

***Legal aspects of non-euro area EU
Member States joining the SSM***

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Summary

1. Close cooperation mechanism
2. NCA liability following implementation of ECB instructions
3. NCA liability for failure to implement ECB instructions
4. NCA disagreement with an objection of the Governing Council to a draft decision of the Supervisory Board

1. Close cooperation mechanism

The ECB does not have directly applicable powers over supervised entities established in the Member State in close cooperation.

Where the ECB considers that a measure should be adopted by the NCA in relation to a credit institution, it shall address instructions to that NCA.

The NCA shall take all the necessary measures to apply ECB instructions
(art.7 SSM Regulation)

1.Close cooperation mechanism (cont.)

ECB legal acts are not applicable in non-euro member states

Art.139 TFEU

Member States in respect of which the Council has not decided that they fulfill the necessary conditions for the adoption of the euro shall hereinafter be referred to as '**Member States with a derogation**'.

The following provisions of the Treaties shall not apply to Member States with a derogation:

(e) acts of the European Central Bank.

2.NCA liability following implementation of ECB instructions

Question:

NCA is brought before the national courts – as the author of the supervisory decision

NCA obliged to pay damages to credit institution

NCA has a right of recourse against ECB?

2.NCA liability following implementation of ECB instructions

Similar situations

NCBs from the euro area

The national central banks shall act in accordance with the guidelines and instructions of the ECB.

(art. 14.3 Statute of ESCB)

*An NCB could be brought before the national courts in case of liability in its performance of an activity in the context of the ESCB. However, the NCB may have acted on instructions of the ECB. **NCBs may point to the ECB when held liable for actions done or omitted to be done on instructions of the latter***

(Rene Smits, *European Central Bank: Institutional Aspects*, 1997)

2.NCA liability following implementation of ECB instructions

Similar situations

Krohn vs. Commission (case 175/84)

The Commission exercised the power conferred upon it (...) to give instructions to the national authorities and must be regarded as the true author of the decision from which the damage resulted.

Where the decision was adopted by a national body, it is necessary to determine whether the unlawful conduct is in fact the responsibility of a Community institution and cannot be attributed to the national body.

The unlawful conduct is to be attributed not to the national body, which was bound to comply with the Commission's instructions, but to the Commission itself.

2.NCA liability following implementation of ECB instructions

Similar situations

Dethlefs vs. Commission (case T-112/95)

Since the damage allegedly suffered by the applicants is a result of the application of an EU Regulation by the national authorities, it can only be attributed to the latter, if they were acting on their own initiative and responsibility, **or to the Commission, if it issued unlawful instructions to them.**

3.NCA liability for failure to implement ECB instructions

Draft ECB Framework Regulation:

The NCA in close cooperation shall be liable for any damage resulting from its failure to apply any ECB measure, instruction, request or guideline, in a timely manner (art. 108 (6)).

Not maintained in the adopted ECB Framework Regulation

4. NCA disagreement with an objection of the Governing Council to a draft decision of the Supervisory Board

- The ECB shall inform an NCA of any objection of the Governing Council
 - If the **NCA disagrees** it shall notify the ECB within **5 working days**
 - The Governing Council shall give its written opinion within 30 days
 - If the Governing Council confirms its objection, **the NCA may, within 5 days** notify the ECB that it will not be bound by any decision taken following amendment of the initial complete draft decision to which the Governing Council objects.
- The ECB shall then consider **suspending or terminating the close cooperation**

Thank you very much for your attention!

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