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Liabilities of Banking Supervisors and Central Banks

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Outlook

- ▶ Expansion of Central Banks' mandates to bank supervision and bank resolution
- ▶ Potential conflict among different mandates
- ▶ Implications of the multiplicity of mandates on Central Banks' organisation
- ▶ Implications of the multiplicity of mandates on Central Banks liability
- ▶ Additional problems at the EU level



Expansion of Central Banks' mandates

- ▶ The expansion of Central Banks' mandate to banking supervision
- ▶ The financial stability as *trait d'union* between Central Bank's mandate and Supervisor's mandate (see Article 127(5) TFEU and recital 13 SSMR)
- ▶ The macro-prudential mandate of Central Banks and the aim of ensuring the overall stability of the financial system
- ▶ The micro-prudential mandate of Central Banks and the aim of ensuring both the stability of banks and the overall stability of the financial system



Expansion of Central Banks' mandate

- ▶ Central Banks' /supervision authorities' tasks in the field of banks resolution
- ▶ The direct assumption of banks resolution tasks
- ▶ Central Banks' /supervision authorities' «indirect» involvement in the field of banks resolution
 - Early intervention measures
 - Power to assess whether a credit institution is failing or likely to fail
 - Other supervisory powers potentially impinging on banks resolution (structural measures)



Potential conflict among different mandates

- ▶ Potential conflicts between monetary policy and banking supervision
- ▶ Monetary policy operations may have an impact on banks' operating framework and activities (lending, investment, etc.)
- ▶ Central Banks in charge of supervision could lend to weak banks for fear that winding them up would trigger losses for Central Banks
- ▶ Central Banks could eventually relax their monetary policy, generating an inflationary bias, so contributing to more risk-taking by banks and breeding future financial instability

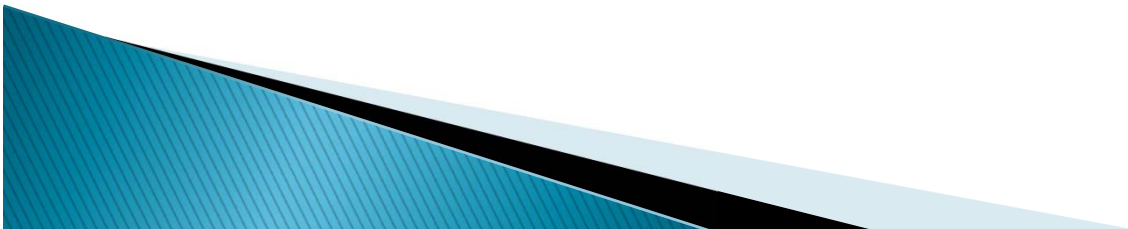


Potential conflict among different mandates

- ▶ Potential conflict between Central Bank's mandate and banks resolution
- ▶ Bail-in may have an impact on financial stability (via contagion risk)
- ▶ But under Article 44(2) BRRD, Resolution authorities shall not exercise conversion powers in relation to liabilities with a remaining maturity of less than seven days
- ▶ Key Attribute 5.1: in order to contain potential systemic impact, no loss should be imposed on senior debt-holders until subordinated debts have been written-off entirely

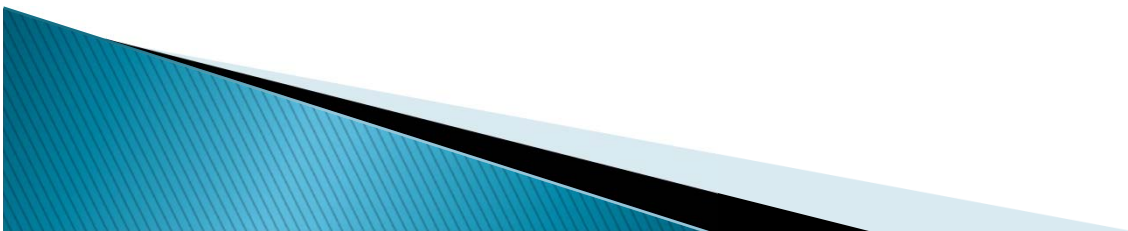
Potential conflict among different mandates

- ▶ Risk of forbearance of supervisory authority?
- ▶ The SRM Regulation approach: both the ECB and the resolution Board have the power to assess whether a bank is failing or likely to fail (recital 26 and Article 18 SRM Regulation)
- ▶ Resolution plans and structural measures



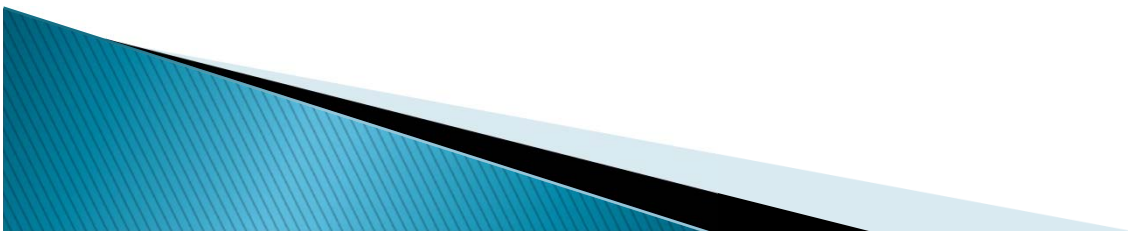
Implications of the multiplicity of mandates on Central Banks' organisation

- ▶ The principle of separation between monetary policy and supervision of banks
- ▶ Recital 65 and Article 25 of the SSMR
- ▶ Side-effects of the principle of separation on the ECB's organisation and decision making process in the field of supervision
- ▶ Is separation achievable? The wording of Article 26(8) SSMR and the monetary policy concerns



Implications of the multiplicity of mandates on Central Banks' organisation

- ▶ The separation between monetary policy/banking supervision/banking resolution (Article 3 of the BRRD)
- ▶ MSs may exceptionally provide for the resolution authority to be also a supervision authority
- ▶ To ensure operational independence and avoid conflicts of interest, MSs shall ensure that, within competent authorities, national Central Banks, etc. there is operational independence between all (resolution, supervision and any other) functions carried on.



Implications of the multiplicity of mandates on Central Banks' organisation

- ▶ The separation of resolution functions basically does not imply a separate decision making entity (Article 25 SSMR, Article 3 BRRD)
- ▶ Thus decisions are imputed to the same central bank/supervision and/or resolution authority
- ▶ Different choice under the SRMR (though there are still overlaps of competences, there is a clear distinction between supervision and resolution authority)

Implications of the multiplicity of mandates on Central Banks' organisation

- ▶ Which allocation of powers would be preferable?
- ▶ Different authorities vested with different mandates (risk of inaction)
- ▶ A single authority vested with different mandates (risk of conflict of interests; need to balance different interests)

Implications of the multiplicity of mandates on Central Banks' liability

- ▶ The multiplicity of interests to be balanced
- ▶ Price stability (Articles 127 TFUE and 2 ESCB/ECB Statute), overall stability and efficiency of financial system, sound and prudent management of banks/other financial institutions, depositors and investors protection (Recital 30, Article 1 SSMR), resolution objectives (Article 31 BRRD), including avoiding a significant adverse effect on the financial system by preventing contagion

Implications of the multiplicity of mandates on Central Banks' liability

- ▶ Consequences on the assessment of Central Banks'/supervision/resolution authorities' liability
- ▶ Since NCBs/NCAs/NRAs are called to balance a multiplicity of public interests, their margin of manoeuvre needs to be preserved and the complexity of their choices needs to be considered



Implications of the multiplicity of mandates on Central Banks' liability

- ▶ National courts consider monetary policy decisions as fundamentally not justiciable
- ▶ See Italian Supreme Court SS.UU. No 1675/2006 on seigniorage
 - “the citizen’s claim to obtain a proportional share of the monetary seigniorage falls outside the scope of the jurisdiction of both the ordinary and the administrative courts, since they are not competent to pass judgment on how the State carries out its sovereign functions, which undoubtedly include those concerned with monetary policy”
- ▶ See also United States’ Court of Appeals Eighth Circuit’s, case *Horne v. Federal Reserve Bank of Minneapolis* 344 F. 2d 725, 1965

Implications of the multiplicity of mandates on Central Banks' liability

- ▶ In line with Basel Core Principle No. 2, several legislations limit the liability of supervisors
- ▶ An overview
 - The German-based liability regimes and the immunity of supervisors vis-à-vis depositors and investors
 - The English-based liability regimes and the limitation of liability to bad faith
 - The French-based liability regimes and the limitation of liability to gross negligence

Implications of the multiplicity of mandates on Central Banks' liability

- ▶ Moreover, irrespective of a specific rule limiting their liability, national courts are inclined to protect the supervisors' margin of manoeuvre (*Yuen Ku Yeu v. Attorney General of Hong Kong, Davis and other v. Radcliffe, United Stages v. Gaubert*)
- ▶ Other hurdles:
 - nature of the damages (pure economic loss)
 - liability for omission/deliberate action of third parties
 - liability for exercise of judicial/quasi judicial functions
 - principle of the protective purpose of the norm/proximity

Implications of the multiplicity of mandates on Central Banks' liability

- ▶ In order to avoid moral hazard, banks become insolvent should be allowed to exit the market; nevertheless, this exit may undermine public confidence in the stability of the financial system
- ▶ Depending on the circumstances/stakeholders, any authority behaviour may be basically challenged for intervention that is too early or too late
- ▶ Need to preserve the authorities' margin of appreciation (ECtHR, *Dennis Grainger and others v. UK*, §§ 34 ff.).

Implications of the multiplicity of mandates on Central Banks' liability

- ▶ Key Attribute No 2.6 requires a legal protection for the resolution authority
- ▶ Under Article 3.12 BRRD, Member States may limit the liability of resolution authority, competent authority and their respective staff, in accordance with national law, for acts/omissions in the course of discharging their functions under the Directive

Additional problems at the EU level

- ▶ EU legislation does not award any limitation of liability to the ECB (Article 340 TFUE, recital 61 SSMR) and the Resolution Board (Article 87(3) SRMR)
- ▶ Nevertheless, the ECJ applies the “sufficiently serious violation” principle where the authority manifestly and gravely disregards the limits of its discretion (case *Bergardem*)
- ▶ Under the CFI case law, a duty of care may be excluded due to the complexity of questions involved and time constraints (case *Comafrica*)

Additional problems at the EU level

- ▶ Within the SSM, monetary policy and supervisory mandates are concentrated on the ECB (accumulation of functions/liabilities)
- ▶ Irrespective of the justiciability of monetary policy decision, Bergarden/Comafrika rules apply
- ▶ Supervision and resolution mandates imputed to two different authorities: the ECB and SRB (basically no accumulation of functions/liabilities)
- ▶ As the Resolution Board enjoys no margin of manoeuvre there are doubts on the application of the Bergarden rule

Additional problems at the EU level

- ▶ Twofold involvement of the ECB in macro-prudential tasks: in its role as Secretariat of the ESRB; as macro-prudential authority under Article 5 SSMR
- ▶ Risk of accumulation of EU and ECB responsibilities/liabilities (ESRB has no legal personality)

Additional problems at the EU level

- ▶ The ECB and NCAs micro-prudential mandates within the SSM and the allocation of responsibilities/liabilities
 - Allocation of liability mimics allocation of responsibilities
 - Misalignment between EBC tasks and NCAs powers
 - ECB power to give instruction to NCAs and the Krohn rule
- ▶ The Resolution Board and NRAs resolution mandates and the allocation of responsibilities/liabilities
 - Article 87(4) SRMR