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Liability of supervisors within the SSM

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What do we want to demonstrate

- ECB enjoys no limitation of liability
- The SSM Regulation (see Recital 61) maintains the common regime provided for under Article 340 of the TFEU
- This is not justified in the light of both the Basel Core Principles and the national legislations
- Nevertheless a limitation of liability may be alternatively inferred: (i) from the general principles common to the laws of the MS on supervisors liability; (ii) from the CJEU case law and the “sufficiently serious violation” criterion therein
Recital 61 of the SSM Regulation

“In accordance with Article 340 TFEU, the ECB should, in accordance with the general principles common to the laws of the Member States, 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”
Recital 61 SSM Regulation

- Thus the ECB liability follows the same rule laid down in the TFEU for other EU Institutions and in the ESAs Regulations for EBA, ESMA and EIOPA
- Under Article 67 of the EBA Regulation (but the same is true for ESMA and EIOPA) “in the case of non-contractual liability, the Authority shall, in accordance with the general principles common to the laws of the Member States, make good any damages caused by it or by its staff in the performance of their duties”
Recital 61 SSM Regulation

- A part from ESMA responsibilities on CRAs and other few cases where ESAs are vested with specific powers towards institutions, ESAs are basically not vested with direct supervisory powers
- But even where they are vested with supervisory powers ESAs do not enjoy any limitation of liability
- The choice of not limiting ESAs liability may be grounded on the absence of any ESAs’ discretionary power (in accordance with the Meroni doctrine)
The trend towards the limitation of supervisors’ liability

- Differently from the ECB and the ESAs common liability regimes, there is a clear trend towards the limitation of supervisors’ liability within the participating MS legal frameworks.
- These limitations (i) are acceptable in order to preserve the supervisors margin of appreciation and (ii) are in line with the Basel Core Principles on Effective Banking Supervision.
Pros and cons of limitations of liability

Arguments in favour of supervisors liability

- To keep supervisors accountable for their acts and omissions and to give them incentives to act in the public interest
- Equal treatment towards the officers and directors of private companies
- Rule of law: it is difficult to accept that individuals can be denied the right to receive compensation for their financial losses from those who are deemed to have caused them through wrongful acts
Pros and cons of limitations of liability

Arguments against supervisors liability

- Inhibition argument: the threat of liability can inhibit supervisors from freely exercise their discretionary powers/supervisory authorities should enjoy the necessary margin of manoeuvre for the effective performance of their statutory duties
- Legal protection of supervisors also preserves their independence
- Difficult to accept that courts should be allowed to substitute their judgment to the one of supervisors
Pros and cons of limitations of liability

Arguments against supervisors liability

- Existence of deposit/investors guarantee schemes
- It is unfair to allow claims against the secondary ‘responsible’ (supervisors) only because they have deeper pockets
- Floodgates argument (risk to opening floodgates to litigation)
- More far-reaching reputational impact for central banks
Pros and cons of limitations of liability

Conclusions
- A certain measure of liability would be defensible to preserve public confidence in the accountability of supervisors
- A certain measure of protection from liability would be acceptable to preserve the supervisors margin of appreciation
- In the light of the above: (i) Basel Core Principles suggest a certain level of legal protection for supervisors; (ii) MS legislations provides for (though to different extent) limitations of liability for supervisors
The Basel principle n. 2

- Basel Core Principle n. 2 “Independence, accountability, resourcing and legal protection for supervisors” – The legal framework for banking supervision includes legal protection for the supervisor.

- Essential criterion n. 9 – Laws provide protection to the supervisor and its staff against lawsuits for actions taken and/or omissions made while discharging their duties in good faith. The supervisor and its staff are adequately protected against the costs of defending their actions and/or omissions made while discharging their duties in good faith.
Liability regimes of supervisors across EU countries

- There is a clear trend towards the limitation of supervisors liability within EU countries.
- In Germany supervisor enjoys a complete immunity towards investors but not towards subjects that are directly affected by an unlawful administrative act as banks and other financial intermediaries.
- In the UK and Ireland supervisor is responsible only for bad faith.
- In France and Italy liability is confined to gross negligence (the same is true in Belgium, Luxembourg and Netherlands).
- Only in Austria the supervisor is liable for simple negligence too.
The immunity of financial supervisor in Germany

- In the German literature supervision of financial institution was traditionally undertaken in the interest of the public at large and not to protect individuals.

- *Shutznormtheorie*: idea that liability is to be denied where a particular claimant is not among those whom a specific legal rule is intended to protect or when the legal rule is intended to protect the interest of the public at large rather than those of any private individual.
The immunity of financial supervisor in Germany

- Depositors/investors could not have any tort claims against supervisors
- This doctrine was premised upon a decision of the German Supreme Court in a case concerning the supervision of insurance companies
- In two decisions from 1979 (cases *Wetterstein* and *Herstatt*) concerning the supervision of banks the Court departed from this doctrine. According to these Court rulings individual bank creditors and depositors represented a protected interest: banking supervision was undertaken also in the interest of individuals
The immunity of financial supervisor in Germany

- In response to this case law, the 1984 Legislation on credit institutions (amended in 1988) stated that banking supervision had to be undertaken in the public interest only and therefore intended to exclude claims from individuals.
- The German legislation of 2002 confirmed this view. Paragraph 4 (4) of 2002 Law on the Federal Institution for the Supervision of Financial Services corresponds to the provision of the 1984 Law as amended in 1988. Moreover the above mentioned provision of 2002 Law applied not only to the supervision on banks but also to the supervision of other financial institutions.
The limitation of liability of supervisors to bad faith in the UK and in IE

- In the UK and in Ireland liability of financial supervisors is confined to bad faith.
- The statutory immunity from damages liability was introduced in the UK under the 1987 Banking Act and was than confirmed by the 2000 Financial Services and Market Act.
- A similar provision is to be found in the Financial Services Bill of 2012 which charges the Prudential Regulator Authority, a subsidiary of the BoE, with prudential tasks instead of FSA.
The limitation of liability of supervisors to bad faith in the UK and in IE

- Regardless of the statutory provisions, regulators have traditionally been well protected by the common law
- In the absence of a specific rule, case law excludes any duty of care upon supervisors on the basis of the following arguments: no proximity/supervision is in the public interest only (Yuen Ku Yeu v. Attorney General of Hong Kong, 1987; Cooper v. Hobart, 2001); need of granting discretionary powers (United States v. Gaubert, 1991); need of impeding the opening of flood of claims (Davis and other v. Radcliffe, 1990)
The limitation of liability of supervisors to bad faith in the UK and in IE

- As the immunity provided for by the 2000 Financial Services and Market Act (now by the Financial Services Bill of 2012) is not applicable to acts taken in bad faith, claims against the supervisory authority are based on the wilful tort of misfeasance in public office, which is the only traditional public law tort in English law.

- Besides the remedies under community law, the claims against the Bank of England were based in the BCCI case on the above mentioned tort of misfeasance in public office.
The limitation of liability of supervisors to bad faith in the UK and in IE

- The tort consists on the exercise of power by a public officer in bad faith which causes loss to the claimant
- But what is bad faith?
- Mental requirement of bad faith (the new stance of the House of Lords in the BCCI case)
The limitation of liability of supervisors to bad faith in the UK and in IE

- The mental requirement of the tort breaks down in two forms
- The most stringent form of the tort is the targeted malice. It requires the proof that the public officer has acted with the intention of injuring the claimant
- The other form is the untargeted malice and it occurs when the public officer acts in the knowledge that he exceeds his powers and that in doing so he would probably injure the claimant
The limitation of liability of supervisors to bad faith in the UK and in IE

- The focus of the BCCI case was upon the second form (untargeted malice) of the mental requirement of the tort of misfeasance in public office.
- The debate in the Court concerned two questions: (a) the first one pertains to the public officer’s knowledge of the unlawfulness of his act; (b) the second one concerns the awareness of the consequences of that unlawful act.
The limitation of liability of supervisors to bad faith in the UK and in IE

The Court ruled the case in the following way:

- (a) on the knowledge of the illegality, the claimant must show that the officer acted with a state of mind of reckless indifference to the illegality;
- (b) on the awareness of consequences, the claimant must show that the public officer act with a state of mind of recklessness about the consequences of his act in the sense of not caring whether these consequences happen or not
The limitation of liability of supervisors to bad faith in the UK and in IE

- The BCCI case represented a perceptible shift towards a more liberal approach to actions brought by investors on the basis of the tort of misfeasance in public office traditionally confined to targeted malice.
- The new approach of the House of Lords may reduce the differences in the protection offered to investors between English law and the laws of other Member States limiting the liability of supervisory authorities to the gross negligence.
The limitation of liability to gross negligence in France

- Due to the complex and sensitive nature of financial supervision, case law of French Conseil d’Etat traditionally required claimants (since 1963, *Sieur Baptst* case) to show faute lourde (gross negligence) in liability actions raised against public bodies responsible for financial supervision.
The limitation of liability to gross negligence in France

- Not avoiding the crisis of a financial intermediary coupled with the knowledge of the crisis’s signals should met the *faute lourde* liability standards (see *Sieur D’André* case of 1964, in which liability of the Commission Bancaire was nonetheless excluded as signals didn’t show that a crisis was approaching)

- The standard of liability applied by the Courts was particularly high, and, until the *Kechichian* case of 2001, only one claim had ever satisfied the *faute lourde* requirement (*Achard* case of 1964)
The limitation of liability to gross negligence in France

- This restrictive approach was abandoned by the Court Administrative d’Appel de Paris in the Kechichian case; the Court decided that the standard of *faute simple* (negligence) applied to the supervisory role of the Commission Bancaire.
- The ruling of the *Cour Administrative d’Appel* was overturned by the Conseil d’Etat who confirmed the *faute lourde* approach.
- The protective role of *faute lourde* in the area of financial supervision was therefore still deemed necessary in order to provide a “margin of manoeuvre” for the public body charged with supervisory powers, even though the Conseil d’Etat recognised the liability of the State for the unlawful conduct of the Commission Bancaire.
The limitation of liability to gross negligence in Italy

- Article 24, paragraph 6-bis, of the Italian Law n. 262 of 2005 stipulated that supervisory authorities and their staff are responsible only if their acts or omissions are shown to have been in bad faith or gross negligence.

- The new Italian regime of supervisors responsibility replaced the previous one based on the general tort law standard of negligence (Article 2043 of the Italian Civil Code).
The limitation of liability to gross negligence in Italy

- The Italian Court of Cassation case law is still dealing with claims against supervisory authorities raised before the entry into force of the Law n. 262 of 2005
- Not surprisingly, they show no gross negligence criterion in the assessment of supervisors’ liability
The limitation of liability to gross negligence in Italy

- Corte di Cassazione (judgment n. 3132 of 2001) decided that the Italian Commission on the Stock Exchange (Consob) had to be held liable as it didn’t use its powers despite the fact that they were necessary in order to protect interests safeguarded by the law (Articles 18 and ff. of the law n. 216 of 1974) and that the need of using these powers clearly emerged from the wording of the prospectus submitted to the Consob approval.

- This principle would have easily met the gross negligence requirement under the French Conseil d’État case law.
A common criterion based on MS legislations?

- Since there is a trend within EU countries requiring the limitation of supervisors’ liability, a question arises as to whether one may infer from national legal frameworks a common criterion for assessing the ECB liability.

  - The House of Lords broad interpretation of the misfeasance in public office tort nears the gross negligence criterion as (restrictively) applied in the French Conseil d’Etat case law and the present stance of the Italian Corte di Cassazione.
The sufficiently serious violation criterion

Liability under the EU law occurs when the following conditions are satisfied:

- a) the breach must be sufficiently serious;
- b) the rule of law that was breached must be intended to confer rights to individuals;
- c) there must be a direct causal link between the breach and the damage sustained by the injured party.
The sufficiently serious violation criterion

- The sufficiently serious violation criterion also applies to the administrative acts of EU institutions (see ECJ, C–352/98, Laboratoires Pharmaceutiques Bergaderm SA)
- A sufficiently serious violation occurs when the supervisors manifestly and gravely disregards the limits of its discretionary powers
- Against this background the circumstance that rules embodied in the EU banking law (or at least in the SSM Regulation) protect a multiplicity of interests could have an influence on the assessment of the seriousness of the violation
The sufficiently serious violation criterion

- ECB carries out the tasks conferred upon it with a view of ensuring the safety and soundness of banks, the stability of financial system and the unity and integrity of internal market, thereby ensuring the depositors protection and improving the functioning of the market (recital 30)
- ECB cooperates with NCAs to ensure an high level of consumer protection and the fight against money laundering (recital 29)
- The multiplicity of interests protected by the ECB according the SSM Regulation justifies the application of the sufficiently serious rule
Whether limitations of supervisor liability are compatible with EU legislation

- The ECJ stated (*Peter Paul* case) that limitation of supervisors liability in German law was compatible with EU legislation as it deemed that banking directives did not contain any express rule granting rights to depositors.
- The same view was shared by the House of Lords in the BCCI case (limitation of liability to bad faith).
Whether limitations of supervisor liability are compatible with EU legislation

- Supervisory powers that directives impose on the national authorities vis-à-vis the credit institutions are aimed at ensuring the sound and prudent management of the banks.
- Even though the ultimate objectives of directives include the protection of the depositors, it does not necessarily follow that directives seek to confer rights on depositors in the event that their deposits are unavailable as a result of a defective supervision.
Whether limitations of supervisor liability are compatible with EU legislation

- Decisions of the House of Lords and the ECJ were criticised in literature, on the ground that it would be difficult to maintain that banking directives were not intended to confer rights to depositors.

- Literature noted that the preamble of the Coordinated Banking Directive (Dir. 2000/12/EU, now Directive 2013/36), unifying the directives mentioned in the Peter Paul judgement, identified the protection of depositors as a major rationale of subjecting banks to authorisation and prudential supervision.
Whether limitations of supervisor liability are compatible with EU legislation

- Moreover, even though the case law of ECJ have shown not a settled stance in terms of depositors protection some judgements outlined the importance of banking authorisation and prudential rules in terms of protection of depositors and consumers: *Panagis Pafitis* (C-441/93, § 49), *Parodi* (C–222/95, § 22), *Romanelli* (C–366/97, § 12)

- Protection of depositors is also referred to in the ESAs regulations (see Article 8.1, lit. h, EBA regulation) and in the SSM Regulation (see recital 30)
Whether limitations of supervisor liability are compatible with Article 6 of ECHR

- Under Article 6 ECHR “in the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”

- ECtHR states that Article 6 “secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal” and that it “embodies the right to a court, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only” (Golder v. UK, § 36)
Whether limitations of supervisor liability are compatible with Article 6 of ECHR

- Nevertheless, Article 6 of the ECHR cannot be used to create civil rights which do not exist under the substantive law of the state concerned.
- Even though this was not crystal clear under some decisions of the ECtHR (see Osman v. United Kingdom), the Court now firmly adheres to the position that Article 6 only applies to procedural rules (see Z v. United Kingdom).
- The supervisors’ immunity cannot be considered a procedural rule.
- Immunities/limitations of supervisors liability are therefore compatible with Article 6 of the ECHR.
Compatiblity of an ECB limitation of liability with EU banking law and the Charter

- Limitation of ECB liability to bad faith/gross negligence or to the sufficiently serious breaches seems to be compatible with EU banking law
- The problem of the full immunity
- Full immunity and limitations of liability seems also to be compatible with Article 47 of the Charter of fundamental rights of the EU (which mimics Article 6 of the ECHR) since it is not a substantial rule (it cannot create a new right)
When supervisors liability may arise

- Illicit banking activity
- The granting or refusal of authorisation
- On-going prudential supervision
When supervisors liability may arise

Illicit banking activity

- Liability arises where supervisory authorities are vested with power of tracking the possible illicit taking-up of banking activity by non-authorised firms
- Cases: (i) compulsory administrative liquidation of non-authorised banks (Italy, France); (ii) application of sanctions and measures in case of the carrying out of banking business without being authorised (Article 66 of the CRD IV)
When supervisors liability may arise

The granting or refusal of authorisation

- The decision is not discretionary
- Courts are reluctant to admit liability of supervisors in such cases (French Conseil d’Etat, *de Waligorski*)
- The peculiar case of Italian Corte di Cassazione n. 6688/2011, *SFA Commissionaria s.r.l.* (solicitation of public savings subject to Consob authorisation after the entry into force of Law n. 1/1991)
When supervisors liability may arise

On-going prudential supervision

- The supervisory authority enjoys a large degree of discretion
- The mere fact that the Authority does not react to the problems discovered within a financial institution does not, in itself, lead to liability
When supervisors liability may arise

On-going prudential supervision: liability may occur when the supervisor

(i) failed to take any action notwithstanding the knowledge of serious difficulties within the institution (French Conseil d’État, Sieur D’André)

(ii) took inadequate measures (gave an ultimate warning only, without further action, despite the existence of serious irregularities, French Conseil d’État, Achard)

(iii) was not consistent in its action (first ordered an institution to recapitalise, then softened its request, French Conseil d’État, Kechichian)
ECB/NCAs liability

- ECB liability is without prejudice to the NCAs liability in accordance with their national legislation (Recital 61 SSMR)
- Allocation of liability to ECB/NCAs follows the allocation of supervisory powers
- But there are exceptions
ECB/NCAs liability (illicit banking activity)

- Under the SSM Regulation NCAs are competent to apply sanctions in case of the carrying out of banking business without being authorised
- But only ECB is competent to withdraw the banking licence
ECB/NCAs liability (banking licence)

- In case of non compliance with the requirements provided for in EU and national law, NCAs shall reject the authorization (only NCAs liable)
- In the other cases ECB is competent for licensing upon a NCA proposal (both ECB/NCAs may be liable)
- ECB is competent to withdraw the authorization on its own initiative (only ECB liable) or upon an NCA proposal in the latter case taking full account of the justification of the NCA (both ECB/NCAs may be liable)
ECB/NCAs liability (on-going prudential supervision)

- Allocation of liability is basically consistent with the allocation of supervisory powers (significant/less significant credit institutions)
- But where ECB is empowered to give mandatory instructions to NCAs, there ECB and not NCA is responsible (CJEU, *Krone*)
- Compliance with ECB instructions will not trigger an ECB liability where NCAs enjoy a certain margin of manoeuvre
ECB/NCAs liability (on-going prudential supervision)

- Under Article 6(3) SSMR NCAs assist ECB for the preparation and implementation of its acts; no NCAs discretion
- Under Article 18(5) SSMR ECB may only require NCA to open proceeding for the application of sanctions; NCAs discretion
- Under Article 9(1), third sub-paragraph, SSMR ECB is empowered to require NCAs, by way of instructions, to make use of their powers under pure national law; unclear whether and to what extent NCAs enjoy a margin of manoeuvre
Liability for damages caused by servants and persons acting on behalf of ECB

- ECB liable for damages caused not only by its staff but also by persons other than ECB staff when acting on behalf of the ECB (see ECJ, case C-201/89, Le Pen and le Front national v. Puhl and others, § 14)
- Against this background ECB should be responsabile for damages caused by (i) the GC and SB members; (ii) all the JSTs members to the extent that their acts are the necessary extention of an ECB task (see ECJ, case C-9/69, Sayag v. Leduc)
Liability for damages caused by servants and persons acting on behalf of ECB

- Under the Protocol on privileges and immunities of the EU, member of organs and staff of the ECB enjoy immunity from legal proceedings in the territory of EU MS for all acts performed in their official capacity.
- Staff and members of organs of ECB may nonetheless be liable for damages caused to the ECB.
- Staff liability is limited to gross negligence and wilful misconduct (Conditions of employment for staff of the ECB, I.6).