



# **The ECB's and NCAs' supervisory responsibilities over LSIs and as consolidated supervisor - procedural and judicial implications**

# Overview

## **I. ECB and NCA supervisory responsibilities over LSIIs**

1. Background
2. Oversight

## **II. Procedural and judicial implications**

1. Procedural implications
2. Judicial protection before courts

# ECB and NCA supervisory responsibilities over LSIIs

## *1. Background*

- LSIIs as a concept did not figure in the Commission's SSM proposal of 2012. ECB would have been competent for all euro area banks!
- Council introduced a division of tasks between the ECB and NCAs along the lines of SI and LSI.

# ECB and NCA supervisory responsibilities over LSIIs

## 1. *Background*

- LSIIs are directly supervised by NCAs, not by the ECB (with some exceptions: licensing, qualifying holdings).
- ECB direct supervision: about 130 significant banking groups at consolidated level, including about 1000 credit institutions belonging to these groups at solo level.
  - about **82%** of overall balance sheet total in the Banking Union area

# ECB and NCA supervisory responsibilities over LSIIs

## *1. Background*

- NCAs direct supervision: about 3000 less significant banking groups at consolidated level and about 3.300 credit institutions at solo level.
  - about **18%** of overall balance sheet total in the Banking Union area

ISSUE: how to cope with the inbuilt tension between centralisation and decentralisation?

# ECB and NCA supervisory responsibilities over LSI

## *2. Oversight*

- measures and safeguards which serve to ensure that the decentralized implementation of supervisory tasks by NCAs vis-à-vis LSI does not pose a threat to the effective and consistent functioning of the SSM as a whole.
- Decentralisation comes with “strings attached”.

# ECB and NCA supervisory responsibilities over LSIIs

## 2. Oversight measures

### a) Rulemaking powers

- ECB regulations → binding
- ECB guidelines → binding?
- ECB general instructions → binding
- ECB recommendations, communications, guidance – legal nature? Binding?

Question: How to choose between these legal forms?

# ECB and NCA supervisory responsibilities over LSIIs

## *2. Oversight measures*

### b) Information rights vis-à-vis NCAs

- requests ad hoc or regularly
- ex ante and ex post

### c) Investigatory powers directly vis-à-vis LSIIs

### d) Take-over of direct supervision by the ECB



# Procedural and judicial implications

## *1. Procedural implications*

- Is there a real change for the LSI? Main interlocutor is the NCA.
- More burdensome or lengthy procedures?
- What happens to ongoing procedures if the ECB assumes direct supervisory responsibility over an LSI?
  - Art. 48 SSM-Framework Regulation: Principle that the authority whose competence ends remains competent to complete the procedure
  - Pending preliminary reference C-52/17 VTB Bank Austria

# Procedural and judicial implications

## *2. Judicial protection*

### a) Supervisory acts adopted by the NCA

- Jurisdiction for direct actions to invalidate is with national courts according to national procedural rules
- No jurisdiction of the ECJ

# Procedural and judicial implications

## *2. Judicial protection*

### b) Oversight measures by the ECB

- rule-making measures: ECB  
regulations, guidelines and general instructions

**Direct challenges:** Actions for annulment before  
Court of Justice

Problem: **Standing of LSIs** according to Article  
263(4) TFEU

# Procedural and judicial implications

## *2. Judicial protection*

Standing according to Article 263(4) TFEU:

"Natural or legal persons may institute proceedings against an act

- i) addressed to them or
- ii) which is of direct and individual concern to them, and
- iii) against a regulatory act which is of direct concern to them and does not entail implementing measures."

# Procedural and judicial implications

## 2. *Judicial protection*

- i) Addressed to them? → usually not!
- ii) Act of direct and individual concern?

Direct concern: *the act must directly affect their **legal** situation and the act must leave **no discretion** to the addressees of that measure.*

Individual concern: → Plaumann-Formula

→ case by case; Order of GC in T-247/16 Fursin v ECB

# Procedural and judicial implications

## *2. Judicial protection*

iii) against a **regulatory act** which is of **direct concern** to them and **does not entail implementing measures**

→ not to be excluded

# Procedural and judicial implications

## 2. *Judicial protection*

### b) Oversight measures by the ECB

- rule-making measures: ECB regulations, guidelines and general instructions

### **Indirect challenges:**

→ Preliminary references according to Article 267 TFEU

- What about other oversight measures, such as recommendations, guidance, communications?

# Procedural and judicial implications

## *2. Judicial protection*

### b) Oversight measures by the ECB

- ECB investigatory measures
- Take over of direct supervision by the ECB

### Findings:

- Mostly actions in national courts
- Actions for annulment according to Art. 263 TFEU conceivable, but hard to show locus standi
- Possibly preliminary reference
- Actions for damages?



# Conclusions

- *ECB and NCAs share supervisory responsibilities vis-à-vis LSIs.*
- *Oversight powers an avenue for the ECB to impose its grip on the SSM?*
- *Are LSIs “caught in the middle” or is it a balanced system?*



*Thank you very much for your attention!*