

# **Accountability in the context of EMU & EBU**

## **Judicial Review of the ECB by the CJEU**

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**EBI Brexit Seminar**  
**Brussels, 10 January 2018**

# Outline

- Challenges for the ECB with the advent of banking union
  - Overlapping nature of its functions, seamless process
  - Governance issues, independence & accountability.
  - Issues of jurisdictional domain and complexity
  - Lack of EU administrative (procedural) leads to lack of uniformity
  - Application of national law and use of national powers
- Accountability
- The case for Judicial review
  - Understanding discretion
  - Specialized judges
  - Constitutional courts and ECJ
  - Too much reliance on administrative review? SSM Cases and SRB cases

## Challenges faced by ECB with advent of banking union (SSM)

- Overlapping nature of its functions: monetary policy, ELA/LOLR, micro-prudential supervision, macro prudential policy and early intervention (prelude to resolution).
  - Need for coordination amongst competent authorities and consistency.
- Balancing act between primary objective of price stability (defined & quantified) and rediscovered objective of financial stability.
  - While PS is unambiguously mentioned in Art 127.1 TFEU, the tenuous reference to financial stability in Art 127.5 TFEU indicates the hesitant tone of the treaty drafters in giving this goal equal footing to PS
  - The simplicity of one goal one instrument one authority established by the Maastricht Treaty in MP versus multiple goals multiple instrument and multiple authorities in the pursuit of financial stability (example of FSOC).

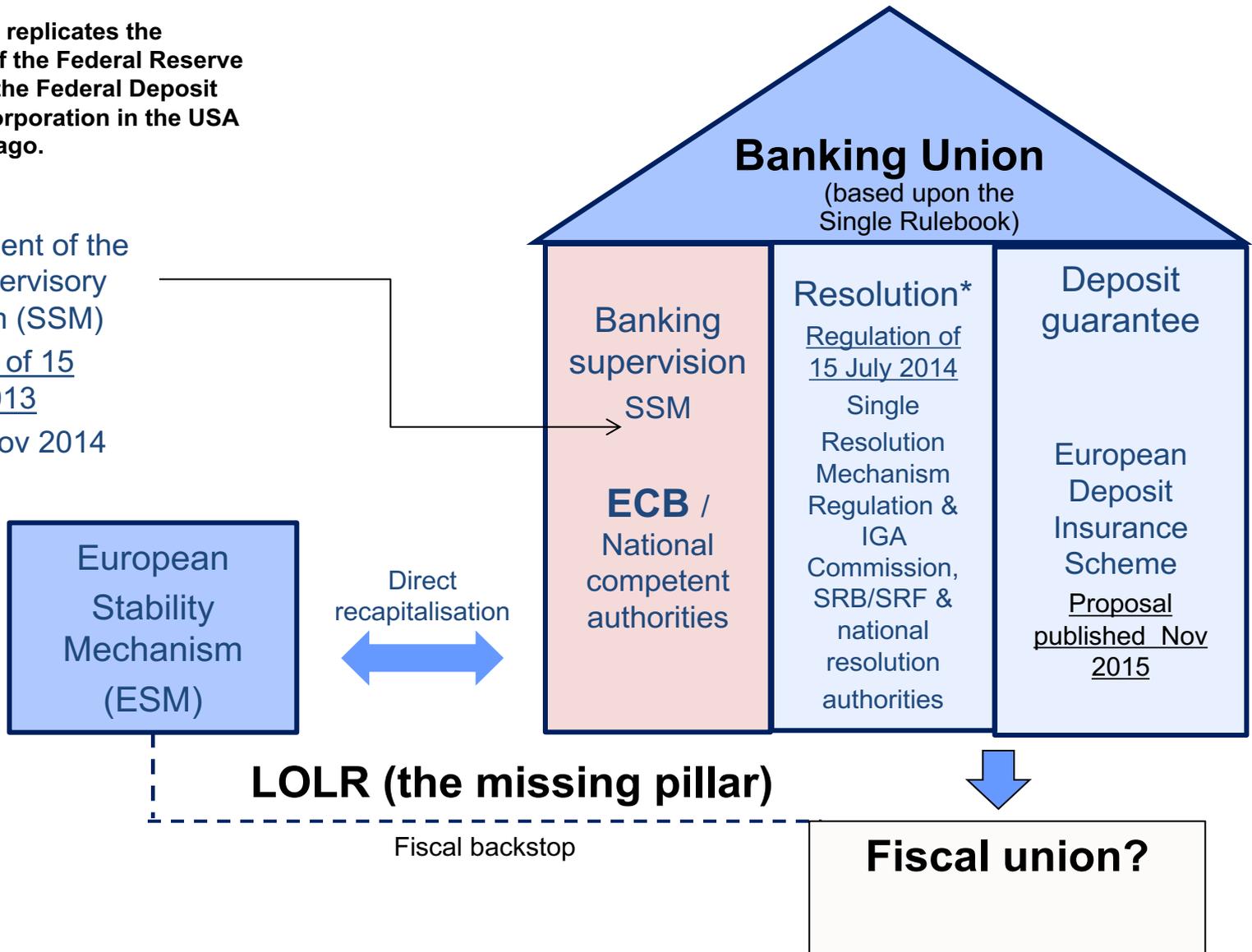
# Supervision and resolution

- **Supervision is resource and personnel intensive, litigious, prone to reputational damage; a ‘thankless task’ in which failures are magnified and success are hidden. It requires judgment, discretion.**
- Supervision and crisis management are part of a seamless process
- The discretionary role of the ECB in early intervention (actions taken before the threshold conditions for resolution are met, and before the institution is insolvent or likely to become insolvent) and in pulling the trigger (and if national ELA does not get ECB GC fiat... *alea jacta est*) provides an additional challenge.
  - Art 4.1 (i) of the SSM Regulation empowers the the ECB: “To carry out supervisory tasks in relation to recovery plans, and early intervention where a credit institution or group in relation to which the ECB is the consolidating supervisor, does not meet or is likely to breach the applicable prudential requirements (...) excluding any resolution powers.”

# Banking union and missing pillars

This process replicates the experience of the Federal Reserve System and the Federal Deposit Insurance Corporation in the USA one century ago.

Establishment of the Single Supervisory Mechanism (SSM)  
Regulation of 15 October 2013  
 Start – 4 Nov 2014



# Governance issues, independence and accountability

- The separation between the monetary and the supervisory functions within the ECB is challenging, as the primary law did not envisage a separate decision-making structure for supervision.
  - The ‘non-objection’ procedure gives the Governing Council the upper hand as it can reject (object to) a decision prepared by the Supervisory Board, (Art. 26 (8) SSM Regulation).
- The widening of the ECB’s mandate poses a challenge to the independence of the institution itself, as it is more likely to be subject to external pressure especially when it comes to supervision and the pre-resolution phase.
- The balance between independence and accountability is different in monetary policy, supervision and resolution. It tilts towards independence monetary policy and towards accountability (and liability) in supervision and even more so in resolution (fiscal backstop).

## Expanded CB mandate and legitimacy

- Expanded mandate - CBs have gone beyond their original mandate and widened their scope of action. ECB, Fed, B of E. Interpreting whether a CB abides by its mandate becomes more difficult as the mandate gets fuzzier, broader and more complicated.
  - Bernanke 2009: “The Fed has done, and will continue to do, everything possible within the limits of its authority to assist in restoring our nation to financial stability” while President Draghi proclaimed in 2012 his ‘whatever it takes’ ... within the limits of our mandate...
  - Given its ‘instrumental’ nature, questioning the goal leads also leads to questioning specific central bank policies, taken to achieve such goal/s, e.g., ‘bail-outs’, QE . If the consensus which surrounds the goal crumbles with it the importance of CBI independence
- Legitimacy pre-exists and is a requisite of accountability. There is ‘formal’ legitimacy (in a democracy the creation of an independent central bank must be the fruit of a democratic act: statute, constitutional decision or treaty provision) and there is also ‘societal’ legitimacy, determined by the public acceptance of or loyalty to the system... When societal legitimacy weakens or is no longer present a change in the law is bound to happen.

# Rethinking accountable independence

- The design of accountable independence is a balancing act: Too much independence leads to an undesirable state within the state. Too much accountability threatens the effectiveness of independence.
- **Forms of accountability**
  - Lawyers tend to emphasize the institutional dimension, the placing the CB within the existing system of checks and balances, in relation to the three branches of the state – legislative, executive, judiciary.
    - Input or process – particularly relevant in MP (*ex ante*) – explanatory
    - An accountable CB should be judged for the reasonableness of its actions, by Parliament, the Executive, the competent Courts of Justice and the public.
    - Checks and balances depending on the institutional balance
  - Economists – focus on performance accountability and transparency. Output or outcomes – in supervision (*ex post*, liability) – amendatory. And de facto dimension

# A framework for Fed accountability (Thomas Baxter, Sullivan & Cromwell)

Type of Central Bank Function	Nature of Accountability		
	Legislative	Judicial	Executive
Monetary Policy	Yes	No	No
Banking Supervision	Yes	Yes	No
Payments Systems	Yes	Yes	Depends
Financial Stability	Yes	Yes	Yes

Influence ←————→ Control

# Judicial review of central banks actions and decisions

- Up until the global financial crisis, courts dealt sparsely with central banking actions and decisions. In the USA, there's no mechanism provided by statute or judicial decision to review Fed MP actions in court.
- However, the situation has changed in the last decade on this side of the Atlantic. In the UK, the Northern Rock case led to a lively debate about discretion, financial stability and moral hazard with regard to the LOLR of the Bank of England. SRM Global Master Fund LP v The Commissioners of HM Treasury [2009] EWCA Civ 788
- In the EU, with Pringle & Gauweiler, the role of CJEU in the formation of economic and MP has become the subject of legal and political debate. Before Pringle the only two material ECJ decisions related to EMU were the 2003 OLAF case on the status and independence of the ECB and the 2004 judgment on the Stability and Growth Pact.
- The CJEU 'has developed a fairly consistent standard of judicial review of crisis-related measures (...). It comprises a close scrutiny of the purposes of a mandate or competence, a check whether the instruments deployed serve the mandate, and an analysis whether the effects are proportionate to the objectives' (Goldmann)

# The case for Judicial review

- **Justiciability of MP and distributional justice** - since CB mandate has been stretched (eg. QE) and has arguably become less accountable and transparent, this alters the existing institutional balance.
  - UK and US – no judicial review of MP but in UK judicial review of LOLR
  - EU different approach
  - Distributional justice
  - Understanding the domain of MP.
- Though Parliamentary accountability (ex ante and ex post) remains fundamental, when parliament is dominated by the executive branch of government or when parliamentary accountability is limited we should consider other mechanisms to hold the central bank to account. EU....
- **In Gauweiler (OMT)** - The CJEU exercised judicial restraint by deferring to the discretion of central bankers – expertise.
- When it comes to supervision and resolution in the EU, in the words of Sabino Cassese (ECB Legal Conference 2017) there has been a shift of competence ‘by stealth’ to the administrative. Adequate safeguards... voice....

# Judicial review of the ECB

- The risk of ‘supplanting the Bank’ justifies the ‘degree of caution’ that should characterize the intensity of judicial review. “Judges should not overstep the limits of their competences in order to enforce the limits of other actors’ competences.” However, the deference to the ECB’s ‘broad discretion’ on the basis of the latter’s experience and technical expertise strengthens the case for expertise and adequate preparation of the judges that will assess those complex issues. This happens in other areas of economic regulation. Judicial activism has become the norm in the field of EU competition policy.
- US Supreme Court Justice Stephen Breyer has argued that it is not possible to understand and evaluate what agencies do without having some sense of the regulatory policy as well. The need for specific expertise when it comes to the adjudication of complex financial and monetary matters is a relevant issue not only for the CJEU but also, for example, for the UK Supreme Court. If judicial restraint in monetary matters is advocated on the basis of [limited] technical expertise and qualifications of the judges adjudicating such matters, the counter-argument to not ‘being equipped’ is to actually equip judges.
- Given the specificity and complexity of monetary policy and other central banking functions (and the added difficulty in the EU context of determining whether a measure is of monetary policy – an exclusive competence of the Union – or economic policy) and considering that only the CJEU can judge the ECB (Article 35 ESCB Statute), the need for competence and expertise in the exercise of judicial review could be served by the establishment of a specialised chamber within the CJEU to deal with these issues. Having dedicated specialised judges with expertise in financial and monetary matters when adjudicating cases related to the ECB would enhance the legal framework of ECB accountability in light of the significantly expanded mandate of the ECB.

# Understanding discretion

- Central bank discretion is the freedom to act within a legal framework. Judicial review does not extend to the ‘content of the decision’ (the aim of the Court is not to supplant or replace the decision taken), but it does extend to the parameters and legal framework that surround such decision in order to determine whether or not the central bank mandate has been exceeded.
  - The ‘rules versus discretion’ debate has a long-standing tradition in administrative law. There are procedural elements that determine the legality of an administrative act, e.g. the competence of the entity that issues the act, the procedure to prepare & approve such act, the existence of a public interest. The more difficult issue is the standard of review judges should apply when they conclude that the administrative act they are reviewing is not legal or legitimate and must be changed or substituted.
  - Comprehensive judicial review – the Court besides assessing the legality of the procedure also appraises the facts
  - Limited review – which applies to cases where the acts have been challenges imply either a complex economic assessment, a technical assessment or the exercise of discretion. Control of reasonableness to avoid ‘arbitrary and capricious’ use of power. (Laguna de Paz 2014).

# Discretion in MP and in ELA

- Discretion in the context of MP means that the central bank can choose whichever monetary policy instrument it deems appropriate in the pursuit of the goal; it also means that the central bank can define what a generic goal such as price stability actually means. The content of such discretionary decision is not reviewable.
  - In Gauweiler the CJEU focused on the objectives of monetary policy rather than the effects of the measures under review. Tridimas & Xanthoulis: “The emphasis on the objectives rather than the effects of a measure as the determining factor for deciding whether it falls within MP or economic policy, coupled with a low standard of review, grants the author of the measure enormous discretion” (p.38)
- Discretion in the context of ELA, means that NCBs acting as LOLR in bilateral lending operations (market liquidity assistance via open market operations is the ECB responsibility) can choose to provide assistance or not (at their own risk and liability), but must act in accordance with the Treaty provisions (Article 123 etc), the ECB Emergency liquidity assistance (ELA) procedures and EU state aid rule

# Specialized judges

- While judicial restraint may be justifiable in the presence of other strong mechanisms of accountability, it may be less justifiable when judicial control emerges as the main mechanism of scrutinising the domain of expanded central bank powers. Expertise and competence. **Specialised chamber CJEU?**
- In the EU context, a specialized court could be created to deal with matters related to the ECB according to Article 257 TFEU and Article 62c of the Statute of the Court of Justice of the European Union.
- Monetary policy is an exclusive EU competence in accordance with Article 3(1)(c) TFEU while economic policy is coordinated at the EU level (positive integration in accordance with Article 119 TFEU and negative integration in terms of the prohibitions applicable to Member States of the eurozone) but the competence remains at the national level.
- Specialist courts or internal pilot program in which certain judges would self-specialize, by taking on all of one certain type of technical case.

# Constitutional Courts and the CJEU (citing Chiara Zilioli)

- o The GCC is competent for German Constitutional Law, while The CJEU is competent for EU law. The EU Treaty requires national courts to refer the issues of EU law to the CJEU.
- o **GAUWEILER case** - Action before the German Constitutional Court in Case Gauweiler and others and subsequently the first preliminary reference to the EU Court, C-62/14. On 16 June 2015 the CJEU concluded that the OMT does not exceed the powers of the ECB in relation to monetary policy and does not contravene the prohibition of monetary financing of Member States
  - o Preliminary ruling confirms the main reasoning of the AG in particular as regards the qualification of a measure as falling within the scope of monetary policy if:
    - o The measure pursues a monetary policy objective (singleness of the monetary policy in the euro area; safeguarding an appropriate monetary transmission mechanism);
    - o The measure uses a monetary policy instrument.
  - o It cannot be treated as equivalent to an economic policy measure merely because it is likely to have indirect effects on the realisation of certain economic policy objectives.
- o **WEISS case** - The GCC has referred to the ECJ a request against the QE of the Eurosystem (defendant is the Parliament, accused of not having acted to impede the ECB from adopting these measures. ECB and BBk have been asked several questions as technical experts by the GGC.
  - o Same arguments as in the OMT – (i) ultra vires? (ii) monetary financing? (iii) (hypothetical): if full loss sharing, monetary financing and infringement of constitutional identity?
  - o The GCC has referred only questions relating to the Public Sector Purchase Programme not to other asset purchasing programmes – ABS, covered bonds etc

# ECB and ECJ

- Litigation on the application of EU law by the ECB (as an EU institution) requires a uniform interpretation by one Court, which is the CJEU.
- Supremacy of EU Law.
- It would lead to havoc if ECB actions could be challenged in 19 national courts or in other courts. In line with Article 263 TFEU and with the long-standing case law the CJEU should remain exclusively competent to assess the legality of acts of EU institutions.
- The CJEU stated in Foto-Frost : “Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty”].
- Though the ECB has been taken to national courts in a number of occasions, the ECB has always successfully alleged lack of jurisdiction.
- Relevant Treaty provisions: Article 263 (legality review), Article 288, Article 267 Article 268 and Article 340.
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# Is judicial review the same for MP as BS?

- Article 35 ESCB Statute and the corresponding TFEU provision, namely Art. 271 (d) (*fulfilment of obligations by NCBs*) - give exclusive jurisdiction to the CJEU on **ECB** monetary matters, in line with the exclusive competence the ECB has in the sphere of monetary policy of the eurozone in accordance with Art. 3(1)(c) TFEU.
- In the area of prudential supervision, the interplay between NCBs/NCAs and the ECB in the SSM may make for a division of competences which, in an actual case, may be hard to decipher. See <https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/>.
- In matters related to SSM operations the issue is whom to address for review when an act, ostensibly taken by a *national* authority, was adopted *upon instruction by the ECB*, and which laws to apply: is the ECJ to interpret and apply national law that the ECB has applied by virtue of Article 4.3 SSM Regulation? And: what when the ECB is confronted with national law that is inconsistent with EU law (a manifestly incorrect transposition of a directive) or that is absent (non-implementation of the directive)
- [http://www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712\\_en.pdf?b452bb9c54dca55f8f5673b21631a4fe](http://www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712_en.pdf?b452bb9c54dca55f8f5673b21631a4fe) Lehman on varying standards

# Administrative review and Judicial review (René Smits)

- Those who would like to see an ECB decision in the area of prudential supervision reviewed have 2 tracks to follow:
  - Request administrative review from ABoR and thereafter challenge the resulting second decision by the ECB in court
  - Go to Court Directly, bearing in mind that only the CJUE can judge the ECB.
- Though administrative review may be fast, cheap and independent, it does not amount to judicial scrutiny. ABoR proceedings are part of a second decision making procedure at ECN and the opinion of ABoR will be known to the applicant and to the ECB but not to the outside World

# SSM Cases

- [https://ebi-europa.eu/wp-content/uploads/2017/08/Cases-against-the-ECB-and-preliminary-proceedings-concerning-prudential-supervision\\_public-sources-1-September-2017\\_def.pdf](https://ebi-europa.eu/wp-content/uploads/2017/08/Cases-against-the-ECB-and-preliminary-proceedings-concerning-prudential-supervision_public-sources-1-September-2017_def.pdf)
- **L-Bank case** T-122/15 - Landeskreditbank Baden-Württemberg v ECB (which represents a very different approach from that of FSOC in the USA with the designation of MetLife as SIFI)
  - The ECB was correct in classifying the German State owned bank as a ‘significant entity’. The Court points out that the supervision of institutions classified as ‘less significant’ by the national authorities under the SSM is not the exercise of autonomous competence, but rather a decentralised implementation of an exclusive competence of the ECB.
  - If CJEU confirms this judgement, it would be certainly classified as a landmark decision for the Europeanization of the banking supervisory law. Landeskreditbank Baden-Württemberg Case C-450/17 P  
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=193985&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=803401>
- **Trasta case/s** Six pleas against withdrawal of license from a Latvian bank alleging, inter alia, that the ECB violated Article 24 SSM Regulation in connection with ABoR’s review of an earlier decision, relied on inaccurate documents submitted by the Latvian supervisory authority and violated the principles of proportionality , equal treatment, legitimate expectations and legal certainty, as well as procedural rules relating to the withdrawal of an authorisation (Article 83 SSM Framework Regulation), and violated its independence (recital 19 of the preamble and Article 19 SSM Regulation)

# Administrative review and Judicial review of SRB cases

- Decisions of the SRB may be challenged **before the Appeal Panel of the SRB**
  - The competence of the Appeal Panel is determined by Article 85(3) of the [SRM Regulation](#). Only the decisions of the SRB referred to in Article 10(10), Article 11, Article 12(1), Articles 38 to 41, Article 65(3), Article 71 and Article 90(3) of the SRM Regulation can be the subject of an appeal before the Appeal Panel. If the contested decision is not included in the list of the decisions referred to in Article 85(3) of the SRM Regulation, the appeal will not be admissible.
  - Any natural or legal person, including resolution authorities, may appeal in accordance with Article 85(3) SRM Regulation. See <https://srb.europa.eu/en/node/41>
- Or **before the Court of Justice of the European Union**
  - All decisions of the SRB that are not appealable before the Appeal Panel, pursuant to Article 86(1) SRM Regulation. This includes, for instance, decisions concerning resolution action in respect of a credit institution. Furthermore, decisions taken by the Appeal Panel may be also challenged before the Court of Justice.
  - Member States and the Union institutions, as well as any natural or legal person, when the SRB decision is addressed to that person, or is of direct and individual concern to that person, in accordance with Article 86(2) [SRM Regulation](#) and Article 263 TFEU may appeal

# SRM cases

- Banco Popular

<https://srb.europa.eu/en/content/banco-popular>

- Banca Popolare di Vicenza S.p.A. and Veneto Banca S.p.A.

<https://srb.europa.eu/en/content/banco-popular>

- Adequate guarantees? Voice?

# ELA

- Though ELA operations conducted by NCBs are imputable to the NCB in question, to the extent that the ECB Governing Council/Executive Board give instructions (as part of the non-objection procedure) they are also imputable to the ECB. And only the CJEU can interpret ECB rules related to its exclusive field of competence.
- The fact that a number of ECB Governing Council rules apply to ELA - such as the 2017 ELA Agreement- suggests that only the CJEU can interpret those rules, which are directly related to the **objectives and tasks of the Eurosystem and the nature of the ECB**, including the scope of its independence.
- The non-objection analysis that the Governing Council conducts for every ELA request takes all these issues into account (and others such as compliance with Article 123 TFEU). This is because ELA as a national task according to Article 14.4 of the ESCB Statute is very closely related to the ECB monetary policy operations (Article 14.3 and 18 of the ESCB Statute).

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