



EUROPEAN CENTRAL BANK
BANKING SUPERVISION

Andreas Witte

Principal Legal Counsel
European Central Bank, Frankfurt
andreas.witte@ecb.europa.eu

- **ECB specific supervisory powers granted under national law not explicitly mentioned in Union law**
- **ECB approach to corporate governance supervision**
- **ECB power to give instructions to the NCAs**

EBI conference

Tallinn, 29 November 2017

Overview

1 ECB specific supervisory powers granted under national law not explicitly mentioned in Union law

1.1 A conceptual novelty in Union law

1.2 When does a national law transpose a Union directive?

1.3 Examples of particularly important cases

1.4 Legal nature of ECB decisions based on national powers

2 ECB approach to corporate governance supervision

2.1 Legal framework

2.2 First example: Fit-and-proper supervision

2.3 Second example: Organisational obligations

3 ECB power to give instructions to the NCAs

3.1 Background

3.2 ECB instructions in case of LSI supervision

3.3 ECB instructions in case of SI supervision

4 Summary/conclusions/outlook

Overview

1 ECB specific supervisory powers granted under national law not explicitly mentioned in Union law

1.1 A conceptual novelty in Union law

1.2 When does a national law transpose a Union directive?

1.3 Examples of particularly important cases

1.4 Legal nature of ECB decisions based on national powers

2 ECB approach to corporate governance supervision

2.1 Legal framework

2.2 First example: Fit-and-proper supervision

2.3 Second example: Organisational obligations

3 ECB power to give instructions to the NCAs

3.1 Background

3.2 ECB instructions in case of LSI supervision

3.3 ECB instructions in case of SI supervision

4 Summary/conclusions/outlook

Directives versus Regulations

- Both are types of legal acts under Union law
- Defined in Article 288 TFEU
- **Single rulebook** in banking supervision includes both
- Difference lies *not* in hierarchical rank but in legal **effect**:
 - **Regulations** have general application, binding in entirety, directly applicable in all Member States
 - **Directives** are binding only as to the result to be achieved; need to be transposed into national law, but MS have choice of form and methods of transposition
 - Made applicable via national **transposing legislation** (Article 4(3) SSMR)

Identifying the transposing character of a national statute

- Article 4(3) SSMR presupposes that it is possible to **identify** whether a national statute is a transposition of a Directive
- Not always straightforward – often MS incorporate new provisions into existing national statutes and codifications
- E.g. **Articles 66 and 104 CRD IV** describe supervisory powers which MS must provide for in rather general terms
- **Vast differences** exist, e.g. supervisory approval for changes to articles of association
- [ECB's approach](#) mostly **teleological** rather than wording-focussed: Does the national power exist for prudential purposes?

Examples of powers not explicitly foreseen in Union law but to be exercised by the ECB

- Wide range of **pre-approval** requirements, e.g. for:
 - Mergers and acquisitions
 - Establishment of branches outside EU/EEA (within EU/EEA: Passporting)
 - Changes to articles of association
- **F&P procedures** for:
 - Board members (substantive requirements in CRD IV; procedural implementation – pre-approval, notification etc. – differs. Power to remove contained in SSMR itself)
 - Key function holders (largely unharmonised, not in all jurisdictions)
- **Moratorium**
 - But: Moratoria differ vastly – one key consideration: Is it to be considered a supervisory or a resolution tool?
- Approval of **external auditors** of a bank:
 - Exercised by ECB to the extent such powers are linked to ensuring compliance with prudential requirements

Even if based on national statutes, ECB decisions are...

- Legal acts under Union, not national, law
- Of **hierarchically** higher rank than national law
(But they must, of course, meet the requirements of the national legal basis on which they are based)
- Subject to **judicial review** before the Union, not national, courts
(Cf. *Foto-Frost* case law; procedural avenue usually Article 263 TFEU)
- Subject to the limits of **discretion** under Union, not national, law

Overview

1 ECB specific supervisory powers granted under national law not explicitly mentioned in Union law

1.1 A conceptual novelty in Union law

1.2 When does a national law transpose a Union directive?

1.3 Examples of particularly important cases

1.4 Legal nature of ECB decisions based on national powers

2 ECB approach to corporate governance supervision

2.1 Legal framework

2.2 First example: Fit-and-proper supervision

2.3 Second example: Organisational obligations

3 ECB power to give instructions to the NCAs

3.1 Background

3.2 ECB instructions in case of LSI supervision

3.3 ECB instructions in case of SI supervision

4 Summary/conclusions/outlook

Corporate law in the European Union

- Largely left to **national law** – only very limited and targeted harmonisation
(Exception: Societas Europaea – but only few companies are organised as one, and even here different national traditions are preserved)
- For instance: Parallelism of **two-tier and one-tier systems**
- Close interaction with other, largely unharmonised, areas of law
 - e.g. public registers, insolvency, private law...
- Different national **sanctioning** traditions
 - Corporate criminal liability? Liability of board members?
- Need to strike balance: Respect the national differences, but ensure a **minimum level** of good corporate governance across SSM

Who should be allowed to run a bank?

- Central provision in Union law: Article 91 CRD IV
- Idea: **Members of management body** (to be determined in accordance with national law) shall:
 - Be of sufficiently good repute
 - Possess sufficient knowledge, skills and experience
 - Commit sufficient time to perform their functions
 - Possess adequate *collective* knowledge, skills and experience
- In many cases spelt out in more detail in **national legislation**
- Where national transposition leaves leeway for authority's discretion: ECB attempts to provide harmonisation and clarity
→ 2017 [Guide to fit and proper assessments](#)
- **Tension** between level playing field, national peculiarities (e.g. Italian prosecutors) and case-by-case nature of the assessments

How should banks be set up internally?

- Central provisions in Union law: Articles 74 and 88 CRD IV
- Characterised by presence of **many unspecified terms**
 - e.g. “effective and prudent management”, “robust governance arrangements”
- In many cases spelt out in more detail in national legislation – binding on ECB (But it must be legislation, not merely an interpretative circular)
- Where national transposition leaves leeway for **discretion**: ECB attempts to provide harmonisation and clarity
 - 2016 [SSM supervisory statement on governance and risk appetite](#). Areas covered: Functioning of boards, design and implementation of RAF
- **Similar tension** as in case of F&P
- Supervisor is supervising the bank, but not managing it

Overview

1 ECB specific supervisory powers granted under national law not explicitly mentioned in Union law

1.1 A conceptual novelty in Union law

1.2 When does a national law transpose a Union directive?

1.3 Examples of particularly important cases

1.4 Legal nature of ECB decisions based on national powers

2 ECB approach to corporate governance supervision

2.1 Legal framework

2.2 First example: Fit-and-proper supervision

2.3 Second example: Organisational obligations

3 ECB power to give instructions to the NCAs

3.1 Background

3.2 ECB instructions in case of LSI supervision

3.3 ECB instructions in case of SI supervision

4 Summary/conclusions/outlook

Institutional principles of the SSM

- The SSM is a **mechanism**, not an authority: NCAs were not replaced by the establishment of the SSM
- ECB and NCAs interact within the SSM, all with their own areas of **competence**
- Distinction between **LSIs and SIs**
- Mutual duty of information exchange and **cooperation** in good faith

More intense NCA role in cases of LSIs

- LSI supervision is, with the exception of qualifying holdings and licencing, a competence of the NCAs
- ECB exercises **oversight**, but no case-by-case interference
→ Power to give “regulations, guidelines or general instructions”
- Can give non-binding recommendations, but **ultimate decision** rests with NCA
- ECB has, however, **information** powers – can obtain information from NCA (not actually a case of an instruction)

ECB as “competent authority” for SIs

- SI supervision is a competence of the ECB
- For this purpose, **the ECB applies:**
 - CA powers under directly applicable Union law (esp. CRR, SSMR)
 - CA powers under national transpositions of Union directives (esp. CRD IV, BRRD)
- Where no such powers exist, but ECB has a task: Power of **instruction**
 - Article 9(1), subpara. 3, SSMR and Article 22 FR
- Importance of this instrument depends on interpretation of “directive transposition”
- Always possible: **Assistance** by NCAs for ECB

Overview

1 ECB specific supervisory powers granted under national law not explicitly mentioned in Union law

1.1 A conceptual novelty in Union law

1.2 When does a national law transpose a Union directive?

1.3 Examples of particularly important cases

1.4 Legal nature of ECB decisions based on national powers

2 ECB approach to corporate governance supervision

2.1 Legal framework

2.2 First example: Fit-and-proper supervision

2.3 Second example: Organisational obligations

3 ECB power to give instructions to the NCAs

3.1 Background

3.2 ECB instructions in case of LSI supervision

3.3 ECB instructions in case of SI supervision

4 Summary/conclusions/outlook

Three years into the SSM...

- Unusual (in system of EU law) **interlinkage** between national and Union law
- Will likely continue for foreseeable **future**
 - Replacement of all directives with regulations unlikely; same for change in case law of direct effect of directives also
- But: Increasing **familiarity**
- Gradual development of **case law** specifically for SSM
- Role of **NCA**s remains crucial:
 - LSI supervision
 - Provision of staff members for JSTs (resources!)
 - Contributions via networks
 - Voting in SB and GovC
 - Contributions to national legislation
- Case of **two-level governance** within EMU