR
- ▶ Dichotomy SSMR/national laws (as they usually provide for the full jurisdiction of the national courts) with regard to the administrative penalties

Safeguards applicable to the procedures for the adoption of the SSM decisions

- ▶ Additional safeguards applicable to penalties having a “coloration pénale”
- ▶ The criteria aimed at identifying penalties having a coloration pénale: the severity of the potential penalty (ECtHR, *Engel*; CJEU, *Bonda*)
- ▶ The principle of culpability
- ▶ The right to remain silent

Safeguards applicable to the procedures for the adoption of the SSM decisions

- ▶ The full jurisdiction of the CJEU as an element of the right to an effective remedy
- ▶ The principle of separation as an element of the right to a fair trial (ECtHR, cases *Dubus*, *Menarini*, *Grande Stevens*)
- ▶ The problem of the public hearing (*Grande Stevens*)
- ▶ Avoiding accumulation of penalties: ne bis in idem/proportionality (ECtHR, *Grande Stevens*)



Relationship between the ECB and the NCAs within the SSM procedures

- ▶ NCAs must assist the ECB for the preparation of any ECB decisions (Article 6(3) SSMR) or...
- ▶ ...they may be directly in charge of a phase of an SSM procedure aimed at adopting an ECB decision (Articles 14 and 15 SSMR)
- ▶ Since flaws of national acts may affect the validity of the ECB final decision, safeguards of defence should be granted already during the national phase
- ▶ Divergences between national and EU administrative law are not so wide, as EU general principles stem from national laws

Relationship between the ECB and the NCAs within the SSM procedures

- ▶ Under the CJEU case law, composite administrative procedures are unitary procedures
- ▶ Safeguards provided for under Union law apply to the national phases too (CJEU, *Borelli*)
- ▶ No clear stance in the case law as to whether CJEU has jurisdiction over the national phase
- ▶ It is disputable whether and to what extent ECB was charged with a duty to monitor NCAs conduct

Relationship between the ECB and the NCAs within the SSM procedures

- ▶ SSM decisions adopted by NCAs within their exclusive competence (Article 6(6) SSMR) or in execution of an ECB decision (Articles 6(3), 7(1) and 9(1) SSMR)
- ▶ Under Article 6(7) SSMR, ECB framework regulation must respect fundamental rights and therefore be in line with the state-of-art of the CJEU and ECtHR case law (recital 86 SSMR)
- ▶ ECB framework regulation as a “benchmark” for national legal frameworks

The problem of the application of the safeguards provided for in the Charter to the SRM procedures

- ▶ The SRMR should be applied and implemented in accordance with the general principles provided for in the Charter (recital 121), including therefore Article 41 on due process
- ▶ In the BRRD's domain, principles provided for in the Charter apply to both the Board and the NRAs
- ▶ Recital 88 of the BRRD expressly refers to the rights of due process and to effective remedy
- ▶ Nevertheless, national laws transposing BRRD limit the right of defence of the addressees of resolutions decisions

The problem of the application of the safeguards provided for in the Charter to the SRM procedures

- ▶ ECB and NCAs may apply early intervention measures both under the SSMR and the SRMR
- ▶ Which safeguards apply to those measures?
- ▶ ECB decisions under Article 16(2) SSMR are subject to provisions under Article 22 SSMR
- ▶ What about decisions under Articles 27 to 29 BRRD?

The problem of the application of the safeguards provided for in the Charter to the SRM procedures

- ▶ Are limitations provided for in national laws compatible with Article 52 of the Charter?
- ▶ Under Article 85(1) of the BRRD, MSs may require an ex-ante judicial approval of a decision to take a crisis prevention measure or a crisis management measure
- ▶ Under Article 85(2) of the BRRD, MSs shall provide a right of appeal against those measures
- ▶ The appeal shall not entail an automatic suspension of the effect of the decision, as a suspension is presumed to be against the public interest