Liability of Financial Supervisors within the Single Supervisory Mechanism

Towards a uniform framework?

Danny Busch

Radboud Universiteit

I. Introduction

- Is there a uniform framework for liability of financial supervisors within the Single Supervisory Mechanism (SSM)? If not, should there be?

- Two types of liability of financial supervisors

- Liability towards third parties, typically for lax oversight

  - bank deposit holders (DSB Bank, Icesave)
  - investors in options (Van der Hoop)
  - former managers of supervised banks (VPV)
  - shareholders and subordinate bondholders (nationalisation SNS Reaal)

- Liability towards banks themselves, typically for oversight which is too strict

  - withdrawing a banking licence
  - refusing a bank's acquisition by a certain shareholder
  - setting capital requirements ('buffers') that are too high
  - imposing sanctions for a breach of EU law for invalid reasons

II. SSM

- SSM in force since 4 November 2014 in the 18 eurozone Member States
- ECB direct prudential supervisor on some 125 ‘significant’ banks within the eurozone
- However, ECB is always responsible for granting and withdrawal of banking licences, and for assessing thre suitability of bank owners
- The ‘less significant’ banks continue to be supervised by the national prudential supervisors, applyingh a ‘single rulebook’ of prudential rules (CRD IV and CRR)
- However, the ECB can always ‘call up’ direct supervision for such other Eurozone banks when necessary to ensure consistent application of high supervisory standards
- ECB applies local implementation rules of CRD IV in relation to the banks it directly supervises
- ECB may instruct national prudential supervisors to exercise their powers pursuant to national law

III. Liability of the ECB within the SSM

- Consideration (61) SSM Regulation

- In accordance with Article 340 TFEU, the ECB should, <u>in accordance with the general principles common to the laws of the Member States</u>, 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.

- But what does that mean?

III. Liability of the ECB within the SSM

- **Why liability in accordance with the general principles common to the laws of the Member States?**

- **Why not liability in accordance with the general principles common to the laws of the Member States that are part of SSM?**

III. Liability of the ECB within the SSM

- Common principles of general liability law?
- Common principles of liability law pertaining to financial supervisors?
- If the latter, what does that mean?

III. Liability of national supervisors within the SSM

Review of the liability regimes pertaining to financial supervisors in the 18 Eurozone member States

<u>Immunity</u>

- **Austrian Financial Market Authority: immunity towards third parties, liability towards banks**

- **In Germany the *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin) is immune for claims by third parties**

III. Liability of national supervisors within the SSM

<u>**Bad faith and gross negligence**</u>

- **National Bank of Belgium and the Financial Services and Market Authority: limitation of liability to fraud and gross negligence**
- **Central Bank of Cyprus: limitation of liability to bad faith and gross negligence**
- **Estonian Financial Supervision Authority: limitation of liability to acts and omissions made in bad faith**
- **In France the *Autorité de Contrôle Prudentiel* (ACP) and the *Autorité des Marchés Financiers* (AMF)) have no legal personality and are part of the French government . Normal state liability rules apply. The supreme administrative court of France has determined that a governmental supervisory body can only be held liable in cases of gross negligence**
- **The Central Bank of Ireland (CBI) is only liable in case of bad faith**
- **The Bank of Italy and Consob (as well as Isvap and Covip) are only liable in case of gross negligence or intention**

III. Liability of national supervisors within the SSM

<u>Bad faith and gross negligence</u>

- **In Latvia, the Financial and Capital Market Commission is only liable for gross negligence**
- **In Luxembourg, the *Commission de Surveillance du Secteur Financier* (CSSF) and the *Commissariat aux Assurances* (CAA) is only liable towards third parties in case of gross negligence**
- **The Malta Financial Services Authority (MFSA) is only liable in the case of bad faith**
- **The liability of the Dutch AFM and DNB is limited to fraud and gross negligence**

III. Liability of national supervisors within the SSM

Negligence

- **The Central Bank of Portugal (BdP), the Securities Market Commission (CMVM) and the Portuguese Insurance Institute (ISP) appear to be liable in case of negligence**

- **The Bank of Slovenia, the Slovenian Securities Market Agency and the Insurance Supervision Agency are liable for negligence**

- **Finnish Financial Supervisory Authority operates in cooperation with the Bank of Finland: Bank of Finland will be liable for any damages arising from an error or omission of the Finnish Financial Supervisory Authority, but the liability only arises if the performance of the activity or task, in view of its nature and purpose, has not met the reasonable requirements set for it**

III. Liability of national supervisors within the SSM

<u>No-fault liability</u>

- **The Bank of Greece (BoG) and the Hellenic Capital Markets Commission (HCMC) are liable for illegal acts or omissions in the course of financial supervision**

- **The National Bank of Slovakia is liable for maladministration**

- **In the case of the Bank of Spain, the National Securities Market Commission and the General Insurance and Pension Funds Directorate, individuals are entitled to compensation from the State regarding damages that are the result of the normal or abnormal functioning of public services**

IV. Conclusions

<u>**Exact criterion for liability of the ECB within the SSM not clear**</u>

- **If ECB liability should be based on the common principles of liability law pertaining to financial supervisors within the Eurozone or within EU at large, it is not clear what this means**

  - immunity?
  - bad faith/gross negligence?
  - negligence?
  - no-fault liability?

- **Majority approach? If so, should GDP matter?**

- **If Eurozone liability rules are decisive, what happens if additional Member States join the SSM?**

IV. Conclusions

Unlevel playing field

- **Between banks supervised at ECB level and banks supervised at national level**
- **Between banks supervised at national level depending on their home member state**

IV. Conclusions

Way forward

- **Clear statutory liability rule for the ECB -> only liable for bad faith and gross negligence? -> But then Treaty change may be required**

- **Harmonised statutory liability rule for national financial supervisors acting within the SSM framework -> only liable for bad faith and gross negligence?**

- **Similar questions arise within the framework of the SRM**

- **Within the broader CMU context harmonization of liability of financial supervisors may be a good idea as well**