



ECB – The New Regulator **SSM - The Lawyers' View**

Dr. Mathias Hanten, M.B.L. – HSG (St. Gallen)
Partner | DLA Piper UK LLP, Frankfurt am Main

Institute for Law and Finance, Goethe University Frankfurt

ECB – The New Regulator

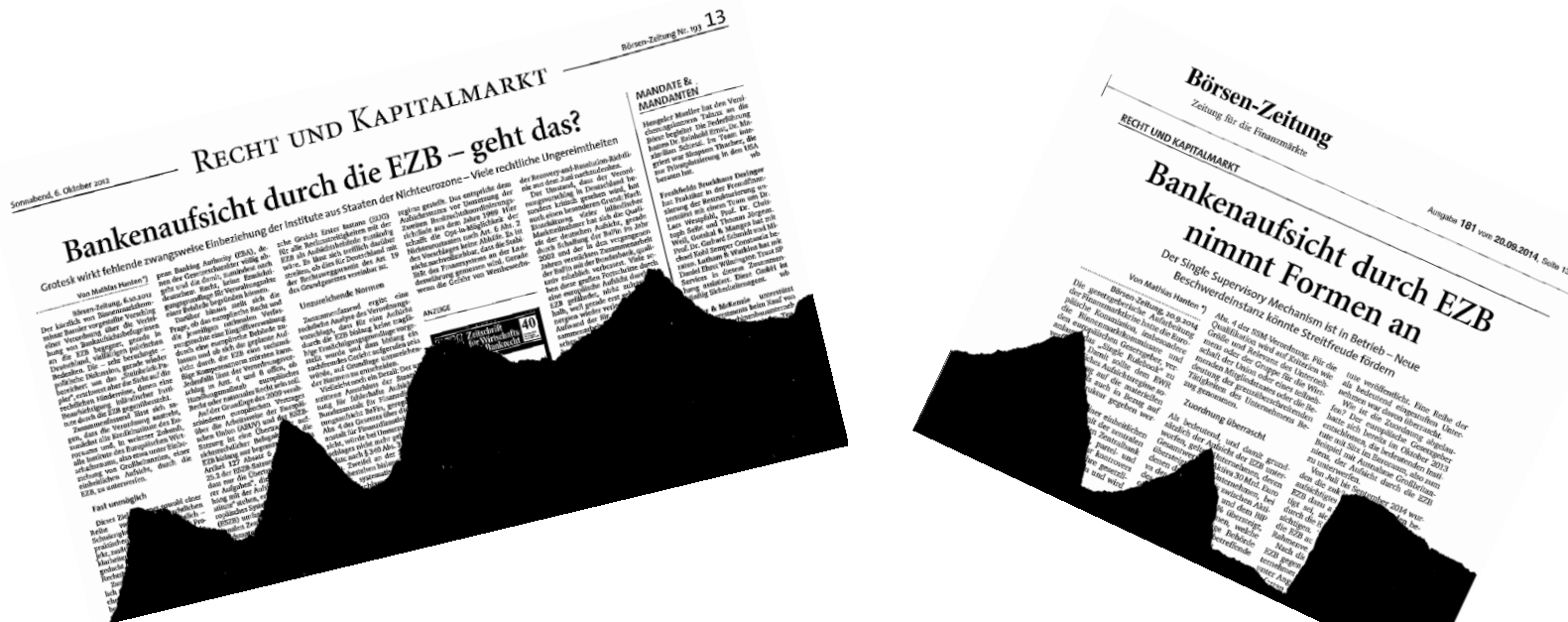
21. October 2014

- What are the Lawyers' roles r/ SSM?
 - Before SSM
 - Currently
 - In the Future
 - Open Questions
 - Some Psychology

■ What are the Lawyers' roles r/ SSM?

■ Before SSM

- Participating in the discussion
- Taking the clients' interest in the law making procedure vs. lobbying
- What were our standpoints ?

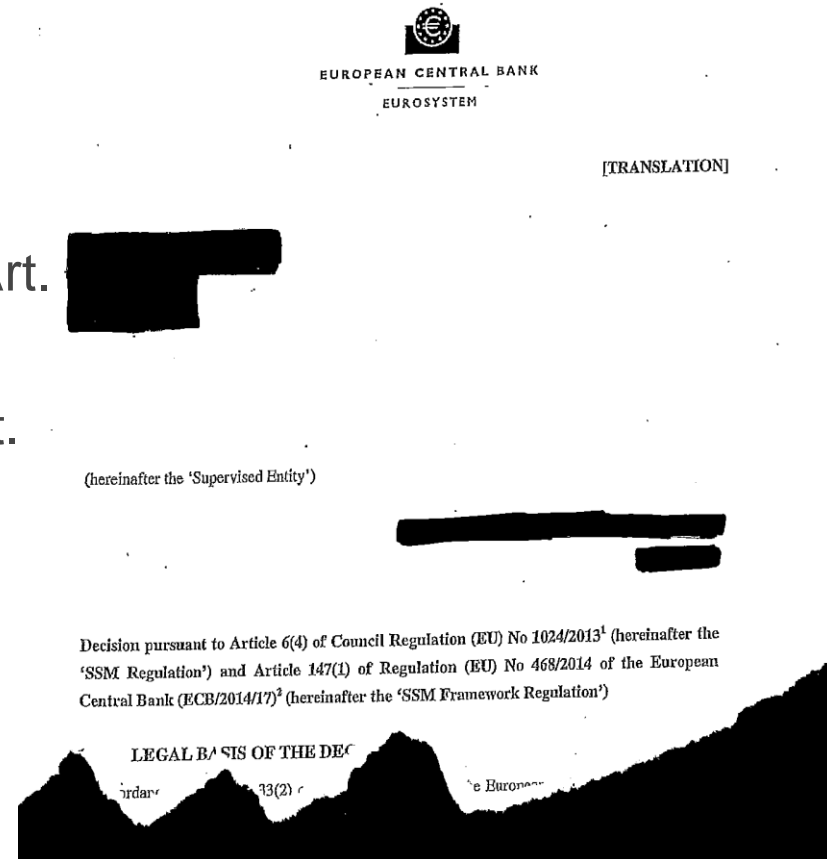


- What are the legal links and which laws apply ?
 - Currently
 - Institutional Side and Procedural Side
 - Regulation EU/1024/2013 – "**SSM Regulation**"
 - Regulation ECB/2014/17 – "**SSM Framework Regulation**" (equivalent to EU/468/2014)
 - "Core" of the competences and procedures and implies the Representation of Parties Regime (Art. 27)
 - Material Side
 - CRD IV (EU/36/2013)
 - Local and transposing laws
 - CRR (EU/575/2013)

- What are the **very** current topics ?
 - Comprehensive Assessment (results to be published on 26. October 2014)
 - Risk Assessment
 - "Normal" supervisory review process
 - Balance Sheet Assessment
 - Review of the main assets and their valuation, loan collaterals and the banks' risk provisioning
 - Stress Test
 - Determining Significance for SSM Purposes

- Stress Test
 - What is the legal basis of Stress Tests?
 - Art. 4 par. 1 lit. f) SSM-Regulation, Art. 32 par. 2 EU/1093/2010 – **"EBA-Regulation"**
 - EBC and European Banking Authority (EBA) perform in cooperation
 - Is the scope of Stress Tests adequate?
 - EBA Examines the banks' resilience under adverse economic conditions, Art. 32 par. 2 EBA-Regulation
 - Is the disclosure of the results compliant with constitutional law and with the legal basis?
 - Remedies ?

- Determining Significance for SSM Purposes
 - Decision pursuant to Art. 6 par. 4 and Art. 70 par 1 of the SSM Regulation
 - Criteria for determining significance, Art. 50 subsequent of the SSM Framework Regulation
 - What does "(...) justified by particular circumstances to be specified in the methodology (...)" in Art. 6 par. 4 of the SSM Framework Regulation mean?
 - Remedies ?



- In The Future
 - Applicable Laws
 - Tasks Conferred to ECB in Detail

- Applicable Laws

- Transposed National CRD IV Laws

- Application of the relevant transposed national laws
 - In other words: ECB must apply the relevant national laws
 - Take away questions:

What is relevant Union law in the scope of SSM regulation under Art. 4 par 3 of SSM Regulation?

CRR

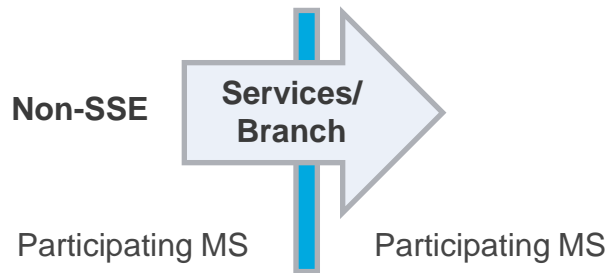
- SSM Regulations

- Task Conferred to ECB in Detail
 - Granting and Withdrawal of Authorization, Art. 4 par. 1 lit. a) of SSM Regulation
 - Supervision of Outbound Procedure into Non-Participating MS, Art. 4 par. 1 lit. a) of SSM Regulation "under the relevant Union Law"
 - Assessment of Acquisitions of Qualifying Holdings
 - Other Potential Topics

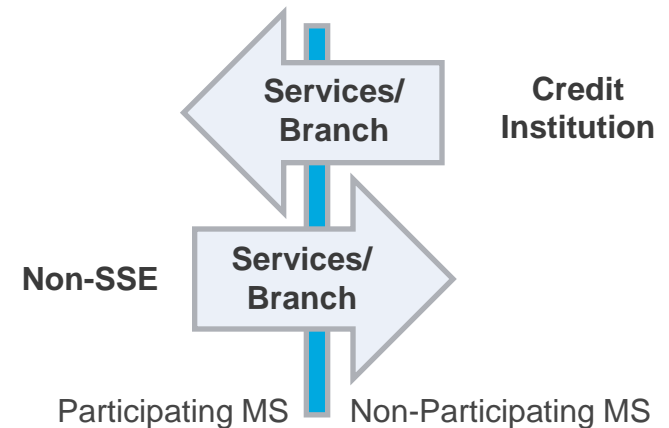
- Granting and Withdrawal of Authorization, Art. 4 par. 1 lit. a) of SSM Regulation
 - Art. 14 applies to all banks, not only to SSE
 - Preparation by NCA under national law and ECB's right to object
 - My question:

How will the cases, which have started before 4 November 2014 be handled ?

- Supervision of Procedure relating to **Member States** "under the relevant Union Law"

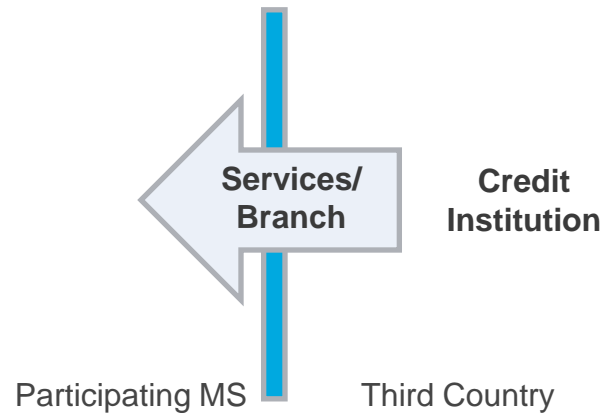


➤ **NCA**



➤ **ECB pursuant Art. 4 par 1 lit b) and par. 2 SSM-Regulation**

- Supervision of Inbound Procedure relating to **Third Countries** "under the relevant Union Law" in a cross-border or branch mode



- Change of the established Home Country or European Passport Concept

- Assessment of Acquisition of Qualifying holdings, Artt. 4 par. 1 lit. c) in conjunction with Art. 15 SSM Regulation
 - Preparation by the relevant NCA, Art. 15 par. 2 SSM Regulation (under national law)
 - Submission at least 10 working days before the expiry of the relevant assessment period as defined by the relevant Union law
 - Union law and transposed national law may well deviate
 - ECB' decision proviso on the basis of the assessment criteria "set out in relevant Union Law"
 - My question:

How will the cases, which have started before 4 November be handled ?

- Further Investigatory and Supervisory Powers, Art. 4 par. 1 lits. d) to i) of SSM Regulation
 - Own Funds, Securitization, Large Exposure Limits, Liquidity, Leverage (lit d))
 - Fit and proper tests, risk management processes, internal control processes; remuneration policies and internal capital adequacy processes (lit. e))
 - Supervisory Reviews, including Stress Tests (lit. f))
 - (...)

- Two Interesting Open Legal Questions
 - Competence of the General Court ?
 - State Liability for Measures of the ECB under SSM Regulation?

- Interesting Question No. 1
 - Competent Court?
 - Artt. 256 in conjunction with 263 TFEU: General Court
 - The German version of Recital 60 of SSM Regulation ("EUGH") is wrong
 - Interesting procedural situation: The Court of First Instance could be obligated to apply national regulatory law applied by the ECB

- Interesting Question No. 2
 - State Liability ?
 - Does Art. 340 par. 3 **TFEU** apply ?
 - Case C-352/98 *Bergaderm*
 - the rule of law which has been breached must be one which is intended to confer rights on individuals;
 - the breach must be sufficiently serious to merit an award of damages; and
 - there must be a direct causal link between the infringement of the rule and the damage suffered by the claimant.
 - Case C-222/02 Paul and others did not decide differently

- To come to an end: Some Psychology
 - The Regulator's Style
 - ECB will have to develop a regulatory and supervisory style
 - Light Touch was yesterday
 - The Psychological State of the Supervised
 - The SSE are still in the process of orientation and will try to get acquainted to this new style
 - The Disposition to Conflict
 - In previous times there was no disposition for judicial and administrative review
 - Now new tools for review such as Administrative Board of Review and Judicial Review

Thank you for your attention