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THE NON-CONTRACTUAL LIABILITY OF THE AUTHORITIES COMPOSING THE SINGLE SUPERVISORY MECHANISM

1. **1.The non-Contractual Liability of Supervisory Authorities: an open dispute**

Over the last three decades, especially after the outbreak of the financial crisis in 2007, bank failures in different EU Member States have increasingly led to liability claims being directed against supervisory authorities for alleged negligence or improper conduct in exercising their supervisory tasks over credit institutions. In general, these claims have been introduced by depositors of the failed credit institution who, following the bank failure, have not managed to fully recover their deposits, as the latter are usually only partially covered by deposit guarantee schemes. In this respect, non-contractual liability of supervisory authorities towards third parties may arise following two different directions: (i) towards natural persons, such as institution's depositors, shareholders or bondholders; and (ii) towards legal persons, *i.e.* the credit institutions subject to supervision. Such duality in exercising supervisory tasks will likely confront the supervisory authority with trade-off decisions, to the extent the interests of credit institutions and their creditors do not necessarily converge, especially when a credit institution is in financial distress (on the argument, see M. Tison, *Challenging the Prudential Supervisor: Liability versus (Regulatory) Immunity*, in *Financial Law Institute Working Paper Series*, n. 4, 2003).

In this regard, while the general right to damages for losses arising from civil wrongs is widely acknowledged, liability for faulty supervisory acts or omissions has always been, in many respects, limited in scope. The conceptual underpinnings for such limitation are mostly two. The first reason is represented by the fear that depositors and other creditors of failed credit institutions could use court action as a natural way to seek redress by considering State authorities a "*deep pocket*" to compensate for their losses, in case insolvency procedures and deposit guarantee schemes reveal themselves not to be able to suffice. The second concern is linked to the financial underpinnings of supervisory authorities, or, in clearer terms, to whom that ultimately bears the cost of supervision. Damage awards to depositors shall inevitably drive up the amounts of these fees, so that in the end the cost of liability will be borne by the surviving institutions and their consumers.

Such limitations notwithstanding, the phenomenon of non-contractual liability of supervisory authorities has substantially gained in importance under a diachronic perspective. Indeed, in recent years most banking failures seemed to be followed by liability claims directed against the relevant supervisory authority. Different explanations for the growing "*popularity*" of supervisory liability can be put forward.

First, supervisory accountability checks and balances help to address the democratic deficit concerns arising from the delegation of State prerogatives to unelected supervisory authorities. Secondly, the increasing formalisation of banking legislation, mainly as a consequence of the adoption of European secondary legislation, concurrently diminishes the discretion that banking supervisors traditionally enjoyed in the exercise of their powers. Indeed, until hardly more than three decades ago, micro-prudential supervision of credit institutions mainly rested on vague and general rules, the application of which left a large discretion to supervisory authorities. By contrary, supervisory action is today strongly embedded into formal, often very detailed rules, pertaining to both authorisation requirements and ongoing supervision, so that supervisory decisions became over time more challengeable by the different stakeholders. Furthermore, the European banking legislation stresses the need to provide for adequate legal protection to the supervised intermediaries, allowing them, to a large extent, to challenge authorities' decisions before a court. Lastly, the increased litigation risk run by supervisory authorities should be put in the broader context of the increased assertiveness of financial consumers, who in general experience less burden in taking recourse to court actions.

In light of the policy and regulatory tension between these two poles, the new institutional position of the European Central Bank (hereinafter, the "*ECB*") as banking supervisor raises the question of the extent of its non-contractual liability towards supervised entities or third parties following the adoption or omission of supervisory decisions. In this respect, the issue of whether or not to admit any supervisory liability for the ECB, and in case to what extent, becomes then essential in the design of the new European banking framework.

2. **2.The New Supervisory Powers of the European Central Bank**

Following the implementation of the first pillar of the European Banking Union, *i.e.* the Single Supervisory Mechanism (hereinafter, the "*SSM*"), established by Regulation 1024/2013 (hereinafter, the "*SSMR*"), as implemented by the European Central Bank with the Framework Regulation 468/2014 (hereinafter, the "*SSMFR*"), the task of direct micro-prudential supervision on a consolidated basis over a large part of Eurozone banks (pursuant to Article 2, para 1 SSMR, all EU Member States being part of the third stage of the Economic and Monetary Union are compulsorily included within the scope of the SSM) has been centralised to the ECB. In particular, for the purpose of exercising over credit institutions – as defined by Article 2 SSMR – its new specific supervisory tasks listed under Article 4, para 1 SSMR, the ECB has been entrusted with a new set of supervisory powers (see Articles 9 – 18 SSMR) which are to be exercised by the latter over "*significant*" credit institutions (hereinafter, "*SIs*") according to the allocation criteria of competences set out under Article 6, para 4 SSMR. In particular, a credit institution is deemed to be considered "*significant*" in case: (i) the total value of its assets exceeds EUR 30 billion; (ii) it is one of the three most significant credit institutions of the relevant Eurozone Member State; (iii) it receives financial assistance directly from the EFSF/ESM; (iv) the ratio of its total assets over the GDP of the relevant Member State of establishment exceeds 20%, unless the total value of its assets is below EUR 5 billion; and (v) it has established banking subsidiaries in more than one Eurozone Member State and its cross-border assets or liabilities represent 20% or more of its total assets or liabilities, unless the total value of its assets is below EUR 5 billion.

On the other hand, National Competent Authorities (hereinafter, "*NCAs*") maintain their exclusive competence of micro-prudential supervision over "*less significant*" institutions (hereinafter, "*LSIs*") and their right to exercise over them supervisory powers as provided for under relevant national legislations. However, the carrying out of such task is not unconditioned, as the NCAs are nonetheless bound by the regulations, guidelines and general instructions issued by the ECB, as provided for under Article 6, para 5, lett. a) SSMR.

The only exemptions to such allocation of competences are provided for under Articles 14 and 15 SSMR, which refer, respectively, to the authorisation, and its withdrawal, to set up in business as a banker and to acquire a qualifying holding in another credit institution. Indeed, the final decision to adopt the relevant supervisory decision in such procedures remains with the ECB with reference to every credit institution established within the Eurozone.

3. **3.A qualified regime of supervisory protection for the European Central Bank**

Against this legislative framework, since the SSM does not have legal personality (see R. D'Ambrosio, *Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings*, in *Quaderni di Ricerca Giuridica della Consulenza Legale n. 74*, Banca d'Italia, 2013), any supervisory decision (or omission thereof) taken under the SSMR cannot be ascribed to the SSM itself but needs to be imputed either to the ECB or the relevant NCA, with potential related liability claims in case such supervisory decisions (or omission thereof) on the part of these Authorities are to be challenged as allegedly unlawful.

In this respect, the new institutional position of the ECB as banking supervisor raises the question of the extent of its non-contractual liability towards supervised entities or stakeholders of the failed intermediary. However, the SSMR provides limited guidance on how such liability regime should be shaped. Indeed, Recital No. 61 SSMR sets out that the liability regime of the ECB should be determined in accordance with Article 340, para 3 of the Treaty on the Functioning of the European Union (hereinafter, "*TFEU*"), *i.e.* by examining the common principles of EU Member States relating to the non-contractual liability regimes of their relevant NCAs. In particular, under the common EU liability regime, EU Institutions do not expressly enjoy any legal protection for anything done or omitted in the discharge of their functions.

However, such strict liability standard for the ECB would be hard to reconcile with Principle No. 2 of the 2012 Basel Core Principles for Effective Banking Supervision, which expressly requires a specific rule to be in place on the legal protection for supervisory authorities with respect to non-contractual liability claims of third parties, as also pointed out by the ECB in its opinion of 27 November 2012, where such Institution pleaded for the limitation of its liability in the performance of its supervisory tasks to some form of qualified unlawfulness.

Secondly, the EU common liability regime provided for the ECB would be inconsistent with the less strict liability regime set out under most legislations of EU Member States for their respective NCAs.

Indeed, within the Eurozone, eleven legislations out of nineteen grant some form of qualified protection from non-contractual liability claims to supervisory authorities, whilst only eight leave the liability bar at the common level of simple negligence or no-fault liability. In particular, the banking supervisor enjoys total immunity in Austria and Germany, it may be held responsible only in case of bad faith on its part in Estonia, Ireland and Malta, whilst it is subject to a gross fault/negligence regime in Belgium, Cyprus, France, Italy, Latvia and Luxembourg. Differently, an ordinary fault/negligence regime applies in Finland, The Netherlands, Portugal and Slovenia, whilst in Greece, Lithuania, Slovakia and Spain the banking supervisor is subject to a general a public law illegality regime or no-fault liability (on the argument, see R. Dijkstra, *Liability of Financial Supervisory Authorities in the European Union*, in *Journal of European Tort Law*, vol. 3 n. 3, 2012).

Thirdly, one may also argue that the absence of any non-contractual liability protection for the ECB would be inconsistent with the singleness and unitariness of the SSM. Indeed, following the implementation of the SSMR, the ECB is required to perform, with the only exception of the procedures under Articles 14 and 15 SSMR, identical supervisory tasks over SIs than the ones carried out by the NCAs with respect to LSIs. In this respect, from an SSM-internal consistency perspective, it would appear incoherent if the ECB were to be held, for the same type of wrongful acts or omission thereof, to a stricter liability regime compared to most NCAs.

4. **4.What Liability Regime for the European Central Bank? The Role of the Court of Justice of the European Union**

In light of the above remarks, it is likely to assume that, in the event the non-contractual liability regimes of the ECB and the NCAs would greatly differ, negative consequences in the operation of the SSM might occur. First of all, no limitation of the ECB's liability may induce it to over-rely on the NCAs enjoying a greater degree of legal protection under their respective national legislations, and this, in turn, may *de facto* distort over time the allocation of supervisory powers and responsibilities within the SSM. Secondly, distortions in the allocation of supervisory powers may trigger unintended side effects with regard to other aspects of the SSM architecture, as they may, for example, affect the allocation of accountability obligations towards the EU or national Parliaments, or induce claimants to seek economic redress against the ECB before the CJEU even in the event where the case should have been brought before national competent courts against the relevant NCA.

Against this background, it would be desirable to ensure that the liability standard of the ECB at least mirrors the liability regime of most NCAs. In order to reach this aim, and given the limited provisions of the SSMR, options would range from legislative intervention to reliance on judicial interpretation. However, amending Article 340 TFEU at this stage would probably prove to be politically controversial and legally not effective. Similarly, secondary EU law would not represent, in all likelihood, an appropriate tool to introduce limitations to the ECB's liability. Therefore, it would appear that EU Courtsare at the moment the only appropriate EU Institutions to intervene on such matter and to shape a prospective liability regime for the ECB as supervisory authority. In this regard, pursuant to Article 268, TFEU, supervisory claims relating to compensation for damages attributable to acts, or

omissions thereof, of EU Institutions – such as the claims against the ECB as supervisory authority – expressly fall within the jurisdiction of the CJEU.

In light of the above, in the author's view the CJEU may come to outline a liability regime for the ECB as banking supervisor in line with several civil law jurisdictions and based on the gross negligence criterion (such as under French law and Italian law), overlooking the total immunity regime provided for under German legislation, which would probably prove to be unconstitutional with respect to the TFEU and EU substantial banking law.

Indeed, under French law, case-law of the *Conseil d'Etat* traditionally requires claimants – since the *Sieur Bapst* case of 1963 – to prove *faute lorde* (gross negligence) in liability claims brought against the State for the alleged defective banking supervision of the relevant supervisory authority. In similar terms, Article 24, para 6-*bis* of law No. 262/2005 sets out that the Bank of Italy (as well as its servants and members of the decision-making bodies) are to be held responsible in case their acts or omissions shown to have been in bad faith or gross negligence. By contrary, Article 4, para 4 of the German Law on the Supervision of Financial Services (*Finanzdienstleistungsaufsichtsgesetz*) sets out that "*die Bundesanstalt nimmt ihre Aufgaben und Befugnisse nur im öffentlichen Interesse wahr*". From this provision – at the basis of which underlies the German doctrine of the *Schutznormtheorie* – it follows that supervision of credit institutions in Germany is undertaken in the interest of the public at large, and not to protect individuals

As a last argument to be put forward, a qualified form of legal protection for the ECB as banking supervisor may be inferred also from the general criteria of liability provided for EU Institutions, as interpreted by the CJEU (see, *inter alia*, the *Artegodan* case). In particular, under EU law liability of a EU Institution may be found when all the three following conditions occur: (i) unlawful conduct (action or omission) on the part of the institution – in this respect, the violated provision must be intended to confer rights to individuals and the breach of law must be "*sufficiently serious*"; (ii) damage to the claimant; and (iii) a direct causal link between the breach and the damage sustained by the injured party. In line with such court precedents, in the *Bergaderm* case (para 39-47) the CJEU stated two further important principles: (i) the "*sufficiently serious violation criterion*" applies not only to legislative acts but also to administrative ones; and (ii) the "*sufficiently serious violation criterion*" may be found when the supervisory authority manifestly and gravely disregards the limits of its discretionary power. Against this background, the fact that EU banking law (including the SSMR) protects a multiplicity of interests does have an influence on the assessment of the seriousness of the violation by the banking supervisory authority. In this regard, a supervisory decision of the ECB shall be expected to protect also other interests (*e.g.* stability of the financial system as a whole, integrity of the internal market, anti-money laundering, etc.) than merely the one represented by consumer protection under substantive EU law, as, in principle, any liability regime for banking supervisors should not necessarily be aimed at ensuring, at any costs, the best possible protection for claimants. From the above it follows that the principle of multiplicity of interests protected by the ECB might be invoked as a further argument to provide supervisory authorities with a qualified form of legal protection. This has also been confirmed by the CJEU in the *Peter Paul* case, brought before the European Court following the

ruling of the German Federal Court of Justice (*Bundesgerichtshof*) relating to a claim for compensation lodged by depositors of a bankrupt German credit institution –the BVH Bank – against the German Federal Banking Supervisory Office (*Bundesaufsichtsamt*). Indeed, in its ruling the ECJ confirmed that it would not be against the principles of EU liability law to provide a qualified form of protection from third-party claims to national authorities responsible for supervising credit institutions, as such rules would be based on considerations related to the complexity of banking supervision, in the context of which the authorities are under an obligation to protect a plurality of interests, including more specifically the stability of the financial system (see para 44 of the judgement).

In light of the above, it is the author's view that there is room to conclude that the CJEU would be entitled to find common rules for limiting to some extent the liability of the ECB while performing its supervisory tasks provided for under the SSMR and that such liability regime should be based on the gross negligence criterion.

5. **5.The Shared Liability: National Competent Authorities' Regime**

Final considerations need to assess the symmetrical issue of NCAs' liability regime within the SSM framework (see P. Athanassiou, *Non-contractual liability under the Single Supervisory Mechanism: Key Features and Grey Areas*, in *Journal of International Banking Law and Regulation*, vol. 30 no. 7, 2015). In this respect, NCAs are subject to their respective supervisory liability regimes under national law (as also set out by Recital No. 61 SSMR). It follows that liability for tortious conducts of each NCA would be assessed by the relevant national court. Thus, the main institutional issue with reference to such Authorities is to determine in what cases they might be considered liable according to the allocation criteria of competences (not always crystal-clear) provided for under the SSMR.

As a starting point, it is the author's view that the scope *rationae materiae* of NCAs provided for under the SSMR should be read in conjunction with the principal of conferral of tasks to the ECB under Article 127, para 6 TFEU. In particular, as Article 127, para 6 TFEU is to confer to the ECB only "*specific tasks*", rather than to supplant NCAs, one can conclude that interpretative doubts with reference to SSM's supervisory tasks and powers falling either within the ECB or NCAs' scope should be solved in favour of the latter. In this respect, tasks not expressly conferred to the ECB under the SSMR are vested in the NCAs, unless a given power is so closely linked to the exercise by the ECB of supervisory powers provided for under the SSMR that its implicit attribution to the ECB itself would be crucial to the effective performance of its supervisory tasks under the SSM.

That being said, because of the close cooperation between the ECB and the NCAs, doubts may be raised with regard to the allocation of liability between such Authorities under the SSM. In particular, issues arise where the ECB is vested with powers of instructions *vis-à-vis* NCAs in accordance with Articles 6, para 3, 9, para 1 (3) and 18, para 3 SSMR.

In this respect, the CJEU has clarified (see the *Oleifici Italiani SpA* case*,* para 67) that where national authorities enjoy a certain margin of discretion under EU law, being free to make their own choices in terms of its application (which is the case also in the event of non-binding information, opinions, advice or technical assistance provided by EU Institutions), they bear liability for any unlawful conduct (action

or omission) on their particle To opposite conclusions one is to be led where EU Institutions have the power to impose an obligation or a prohibition to national authorities, leaving them with no choice but to comply. In this event, any unlawful conduct in the implementation of those instructions will be attributed to the relevant EU Institution (see the *Krohn* case, para 18-19).

In light of such CJEU's principles, the allocation of liability relating to supervisory decisions adopted Articles 6, para 3, 9, para 1 (3) and 18, para 3 SSMR shall be addressed. In the first place, Article 6, para 3 SSMR states that the NCAs "*shall follow the instructions given by the ECB when performing the tasks mentioned in Article 4*" SSMR. As Article 4 SSMR enumerates a wide range of supervisory tasks and, in turn, Article 6, para 3 SSMR does not expressly refers to the allocation criteria of competences provided for under Article 6, para 4 SSMR between the ECB and the NCAs, it is not clear whether the scope of the ECB's power of instruction under such provision covers only SIs, LSIs, or, irrespectively of their classification, all Eurozone credit institutions. However, independently from how one may interpret the scope of Article 6, para 3 SSMR, where the ECB would exercise such power of instruction, the ECB itself would be called to bear liability for any unlawful outcome.

In a similar vein, Article 9, para 1 (3) SSMR states that "*to the extent necessary to carry out the tasks conferred on it by this Regulation, the ECB may require, by way of instructions, those national authorities to make use of their powers, under and in accordance with the conditions set out in national law, where this Regulation does not confer such powers on the ECB*". As this particular power of instruction appears to be very broad and to leave very limited margin of discretion to NCAs, NCAs' liability for unlawful conducts should be excluded also in such cases.

To opposite conclusions leads the analysis of Article 18, para 5 SSMR. Indeed, under such Article the prerogatives of the ECB seem to be limited to a general power over the NCAs to request the opening of a sanctioning proceeding, with the NCAs remaining free to choose which action (if any) they deem appropriate to take. It follows that, when the ECB makes use of its power of instruction under Article 18, para 5 SSMR, non-contractual liability would rest with the relevant NCA, on the assumption that such Authority is free to decide what sanctions (if any) are appropriate.

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