EUROPEAN CENTRAL BANK

EUROSYSTEM

# ESCB Legal Conference 2024

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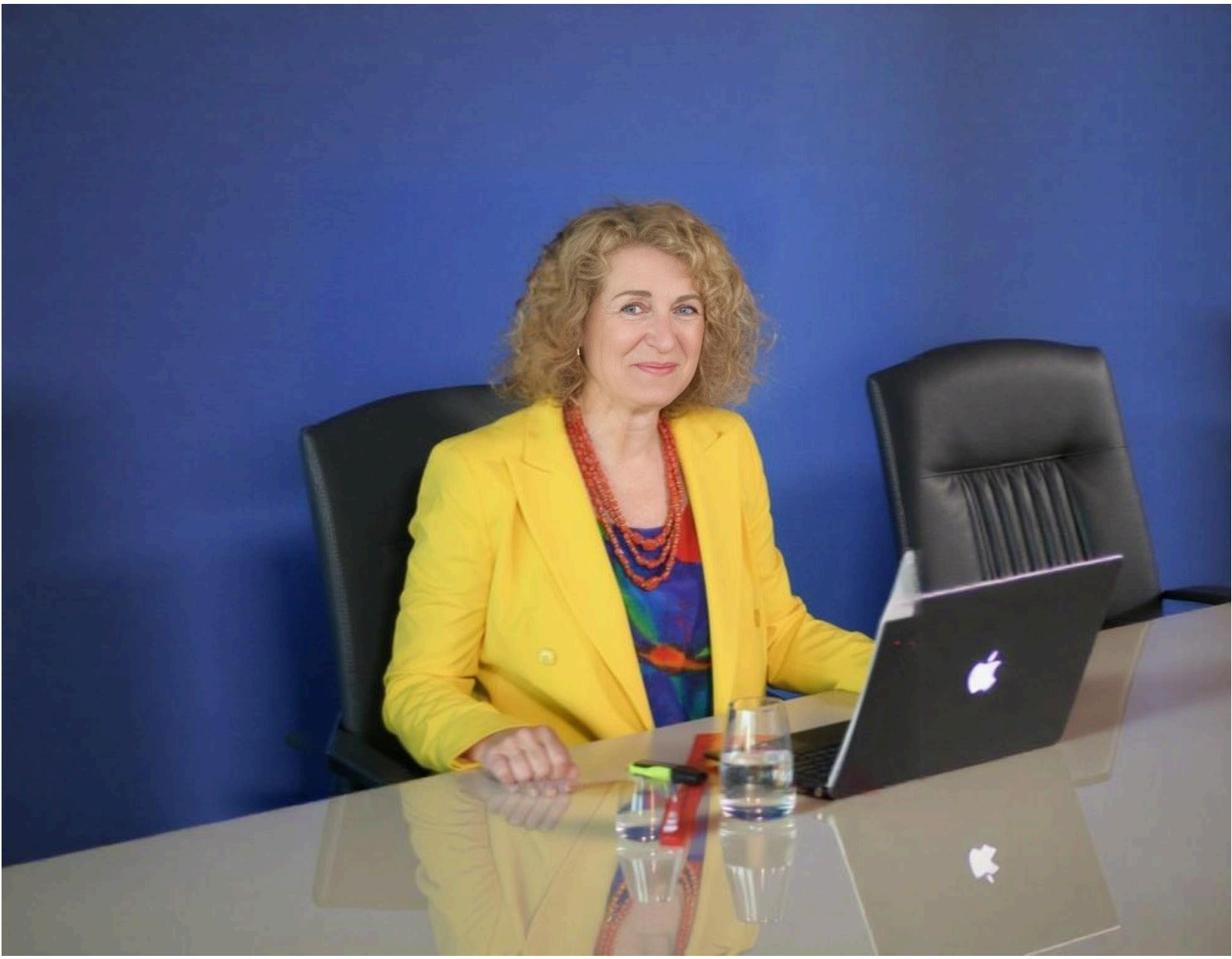
# Contents



# Introductory remarks

Chiara Zilioli*

Since its inception nearly a decade ago, the annual **European System of Central Banks** (**ESCB)** Legal Conference has become a vital forum for legal scholars, practitioners, supervisors, and central bankers.

The 2024 edition of the ESCB Legal Conference builds on this tradition by addressing key legal issues relevant to central banking.

The book accompanying this year's conference is divided into six chapters, each with its own theme and each offering in-depth and diverse perspectives on critical and current legal topics. The book further supports the ESCB Legal Conference's standing as a leading forum for legal discourse on central banking.

The ESCB Legal Conference 2024 is made possible through the support of the Executive Board members, with special acknowledgment to **Frank Elderson**, who oversees the ECB's Legal Services. We are honoured to include his keynote speech on nature-related risks in this publication.

Finally, the continued success of the conference owes much to the dedication and expertise of the contributors to this volume, whose efforts ensure that it remains a dynamic and influential platform for advancing legal thought in central banking.

## 1 AI and the management of legal risk

The first chapter of the book examines **"AI and the Management of Legal Risk: A Transformative Impact on Legal Practice?"**. Artificial Intelligence (AI) has emerged as a critical topic in recent years, capturing significant attention across various sectors.

The ECB's Legal Services has been examining this matter extensively. At our 2021 ECB Legal Conference, Professor Langenbucher delivered a presentation on "AI Credit Scoring and Evaluation of Creditworthiness"[1]. Also, our Legal Research Programme sponsored a paper by Azzutti, Batista, and Ringe, published in the EBI working papers, entitled "Navigating the Legal Landscape of AI-Enhanced Banking Supervision: Protecting EU Fundamental Rights and Ensuring Good Administration".[2]

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1 ECB Legal Conference 2021: Continuity and change – how the challenges of today prepare the ground for tomorrow.

2 Azzutti, Batista and Ringe (2023), Navigating the Legal Landscape of AI-Enhanced Banking Supervision: Protecting EU Fundamental Rights and Ensuring Good Administration, EBI Working Paper Series No. 140.

The topic of AI has become increasingly prominent with the rise of "generative AI" technology, particularly due to the widespread accessibility of large language models (LLMs) to the general public. AI's impact on the legal profession raises several critical questions, including the extent to which it will influence legal practice, the organisation of in-house legal departments, and the future training and recruitment of lawyers. Presently, these questions yield only a few inconclusive answers.

The first chapter of the book delves into these issues, offering a closer examination of AI's potential transformative effects on legal practice.

## 2 Non-contractual liability of the ECB

The second chapter of the book addresses the "**Non-contractual liability of the ECB: comprehensive overview"**. Like any Union institution, the ECB must provide compensation for damage caused by its actions or those of its officials in the performance of their duties. However, establishing such liability requires the fulfilment of specific conditions.

Due to the nature of monetary policy and of the instruments of general application used to implement it there is a certain distance from individuals' interests and legal positions that makes it difficult to fulfil these conditions. At the time the Maastricht Treaty was drafted, the prevailing viewpoint was that central banks could not be held liable for damages caused to individuals. However, the increasing role and visibility of central banks, and heightened accountability for their actions, means that holding a central bank liable in legal proceedings is now conceivable.

This chapter explores recent developments in case-law and legal scholarship and examines how liability may be established for a central banks' actions under Union law.

## 3 Talking about cash when the euro turns 25

The third chapter of the book is entitled **"Talking about cash when the euro turns 25: rediscovering the legal tender status of euro banknotes and coins and their continued role in society"**. This chapter delves into a classic theme of central banking, which has gained renewed interest due to the recent decision by the Court of Justice of the European Union (CJEU) in the *Hessischer Rundfunk* case[3].

The CJEU held that "the concept of 'legal tender' […] is a concept of EU law that must be given an autonomous and uniform interpretation throughout the European

[3] Judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, Joined Cases C-422/19 and C-423/19, EU:C:2021:63.

Union"[4] and "precludes a Member State from adopting a provision which, in the light of its objective and its content, establishes legal rules governing the status of legal tender of euro banknotes"[5]. This judgment sparked broader reflections on the notion of legal tender and led to an EU proposal for a regulation on the legal tender of euro banknotes.

Concurrently, preparations for the issuance of a digital euro are underway, raising several compelling questions that this chapter addresses: What is the future role of banknotes and coins in a world where they coexist with digital currencies issued by the same central bank? How will these various means of payment be accepted by society? And how should the legal framework adapt to these evolving circumstances? These questions are at the forefront of discussion as the euro reaches its 25th anniversary.

## 4 Fundamental right(s) to access to documents

The fourth chapter is entitled "**Fundamental right(s) to access to documents – similar tools for different purposes"**. The right to access documents is enshrined in the Charter of Fundamental Rights of the European Union under two distinct provisions: the right of public access to documents (Article 42 of the Charter) and the right of access to the file (Article 41(2), second indent, of the Charter).

Although these rights appear to be similar in that they both provide access to documents held by administrative bodies, they serve fundamentally different purposes, resulting in significant differences in the legal frameworks that govern them.

This topic has long captured our interest, as reflected in previous conferences. In the 2019 ECB Legal Conference, we explored the theme of "Transparency, Confidentiality, and Exchange of Information Between Authorities"[6]. In 2020, we examined the theme of "Transparency Versus Confidentiality of Supervisory Decisions, Documents, and Information"[7]. Building on these discussions, this year's contributions examine the fundamental right to access documents in the light of recent CJEU case-law.

The chapter considers these rights not only within the context of the Single Supervisory Mechanism (SSM) but also in relation to the Single Resolution Mechanism (SRM), especially concerning public access to ECB supervisory documents. The Court has, in several cases, scrutinised the role of the general presumption of confidentiality regarding supervisory documents and has clarified the

4 Judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk,* Joined Cases C-422/19 and C-423/19, EU:C:2021:63, paragraph 45

5 Judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk,* Joined Cases C-422/19 and C-423/19, EU:C:2021:63, paragraph 58.

6 ECB Legal Conference 2019: Building bridges: central banking law in an interconnected world.

7 ESCB Legal Conference 2020.

relationship between the regime governing public access and that governing access to file.

## 5 Nature-related risks: legal implications for central banks, supervisors and financial institutions

The book reports a keynote speech by our Executive Board member Frank Elderson on **"Nature-related risk – legal implications for central banks, supervisors and financial institutions"**.

Mr Elderson emphasised the increasing importance of evaluating nature-related risks within the financial sector. He pointed out that nature degradation presents significant financial threats to both financial institutions and the financial system as a whole, necessitating management similar to other types of risks.

He also highlighted the necessity for central banks, supervisors, and financial institutions to closely monitor the development of legal acts and frameworks that address nature-related risks, such as the EU's Corporate Sustainability Due Diligence Directive (CSDDD)[8] and the European Deforestation Regulation (EUDR)[9], which are expected to progressively hold companies accountable for environmental harm.

Mr. Elderson also explored the potential roles that central banks and supervisors may undertake in incorporating nature-related risks into their mandates.

## 6 The new EU anti-money laundering framework

The fifth chapter focuses on **"The new EU anti-money laundering framework, its impact on the banking sector and its relevance for central banks"**. It introduces and evaluates the new anti-money laundering and countering the financing of terrorism (AML/CFT) framework within the Union, which is poised to bring about significant changes.

The establishment of a new EU agency in the form of the Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA) is a key development. It is to be based in Frankfurt and is expected to have a marked impact on the banking sector. Banking supervisors, including the ECB, will be directly influenced by these changes, particularly concerning the obligation to conduct more thorough checks on the senior management of certain "obliged entities" and to

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8 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (OJ L, 2024/1760, 5.7.2024, ELI: http://data.europa.eu/eli/dir/2024/1760/oj).

9 Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (OJ L 150, 9.6.2023, p. 206).

ensure the effective implementation of various policies, procedures, and controls by the entities they supervise.

Additionally, central banks may be directly affected by these obligations as they carry out their traditional central banking tasks, given the potential implications of AML/CFT rules.

## 7 The principle of equal authenticity

The last chapter concerns **"The principle of equal authenticity: interpretation of Union legislation in cases of linguistic divergence"**. Multilingualism is a fundamental and enduring topic for the Union and its institutions.

The principle of multilingualism has been firmly established in our legal framework since the inception of the European project, as evidenced by Regulation No 1 of 1958. Over time, the number of official languages has expanded from four to twenty-three.

While the significance and value of this principle are undisputed, the existence of multiple equally authentic language versions of the same legal text inherently increases the risk of discrepancies. Greater interpretative efforts are required as compared to a monolingual regime.

The adoption of increasingly technical legislation, particularly within the field of financial law, presents further challenges to the principle of equal authenticity. As English often serves as the *lingua franca,* even at the national level, Union legislation sometimes employs terminology that does not exist in certain languages. This presents the additional challenge of ensuring that provisions containing such terminology are clear and immediately comprehensible to all potential addressees and stakeholders. Developing methodologies to prevent and resolve these issues is crucial, especially considering the potential impact of this legislation on individuals and their rights. These issues are the focus of the last part of the book.

## 8 Conclusion

In conclusion, I encourage all readers to engage thoughtfully with the discussions presented in this book. I invite you to approach the arguments with a critical eye and to seek out valuable insights that you can continue to build upon in the weeks and months to come.

Our ambition is for these discussions to not only contribute to academic scholarship but also to have practical implications, influencing the practice of law within the ESCB, the SSM, and across the Union and its institutions.

I look forward to the rich and constructive dialogues that these contributions will inspire.

# Part I

# Nature-related risk: legal implications for central banks, supervisors and financial institution

# Nature-related risk: legal implications for central banks, supervisors and financial institutions

Frank Elderson*

## 1 Introduction

As a lawyer, I am always glad to discuss the novel legal issues affecting the work of central banks and supervisors.

At last year's conference I spoke to you about climate-related litigation and its impact on the financial sector.[1] This year I want to talk about the risks that nature degradation poses to the economy and the financial sector.

As I have said before, assessing nature-related risk is not some kind of tree-hugging exercise. We are talking about material financial risks, which – like any other type of risk – must be assessed, analysed and managed.[2]

Today, I want to focus on the legal implications of nature-related risk for our central banking and supervisory work. I will first outline the growing trend of **nature-related litigation. Then I will** look at how nature-related risk should be considered in the context of the **mandates** of central banks and supervisors.

## 2 Nature degradation: risks for the economy and the financial sector

Scientists worldwide agree that nature has been declining at an unprecedented rate over the past 50 years. The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) already sounded the alarm back in 2019, shortly before the outbreak of the global pandemic. The IPBES report even warned us that nature degradation was exacerbating emerging infectious diseases in wildlife, domestic animals, plants and people.[3]

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* Transcript of keynote speech given during ECB Legal Conference 2023. Member of the Executive Board of the ECB and Vice-Chair of the Supervisory Board of the ECB.

1 Elderson, F. (2023), "'Come hell or high water': addressing the risks of climate and environment-related litigation for the banking sector", keynote speech at the ECB Legal Conference, 4 September.

2 Elderson, F. (2023), "Climate-related and environmental risks – a vital part of the ECB's supervisory agenda to keep banks safe and sound", introductory remarks at the panel on green finance policy and the role of Europe organised by the Federal Working Group Europe of the German Greens, 23 June.

3 Díaz, S. et al. (eds.) (2019), *The global assessment report on biodiversity and ecosystem services, summary for policymakers*, IPBES secretariat, Bonn, Germany.

The decline of nature is primarily caused by human activity and is being made worse by climate change. Scientists have calculated that humanity is using natural resources 1.7 times faster than ecosystems can regenerate them – in other words, we are consuming resources equivalent to 1.7 planet Earths.[4]

This decline undermines the planet's ability to provide ecosystem services, which are the benefits we obtain from nature to support and sustain our society and economies. Examples of ecosystem services include food, drinking water, timber and minerals; protection against natural hazards, such as floods and landslides; or carbon uptake and storage by vegetation.[5]

The degradation of nature not only threatens these ecosystem services, but also increases the risk of us reaching ecosystem tipping points, i.e. non-linear, self-amplifying and irreversible changes in ecosystem states that can occur rapidly and on a large scale.[6] Through these tipping points, we are at risk of going beyond the Earth's safe operating space for sustaining life on the planet.[7]

From the perspective of central banks and supervisors, the degradation of nature makes our economies, our companies and our financial institutions increasingly vulnerable.

We cannot ignore these vulnerabilities. Indeed, we need to deepen our understanding of how nature-related financial risk affects the economy and the financial system.[8]

Work is progressing at the ECB: for example, our research has found that 72% of euro area companies are highly dependent on ecosystem services and would experience critical economic problems as a result of ecosystem degradation.[9] Moreover, research by the European Commission has detailed that several sectors of the European economy – in particular agriculture, real estate and construction, and healthcare – are heavily dependent on nature and thus exposed to associated risks.[10]

Work is also progressing at international level. The Financial Stability Board recently took stock of supervisory and regulatory initiatives among its members and

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4 Lin, D., Hanscom, L., Murthy, A., Galli, A., Evans, M., Neill, E., Mancini, M.S., Martindill, J., Medouar, F.-Z., Huang, S. and Wackernagel, M. (2018), "Ecological Footprint Accounting for Countries: Updates and Results of the National Footprint Accounts, 2012–2018", Resources, Vol. 7, No 3, p.58.

5 NGFS (2024), *Nature-related Financial Risks: a Conceptual Framework to guide Action by Central Banks and Supervisors*, July.

6 Marsden, L. et al. (2024), "Ecosystem tipping points: Understanding risks to the economy and financial system", UCL Institute for Innovation and Public Purpose, Policy Report, April.

7 NGFS (2024), *Nature-related Financial Risks: a Conceptual Framework to guide Action by Central Banks and Supervisors*, July.

8 Elderson, F. (2023), "The economy and banks need nature to survive", *The ECB Blog*, 8 June; Lagarde, C. (2024), "Central banks in a changing world: the role of the ECB in the face of climate and environmental risks", speech at the Maurice Allais Foundation, 7 June.

9 Boldrini, S. et al. (2023), "Living in a world of disappearing nature: physical risk and the implications for financial stability", *Occasional Paper Series*, No 333, ECB, Frankfurt am Main, November.

10 Cziesielski, M. et al. (2024), *Study for a methodological framework and assessment of potential financial risks associated with biodiversity loss and ecosystem degradation – Final Report*, European Commission, Brussels, March. These sectors are vulnerable to risks such as water scarcity, floods, storms, soil erosion, pests and invasive species, loss of pollinators and disease (including microbial resistance).

established that a growing number of financial authorities are considering the potential implications of nature-related risks for the financial sector.[11] In addition, the Network for Greening the Financial System (NGFS) – a network of 138 central banks and supervisors from around the world – had already acknowledged the relevance of nature-related risks for the mandates of central banks and supervisors back in March 2022.[12] The NGFS has since developed a conceptual framework offering central banks and supervisors a common understanding of nature-related financial risks and a principle-based risk assessment approach.[13]

All these efforts are improving our ability to quantify the financial implications of nature degradation. And of course, there are also important legal implications that we need to start talking about.

## 3 Nature-related litigation

The first legal implication is the rise in nature-related litigation.[14] Litigants are starting to understand the link between climate change and nature degradation and are using the legal system to drive policy change.

Building on their successes in the field of climate litigation,[15] litigants are taking court cases to address the biodiversity crisis, protect carbon sinks, limit deforestation and loss of ocean habitats, and prevent ecosystem degradation.[16]

In July of this year the NGFS published a report on this new trend to raise awareness among financial institutions, central banks and supervisors.[17] The report highlighted that while nature-related litigation is still in its infancy, the number of cases is expected to grow rapidly.

The report reiterated that litigation can affect financial institutions, not only where they are directly challenged, but also indirectly, when their counterparties, or the states in which they operate, are subject to such claims.[18]

The report identified **two key categories** of nature-related litigation as well as **two key drivers**.

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11 FSB (2024), *Stocktake on nature-related risks: Supervisory and regulatory approaches and perspectives on financial risk*, 18 July.

12 NGFS (2022), *Statement on nature-related financial risks*, 24 March.

13 NGFS (2024), *Nature-related Financial Risks: a Conceptual Framework to guide Action by Central Banks and Supervisors*, July.

14 The NGFS defines nature-related litigation as encompassing all strategic claims brought before judicial bodies, focusing on climate, biodiversity loss and ecosystem services degradation.

15 NGFS (2023), *Climate-related litigation: recent trends and developments*, September.

16 Setzer, J. and Higham, C. (2024), *Global trends in climate change litigation: 2024 snapshot*, London, June.

17 NGFS (2024), *Nature-related litigation: emerging trends and lessons learned from climate-related litigation*, 2 July.

18 See also Solana, J. (2020), "Climate change litigation as financial risk", *Green Finance,* Vol. 2, Issue 4, p. 344.

## 3.1 Categories of nature-related litigation

In terms of categories of litigation, most nature-related cases are being brought against **states and public entities**, using arguments based on fundamental rights.[19] This is not surprising given how effective such arguments have been in climate litigation.

Interestingly, however, **corporates and banks, too,** are already being directly targeted in nature-related litigation. This contrasts to the trends we saw under climate litigation, where cases against the private sector were much slower to start.

First, this may be because climate litigation has offered a blueprint for action for litigants who are seeking innovative ways to protect nature. Second, it may be because nature-related litigation can identify a closer causal connection between the impact of economic activities on local ecosystems and people. It is often easier to pinpoint the damage and attribute responsibility to specific actors. Thanks to new legislation, it is also becoming easier to hold multinational companies liable for harm occurring in remote parts of their global supply chains. And we can even see that litigants are already challenging banks that are alleged to finance such companies.[20]

Indeed, we can observe a close nexus between corporate litigation and legislation. Litigants are already relying on new corporate sustainability due diligence legislation,[21] on tort law, anti-money laundering laws[22] and shareholder rights to bring nature-related claims. The number of such cases is likely to grow as further legislation – such as the EU Directive on corporate sustainability due diligence and the EU Deforestation Regulation – enters into force.

## 3.2 Drivers of nature-related litigation

Looking now at the **drivers** behind the trend in nature-related litigation, the first is that scientists – and litigants – are developing a much better understanding of the **climate-nature nexus**. Protecting nature is crucial to mitigating climate change and vice versa. The climate crisis deepens the nature crisis, thus diminishing nature's ability to mitigate what the UN Secretary General has called "the era of global

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19 Rodríguez-Garavito, C. and Boyd, D. (2023), "A Rights Turn in Biodiversity Litigation?" *Transnational Environmental Law*, Vol.12, No 3, p. 498.

20 See for example Comissão Pastoral da Terra and Notre Affaire à Tous v. BNP Paribas. This case is still pending.

21 For example, cases have been brought against corporates under the French "duty of vigilance" law, such as ClientEarth, Surfrider Foundation Europe, and Zero Waste France v. Danone and Envol Vert v. Casino. These cases are still pending.

22 For instance, a complaint has been brought against banks in France, citing financial support to companies implicated in alleged illegal deforestation in the Amazon. A different application has also been filed before the UK courts against an exchange operator, in connection with the trading of metals which are allegedly the proceeds of environmental crimes.

boiling".[23] The scientific consensus on this point may help litigants to strengthen their cases.[24]

The second driver is that courts are taking, as a given, the findings of climate and environmental science, in the same manner as any other area of technical expertise. Court assessments and rulings are taking into account **advanced scientific concepts and sources**. We saw this quite clearly in the recent ruling of the European Court of Human Rights, in the case brought by a group of Swiss grandmothers.[25] There, the Court based its ruling on the IPCC reports, and took it as a matter of fact that climate change exists, that it poses a serious threat to human rights, and that states are aware and capable of doing something about it. Moreover, the Court held that states have a positive obligation to act, regardless of whether their individual contribution might be a "drop in the ocean" in terms of its ability to affect climate change.[26]

# 4 Relevance of nature degradation for the mandates of central banks and supervisors

This leads me to the next key legal implication of the nature crisis: how will it affect the mandates of central banks and supervisors?

It goes without saying that addressing the nature crisis is primarily up to governments and legislators. However, as I mentioned at the outset, central banks and supervisors also need to consider the nature crisis as a source of risk to the economy, financial system and the individual banks they supervise.

## 4.1 Nature-related risk and banking supervision

A very clear example of this is the way banking supervision is looking at nature-related risks. Back in 2020, the ECB's guide on supervisory expectations for the risk management of climate-related and environmental[27] (C&E) risks already highlighted

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23 The Secretary-General noted: "The era of global warming has ended; the era of global boiling has arrived.", see Guterres, A. (2023), "Press conference by Secretary-General António Guterres on climate", 27 July.

24 For instance, the Intergovernmental Panel on Climate Change (IPCC) has emphasised that safeguarding biodiversity and ecosystems is fundamental to climate resilient development, in the light of the threats posed by climate change to nature and its roles in adaptation and mitigation. Intergovernmental Panel on Climate Change (2022), "Summary for Policymakers", in *IPCC, Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, Cambridge, pp. 3-33.

25 European Court of Human Rights (2024), "Judgment Verein KlimaSeniorinnen Schweiz and Others v. Switzerland – Violations of the European Convention for failing to implement sufficient measures to combat climate change", press release, 9 April.

26 See also Kotze, L. et al. (2024), "Courts, climate litigation and the evolution of earth system law", *Global Policy*, 15, 5–22.

27 Here, I use the terms "environmental" and "nature-related" risk interchangeably.

the need for banks to identify, measure and – most importantly – manage nature-related risks, such as water stress and pollution.[28]

We have been actively following up with banks regarding these supervisory expectations since then.[29] The first interim deadline fell due in March 2023, when banks were expected to have in place a sound and comprehensive materiality assessment of both climate and nature risks. Since then, we have issued binding supervisory decisions against 28 banks that failed to meet this first interim deadline – with the possibility of imposing periodic penalty payments in the 22 most relevant cases, if the banks don't remedy this shortcoming in time.

Banks were also expected to meet a second interim deadline in December 2023, and by the end of this year, we expect all banks under our supervision to be fully aligned with all our supervisory expectations on the sound management of C&E risks.

In that respect, nature degradation is already integrated in ECB supervisory work as a risk driver that banks are expected to manage. Rather than considering nature-related risk as a standalone category of risk, we see it as a driver for each traditional type of risk reflected in the Capital Requirements Directive, from credit risk, reputational and operational risk including legal risk, to market and liquidity risk.

## 4.2 Nature-related risk and monetary policy

We must also properly consider nature-related risk in the context of our monetary policy mandate.

First, the nature crisis could have direct implications for **price stability – the primary objective of the ECB.** One of the papers presented at the annual ECB Forum on Central Banking in Sintra, Portugal, in July shows how loss of biodiversity

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28 ECB (2020), *Guide on climate-related and environmental risks – Supervisory expectations relating to risk management and disclosure*, Frankfurt am Main, November. See also ECB (2022), *Good practices for climate-related and environmental risk management – observations from the 2022 thematic review*, Frankfurt am Main, November; ECB (2022), *Walking the talk: Banks gearing up to manage risks from climate change – results of the 2022 thematic review on climate-related and environmental risks*, Frankfurt am Main, November.

29 Elderson, F. (2024), "You have to know your risks to manage them – banks' materiality assessments as a crucial precondition for managing climate and environmental risks", *ECB Blog*, 8 May. For further background, see Elderson, F. (2021), "Mapping connected dots: how climate-related and environmental risk management is becoming a reality", speech at a workshop organised by the International Monetary Fund's South Asia Regional Training and Technical Assistance Center and Monetary and Capital Markets Department, 10 December; Elderson, F. (2022), "Good, bad and hopeful news: the latest on the supervision of climate risks", speech at the 10th Annual Conference on Bank Steering & Bank Management at the Frankfurt School of Finance & Management, 22 June; Elderson, F. (2023), ""Running up that hill" – how climate-related and environmental risks turned mainstream in banking supervision and next steps for banks' risk management practices", speech at the ECB Industry Outreach event on Climate-related and Environmental Risk, 3 February; Elderson, F. (2023), "Climate-related and environmental risks – a vital part of the ECB's supervisory agenda to keep banks safe and sound", speech at the panel on green finance policy and the role of Europe organised by the Federal Working Group Europe of the German Greens, 23 June; Elderson, F. (2024), "Making banks resilient to climate and environmental risks – good practices to overcome the remaining stumbling blocks", speech at the 331st European Banking Federation Executive Committee meeting, 14 March; Elderson, F. (2024), "Know thyself – avoiding policy mistakes in light of the prevailing climate", speech at the Delphi Economic Forum IX, 12 April.

can cause losses to economic output while at the same time decreasing the resilience of output to future biodiversity losses.[30]

As part of its Climate and Nature Plan 2024-2025, the ECB is conducting further work on the risk posed to the economy by nature loss and degradation.[31] This will inform our understanding of risks to price stability and financial stability.

Second, it is clear from the Treaties that the ECB must take into account the EU's policies to address nature degradation when carrying out its mandate.[32] There are two key legal bases for this: the ECB's secondary objective in Article 127(1), second sentence, and the transversal Treaty provisions of Articles 11 and 7 of the Treaty on the Functioning of the European Union (TFEU).

**The ECB's secondary objective states that,** without prejudice to price stability, the ECB shall support the general economic policies in the EU, with a view to contributing to the objectives of the EU. These objectives include "the sustainable development of Europe" and "a high level of protection and improvement of the quality of the environment". It is irrefutable that the EU's climate policy constitutes part of the general economic policies in the EU. As reiterated in the European Climate Law, the transition to net zero affects every aspect of economic life, in all sectors. Thus, to the extent that nature protection directly contributes to climate crisis mitigation and adaptation – which it often does – the ECB must support the EU's efforts in this field. In this context it is notable that the EU adopted the groundbreaking Nature Restoration Law earlier this year[33] and signed up to the Kunming-Montreal Global Biodiversity Framework (the "Paris Agreement for nature") in 2022[34] – significant developments that could be invoked to argue that nature protection, just like climate policy, constitutes an independent general economic policy. As lawyers, we need to watch this space.

**Beyond the secondary objective, the ECB has to comply with two key transversal principles of the Treaties.** Article 11 of the TFEU provides that the EU's environmental protection requirements must be "integrated into the definition and implementation of the Union's policies and activities".[35] This imposes an obligation on the ECB to take into account the EU's policies to protect nature when shaping its own policies and performing its tasks. In addition, under Article 7 of the TFEU, the activities and policies of the ECB need to be consistent with EU law – including EU law on nature and biodiversity.

This does not mean economists should start counting ants in Aragon, butterflies in Bavaria or worms in Wallonia. Instead, economists must develop means to

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30 Kuchler, T. et al. (2024), *The economics of biodiversity loss*, ECB Forum on Central Banking, June.

31 ECB (2024), *Climate and nature plan 2024-2025 at a glance*.

32 O'Connell, M. (2024), "Birth of a naturalist? Nature-related risks and biodiversity loss: legal implications for the ECB", *ECB Legal Working Paper Series*, No 22, Frankfurt am Main, June.

33 Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869 (OJ L, 2024/1991, 29.7.2024).

34 Kunming-Montreal Global Biodiversity Framework (GBF) was agreed on 18 December 2022.

35 This "principle of integration" is also reflected in Article 37 of the Charter of Fundamental Rights.

transpose insights from nature science into variables of economic interest like growth, inflation and financial risks.

In developing tools for policy analysis of nature-related risks, the growing availability of data from sustainability disclosures will make it easier for central banks to identify how they need to incorporate nature into their work. Recently adopted legislation, in particular the sustainable finance framework[36], creates an entire "ecosystem" of EU legislation that makes the link between nature degradation, the economy and the financial sector – and thus central banks and supervisors – clear and apparent. It leaves us in no doubt that we have the duty and the tools at our disposal to take nature-related risk into account when we exercise our mandate.

## 5 Conclusion

The economy and the financial sector are vulnerable to nature-related risks. This vulnerability is all the more relevant given the importance of nature in mitigating and adapting to climate change.

Time is running out to prepare for the materialisation of nature-related risks. We need to be ready for the impact of these risks, just like we are for climate-related risks – or indeed for any other risk driver.

For that reason, we need to properly consider the legal implications of nature-related risks for the financial sector, and for the mandates of central banks and supervisors

[36] In particular, the Taxonomy Regulation targets not only climate mitigation and adaptation, but also four further environmental objectives relevant to nature; the Sustainable Finance Disclosure Regulation (SFDR) defines "sustainable investments" with reference to the impact on biodiversity and nature; and perhaps most importantly, the Corporate Sustainability Reporting Directive (CSRD) imposes substantial disclosure requirements related to nature.


Antonio Riso
European Central Bank

# Part II

# AI and the management of legal risk: a transformative impact on the legal practice?

# The Integration of AI in Legal Practice: Opportunities and Challenges

## Exploring How AI is Revolutionizing the Legal Landscape

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## 1 Introduction

All seems to have been said about AI already, and yet all needs still to be said. The choice to propose this topic for the ESCB Legal Conference of 2024 came at a particular salient moment in time when developments in this field are happening at an amazing pace and things become old within few months. There is considerable attention surrounding generative AI, driven by both enthusiasm over anticipated capabilities that may not yet align with current AI technologies, and concerns regarding future implications. This interest is partly sparked by the widespread accessibility of Large Language Models to the public, which has generated significant curiosity. Consequently, millions of individuals globally are now exploring these new tools to ascertain their potential applications. Although it may appear particularly challenging to engage in a discussion that risks becoming irrelevant or outdated by the time it is resolved, we have decided to proceed based on two considerations.

The first consideration stems from our experience within our legal department. Delaying the adaptation process until technology becomes more stable is not a viable option if one wishes to avoid the risk of a legal department becoming obsolete. In my experience as a manager at the ECB Legal Services, my team and I have been working intensely on the digitalisation of our processes over the past few years. Digitalising our work processes has become a significant focus for many within the organization, and AI is clearly the next step due to its potential to further enhance the digitalisation of our work. The integration of AI in legal practice is of extreme relevance not only to our team but to any in-house legal department or legal professional in the legal practice. As AI technologies continue to evolve, their potential to revolutionize the way we manage legal risks, enhance efficiency, and improve accuracy becomes increasingly apparent. This is thus a critical area of focus for us, as it is for many others in the legal field.

The second consideration is that, despite these tumultuous times and developments, there are overarching themes that will remain relevant and warrant further examination regardless of technological advancements. We have decided to focus on three pertinent questions concerning the potential future deployment of AI tools

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within the in-house legal departments of central banks or similar institutions. The first question pertains to the technology itself and its ability to adapt to legal practice, given its unique characteristics. The second question addresses the impact of AI on the identity of lawyers and the broader legal profession, with a specific emphasis on the implications for lawyer training. The third question examines the most significant risk associated with the use of generative AI, namely the risk of hallucinations, and how this issue is and should be managed under the applicable legal framework, particularly in terms of liability.

## 2 How does AI relate to legal practice?

Lawyers will remain relevant despite the rise of AI, highlighting three key aspects: legal reasoning is guided by rules rather than governed by them, legal terms are inherently open-textured, and legal questions can have multiple answers that may change over time. The most significant challenge is that success in law cannot be reduced to mere statistics.

Although Artificial Intelligence (AI) has garnered increased public attention in recent years, it is not a new concept. As an academic discipline, AI originated in the 1950s. Over more than half a century, AI has experienced numerous waves of innovation, each generating significant expectations. Several times in the past, it has been predicted that general intelligence, comparable to or surpassing human capabilities, would be achieved within a few years. But as any central banker knows, there are certainly good reasons to claim that this time is different (pun intended).

The advent of artificial intelligence in the legal sector marks a pivotal moment, promising to revolutionize how legal risks are managed. Keeping track of advancements under the AI label can be challenging, but there are market tools that assist law firms in better retrieving their knowledge base of legal advices, as well as tools that claim to predict case outcomes based on precedents and the identities of the judges and lawyers involved, thus promising to enable proactive risk management and decision-making analytics that can foresee potential legal risks. Other technologies enable the automation of time-consuming tasks like document review and legal research, allowing lawyers to focus on more strategic aspects of their work.

The basis for this revolution is the ability of AI to analyze vast amounts of data from past cases, contracts, and legal precedents. Based on that, the claim is that AI can identify patterns and correlations that might escape even the most seasoned professionals. This capability would not only enhance the accuracy of legal predictions but also offers deeper insights into potential risks. The ability to anticipate and address issues proactively would clearly be a significant competitive advantage.

The AI's role in transforming legal practice is multifaceted, offering a suite of tools that enhance various aspects of legal work. At the heart of these innovations are technologies such as machine learning and natural language processing, which would facilitate a deeper understanding and analysis of legal texts. Natural language processing allows for the automation of complex tasks like document review and legal research, making these processes faster and more efficient. Machine learning algorithms can identify patterns in legal data, enabling predictive analytics that would forecast case outcomes with remarkable accuracy: recent experiments with large language models (LLMs) have shown that these advanced AI systems are allegedly capable of predicting court verdicts and even passing bar exams.

This has sparked both excitement and concern within the legal community. Already in the 90s of last century press outlets suggested that the advent of robots would eliminate human jobs: definitely “a report which was greatly exaggerated”, as Mark Twain would have put it, and a notion that has been challenged by experts such as Professor Verheij.[1] The extent to which the claims about the abilities of AI in the legal field are grounded or at least plausible, is the focus of the analysis of **Bart Verheij**, Professor of Artificial Intelligence and Argumentation at the University of Groningen, where he heads the Department of Artificial Intelligence at the Bernoulli Institute. His experience is particularly relevant since he holds an MSc in Mathematics from the University of Amsterdam and a PhD from Maastricht University, but he also got legal education. He contends that lawyers will remain relevant despite the rise of AI, highlighting three key aspects[2]: legal reasoning is guided by rules rather than governed by them, legal terms are inherently open-textured[3], and legal questions can have multiple answers that may change over time[4].

Professor Verheij points out several issues with relying on machine learning for legal decision-making. The most significant challenge is that success in law cannot be reduced to mere statistics.[5] The traditional view that legal reasoning proceeds mechanically through the steps of recollecting facts, assessing applicable norms, and making decisions should in his vire be seen as partly inaccurate. According to Professor Verheij, legal reasoning is fundamentally an argumentative process, suggesting that AI systems need to evolve to understand and engage in this flow of argumentation.

The emergence of large language models has been a game changer in the field of AI. However, this raises the question: is this just sophisticated plagiarism, or is something genuinely new happening? If the latter is true, then language models may represent a new developmental phase in AI, potentially transforming legal practice by incorporating systems based on argumentation.

These advanced technologies are becoming integral tools within the legal sector, offering innovative solutions to age-old challenges. These real-world applications underscore the tangible benefits that AI brings to legal practice. For instance, document review, a traditionally time-consuming and labor-intensive process, can now be expedited through AI-driven tools that sift through vast quantities of data to

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1 Verheij, B. (2022). The Study of Artificial Intelligence as Law. Law and Artificial Intelligence. Regulating AI and Applying AI in Legal Practice (eds. Custers, B., & Fosch-Villaronga, E.), 477-502. Berlin: Springer. https://doi.org/10.1007/978-94-6265-523-2_24

2 Rissland, E.L. (1988). Book review. An Artificial Intelligence Approach to Legal Reasoning. Harvard Journal of Law and Technology, 1 (Spring): 223–231

3 For an interesting experiment on the capability of large language models to interpret the meaning of legal provisions, see Engel, Christoph and McAdams, Richard H., Asking GPT for the Ordinary Meaning of Statutory Terms (February 6, 2024). MPI Collective Goods Discussion Paper, No. 2024/5, Available at SSRN: https://ssrn.com/abstract=4718347 or http://dx.doi.org/10.2139/ssrn.4718347.

4 For a first attempt to have a language model mimicking the ability of a lawyer to derive principles in a structured manner from a body of jurisprudence which has evolved over time, see Engel, Christoph and Kruse, Johannes, Professor GPT: Having a Large Language Model Write a Commentary on Freedom of Assembly (October 18, 2024). MPI Collective Goods Discussion Paper, No. 2024/14, Available at SSRN: https://ssrn.com/abstract=4994131 or http://dx.doi.org/10.2139/ssrn.4994131

5 Bench-Capon, Trevor (2021) The Need for Good Old Fashioned AI and Law. Jusletter-IT (fses). pp. 23-35.

identify relevant information with remarkable accuracy. This not only saves time but also reduces the risk of human error, ensuring that critical details are not overlooked.

## 3 The impact of AI on the lawyer's profession

With AI taking over these foundational tasks, the question arises: how will future lawyers acquire the necessary experience? This shift necessitates a comprehensive rethink of legal training, incorporating new skills tailored to an AI-enhanced legal landscape. Developing these new competencies will be crucial for preparing the next generation of lawyers to thrive in a rapidly evolving profession.

The above considerations relate to the second question that we had in mind since the outset, and which revolves around the identity of lawyers. When a new technology is introduced in a work environment, there are often two conflicting perspectives at opposite ends of the spectrum. One perspective is that existing jobs will be eliminated by the new technology, while the other is that certain jobs are unique and will remain unaffected. However, the reality likely lies somewhere in between. It is probable that jobs will not disappear entirely but will evolve in nature, and AI is probably going to increasingly become a valuable tool for lawyers.

The relation between AI and the role of lawyers and their training is a subject which extensively analysed by **Felicity Bell**, Senior Lecturer and Deputy Director of the Centre for the Future of the Legal Profession at the University of New South Wales, in Sydney, Australia. Professor Bell argues that as AI becomes more integrated into legal practice, the very essence of what it means to be a lawyer is being redefined. Traditional legal training, which emphasizes critical reasoning, ethical judgment, and persuasive advocacy, must now adapt to incorporate technological proficiency. Lawyers will need to develop new skills to work alongside AI, understanding its capabilities and limitations to leverage its full potential. AI, despite its remarkable speed and efficiency in processing and analysing vast amounts of data, often exhibits variability in the quality of its outputs. This inconsistency necessitates that individual lawyer exercise heightened vigilance when integrating AI into their practice. In most jurisdictions, the ethical responsibilities associated with the use of AI are placed squarely on the shoulders of the legal professionals employing these tools.[6] Lawyers must thus ensure that AI applications comply with ethical standards and do not compromise the integrity of legal processes. This evolution in training and identity is not just about acquiring technical skills but also about reshaping the mindset of legal professionals to embrace innovative approaches in their practice.

In recent years, the integration of artificial intelligence within the legal profession has shifted from merely digitalizing tedious tasks to establishing AI as a companion to lawyers. This evolution underscores the need for lawyers to develop a robust understanding of AI's capabilities and limitations. For AI to be effectively adopted by legal departments, there must be an expansion of lawyers' skills, as lack of staff expertise accounts for one of the current barriers to such adoption, together with financial constraints, and regulatory ambiguity hindering wider implementation. [7]

The integration of AI into legal practice presents significant challenges to the traditional role and identity of lawyers. As AI systems become more sophisticated,

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6 J Rogers and F Bell, "The Ethical AI Lawyer: What is Required of Lawyers when they Use Automated Systems" (2019) 1(1) *Law, Technology and Humans* 80, 86.

7 M Sako and R Parnham, *Technology and Innovation in Legal Services: Final Report for the Solicitors Regulation Authority* (University of Oxford, 2022).

they could perform tasks that were once the exclusive domain of human lawyers. This shift may lead to a reevaluation of what it means to be a lawyer, emphasizing the need for unique human skills such as critical thinking, emotional intelligence, and ethical judgment. Lawyers will need to adapt to working alongside AI, leveraging technology to enhance their capabilities while addressing the ethical and practical implications of AI's use in legal contexts. This evolution also requires lawyers to develop technological proficiency to effectively collaborate with AI tools and address associated ethical considerations, including algorithmic bias and data privacy. This evolution will necessitate continuous learning and adaptation, ensuring that lawyers remain relevant and effective in an AI-driven legal landscape.

The training of lawyers is after all a longstanding issue that predates AI adoption. Traditionally, clients have indirectly funded the training of young lawyers through the legal fees they pay, as junior lawyers perform much of the groundwork in their early careers. However, with AI taking over these foundational tasks, the question arises: how will future lawyers acquire the necessary experience? [8] This shift necessitates a comprehensive rethink of legal training, incorporating new skills tailored to an AI-enhanced legal landscape. [9] Developing these new competencies will be crucial for preparing the next generation of lawyers to thrive in a rapidly evolving profession. [10]

The financial aspects relating to the necessary resources to implement AI in the legal practice significantly influence the ability to adopt AI technologies and thereby affect the environment where lawyers are going to work. Larger organisations with greater capital are better positioned to integrate AI, potentially widening the gap between them and smaller firms. This dynamic could also lead to the rise of multidisciplinary practices, challenging the traditional legal organizational models that tend to be lawyer-centric. Far from subscribing to Richard Susskind's prediction on the end of lawyers[11], Professor Bell is of the view that the evolving role of lawyers may lead to a possible democratization of the legal profession, moving away from the hierarchical structures that have dominated for so long. This democratization, while potentially diluting the lawyer's monopoly, offers a more inclusive and collaborative professional environment.

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8 Wilkins, D. (2024). Harvard Law Expert Explains How AI May Transform the Legal Profession in 2024. Harvard Law Today. https://hls.harvard.edu/today/harvard-law-expert-explains-how-ai-may-transform-the-legal-profession-in-2024/

9 M Legg and F Bell, *Artificial Intelligence and the Legal Profession* (Hart, 2020) Chapter 11. See also M Legg, *New skills for new lawyers, responding to technology and practice developments*, in *The Future of Australian Legal Education* (Thomson Reuters 2018) [2018].

10 International Bar Association. (2024). The Future is Now: Artificial Intelligence and the Legal Profession. https://www.ibanet.org/document?id=The-future-is+now-AI-and-the-legal-profession-report

11 Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services*, Oxford University Press, Oxford, 2008.

# 4 The risks of applying AI to legal practice

The EU AI Act emphasizes transparency but falls short in mandating content accuracy. Professor Wachter compared this to issuing a warning that well water is poisoned rather than requiring a purification filter to be installed on the well.

As with any disruptive technology, the legal framework surrounding AI use must evolve to address new ethical and operational issues, [12] ensuring that its deployment adheres to established standards and practices. The adoption of the EU AI Act[13] was a landmark moment at global level in the attempt to regulate this field. Ensuring accountability and transparency in AI-driven legal services is critical to maintaining client trust and upholding the integrity of the legal profession, and in line with an overall convergence across jurisdictions in the choice of tools to manage risks connected to AI [14]: this approach alone is not however sufficient to effectively cater for some of the most relevant risks connected to the use of large language models, [15] namely hallucinations.

Hallucinations in large language models occur when these AI systems generate outputs that are plausible-sounding but factually incorrect. These hallucinations happen because LLMs are trained on vast datasets of text without an inherent understanding of the world, leading them to sometimes produce information that is not grounded in reality. This phenomenon is somewhat inherent to the functioning of LLMs, as they rely on pattern recognition and statistical associations rather than true comprehension. The existence of hallucinations underscores the continued relevance of experts such as lawyers, who bring critical thinking, ethical judgment, and domain-specific knowledge to their work. Lawyers are essential in ensuring that the use of AI in legal contexts adheres to accuracy and integrity, providing the necessary oversight to mitigate the risks associated with AI-generated content.

Hallucinations in large language models present thus significant legal and practical challenges. From a legal perspective, the issue of liability for wrong outputs generated by AI is complex and evolving. **Sandra Wachter**, who leads and coordinates the Governance of Emerging Technologies Research Programme at the Internet Institute of the Oxford University, presented her views on the matter. Currently, there is a notable absence of comprehensive legal recourse for addressing the inaccuracies produced by these models.[16] This gap raises critical questions about the accountability of AI developers and the potential legal implications for the end users who rely on these systems.

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12 Morley, J., Floridi, L., Kinsey, L., & Elhalal, A. (2021). Auditing of AI: Legal, Ethical and Technical Approaches. AI and Ethics, 1(1), 1-14.

13 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

14 Kaminski, M. E. (2023). Regulating the Risks of AI. Boston University Law Review, 103(1347).

15 Kaminski, M. E. (2023). The Developing Law of AI: A Turn to Risk Regulation. University of Colorado Law Legal Studies Research Paper No. 24-5

16 Wachter, S., Mittelstadt, B., and Russell, C. 2024. Do large language models have a legal duty to tell the truth? Royal Society Open Science 11, 8.

The EU AI Act emphasizes transparency[17] but falls short in mandating content accuracy. Professor Wachter compared this to issuing a warning that well water is poisoned rather than requiring a purification filter to be installed on the well.[18] This approach underscores a significant gap in regulatory measures, where the emphasis is more on alerting users to potential risks than ensuring the integrity of the AI outputs. This regulatory stance poses a challenge for legal practitioners who rely on AI systems, as they must navigate the implications of using tools that may not fully adhere to truthfulness. All industries are heavily investing in these AI systems, some of which are advertised as hallucination-free. However, there is no binding legal obligation for these systems to always convey truthful information. This creates a troubling disconnect between the existential warnings about AI[19] and the documented behaviour of these models, which continue to hallucinate[20]. The producers of these AI systems often disclaim responsibility for these inaccuracies, raising ethical and operational concerns.

Professor Wachter underscored the importance of the proposed EU liability directive,[21] which remains in the proposal stage.[22] The existing product liability directive notably excludes certain damages pertinent to AI-related risks from triggering liability.[23] This exclusion adds another layer of complexity to the accountability framework for AI deployment. Without robust liability frameworks, the responsibility for mitigating AI risks may disproportionately fall on end-users, including legal professionals who depend on these technologies for their work. The absence of stringent regulatory frameworks means that users, including legal professionals, must navigate the risks associated with AI-generated content without clear legal protections.

Legal professionals must thus develop a strong understanding of AI's capabilities and limitations to effectively collaborate with these technologies and ensure the

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17 See *ex multis* Fraser H, Bello y Villarino J-M. Acceptable Risks in Europe's Proposed AI Act: Reasonableness and Other Principles for Deciding How Much Risk Management Is Enough. European Journal of Risk Regulation. 2024;15(2):431-446. doi:10.1017/err.2023.57; Veale, M., & Borgesius, F. Z. (2021). Risk Management in the Artificial Intelligence Act. European Journal of Risk Regulation, 13(1), 1-16.

18 Wachter, Sandra, Limitations and Loopholes in the EU AI Act and AI Liability Directives: What This Means for the European Union, the United States, and Beyond (July 01, 2024). Yale Journal of Law & Technology, Volume 26, Issue 3 , Available at SSRN: https://ssrn.com/abstract=4924553 or http://dx.doi.org/10.2139/ssrn.4924553

19 See *Statement on AI Risk - AI experts and public figures express their concern about AI risk*, available at < https://www.safe.ai/work/statement-on-ai-risk>, and *Pause Giant AI Experiments: An Open Letter*, available at: < https://futureoflife.org/open-letter/pause-giant-ai-experiments/>.

20 See e.g. the Europe Terms of Use of ChatGPT, updated December 11, 2024, according to which '*Output may not always be accurate. You should not rely on Output from our Services as a sole source of truth or factual information, or as a substitute for professional advice. You must evaluate Output for accuracy and appropriateness for your use case, including using human review as appropriate, before using or sharing Output from the Services. You must not use any Output relating to a person for any purpose that could have a legal or material impact on that person* […]'. Available at: < https://openai.com/policies/eu-terms-of-use/>.

21 COM (2022) 496: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive).

22 The proposal may be significantly amended by the Parliament in the current legislature – see European Parliamentary Research Service, *Proposal for a directive on adapting non-contractual civil liability rules to artificial intelligence: Complementary impact assessment PE 762.861*, available at: < https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2024)762861#:~:text=The%20complementary%20impact%20assessment%20study,fault%2Dbased%20and%20strict%20liability. >.

23 Recital 24 of Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC.

integrity of their work. From a practical standpoint, an effective strategy is the adoption of methodologies such as "zero-shot translation",[24] which involves grounding AI outputs in verified data and translating reliable information into new domains or formats. This method aims to minimize the likelihood of hallucinations by ensuring that the AI's outputs are based on accurate and trustworthy data. Additionally, continuous monitoring and human oversight are essential in identifying and correcting these inaccuracies. As AI continues to evolve, these practical measures will be crucial in mitigating the risks associated with hallucinations and ensuring that AI is integrated responsibly into various professional fields, including law.

# 5 Conclusions

The reference to a very practical methodology to reduce the risks of hallucination powerfully illustrates how high-level discussions cannot be disentangled from very practical aspects when it comes to AI. Considering our initial starting point, to ponder the necessary steps to undertake to deploy AI in legal departments, a first interim conclusion derives from the reiterated importance of past cases in the functioning of generative AI. In the realm of AI-driven legal practice, the adage "garbage in, garbage out" underscores the critical importance of using accurate and reliable data. Legal databases must be meticulously curated, ensuring that only correct and relevant information is included to prevent AI from producing erroneous outputs. The implementation of comprehensive data verification protocols is paramount in maintaining the integrity and dependability of AI-generated insights. By ensuring that legal datasets are comprehensive and accurate and prioritizing the quality of data fed into these systems, legal departments can significantly enhance the dependability of AI-generated insights and harness the full potential of AI.

The practical steps towards achieving this involve integrating thorough data validation measures into our workflows. This means not only rectifying existing data inaccuracies but also establishing continuous monitoring and updating mechanisms to keep the databases up to date. Legal professionals must collaborate closely with data scientists and AI developers to establish these protocols. It is imperative to assess whether we are currently equipped to undertake these measures and, if not, to identify the resources and training needed to do so.

Another point that we heard in the discussion is that we do not know why large language models are right when they are right – this sounds, however, like a broken clock that is right about the time twice a day, but it is of no use if there is no human being to read it and assess the reliability of this information. This brings to light the critical question of the evolving role of lawyers in the age of AI. Traditionally, a lawyer's prowess has been measured by their ability to recall and apply vast amounts of legal knowledge. Yet, as AI systems increasingly take over the storage and retrieval of legal information, the essence of what it means to be a good lawyer is bound to shift. This shift implies that the future of legal practice will place a higher

[24] Mittelstadt B, Wachter S, Russell C. To protect science, we must use LLMs as zero-shot translators. Nat Hum Behav. 2023 Nov;7(11):1830-1832. doi: 10.1038/s41562-023-01744-0. PMID: 37985912.

value on analytical and interpersonal skills, which AI cannot replicate. This redefinition of roles could lead to a completely different legal environment, one that requires lawyers to adapt to new modes of thinking and operation.

This brings us to the ethical and legal implications of integrating AI in legal practices. While the aspiration for AI to always convey truthful information is noble, the practicality of this goal remains uncertain. Even the option of shifting the liability from lawyers to the producers of large language models if these are advertised as flawless and hallucination-free is not deprived of wider consequences. The obvious question is indeed whether excluding hallucinations is at all currently possible and whether the ethical imperative to prohibit the production of information which is not truthful may come at the cost of technonlogical innovation. The pressure to innovate and push technological boundaries might thus conflict with the need for absolute accuracy and reliability. By all means, the discourse around large language models' truthfulness requirement, liability for inaccurate information that these models produce, and the balance between innovation and ethical imperatives is pivotal in shaping the future of law in the AI era.

Another pressing question is whether we will ever delegate decisions to AI and what impact this may have beyond the narrow scope of law and more broadly on democracy. Delegating decisions to AI carries significant risks for democratic societies, as it can undermine the foundational principles of accountability, transparency, and human oversight. AI systems, despite their advanced capabilities, can still exhibit biases and errors, leading to decisions that may not reflect the values and norms of a democratic society. The lack of human intervention in critical decision-making processes could erode public trust in democratic institutions and exacerbate existing inequalities. Moreover, the opaque nature of many AI algorithms means that their decision-making processes are often not fully understood, making it difficult to ensure that these systems adhere to democratic standards. Ensuring that AI-driven decisions are transparent and subject to human oversight is crucial to maintaining the integrity of democratic governance.

As we navigate the complexities of integrating AI into legal practices, it becomes increasingly clear that the role of human oversight is indispensable. Lawyers, with their deep understanding of legal principles and ethical considerations, are uniquely positioned to ensure that AI systems operate within the bounds of democratic values. By actively participating in the development and implementation of AI technologies, legal professionals can help safeguard the integrity of the legal system, ensuring that decisions remain transparent, accountable, and aligned with the rule of law.

# Why AI needs lawyers and other humans in the loop

Bart Verheij*

In these times of immense developments in artificial intelligence (AI), it has become a serious question: should we be afraid of our jobs? Spoiler alert: my answer is a clear no, we do not have to be afraid. Our jobs will change and AI will have an influence. But AI needs lawyers and other humans in the loop, and in the following I will give you a brief perspective on why.

The current discussion is fuelled by headlines in the serious press that robots know what decisions courts will make, even at the level of the European Court of Human Rights.[1] Some say that large language models (such as ChatGPT) can pass the legal bar exams that for human beings are not so trivial to pass.[2] The question whether progress makes people unemployed goes at least back to the 1970s,[3] when it was suggested that by the computer revolution jobs will be taken over by robots.

Will that also happen for lawyers? We know that people are experimenting with the new possibilities. For instance, there is the recent story about a lawyer in New York who used today a chatbot to discover a case citation, unfortunately overlooking that what chatbots produce can be wildly wrong. Hence he is facing disciplinary measures.[4] Even more recently, in the Netherlands, a court decision published online showed how a judge used ChatGPT as a source of information, a bit like a search engine such as Google.[5] Not at all a good idea since ChatGPT is not designed as a search engine. Everyone will need to check for themselves whether the generated information that comes out makes any sense at all, the more so in sensitive setting such as legal decision making.

In the following, I give an update on the state of AI as a tool in law, a perspective on how AI needs to improve to meet the needs of law, and a vision that argument-based discussion between AI systems and humans is the next step forward. I will conclude that lawyers (and humans more generally) remain relevant as contributors to AI.

We start with a bit of history of AI. A first kind of AI systems to be considered is knowledge systems, going back to the 1970s. In knowledge systems, the expertise of a professional is made explicit (`represented') and then typed as a kind of computer program that can be used by the AI system for an intelligent task. Typically the knowledge has the form of if-then rules that are applied in reasoning. For

* Bart Verheij holds the chair of artificial intelligence and argumentation as full professor at the University of Groningen.

1 Dutch newspaper NRC Handelsblad (December 30, 2020), Robot knows what decision the court will make [Translation: Google Translate].

2 CNN (January 1, 2023), ChatGPT passes exams from law and business schools.

3 Der Spiegel (April 17, 1978), Die Computer-Revolution. Fortschritt macht arbeitslos.

4 Reuters (January 30, 2024), Another NY lawyer faces discipline after AI chatbot invented case citation.

5 Rechtbank Gelderland (June 7, 2024), ECLI:NL:RBGEL:2024:3636.

instance, IF there are damages AND the act that led to the damages is an unlawful AND the act is imputable to the actor AND there is a causal connection between the act and the damages, THEN there is a duty to repair, to pay for those damages. The example rule refers to tort law, making explicit the conditions that need to be fulfilled for having to pay damages, and you can actually build computer programs that have this kind of information as embedded knowledge.

A second, very different kind of AI systems is data systems, which have taken over AI since the data revolution by rise of the internet, smartphones and social media. There is now so much information available, that that information can be used as a large database of examples as the basis for predicting new information. Consider a database of possible tort law situations that are used to train a neural network (a key type of data system based on machine learning). Every example situation is used as input of the network, which then provides as output whether the damages have to be repaired. If the answer is correct, nothing happens. If it is wrong, the weights of the links in the network are changed slightly, gradually training the network to give correct answers. It turns out that neural networks are a very successful tool for various application domains, for instance for recognizing whether there is a cat in an image.

Already in the 1980s, it was well known that there are many hurdles to overcome when AI is applied in the field of law. At that time, knowledge systems were most prominent in the field of AI. A first hurdle is that legal reasoning is rule-guided rather than rule-governed. Second, legal terms are open-textured, and third, legal questions can have more than one answer, but the reasonable and timely answer must be given. And finally, the answer to legal questions can change over time. With this list of four hurdles, we are following Edwina Rissland who reviewed[6] Anne Gardner's Stanford University dissertation (1987), two of the founding mothers of the field of AI as it is applied in the law.

But also in these times of machine learning and data systems, it is still true that there are significant hurdles for AI applied in the context of legal decision making. First, machine learning is retrospective. It always uses old data. Then, success in law is not statistical, instead the focus is on the fairness of a decision. Third, machine learning AI systems often do not provide explanations since they often function as black box systems. And, fourth, in machine learning, we typically need a large data size, whereas the number of cases perhaps in the daily life of a practicing lawyer seems large, but is not nearly large enough for what machine learning needs. Furthermore, given the variation of legal cases, past data may not be homogeneous. Sixth, past decisions may simply be wrong and can hence not be used as examples for proper training (`garbage in, garbage out'). And, seventh, and finally, a legal dispute is often about what rules should be applied, so in a sense, lawyers are trying to determine whether the system used is the right system for the situation. With this

[6] Rissland, E.L. (1988). Book review. An Artificial Intelligence Approach to Legal Reasoning. Harvard Journal of Law and Technology, 1 (Spring): 223–231

list we are following an analysis by Trevor Bench-Capon,[7] an influential researcher in AI applied in the law, who passed away in 2024.

These eleven hurdles (four from the times of knowledge systems and seven for contemporary data systems) can be placed in context using two perspectives on legal decision making: subsumption and theory construction. The first subsumption perspective concerns the idea that in legal decision-making, there are given facts and given rules, which then lead to the legal consequences. As all lawyers know from experience, the perspective is clearly wrong. The perspective is connected to the phrase that the judge is the `bouche de la loi'. The phrase goes back to Montesquieu (1689-1755) (but he did not endorse the perspective).

The second perspective considers decision making as a form of theory construction. Now the idea is that decision making starts with a hypothesis (a theory) about what might be the facts, what might be the rules and what might be the legal consequences, and then this hypothesis is adapted gradually, arriving in the end at the final perspective on the facts, the rules and the consequences. The process can be thought of as an argumentative dialogue in which the decision maker carefully listens to the parties involves, aiming to discover relevant information before a decision can be made. As opposed to the first, this second perspective of decision making as theory construction is recognizable for actual decision makers.

This dynamic, active perspective on decision making, so typical for the law, has influenced my academic agenda, and led me to a perspective on where where AI should go in the future: AI researchers and engineers should learn from how the law and its decision making operates. In a slogan: we should do AI as we do law.[8] A key idea is that in law there is data, in the form of past decisions, the legal example precedents that can be followed; and there is also knowledge, in the form of statutes, that are explications of the regulations as they hold. But there is always a need fpr balancing between the data and the knowledge. Lawyers are always on the lookout where the new decisions based on existing knowledge are correct and where they are not, and, if necessary, they adapt a decision, using their discretionary power, meanwhile explaining why they make a difference. In a way, new cases are the source of testing old ideas and inspire new ideas about what the law is, in a cyclic process of argumentative discussion.

An elementary example of how argumentation can address conflicts by including new information, is the following. Consider a bike that is stolen. Mary is the original owner of the bike, so has a claim of ownership. But also John has such a claim since he has bought the bike that was stolen from Mary. Since there is only one bike, there is a conflict of reasons about the ownership as it is impossible to honour both claims. In order to decide, whether Mary is the owner or John is the owner, in many legal systems, there are considerations that help resolve such a conflict, for instance, whether the buyer, here John, was acting in good faith. If for instance John bought

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7 Bench-Capon, T. (December 2020). The need for good old fashioned AI and Law. Jusletter-IT, pp. 23-35.

8 Verheij, B. (2022). The Study of Artificial Intelligence as Law. Law and Artificial Intelligence. Regulating AI and Applying AI in Legal Practice (eds. Custers, B., & Fosch-Villaronga, E.), 477-502. Berlin: Springer. https://doi.org/10.1007/978-94-6265-523-2_24

the bike for a very low price, much below market value, he was not bona fide, blocking his claim to ownership. John could have known that the bike was stolen, solving the conflict, and it can be concluded that Mary is the owner. We can think of this example as a simple process of discover, where we had to discover the solution to a conflict. And while this is a simple example, all lawyers know that arriving at a good resolution of a conflict can be very hard.

The argumentation perspective on AI has led me to suggest that after the early days of intelligent systems in the 1950s, the heyday of knowledge systems in the 1970s and the start of data systems around 2000, we now need to move towards the development of argumentation systems, i.e., dialogue systems, in which interaction with the machine takes the form of a discussion based on arguments. Such argumentation systems can conduct a critical discussion in which hypotheses are constructed, tested and evaluated on the basis of reasonable arguments. Argumentation systems will be hybrid in two senses. First they will combine various AI methods in a hybrid way, focusing on knowledge, data, reasoning and language in concert, and second they will involve the hybrid collaboration of humans and machines in order to strengthen both human and machine performance.[9]

A natural question that arises is the connection between hybrid argumentation systems and a recent prominent development in AI, namely the rise of large language models (LLMs), such as ChatGPT. Indeed, these are a game changer in artificial intelligence technology. What happens for instance when we ask ChatGPT to apply tort law to a case? A small experiment shows that the system correctly lists the main conditions to be tested for the duty to repair damages based on (Dutch) tort law, and also the application of these conditions to a small standard example case works well. Even a case in which an exception applies is handled correctly. And all that in carefully phrased, flawless natural language. We can conclude that at least some of the times for some tasks ChatGPT can produce correct reasoning output. The problem is that it is unknown when it works and when it doesn't. There is no guarantee. A key issue is that LLMs are literally language generators, which can include correct text with a relevant meaning but just as easily can be text that is completely off the mark. This is the problem of `hallucination' of LLMs as it is called: text is generated but correctness is not established. The technology is not designed for correctness of the generated text, and in the current state of the art of technology it is not clear how to improve that in a generalizable, reliable way. For now, an LLM can be used for idea generation (as in a brainstorm) but needs a human in the loop to check what is produced. Research often focuses on limited, carefully protocolled and guarded settings in which LLMs can be helpful and in which errors made are not very harmful.

Some say that LLMs are just high-level plagiarism. Others claim that we are in a phase transition in the history of artificial intelligence. And while we are still in the

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9 Akata, Z., Balliet, D., de Rijke, M., Dignum , F., Dignum, V., Eiben, G., Fokkens, A., Grossi, D., Hindriks, K., Hoos, H., Hung, H., Jonker, C., Monz, Christof, Neerincx, M.A., Oliehoek, F., Prakken, H., Schlobach, S., van der Gaag, L., van Harmelen, F., van Hoof, H., van Riemsdijk, B., van Wynsberghe, A., Verbrugge, R., Verheij, B., Vossen, P., & Welling, M. (2020). A Research Agenda for Hybrid Intelligence: Augmenting Human Intellect by Collaborative, Adaptive, Responsible and Explainable Artificial Intelligence. Computer 53 (8), 18-28. https://doi.org/10.1109/MC.2020.2996587

middle of discovering what is at stake, it is necessary that we do experiments with the people that are in the know: the human experts. This is the time to participate in your own experiments with LLMs, and discover for yourself what works for you in your setting. But never forget that LLMs do not check things themselves. They still need us for that. Meanwhile, it may be true that the language systems that are now on the rise will fundamentally transform artificial intelligence and its uses in society, and will become the conversation partners that I referred to as hybrid argumentation systems. This is an open debate, in research, and, interestingly, also very actively in society. Meanwhile there is clearly a place for humans as relevant contributors to how AI is integrated in society since we determine what works and what does not work for our purposes. They cannot do that without us.

# AI and Lawyers: Hope, Help or Hype?

Felicity Bell*

## 1 Overview

In 2019, David Wilkins and María J Esteban Ferrer wrote:

> *"Although artificial intelligence and machine learning will surely replace some legal jobs, the delivery of corporate legal services is likely to remain a human capital intensive endeavor for the foreseeable future. But these humans must be taught to work effectively with new technologies, in environments where lawyers and other professionals and knowledge workers…must learn to collaborate effectively to deliver value to increasingly sophisticated and cost-conscious clients."*[1]

Although this predated the current, latest developments in Generative AI (GenAI), it continues to hold true. Several years ago there were rampant predictions of lawyers being replaced by artificial intelligence (AI) but this has not come to pass. Nor does it seem that lawyers are in imminent danger of disappearing. The discourse surrounding the effect of AI on the professions, and the legal profession in general, tends to view professional work as augmented, not replaced.[2] At the same time, there are many challenges for legal professionals deriving from the rise, adoption and implementation of new technologies.

Further, the nature of the "augmentation" continues to change, and its areas expand – we know that machine learning is already applied many areas within legal services including e-disclosure, case law analysis, argumentation mining and quantitative legal prediction.[3] GenAI can do tasks such as writing or improving content by producing a draft text in a specific style or length, outlining and summarizing. However, GenAI is imperfect, and lawyers have a famously difficult relationship with technology, so it is in many ways no surprise that in June 2023, fake case citations appeared in ostensibly lawyer-authored submissions in the United States District Court for the Southern District of New York.[4] This was caused by the lawyers' use of

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1 D Wilkins and M J Esteban Ferrer, "Taking the 'Alternative' Out of Alternative Legal Service Providers: Remapping the Corporate Legal Ecosystem in the Age of Integrated Solutions'" in M DeStefano and G Dobrauz-Saldapenna (eds) New Suits: Appetite for Disruption in the Legal World (Stampfli Verlag, 2019) 41, 77.

2 B Alarie, A Niblett and A Yoon, "How Artificial Intelligence Will Affect the Practice of Law" (2018) 68 *University of Toronto Law Journal* 106.

3 M Hildebrandt, "Law as Computation in the Era of Artificial Legal Intelligence" (2018) 86(Supp 1) *University of Toronto Law Journal* 12–35.

4 *Mata v Avianca, Inc* 678 F.Supp.3d 443 (S.D.N.Y. 2023).

ChatGPT, unaware that it had “hallucinated” and invented the cases and their citations.[5]

AI promises efficiency for lawyers, which is arguably its most significant contribution to legal services. But what does efficiency mean in this context? Primarily, it means performing tasks quickly and competently. Lawyers cannot afford to sacrifice quality in the highly regulated setting they inhabit, that’s not an option. In some cases, we might also say that not only is AI faster, but it is also better, in the sense of producing fewer errors and/or “spotting” things rather than missing them. We have applications which may take over and replace lawyer’s or paralegal’s tedious and mechanistic work, such as review of documents; other uses may equip lawyers to do their work better or to a higher standard.

Oxford academics John Armour, Mari Sako and Richard Parnham have categorised lawyers as either consumers or producers of AI.[6] By ”producers”, they mean lawyers who are involved in creating AI-enabled legal services, such as those working at tech companies developing legal AI tools. However, this paper focuses on lawyers as consumers of AI. This includes lawyers who are themselves using AI to deliver their work – either enhancing their work with AI or replacing parts of their work using AI.

Technology Assisted Review (TAR) in the common law discovery process is a quintessential application of AI in legal services, illustrating both aspects well.[7] More than a decade ago, it was demonstrated that supervised machine learning for voluminous discovery was not only much quicker at identifying nearly all relevant documents in a corpora but also less prone to error than humans. However, this process still requires lawyer input and supervision. While TAR focuses on velocity and quality, GenAI examples emphasize quantity and velocity, such as producing drafts of various materials in minutes. However, the quality of GenAI, as noted in relation to hallucinations, may be variable.

The argument is that AI will continue to perform specific tasks which were previously done by lawyers or paralegals. Lawyers will review or supervise this work. A few years ago, this was typically presented as lawyers still getting to do the interesting and meaningful work, with AI doing the “grunt” work. With the advent of GenAI, this narrative has shifted slightly, as this technology is seen as more capable and able to perform a wider range of tasks. GenAI is presented as more of a source of inspiration – writing the first paragraph or even a draft, producing ideas, extracting key information from texts by way of summarising and outlining. It is no longer just performing grunt work but is now portrayed as a companion. Tsedal Neeley of the Harvard Business School has stated that AI is qualitatively different from previous technological developments that we have incorporated into our work and

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5 B Weiser, ‘A Man Sued Avianca Airline. His Lawyer Used ChatGPT’, *The New York Times*, 27 May 2023.

6 J Armour, M Sako and R Parnham, “Augmented Lawyering” [2022](1) *University of Illinois Law Review* 71.

7 M Grossman and G Cormack, “Technology-Assisted Review in e-Discovery Can Be More Effective and More Efficient than Exhaustive Manual Review” (2011) 17 *Richmond Journal of Law & Technology* 1.

organisations. She says that “instead of thinking of AI as the tools we use, we should think of it as a set of systems with which we can collaborate.”[8]

The positive view of AI in legal practice focuses on its ability to eliminate or reduce tedious or menial work, freeing lawyers to engage in higher-level, higher-value, more interesting and self-directed activities. The pessimistic forecast is that AI will likely intensify competition in the legal services market, threatening the jobs of those in the most precarious positions (junior lawyers and paralegals) and putting more senior lawyers under pressure to cut costs, adapt to new technology and see their work steadily eroded. AI has implications for the employment environment, the construction of lawyers’ expertise and their autonomy in both work and regulation, and even for the ideal of professional service. It is possible, too, that the integration of AI with the practice of law will bring about a more fundamental transformation of professionalism. Technological change will cause some professions to shrink or disappear,[9] others to grow, and new ones to be created.[10]

Therefore, the key questions examined in this paper are as follows:

- How can AI be ethically and responsibly used by lawyers?
- What are the macro effects on lawyers’ work, now and in the future?
- What do we require from those future lawyers?

## 2 How can AI be ethically and responsibly used by lawyers?

Whether we characterise AI as a set of tools, a companion, or a legal database, there are some core professional responsibility messages. Lawyers bear individual professional responsibility (and liability) for their work,[11] regardless of whether they use AI. In short, AI can only be ethically used by lawyers if they verify its outputs its outputs that are included in their work product or have overwhelming confidence in the integrity of the system, due to the significant responsibility they bear. There are also open questions about what lawyers should disclose to their clients regarding the use of AI, which partly relates to the significant implications for legal costs. Generally, however, and this is connected to points made below, increasing the use

8 T Neeley, “8 Questions About Using AI Responsibly, Answered”, *Harvard Business Review,* 9 May 2023.

9 F Pasquale and G Cashwell, ”Four Futures of Legal Automation” (2015) 63 *University of California LA Discourse* 26.

10 M Bruckner, M LaFleur and I Pitterle, The Impact of the Technological Revolution on Labour Markets and Income Distribution, United Nations Department of Economic & Social Affairs, 2017, 26, <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/2017_Aug_Frontier-Issues-1.pdf>.

11 J Rogers and F Bell, “The Ethical AI Lawyer: What is Required of Lawyers when they Use Automated Systems” (2019) 1(1) *Law, Technology and Humans* 80, 86.

of automation in legal services increases the need for, and arguably value of, "ethical standards, moral judgment and criticality".[12]

Lawyers owe numerous ethical obligations, and some key ones are discussed below. However, there are three main points to consider, beyond the content of lawyers' professional ethical obligations, which vary by jurisdiction.

Firstly, lawyer regulation and discipline are highly individualised, so the main regulatory burden of using AI falls on lawyers. This is despite the fact that organisations play a critical role as the primary sites where professionalism is enacted and where organisational culture influences ethical or unethical behaviour.[13] As Justine Rogers and I have written: "The workplace is now the site and source of professional norm-setting and control, wherein a significant proportion of unethical behaviour is done with or at the behest of others or organisational systems".[14]

The second point concerns motivation. The regulation of lawyers relies on their motivation and capacity to uphold their professional obligations.[15] It's only when these components of ethical behaviour are supported that regulation can be legitimate and effective.

Finally, Anthony Kronman said that law is not an autonomous discipline.[16] By this, he meant, as echoed by others, that professions are social institutions and part of the social structure. Lawyers serve various clients in different practice settings, with diverse needs, but in accordance with a consistent ethical framework. Lawyers play an institutional role in the administration of justice and the maintenance of a democratic society. When considering the impact of AI on lawyers, we need to consider all levels – the individual, their clients, their organisation, the profession, and society itself.

## 2.1 Competence

Competence means having knowledge of the law and the ability to use it (both substantively and procedurally) with skill to solve problems. It refers to technical proficiency and requires efficiency, such as achieving an outcome in a timely and cost-effective manner. In Australia, legal competence does not specifically include technological competence, but the requirements of cost-effectiveness and efficiency mean that lawyers (or their support staff) are obliged to engage in baseline use of technology. In the US, the American Bar Association's "Comment 8" was added to its

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12 S Kift, "A Virtuous Journey Through the Regulation Minefield: Reflections on Two Decades of Australian Legal Education Scholarship" in B Golder et al (eds), *The State of Legal Education Research: Then, Now and Tomorrow* (Routledge, 2019) 166–67.

13 See J Rogers, D Kingsford Smith and J Chellew, "The Large Professional Service Firm: A New Force in the Regulative Bargain" (2017) 40(1) *UNSW Law Journal* 218.

14 Rogers and Bell (n 11) 85.

15 Rogers and Bell (n 11).

16 A T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, 1993).

Model Rule 1.1, making clear that lawyers have a duty to be competent not only in the law and its practice, but also in technology.[17]

Regarding lawyers' responsibility for AI outputs, some writers have referred to this in the past as akin to the responsibility of supervisinga less senior lawyer or a paralegal.[18] This analogy might work for some, but not all, AI applications. Generally, there are significant differences between supervising the work product of a person and that of an AI. If a person produces something ambiguous, you can easily ask for clarification and explanation. You can ask for copies of the cases and legislation they are referring to. Most importantly, over time, you will likely see enough evidence of their work practices to decide whether you trust them or not, and you will come to know their strengths and weaknesses. None of this is possible with AI. It would be misguided to develop trust in it the same way as you do with a person. Of course, there are other ways of "trusting" AI, such as understanding measures of accuracy.

## 2.2 Independence

Professional rules emphasise lawyers' obligations to exercise independent judgement free from external pressures or self-interest.[19] How this may affect lawyers' use of AI legal tools is also unclear. If lawyers are overly reliant on AI technology, it may compromise their independent judgment.[20] As noted, it-is argued that lawyers should therefore "supervise" technology; however, this could be challenging if lawyers do not have the capacity to independently evaluate how the technology is working.[21] If a means of evaluation is apparent, lawyers must feel confident in understanding the nature of the evaluation and its implications. For example, lawyers will need to understand statistical concepts such as confidence intervals (margins of error) and confidence levels to gauge accuracy. This is especially important if acceptable statistical parameters, such as those in TAR, must be agreed upon with opponents before starting. A lawyer might not be acting in their client's best interests or exercising independent professional judgement if they agree to accept, for example, a margin of error that is too high due to a failure to properly understand the concepts or how its application translates to the number of relevant documents found.

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[17] <www.lawsitesblog.com/2018/03/make-30-states-another-adopts-ethical-duty-technology-competence.html>

[18] Eg, K Medianik, "Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era" (2018) 39(4) *Cardozo Law Review* 1497.

[19] Eg, American Bar Association Model Rules, r 2.1; Solicitors Regulation Authority (England and Wales) Code of Conduct for Solicitors, principle 3; Uniform Law Australian Solicitors Conduct Rules 2015, r 4.1.4.

[20] Rogers and Bell (n 11) 87. See also A Bernstein, "Minding the gaps in lawyers" rules of professional conduct' (2019) 72 *Oklahoma Law Review* 125, 132

[21] Eg, Medianik (n 18), c.f. M Legg and F Bell, *Artificial Intelligence and the Legal Profession* (Hart, 2020) 303.

## 2.3 Duty to the administration of justice

Lawyers owe a duty to the court and the administration of justice for the benefit of society, as they provide institutional protections that support the rule of law and a democratic society. The administration of justice goes beyond the duty to the court, reflecting an obligation to society at large. As has been well documented, the use of AI tools may challenge rule of law values, particularly where systems operate in biased ways or lack transparency or oversight. The American Bar Association and the Solicitors Regulation Authority (SRA) in the UK have taken stances on this, clearly identifying ethical issues related to the use of AI not only in legal practice but more broadly, such as the potential for bias, and issues around explainability and transparency. The ABA passed a 2019 resolution urging:[22]

> "courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI."[23]

The SRA identified similar issues in Technology and Legal Services (2018)[24], as did the UK Law Society in its Horizon Scanning report on AI and the legal profession[25] and its 2019 report Algorithms in the Criminal Justice System.[26] More recently, the Law Society issued guidelines on GenAI[27], and the International Bar Association produced a report titled "The Future is now".[28]

There are questions for lawyers about how they might use AI in their own practice and how far they may be obliged to counsel clients about their use of AI.[29] The duty to the administration of justice may require lawyers to question the uses of this technology, including their own and their clients' use of it. Economou asks, for example: "To what extent may my clients use impenetrable, potentially biased algorithms to make determinations that assess or affect customers or unsuspecting citizens? What should they disclose? What representations can my clients fairly make about the AI solutions they market?"[30] The extent of what this duty requires is, however, uncertain.

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22 N Economou, "Artificial Intelligence and the Law: The ABA's important and timely contribution", 26 August 2019, American Bar Association.

23 ABA Resolution House of Delegates Resolution, adopted 12-13 August 2019 <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/112-annual-2019.pdf>

24 Solicitors Regulation Authority (England and Wales), *Technology and legal services* (11 December 2018) 14–16.

25 The Law Society, *Horizon Scanning: Artificial Intelligence and the Legal Profession* (1 May 2018) 12–14.

26 The Law Society Commission on the Use of Algorithms in the Justice System, *Algorithms in the Criminal Justice System* (June 2019, The Law Society).

27 The Law Society "Generative AI: The essentials", 7 August 2024, < https://www.lawsociety.org.uk/topics/ai-and-lawtech/generative-ai-the-essentials>.

28 International Bar Association, Center for AI and Digital Policy, "The Future is Now: Artificial Intelligence and the Legal Profession", <https://www.ibanet.org/Artificial-intelligence-hubpage>.

29 Economou (n 22).

30 Economou (n 22).

Another question is how AI, such as document automation, might subtly impact the use of certain types of agreements or clauses by expanding their use, and whether automation might lead to less reflection.[31] Or, as Frank Pasquale has argued, what we might call the reverse of access to justice – some legal actions typically conducted by the more powerful against the less powerful (such as eviction) becomes easier and cheaper due to automation.[32]

## 3 Effects on lawyers' work

An immediate and obvious impact on lawyers' work, stemming from AI, is the change it will cause in the employment landscape. In the most extreme prognosis, lawyers' market power and economic prospects are decreased due to AI performing work previously done by lawyers. While job loss is still credible, the focus is shifting to the more nuanced ways that AI will change, and indeed is already changing, lawyers' work. AI implies job insecurityand an associated reduction in prestige, as well as making further inroads into the traditional monopoly. Yet, AI may also subvert some of the negative aspects of the traditional model, namely the profession's hierarchies around entry and ascendancy.

The specialised knowledge and expertise of lawyers is the cornerstone of professionalism: this justifies exclusionary practices and self-regulation, while supporting esteem and self-worth once acceptance into the profession has been achieved. The professional ideal emphasises lawyers' expertise and mastery of their field, generating social prestige and supporting the reservation of certain legal work to lawyers alone. Yet, considering the diversity of the legal profession, we can see that AI will have differing impacts on different lawyers and different segments of the profession. Regarding the impact of AI, Pasquale argues: "Only specific, situated, technical, and sociological analyses of particular areas of law are truly valuable".[33]

Ideally, the work being done by AI creates a trickle-down effect, where junior lawyers no longer undertake repetitive and dull tasks and, instead, are able to do "higher-level" work earlier in their careers. Expertise can be directed towards work that requires uniquely human and professional skills such as judgement, creativity, empathy and advocacy.[34] Lawyers then garner material rewards both by capitalising on the efficiencies available through AI and through increased demand for their services. Secondly, it is claimed that lawyers will be able to "do more with less", with smaller firms able to increase their competitiveness. Thirdly, as the number of jobs is not finite, there will be opportunities for entirely new legal roles connected to AI and

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31 Rogers and Bell (n 11).

32 F Pasquale, "Is Eviction-as-a-Service the Hottest New #LegalTech Trend?", Concurring Opinions (blog) (26 February 2016), online: <https://concurringopinions.com/archives/2016/02/is-eviction-as-a-service-the-hottest-newlegaltech-startup.html>; cited by P Gowder, "Transformative legal technology and the rule of law" (2018) 68(Supp 1) *University of Toronto Law Journal* 82.

33 F Pasquale, "Automating the Professions: Utopian Pipe Dream or Dystopian Nightmare?", Los Angeles Review of Books (15 March 2016) <https://lareviewofbooks.org/article/automating-the-professions-utopian-pipe-dream-or-dystopian-nightmare/>.

34 M Bues and E Matthaei, "LegalTech on the Rise: Technology Changes Legal Work Behaviours, But Does Not Replace Its Profession" in K Jacob, D Schindler and R Strathausen (eds), Liquid Legal (Springer 2017) 105.

the management of new entrants to legal services. A response to predictions of job losses stemming from AI is that whole new fields of legal problems are likely to emerge, including increased regulation around the use of AI itself in many contexts. Thus, the optimistic outlook sees the legal profession moving beyond the existing current forms of legal practice.

We might argue that AI can be supportive of the traditional professional model by enhancing lawyers' expertise. On this rosy view, lawyers no longer perform menial work (which is performed by technology); plus they can perform their higher value, skilled work to an even higher standard. The value placed on "soft" human skills[35] and the role as trusted advisor are increased. Even in the context of a more business-focused orientation, AI might also be positive in leading to valuing new kinds of knowledge, increasing innovation and dynamism; and rewarding those with different and novel skill sets.

Potential positives are illustrated in a small way in a Bloomberg Law interview about GenAI with Katherine B Forrest, a former judge, now law firm partner, and AI advocate.[36] Ms Forrest gives some examples of how she considers GenAI to be useful in legal practice. She mentions drafting some early paragraphs in a brief, uploading a complaint (identifying details removed) and asking for arguments against, and predicting what questions a particular bench of judges would be likely to ask in a Ninth Circuit appeal hearing.

These examples sound valid and helpful but they also sound optional. With her three decades of experience, including time as a judge, it isn't as though Ms Forrest would not be able to write her own catchy opening paragraph of a brief or predict the likely questions that a particular bench of judges might ask her about her client's case. Perhaps more saliently, it seems unlikely that she would be stumped by any questions the Bench did ask her, whether she had predicted them or not. These applications therefore seem very much like enhancements.

The counterargument is that AI, rather than enhancing lawyers' work, leads to a wider loss of skills and de-professionalisation. In this scenario of AI-produced drafts or AI-produced research about case law in a specific area, there is significant disruption to the training and knowledge acquisition of novice lawyers, as the work they previously undertook is no longer available. Clients will not pay for a human to do work which can be done by a machine. In addition to the actual loss of work, there is an existential threat or "reminder" aspect to the encroachment of AI. For professionals for whom the upholding of both high technical and ethical standards is key, motivation is crucial. Can this motivation be retained where a machine can perform one's professional work (or substantial elements of it), and where the profession is destabilised through a sense of precarity? The legal profession is already "fragmented" due to its diversity.[37] Some authors posit that the use of AI

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[35] See J Rogers, "Teaching Soft Skills Including Online: A Review and Framework" (2020) 30 *Legal Education Review* 1, 4.

[36] Bloomberg Law, "Why Are Lawyers Still Making Bad AI Mistakes? (Podcast)", 22 March 2024, <https://news.bloomberglaw.com/tech-and-telecom-law/why-are-lawyers-still-making-bad-ai-mistakes-podcast>

[37] A M Francis, "Legal ethics, the marketplace and the fragmentation of legal professionalism" (2005) 12(2) *International Journal of the Legal Profession* 173.

could further exacerbate inequalities within it, as “low level” work is taken away, while those already at the pinnacle of the profession further enhance their offerings.[38] Competition does add pressure and may negatively impact professional values by supplanting them with a greater profit orientation. Regulation diminishes autonomy and lawyers are also increasingly subjected to greater control within their workplaces, managerialism which overshadows autonomy and feelings of competence. Finally, a professional’s community is now less centred in the profession as a whole, and more in their workplace, practice area and the industries or communities of their most powerful clients.

Regarding efficiency, although it is not based on very robust research, it seems that many clients expect AI technology to reduce legal costs. LexisNexis reported this year that just over half of the in-house lawyers it surveyed expected their bills for legal services to decrease with GenAI, and nearly two-thirds expected changes to billing practices.[39] The argument is that firms should be able to do things more efficiently, that means much faster, and with fewer lawyers and less time from those lawyers.

Meanwhile, firms need to maintain profitability, and there is substantial cost associated with obtaining AI products which work sufficiently well. A study by Brooks and colleagues in the UK concluded that “clients are generally unaware of the investment required to innovate or adopt new technologies and are reluctant to pay the same amounts for services enabled by technology.”[40] So the extra time that lawyers gain through using their AI “partner”, they will need to fill with more work. It might be different, more interesting, valued and special work, but it will still be work. This assumes, of course, that there is actually sufficient work for lawyers to do in that extra time.

Despite enormous criticism of the billable hour, it remains remarkably persistent in law firms.[41] Periodically, we hear about something that may shift the billable hour culture, yet it persists. Unsurprisingly then, commentators have suggested that AI will be the factor that finally pushes the billable hour off the cliff.[42] For most firms, changes to billing methods would require significant changes to work methods and business structures. However, in terms of costs, when considering where AI fits in, we must think about who it fits around and whose work it supplements or even replaces. There is a strong argument that a pyramidal model, relying on juniors to

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38 Pasquale and Cashwell (n 9) 35.

39 LexisNexis, ‘Lawyers cross into the new era of generative AI’, <https://www.lexisnexis.co.uk/insights/lawyers-cross-into-the-new-era-of-generative-ai/index.html> (Survey conducted across 1,225 lawyers and legal support workers in the United Kingdom from 3 to 19 January 2024).

40 C Brooks, C Gherhes and T Vorley, “Artificial intelligence in the legal sector: pressures and challenges of transformation” (2020) 13(1) *Cambridge Journal of Regions, Economy and Society* 135, 143 <https://doi.org/10.1093/cjres/rsz026143>.

41 See M Legg and J Rogers, “Lawyers’ fee arrangements and their wellbeing” in M Legg, P Vines & J Chan (eds) *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020) 267.

42 Brooks, Gherhes and Vorley (n 40) 144; BDO, “Artificial Intelligence and its impact on law firms”, Law Firm Leadership Series 2023, <https://www.bdo.co.uk/en-gb/microsites/law-firm-leadership-series-2023/ai-and-its-impact-on-law-firms>.

create profitability,[43] will no longer be viable. What we want to know, then, is how much AI will reduce the work of new lawyers, and how they will become the next generation of Katherine B Forrests.

## 4 What do we require from our future lawyers?

The previous section discussed some relevant changes for lawyers. The question for this section is: what do we need and want from our future lawyers?

The short answer is that there are three main considerations. First, lawyers will need to understand the relevant technology. This includes how it may be used, what it can do and its limitations, how to comprehend its outputs and critique its results, and how to communicate with technology experts, including making decisions about investing in technology. Second, lawyers' "human skills" will become even more important. This means things which AI may emulate but cannot do – such as empathising; exercising judgement, including ethical judgement; thinking creatively, critically, and strategically; weighing up incommensurables, and so on. Third, the process by which new lawyers are trained may need fine-tuning or even more radical rethinking, if the work that they were once trained on can now be automated and clients are not willing to pay for a human lawyer to do it – but we still need to inculcate professional values at the same time.

In relation to the first point, about technology expertise, this extends beyond individual lawyers to their organisations. Mari Sako and Richard Parnham wrote a report for the SRA looking at the impact of technology (not just AI) on lawyers' work in a broad sense.[44] Persons whose organisations were nonetheless planning on or in the process of adopting technology identified the key barriers to that adoption. These seem likely to reflect the challenges for lawyers and their organisations of adopting AI technology too, as these changes are almost prerequisites to using AI driven technologies. The first is a lack of capital to invest, the second is a lack of expertise to assess and implement technology, and the third is regulatory uncertainty.[45] It suggests also that many firms and corporate legal departments have not travelled far along the path of technology adoption. Many are still finding ways to make efficiencies in their processes and to use their existing technology more effectively. There are some salient lessons to be learned from the integration of AI into healthcare. For instance, the UK's National Health Service review into the digital future of the healthcare workforce considered that there were four essential conditions that needed to be met for successful adoption of AI. Those were: the workforce having time and motivation to adopt new technology; having an

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43 M Galanter and T Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (University of Chicago Press, 1991).

44 M Sako and R Parnham, *Technology and Innovation in Legal Services: Final Report for the Solicitors Regulation Authority* (University of Oxford, 2022).

45 Sako and Parnham (n 44).

understanding of the technology; dealing with technology that had been thoughtfully designed; and having workplaces which supported the use of the technology.[46]

In terms of human skills, Michael Legg and I have proposed three key areas where human lawyers will remain predominant: expertise, ethics and human skills.[47] Hallmarks of law as a traditional profession are expertise and autonomy in its enactment, with lawyers largely free from the competitive and financial pressures, regulatory intervention, and interpersonal dictates that characterise other, non-professional work.[48] Professional work is marked out by individualism, independence, and "professional judgement" (a combination of intellect, skill, creativity, intuition, and interpersonal abilities of the practitioner). Micha-Manuel Bues and Emilio Matthaei have contrasted the work of lawyers with the types of task which may be automated:

> Lawyers need to process convoluted sets of facts and circumstances, consider applicable legal rights and obligations and render reasoned opinions and guidance on the best course of action based on all of that information. A lawyer (ideally) has the ability to understand the background and context of events, general knowledge of how the world works, and knowledge of the law and its application.[49]

They then explain that the value of lawyers' creative and "outside the box" thinking cannot be replicated. Lawyering involves the capacity to distil information down but also having a broad and contextualised knowledge base. Pasquale has said: "Situations involving conflicting rights, unusual fact patterns, and open-ended laws will remain excessively difficult to automate for the foreseeable future."[50] Further, he argues that professional roles are not solely about the delivery of information as they can involve complex value choices, which society deems should be made by people.[51]

The traditional professional ideal of the lawyer is fundamentally about good judgement. While "good judgement" is hard to define, there is wide agreement that it is foundational to the type of decision-making that professionals engage in. It requires both general knowledge and the capacity to examine particular situations.[52] Further, it incorporates values. Davis has argued that even if AI can become better

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46 Health Education England, *The Topol Review: Preparing the healthcare workforce to deliver the digital future* (February 2019), <https://topol.hee.nhs.uk/> See also P Glock and S von Alemann, "The Paradigm Shift in AI: From Human Labor to Humane Creativity" in K Jacob, D Schindler and R Strathausen (eds), *Liquid Legal – Humanization and the Law* (Springer Nature, 2022) 215.

47 M Legg and F Bell, *Artificial Intelligence and the Legal Profession* (Hart, 2020) Ch 11. Subsequently, the Centre for the Future of the Legal Profession at the University of New South Wales Faculty of Law & Justice was founded, and we developed the "personal competencies skillset" – twelve skills that we think future lawyers need to have: see Centre for the Future of the Legal Profession, <https://www.unsw.edu.au/research/centre-future-legal-profession>.

48 F Bell, J Rogers and M Legg, "Artificial Intelligence and Lawyer Wellbeing" in M Legg, P Vines & J Chan (eds) *The Impact of Technology and Innovation on the Well-Being of the Legal Profession* (Intersentia, 2020) 239.

49 Bues and Matthaei (n 34) 94.

50 Pasquale (n 33).

51 Pasquale (n 33).

52 D Luban and M Millemann, "Good Judgment: Ethics Teaching in Dark Times" (1995) 9(1) Georgetown Journal of Legal Ethics 31, 34.

than humans at describing the law and predicting how people will apply it, it will not be able to address value judgements about what the law should be.[53] Judgement and professional ethics also go together. Lawyers need to develop the reflective judgement necessary to assess the demands made upon them by clients or colleagues at a particular time within the larger framework of being a member of the legal profession, which requires integrity, honesty, loyalty, and maintenance of the standing of the profession in the eyes of the community.

My colleagues and I have also previously argued that AI will also increase the relative value of other exclusively "human" skills, including emotional intelligence, empathy, trust, cooperation, creativity, and communication.[54] On emotional intelligence, Karen Yeung has written of the importance for individuals of being "listened to" by decision-makers, and their subjective experience being properly acknowledged. She says: "While AI systems are increasingly capable of simulating human emotions and responses, they are artificial and inferior substitutes for authentic empathy, compassion, and concern of those with whom we share the common bonds of human experience."[55]

## 5 Conclusion

Through strictly controlled entry, within the legal profession the combination of mentorship, connection to colleagues, and shared expertise promotes cohesion, and socialisation into the professional community. This may be perceived as threatened by AI – firstly, as the training of young lawyers is rendered uncertain without basic work available as a learning tool. The first thing to recognise is that there is a long-standing issue with the training of lawyers already. Historically, lawyers honed their craft through years of practice, being supervised or mentored by more senior members of the profession.[56] But in many, if not most, jurisdictions, law has morphed from an apprenticeship model to one where university training is followed by entrance examinations or a period of practical training.

For a long time, clients have balked at paying or paying very much for the services of newly-minted lawyers – in effect, for paying them to learn by slowly undertaking research tasks or drafting. Experienced lawyers could do these tasks more efficiently, but undertaking them is part of junior lawyers' development. Along with document review and drafting of agreements, even drafting memos or letters is possible for AI software, and if AI can now perform some of those tasks, there is even less need for junior lawyers to do them. Therefore, a key issue for firms which are beginning to utilise AI assistance for work like this is how they will train their

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53 J P Davis, "Artificial Wisdom? A Potential Limit on AI in Law (and Elsewhere)" (2019) 72 Oklahoma Law Review 51, 54-55.

54 Bell, Rogers and Legg (n 48).

55 K Yeung, "Why Worry about Decision-Making by Machine?" in K Yeung and M Lodge (eds), *Algorithmic Regulation* (Oxford University Press, 2019) 21.

56 See, eg, G Gasteen, "National Competency Standards: Are they the Answer for Legal Education and Training" (1995) 13(1) Journal of Professional Legal Education 1, 6–7; J Giddings and M McNamara, "Preparing Future Generations of Lawyers for Legal Practice: What's Supervision Got to Do with It?" (2014) 37(3) UNSW Law Journal 1226, 1230.

junior lawyers in the absence of this type of work.[57] Richard Susskind has queried, therefore, how new lawyers will "take the early steps towards becoming an expert?"[58] Others have also raised this question in the context of professional socialisation and the acquisition of tacit knowledge, noting that post-pandemic remote working practices will likely exacerbate the issues.[59] As Kay and Gorman have explained, "formal training" might be good for increasing technical skill, but be "less effective at conveying culturally valued styles of communication or fostering social network ties to colleagues and clients",[60] which are also key to performing well as a lawyer. This is especially the case where lawyers' "human exclusive" skills will become ever more important and must be learned and practised.

In terms of all these skills – those related to technology, those that are "human" skills – ongoing challenges are therefore apparent regarding how they can be inculcated in law students or new lawyers. This is part of a bigger debate about how law should be taught and how much is the responsibility of the academy and how much the profession. One thing that we can do is to stop devaluing these skills and recognise their value, both in intrinsic and extrinsic terms. Traditionally, so-called "soft" skills were demeaned in favour of technical skills. But when AI can perform the technical skills, soft skills might be all we have left.

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57 R Susskind, Tomorrow's Lawyers: An Introduction to Your Future (Oxford University Press, 2nd ed, 2017); The American Lawyer, "The 2018 Midlevel Associates Survey", 26 August 2018. <https://www.law.com/americanlawyer/2018/08/26/the-2018-midlevel-associates-survey/>.

58 Susskind (n 57) 167.

59 L Empson, "Researching the Post-Pandemic Professional Service Firm: Challenging our Assumptions" (2021) 58(5) *Journal of Management Studies* 1383, 1385; J M Green, "Legaltech and the Future of Startup Lawyering" in A Masson and G Robinson (eds), *Mapping Legal Innovation: Trends and Perspectives* (Springer, 2021) 189.

60 F M Kay and E H Gorman, "Developmental Practices, Organisational Culture, and Minority Representation in Organisational Leadership: The Case of Partners in Large U.S. Law Firms" (2012) 639(1) *The Annals of the American Academy of Political and Social Science*, Special Issue: Gender and Race Inequality in Management: Critical Issues, New Evidence, 91, 94.


Marta Szablewska
European Central Bank

# Part III

# Non-contractual liability of the ECB: comprehensive overview

# Non-contractual liability of the ECB: comprehensive overview

György Várhelyi*

The ECB, like any Union institution, must provide compensation for damages caused by itself or by its servants in the performance of their duties. Whilst the idea of a central bank causing damages to individuals seemed relatively remote for decades, the increasing role of central banks in financial crises, coupled with the substantial losses experienced by stakeholders (depositors, bondholders, shareholders) during the Greek and the Cypriot financial crises, proved this earlier pattern to be incorrect.

In the aftermath of the financial crises of 2008 and 2011, a substantial number of actions for damages have been initiated against the ECB in view of its role in the so called "Troika", the various duties conferred upon it by the ESM Treaty "in liaison" with the Commission or its expert role in the Euro Group. Its final say on the provision of emergency liquidity assistance (ELA) was also contested. This litigation proved to be of constitutional relevance in many respects.

The number of actions brought against the ECB then steadily increased with the set-up of the Banking Union and the single supervisory mechanism (SSM) starting from 2014. However only a minority of these actions was seeking to establish the non-contractual liability of the ECB.

The ability for individuals to pursue compensation for damages resulting from ECB actions is a key element of what we call "*État de droit*" or "the rule of law" principle. With the implementation of the Charter of Fundamental Rights in 2009 established as primary EU legislation, the entitlement to seek compensation became a legally enforceable fundamental right and has been recognized as integral to the right to good administration (as per Article 41(3) of the Charter of Fundamental Rights).

Specifically, **Article 340(3) of the Treaty on the Functioning of the European Union (TFEU)** provides a specific framework (*lex specialis*) for the non-contractual liability of the ECB stemming from its own legal personality. Pursuant to that provision, the ECB shall, in accordance with the general principles common to the laws of Member States, make good any damage caused by itself or by its servants in the performance of their duties. The Court of Justice of the European Union (CJEU) has exclusive jurisdiction to hear non-contractual liability cases brought against the ECB under Article 340(3) TFEU, as per Article 68 of the TFEU.

There are procedural and substantive conditions for the ECB's liability.

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While the admissibility of cases before the CJEU is generally recognised without much difficulty, the threshold for establishing an actual violation of EU law by the ECB is typically more challenging to meet. This is evidenced by the relevant case law of the CJEU. The leading case in this respect is *Ledra Advertisement*[1], where the Court of Justice held that the illegality of a Memorandum of Understanding between the ESM and the Member States, which was not attributable to the Commission or the ECB, could become an admissible ground of action against these two EU institutions in view of their involvement in its negotiation and monitoring.

However, despite the admissibility of these cases, the CJEU has often refrained from establishing the EU institutions' liability on substance. *Brasserie du Pêcheur*[2] and *Bergadem*[3] have laid down the substantive conditions for non-contractual liability: the existence of a sufficiently serious breach of a rule of EU law that is intended to confer rights on individuals, an actual harm suffered, and the existence of a causal link between the institution's conduct and the alleged damage.

The restrictive interpretation of liability concerning ECB acts is associated with the fact that the ECB often navigates in the uncharted waters of complex economic analysis, as established by case law. A "broad discretion" has thus been granted to the ECB in the execution of monetary policy. As held in *Accorinti*[4], and confirmed in *Nausicaa*[5] and *Steinhoff*[6], this "broad discretion" is justified by the "*complex evaluations of an economic and social nature and of rapidly-changing situations*" that the ECB has to carry out when designing and implementing monetary policy.

This stance can be justified by the need to strike a balance between compensating individuals for damages and preventing excessive liability claims that could freeze the functioning of public authorities. Consequently, claimants encounter substantial obstacles in fulfilling the prerequisites essential for the success of their claims. Failure to meet any of these conditions will lead to the dismissal of their cases.

To discuss these issues, our panel is composed of eminent speakers vetted in EU litigation:

First, Marta Szablewska, from the ECB, will provide a broad overview of the requirements that actions for damages have to fulfil in order to be successful.

Second, Olga Stavropoulou, from the Bank of Greece, will focus more specifically on the meaning of the concept: 'in accordance with the general principles common to the laws of the Member States' as per Article 340(3) TFEU and will analyse its role in assessing the non-contractual liability of the ECB.

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1 *Ledra Advertising Ltd and Others* v *European Commission and ECB*, C-8/15 P to C-10/15 P, ECLI:EU:C:2016:701.

2 *Brasserie du pêcheur* v *Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others,* C-46/93 and C-48/93, ECLI:EU:C:1996:79, para. 51.

3 *Bergaderm and Goupil* v *Commission*, C-352/98 P, ECLI:EU:C:2000:361, para. 42.

4 *Accorinti and Others* v *ECB*, T-79/13, ECLI:EU:T:2015:756, para. 68.

5 *Nausicaa Anadyomène and Banque d'escompte* v *ECB*, T-749/15, ECLI:EU:T:2017:21, para. 71.

6 *Steinhoff and Others* v *ECB*, T-107/17, ECLI:EU:T:2019:353, paras. 72-73.

Finally, Hans-Georg Kamann, from the law firm Wilmer Hale, will discuss the very topical issue of non-legal conduct leading to liability: namely ECB opinions, recommendations, statements, conduct at a meeting (Eurogroup, Parliament, or other).

# Basic tenets of ECB's non-contractual liability

Marta Szablewska*

## 1 Introduction

The subject of non-contractual liability of the European Union, and therefore also of the European Central Bank (ECB), is extensive and has filled many pages of academic and practitioners' writings. The purpose of this paper is to outline and briefly expand on the basic concepts relevant to this topic with a particular focus on the aspects that have been discussed in some of the cases involving the ECB. This will hopefully set the ground for the following excellent papers by Olga Stavropoulou on the meaning of the concept "in accordance with the general principles common to the laws of the Member States" in Article 340 of the Treaty on the Functioning of the European Union (TFEU) and by Hans-Georg Kamann on the issue of non-legal conduct.

Most of the cases discussed in this paper concern the ECB's involvement in the financial assistance programmes in Cyprus and Greece. Broadly, these cases discussed – for Cyprus - the ECB's role in the so-called "Troika", the various duties conferred upon it by the ESM Treaty[1], its expert role in the Euro Group, as well as its final say on the (non)-provision of emergency liquidity assistance (ELA). All these acts were alleged by the applicants to have forced the Cypriot authorities to adopt a series of bank restructuring measures (including the bail-in of deposits), which were a condition for Cyprus to receive financial assistance. The litigation relating to the ECB's involvement in the financial assistance programme in Greece concerned primarily the ECB's exemption from the restructuring of the Greek debt (i.e., the so-called private sector involvement or 'PSI') and its advisory role. To date, these cases have represented the largest portion of the ECB's litigation concerning non-contractual liability. Some cases in which the ECB's conduct in the supervisory field was raised will also be mentioned. On the other hand, given the different legal basis[2], issues relating to ECB's liability in staff matters are outside the scope of this paper.

Accordingly, this paper discusses, first, the legal basis for the ECB's non-contractual liability (section 2). It then provides an overview of the issues that are relevant to the

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1 Treaty establishing the European Stability Mechanism (ESM) which was signed in Brussels on 2 February 2012.

2 See Art. 270 of the Treaty on the Functioning of European Union (TFEU).

admissibility of damages cases (section 3) and those relevant to the substance (section 4). Section 5 briefly concludes.

## 2 Legal basis

Article 340(3) TFEU:

"Notwithstanding the second paragraph, the European Central Bank shall, 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."

The ECB's non-contractual liability derives its legal basis from Article 340(3) TFEU. With the wording almost identical to paragraph (2) of Article 340 TFEU, the provision in paragraph (3) has been introduced as a *lex specialis* in order to account for the ECB's distinct legal personality (which in turn reflects its independence). Therefore, any damages potentially incurred under Article 340(3) TFEU would need to be paid from the ECB's budget.

Notwithstanding this, the general principles governing the non-contractual liability of the Union, particularly the preconditions for liability, also extend to the ECB's own liability regime.[3]

It is worth mentioning that Article 340(3) TFEU provides a legal basis for liability actions against the ECB even when it acts outside the remit of EU law, e.g., when it performs tasks assigned to it under the ESM Treaty.

In accordance with Article 268 TFEU, the Court of Justice of the European Union (CJEU) has exclusive jurisdiction over disputes arising under Article 340(2) and (3) TFEU.

## 3 Issues relevant to the admissibility of an action for damages

All applications initiating proceedings (i.e., not only in liability cases) before the CJEU need to comply with several formal requirements. These are examined by the Court[4] before it proceeds to discuss the merits of the case. The requirements concern the content of the pleadings, the limitation period for bringing an action, locus standi (i.e., an appropriate applicant), the types of acts that are capable of being challenged, and the issue of the Court's jurisdiction (the latter linked to the issue of attributability). Most of the requirements differ depending on the type of action (i.e., whether it is an action for annulment or an action for damages); therefore, the below analysis will primarily focus on actions for damages.

### 3.1 Specificity and content of pleadings

According to Article 21(1) of the Statute of the Court of Justice and Article 76 of the Rules of Procedure of the General Court (RoP), an application must state, *inter alia*, the subject matter of the proceedings, the form of order sought, and include a brief

3 See, for example, *Steinhoff and Others* v *ECB*, T-107/17, ECLI:EU:T:2019:353, para. 52.

4 Unless specified otherwise, all references to "Court" mean the General Court.

statement of the pleas in law on which it is based. In accordance with settled case law[5], that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary, without any further information. In actions for damages, in particular, the application must indicate the evidence from which the conduct that the applicant alleges against the institution can be identified, the reasons why the applicant considers that there is a causal link between the conduct and the damage which it claims to have sustained, and the nature and extent of that damage.[6]

Based on the cases involving the ECB, it is fair to say that the Court has established a relatively low standard for these requirements. Applications filed against the ECB were deemed inadmissible only when they were manifestly deficient in terms of detail and evidence. One such case was *Estamede*[7], which concerned the Greek PSI. The Court found that the application failed to meet the clarity and coherence requirements for all three conditions for incurring non-contractual liability (which conditions will be discussed in more detail in section 4). With respect to the condition that there needs to be unlawful conduct, the Court held that the applicant had only vaguely referred to certain "actions" and "omissions" that were attributed to the ECB in the context of the PSI, without, however, specifying them and legally defining them in the context of independent pleas[8]. In particular, the Court held that, whilst the application did vaguely refer to alleged breaches of certain rights and principles, such pleas were not developed in a sufficiently coherent and intelligible fashion, nor did they demonstrate the allegedly serious nature of the breaches as required by case law[9]. Similarly, the Court held that the causal link was insufficiently and vaguely argued[10], and the nature and extent of the damage were poorly defined (including the fact that the application did not reveal the identity of individuals who allegedly suffered the damage)[11]. Similarly, in *Alcimos*[12], the claim for damages was declared as inadmissible because, whilst the applicant submitted that it had suffered a material and irreparable damage, the application confined itself to claiming damages in the amount of only one euro. The Court found such an argument to be inherently contradictory and therefore held that the applicant failed to put forward sufficiently clear and precise information to enable the ECB and the Court to assess the damage.[13]

On the other hand, in some cases where the ECB argued inadmissibility on the basis that the application did not comply with the requirements of Article 76 of RoP, the

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5 See, for example, *Accorinti and Others* v *ECB*, T-79/13, ECLI:EU:T:2015:756, para. 53*; Dr. K. Chrysostomides & Co. LLC and Others* v *ECB and Others*, T-680/13, ECLI:EU:T:2018:486, para. 101; *Bourdouvali and Others* v *ECB and Others*, T-786/14, ECLI:EU:T:2018:487, para. 97.

6 Ibidem.

7 *Estamede* v *ECB*, T-124/17, ECLI:EU:T:2018:152.

8 Ibidem, para. 20.

9 Ibidem, para. 21.

10 Ibidem, para. 24.

11 Ibidem, para. 25.

12 *Alcimos Consulting SMPC* v *ECB,* T-368/15, ECLI:EU:T:2016:438.

13 Ibidem, para. 43.

Court rejected such arguments and stated essentially that if the ECB was able to prepare a defence, the application was sufficiently clear and precise[14].

## 3.2 Limitation period, locus standi and types of acts

When it comes to the limitation period, locus standi, and types of acts that may be raised in an action for damages, it is worth noting that the requirements are much less stringent than those in an action for annulment. For instance, the **limitation period** for an action for damages is five years from the occurrence of the event giving rise to damage (Article 46 of the Statute of the Court of Justice). This contrasts with the two-month deadline applicable in actions for annulment.

As regards **locus standi**, the threshold is also much lower. In fact, anyone who claims to have suffered a damage allegedly caused by the ECB can sue it. Therefore, for example, in *Estamede,* the action was declared inadmissible not only for non-compliance with the formal requirements (see above) but also due to the applicant's lack of standing.[15] In particular, the applicant in this case was an association of pensioners who were beneficiaries of a Greek pension fund. The latter was the holder of bonds that were made subject to the PSI. Since the alleged damage was suffered by the pension fund and its beneficiaries, and the applicant association did not demonstrate that the right to compensation had been assigned to it or that it had a particular interest of its own in bringing the proceedings, the action was held be inadmissble.

Finally, the **types of acts** capable of establishing liability of the ECB are much broader than those that would make an action for annulment admissible. Essentially, any act or conduct, even if it does not constitute a binding decision, but which caused damage is capable of establishing non-contractual liability[16]. The same applies to omissions. This broad scope also extends to the conduct falling outside of the EU legal framework, such as when, for example, the ECB performs tasks under the ESM Treaty. This was established in the seminal *Ledra Advertising*[17] case which concerned the Cypriot bail-in.

In particular, the bail-in was part of the conditions that Cyprus had to comply with to receive financial assistance from the ESM. The conditions were set out in a Memorandum of Understanding (MoU) between the ESM and Cyprus, which was negotiated by the Commission and the ECB. The applicants considered that the MoU breached their right to property and therefore sought both its annulment and damages for the losses suffered. The General Court dismissed both actions essentially because the adoption of the MoU could not be held to have originated from the Commission and the ECB. This is because the ESM is an intergovernmental organisation that sits outside of the EU legal framework and

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14 *Fersher Developments and Lisin* v *Commission and ECB*, T-200/18, ECLI:EU:T:2022:478, para. 36 and *Accorinti*, para. 58.

15 *Estamede*, paras. 13-16.

16 *Steinhoff*, para. 55.

17 *Ledra Advertising Ltd and Others* v *European Commission and ECB*, C-8/15 P to C-10/15 P, ECLI:EU:C:2016:701, para. 55.

neither the ECB nor the Commission have any power to make their own decisions within that setup. Whilst on appeal the Court of Justice agreed that an action for annulment could not succeed, it set aside the General Court's conclusion on the inadmissibility of the action for damages. Instead, it held that unlawful conduct *linked* to the adoption of the MoU could be raised against the Commission and the ECB in an action for compensation[18] (it nevertheless dismissed the case because it established that there was no breach of the right to property).

## 3.3 Court's jurisdiction and attributability

At the outset, it is important to note that the issue of attributability of an act causing damage (and therefore also of the jurisdiction of the Court) is particularly relevant for the ECB. This is because the ECB does not operate in isolation but relies on cooperation with various actors, most notably national central banks and national competent authorities. Additionally, as evidenced by the Cypriot litigation, the fact that the ECB is assigned tasks under the ESM Treaty can also raise attributability issues.

Attributability can be classified as an issue relevant to the admissibility of an action for damages because the Court lacks jurisdiction over claims for damages that are not attributable to the ECB. However, it can also play a significant role in the substantive examination of the case, particularly concerning causality. This dual aspect of attributability was acknowledged by the Court in the *Chrysostomides* and *Bourdouvali* cases[19]. Like *Ledra Advertising*, these cases also related to the involvement of the ECB, the Commission, and the Council in the negotiation and monitoring of the conditions tied to the financial assistance for Cyprus. With respect to the ECB, the applicants additionally also contested the specific decisions relating to ELA provided to Cypriot banks. The ECB, along with the Commission and the Council, argued that the applications were inadmissible for lack of the Court's jurisdiction due to the fact that the restructuring measures (i.e. those that included bail-in of deposits) had been unilaterally adopted by Cyprus. The applicants, on the other hand, essentially argued that the defendants effectively obliged Cyprus to adopt these restructuring measures. Consequently, the Court had to determine whether the measures were attributable to the ECB and the other defendants and therefore whether it had jurisdiction to hear the cases.

In its assessment, the Court followed a structured approach. First, it recognised that the national measures introducing bank restructuring were not formally attributable to the Union, as they were not mandated by a Union act such as a directive. The Court then proceeded to examine if the measures were, in reality, attributable to the Union. In particular, it investigated whether the Commission, Council, or the ECB had, through a series of acts, effectively required Cyprus to adopt these measures, and if so, whether Cyprus had any discretion to escape that requirement. The Court found that only one measure, mandated by a Council decision, required Cyprus to maintain

[18] Ibidem, para.55.

[19] *Chrysostomides,* para. 101; *Bourdouvali*, para. 97.

or implement a specific bank restructuring measure[20]. This finding was later overturned by the Court of Justice[21], which ruled that Cyprus retained some discretion in its implementation. In the next step, effectively applying the principle established in *Ledra*, the Court then considered whether, certain acts or conduct of EU institutions linked to the grant of financial assistance could incur Union liability, irrespective of attributability. The Court determined that several actions by the ECB and the Commission were capable of incurring Union liability, and that therefore it had jurisdiction to hear the cases[22].

It follows from the above that as long as some ECB conduct is involved and a party claims to have suffered a damage as a result of such conduct, attributability is unlikely to be a decisive factor in assessing potential inadmissibility of such a liability case.

Related to the issue of admissibility and attributability is the question of whether, in case of involvement of national and EU actors, a party claiming damage must first exhaust domestic measures before it brings a claim to the CJEU. This argument was specifically examined in the *Chrysostomides*[23] and *Bourdouvali*[24]cases. The Commission argued that because the immediate cause of the applicants' harm stemmed from national measures, and no ancillary damage was solely attributable to the Union, the applicants should have first exhausted domestic remedies before seeking compensation from EU courts. However, the Court dismissed this argument, affirming that an application for damages against the Union is not inadmissible merely because a national authority may also be liable for the same damage.

The Court relied on the existing case law, which limits the inadmissibility due to non-exhaustion of domestic remedies to situations where such failure prevents it from identifying the nature and quantum of the damage pleaded. In the cases at hand, the Court held that it was able to identify the character and amount of damage, and therefore the action could not be considered inadmissible solely because the applicants did not exhaust domestic measures.

However, the Court noted that there could be situations where an applicant seeks compensation before a national and EU court for the same damage creating a risk of different assessment by the two courts which could result in the applicant being either insufficiently or excessively compensated. In such situations, the Court may need to wait for the national court's decision on the amount of damages, but this should not prevent it from ruling on whether the conduct alleged against an EU institution is capable of giving rise to the EU liability.

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20 *Chrysostomides*, para. 192; Bourdouvali, para. 191.

21 *Council* v *K. Chrysostomides & Co. and Others*, C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, ECLI:EU:C:2020:1028, para. 116.

22 *Chrysostomides*, paras. 194-208; *Bourdouvali*, paras. 193-207.

23 *Chrysostomides*, paras. 235-242.

24 *Bourdouvali*, paras. 234-241.

# 4 Issues relevant to the substance

After determining the admissibility of an application, the Court proceeds to examine the substance of the case. In liability cases, this means that the Court needs to assess whether the applicant has proven the existence of **three cumulative conditions** that is required to hold the ECB liable under Article 340(3) TFEU. These conditions - established by long standing CJEU case law - have also been reaffirmed in all ECB damages cases.

Firstly, the conduct alleged against the ECB must be unlawful, meaning that it must constitute a sufficiently serious breach of a rule of EU law intended to confer rights on individuals. Secondly, the applicant must demonstrate that they have suffered actual and certain damage. Thirdly, a sufficiently direct causal link between the damage suffered and the unlawful conduct must be established.

## 4.1 Unlawful conduct

The first condition for establishing the non-contractual liability of the Union or the ECB is that the conduct alleged against it must be unlawful. In this context, two aspects are analysed to determine the unlawfulness of the conduct: the breach of a rule of law must be sufficiently serious, and that rule of law must confer rights on individuals.

### 4.1.1 Sufficiently serious breach

According to the standing case law, “the decisive test for whether a breach is sufficiently serious is whether the EU institution or body concerned manifestly and seriously disregarded the limits on its discretion. It is only where that institution or body has only considerably reduced, or even no, discretion, that the mere infringement of EU law may suffice to establish the existence of a sufficiently serious breach”. [25]

The Court will also “look into the complexity of the situation to be regulated, the difficulties in the application or interpretation of the legislation, the clarity and precision of the rule infringed, and whether the error made was inexcusable or intentional”.[26]

Accordingly, the ECB’s broad discretion has been confirmed in several cases, both in the context of monetary policy[27] and supervisory matters[28]. In particular, regarding the ECB’s competence in the monetary policy field, the Court held that the provisions

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25 *Accorinti*, para. 67.

26 *Malacalza Investimenti and Malacalza* v *ECB*, T-134/21, ECLI:EU:T:2024:362, para. 40 and the case law cited therein.

27 See, e.g., *Accorinti*, para.68; *Peter Gauweiler and Others* v *Deutscher Bundestag*, C-62/14, ECLI:EU:C:2015:400, para. 68.

28 See, e.g., *Malacalza*, para. 45; *ECB* v *Crédit Lyonnais*, C-389/21, ECLI:EU:C:2023:368, para. 55; *Landeskreditbank Baden-Württemberg* v *ECB*, C-450/17 P, ECLI:EU:C:2019:372, para. 86.

of Articles 127 TFEU and 282 TFEU, as well as Article 18 of the ESCB Statute "confer a broad discretion on the ECB, the exercise of which entails complex evaluations of an economic and social nature and of rapidly-changing situations, which must be carried out in the context of the Eurosystem, or even of the European Union as a whole. Thus, any sufficiently serious breach of the legal rules at issue must be based on a manifest and serious failure to have regard for the limits of the broad discretion enjoyed by the ECB when exercising its powers in monetary policy matters. This is even more true because the exercise of that discretion implies the need for the ECB to foresee and evaluate complex and uncertain economic developments, such as the development of capital markets, the monetary mass and the rate of inflation, which affect the proper functioning of the Eurosystem and payment and credit systems, and also to make political, economic and social choices in which it is required to weigh up and decide between the different objectives referred to in Article 127(1) TFEU, the main objective of which is the maintenance of price stability".[29]

With respect to the supervisory matters the Court held that since the tasks conferred on the ECB under Article 4 of Regulation No 1024/2013[30] (SSM Regulation) entail the power for it to carry out a number of operations (such as authorising and withdrawing bank licences, imposing additional capital requirements), which require it to make complex assessments, the ECB's broad discretion in that field is justified.[31]

What could then qualify as a manifest and serious disregard of the limits on the ECB's discretion?

The Court held that "mere errors of assessment cannot of themselves be sufficient to define an infringement as manifest and grave".[32] Also, whilst it was an annulment case, the Court of Justice in the *Credit Lyonnais* case provided some guidance that could be useful in the context of what constitutes a manifest and serious disregard of the limits of discretion also in liability cases. Namely, the Court of Justice pointed out that it is important for the EU courts to consider whether decisions are not based on materially incorrect facts and not vitiated by a manifest error of assessment or misuse of powers. In addition, the EU courts must consider whether all the relevant information was taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.[33]

The Court of Justice also recalled what it stated in the *Weiss* case[34], namely that "where an institution enjoys broad discretion, observance of procedural guarantees

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29 *Accorinti*, para. 68.

30 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

31 *Malacalza*, paras. 42-45.

32 Ibidem, para. 41

33 *Crédit Lyonnais*, paras. 55-56.

34 *Weiss and others*, C-493/17, EU:C:2018:1000

is of fundamental importance, including the obligation for that institution to examine carefully and impartially all the relevant aspects of the situation in question".[35]

Importantly, the Court established recently in the *Malacalza* judgment that where the ECB enjoys broad discretion (as in the performance of its prudential tasks), the Court's review cannot lead it to substitute its own assessment for that of the ECB.[36]

It is also worth mentioning that in the same case the Court refused to establish different rules on non-contractual liability to which the European Union should be subject in the field of prudential supervision. In particular, the Court did not accept that such liability should be subject to the existence of intentional fault or serious misconduct.[37]

Similarly, in a different case concerning the Greek PSI, the Court rejected the argument by the applicants that since they sustained unusual and special damage they should be entitled to compensation even in the absence of an unlawful act on the part of the ECB.[38]

### 4.1.2 Rules of law conferring rights on individuals

The requirement that a breach must pertain to a rule of law conferring rights on individuals means, firstly, that the protection offered by the rule must be effective vis-à-vis the person who invokes it (i.e., the individual must be among those on whom the rule confers rights). Thus, it is not sufficient for the rule to confer rights on someone else. Secondly, the rule must create a vested right, be designed for the protection of the interests of the individual, or entail the granting of rights which are sufficiently identifiable. [39]

One clear example of such a category of rules is fundamental rights, such as the right to property under Article 17(1) of the Charter of Fundamental Rights (Charter). The alleged breach of this right was raised in several cases involving the ECB, e.g. *Steinhoff*[40], *Ledra*[41], *Chrysostomides* and *Bourdouvali*[42].

In addition, the Court has confirmed that general principles of Union law, such as the principle of equal treatment enshrined in Articles 20 and 21 of the Charter[43], and the principle of legitimate expectations[44], are also of the kind that confer rights on individuals (in the case of the principle of legitimate expectations, subject to the fulfilment of certain requirements).

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35 Ibidem, para. 57.

36 *Malacalza*, para. 110.

37 *Malacalza*, paras. 53-57.

38 *Accorinti*, para. 119.

39 *QI and Others* v *Commission and ECB*, T-868/16, ECLI:EU:T:2022:58, para. 90.

40 *Steinhoff*, para. 96.

41 *Ledra*, para. 57.

42 *Council* v *K. Chrysostomides & Co*, para. 96.

43 See, for example, *Accorinti*, para. 87; *Chrysostomides*, para. 440; *Bourdouvali*, para. 439.

44 See, for example, *Accorinti*, paras. 75-76; *Chrysostomides*, para. 404; Bourdouvali, para.403.

On the other hand, the Court has determined that several rules which are of key importance to the ECB's activities do not confer rights on individuals. This applies, for instance, to the monetary financing prohibition enshrined in Article 123 TFEU which has as its sole focus public interest objectives.[45] Similarly, Article 127 TFEU, which determines the objectives of monetary policy and confers powers on the ESCB and the ECB in that field, is institutional in nature and thus not intended to confer rights on individuals.[46] The same conclusion was reached regarding the rules contained in several articles of the ESCB Statute which define ESCB tasks and concern the composition and procedures of the ESCB decision-making bodies (i.e., Articles 3, 10 and 11). Finally, also the norms empowering the ECB to perform certain tasks in the supervisory field, such as Articles 4 and 16 of the SSM Regulation, were held to serve the public interest only and therefore not to confer rights on individuals.

It should be noted that in all cases involving the ECB, the Court has consistently assessed each provision alleged to have been breached individually, rather than issuing a blanket statement that all provisions assigning competence or tasks to the ECB do not confer rights on individuals.

## 4.2 Damage and causal link

The second and third conditions for non-contractual liability are the existence of (i) an actual and certain damage and (ii) a direct causal link between the damage and unlawful act, for which the applicant bears the burden of proof.

Although the case law on damages and causal link is extensive, this paper will not focus on these aspects specifically. The main reason for this is the fact that, in the cases involving the ECB, the Court hardly got to assess these two conditions, given that the claims were rejected already on the basis that the first condition, i.e., that of unlawful conduct, had not been fulfilled.

It is worth noting, however, that whilst all damages cases against the ECB were based on financial losses (e.g., reduction in share or investment value, loss of deposits), in some cases applicants also claimed non-material damage (e.g., damage to reputation).[47]

# 5 Conclusion

Whilst the threshold for admissibility of damages actions is relatively low, the bar for substantiating that all three conditions for non-contractual liability are met remains high. This is demonstrated by the fact that, so far, few ECB cases have been

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45 *QI*, paras. 94-97. Similarly, the Court also held that Articles 124 and 125 TFEU do not confer rights on individuals either.

46 *QI*, para. 100; *D'Agostino and Dafin* v *ECB*, T-424/22, ECLI:EU:T:2023:443, para. 24; *D'Agostino* v *ECB*, T-90/23, ECLI:EU:T:2023:445, para. 21; *Nardi* v *ECB*, T-131/23, ECLI:EU:T:2023:444, para. 21 and T-326/23, *D'Agostino* v *ECB*, ECLI:EU:T:2023:750, para. 21.

47 See *D'Agostino cases*.

dismissed on the formal grounds, but the ECB has nevertheless been successful in defending all damages cases under Article 340 TFEU on substance (including the award of costs). Such trend may reflect the balance that the EU courts are aiming to achieve between, on the one hand, the ECB's broad discretion, which is necessary for it to exercise its mandate, and an additional means of ensuring its accountability, on the other.

# The general principles common to the laws of the Member States and their role in assessing the ECB's non-contractual liability

Olga Stavropoulou*

## 1 Introduction

The legal basis for the ECB's non-contractual liability is laid down in Article 340(3) TFEU.[1]

The wording of Article 340(3) TFEU closely replicates that of Article 340(2) TFEU on the non-contractual liability of the Union for damages caused by its institutions or by its servants in the performance of their duties. Given that, under Article 13(1) TEU, the ECB itself is a Union institution, two questions reasonably pose themselves: first, why it was deemed necessary to specifically regulate, through a dedicated Treaty provision, the ECB's non-contractual liability and, second, whether the ECB's non-contractual liability departs from that of other Union institutions.

The answer lies in the ECB's legal autonomy (Article 282(3) TFEU). Taking into account that autonomy, Article 340(3) TFEU clarifies that it is for the ECB, rather than for the Union, to make good any damage which the ECB itself or its servants may have caused in the performance of their duties. Other than that, Article 340(3) TFEU merely reproduces the provision of Article 340(2) TFEU. Accordingly, as expressly acknowledged in several ECB court decisions, the regime governing the non-contractual liability of the Union also applies, *mutatis mutandis*, to the ECB.[2]

The role of the 'general principles common to the laws of the Member States' in assessing the ECB's non-contractual liability will be explored below, having in mind the above-mentioned considerations.

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1 For reasons of convenience to the reader, the second and the third paragraphs of Article 340 TFEU will be succinctly referred to as Article 340(2) and 340(3) TFEU, respectively. In addition to Article 340(3) TFEU, Article 268 TFEU provides that the CJEU has jurisdiction in the relevant disputes.

2 *See, inter alia*, *Accorinti and Others v ECB*, T-79/13, EU:T:2015:756, para 65; *Steinhoff and Others v ECB*, EU:T:2019:353, para 52; *QI and others v Commission and ECB*, T-868/16, EU:T:2022:58, paras 45-46; see also Lenaerts K., Gutman K. & Nowak J.T. (2023), "EU Procedural Law", Oxford EU Law Library, Oxford University Press, p. 487.

## 2 The origins of the ECB's non-contractual liability provision

The origins of Article 340(2) and (3) TFEU can be traced back to the Treaty of Rome. A cursory look into Article 215(2) EEC Treaty and Article 288(2) and (3) EC Treaty readily shows that the provision has essentially remained unaltered, notwithstanding the changes that the Treaties have undergone over the years.[3]

The authors of the EEC Treaty were no doubt aware that the non-contractual liability of public authorities was not governed by a set of rules common to the Member States. National regimes differed across Member States, ranging from those where the non-contractual liability of public authorities was an autonomous area of judge-made law to those applying their respective national civil law regimes. In this context, it is of interest to briefly address the following questions: why did the Community legislators, as they then were, establish a non-contractual liability regime on the basis of the 'general principles common to the laws of the Member States'? What was their legislative intention?

The chosen formula reflects a legislative choice. Given national law divergences, the drafters of the EEC Treaty could have indeed legislated in greater depth in this field, by means of introducing a more detailed non-contractual liability regime for the Community (as they then were) institutions. They, instead, opted to address the matter at a 'higher level', by simply referring to the basic principles of such regime and leaving it to the Court to flesh them out, in its case-law.[4] The 'general principles common to the laws of the Member States' were intended to serve as guidance for the judicature in its task of developing a non-contractual liability regime for the EU public authorities.[5]

## 3 The 'general principles common to the laws of the Member States' as a building block of the Court's comparative law method

For the Court, the reference to the 'general principles common to the laws of the Member States' translates into a methodological tool: it expressly indicates that "the

3 See Article 215(2) EEC that read as follows: "In the case of non-contractual liability, the Community shall, *in accordance with the general principles common to the laws of the Member States*, make good any damage caused by its institutions or its servants in the performance of their duties."; see also Article 288(2) & (3) EC Treaty: "In the case of non-contractual liability, the Community shall, *in accordance with the general principles common to the laws of the Member States*, make good any damage caused by its institutions or its servants in the performance of their duties**.** The preceding paragraph shall apply under the same conditions to damage caused by the ECB or by its servants in the performance of their duties."; for an interesting account of the history of Article 340(2) TFEU see, among others, Brüggemeier G. (2018), "Tort Law in the European Union", Wolters Kluwer, pp. 45-48; see also f. 2 above, Lenaerts K. et al, pp. 473-474, where reference is made, *inter alia*, to the key changes brought about to Article 340(2) by the Treaty of Lisbon.

4 See, in this respect, Lagrange M. (1966), "The non-contractual liability of the Community in the ECSC and in the EEC", in CMLRev. 1966, Vol. 3 (Issue 1), pp. 10-36, also referring to Article 215(2) EEC Treaty as a 'diplomatic formula'.

5 The wording of Article 215(2) EEC Treaty and, in particular the reference to the 'general principles common to the laws of the Member States', has been contrasted with Article 40 ECSC Treaty, that was inspired by the French model of State liability; see f. 3 above, Brüggemeier, p. 48; see also f. 4 above, Lagrange, p. 12.

authors of the Treaties envisaged recourse to the comparative law method as a means of filling lacunae in the legal order of the EU",[6] alongside other Treaty provisions which, either explicitly or implicitly, allow the Court to carry out its mission through a comparative study of the laws of the Member States. Indeed, Article 340(2) and (3) TFEU is by no means an isolated example within the system of the Treaties; rather, it is consistent with Articles 19(1) TEU and 6(3) TEU, which enable the Court to take into account the laws of the Member States in the process of its judicial law-making.[7]

How, then, does the Court apply the comparative law method in its quest for the national principles of non-contractual liability common to the laws of the Member States that are apt to be incorporated into EU law?

The ground rule is that the Court's comparative law analysis entails no automaticity. The Court does not rely 'mechanistically', on a particular number of Member States recognizing a certain legal principle nor does it draw on minimum 'common denominators' in this respect.[8] On the contrary, it has opted, early on,[9] for an 'evaluative approach'[10] that allows it to inquire into the laws of the Member States and, in areas where absolute convergence is lacking, seek out those laws and legal principles that are best suited to achieve the objectives of the Union. The approach adopted by the Court has a dynamic element. It enables it to adapt to changes and to take into account the objectives of the Union and evolving trends. It is through that perspective that the Court has, over the years, developed an EU regime governing the Union institutions' non-contractual liability.

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6 See Lenaerts K. (2016), "The Court of Justice and the comparative law method", in ELI Annual Conference, Ferrara, 9 September 2016, p.3; for an analysis of the Court's comparative law method, see Lenaerts K. & Gutman K. (2015), "The comparative law method and the Court of Justice of the European Union – Interlocking Legal Orders Revisited", in Courts and Comparative Law Method, M. Andenas and D. Fairgrieve eds., Oxford University Press, pp. 141-175.

7 With specific regard to Article 19(1) TEU see, in particular, *Algera and Others Assemblée Commune*, Joined cases 7/56 and 3/57, p. 55, where it was observed that, unless the Court is to deny justice, it is obliged to 'solve the problem' by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the Member States; see, also, *Brasserie du Pêcheur and Factotarme and others*, Joined cases C-46/93 and C-48/93, EU:C:1996:79, para 27, where the Court stated that "it is for the Court, in pursuance of the task conferred on it by Article [164 of the Treaty] of ensuring that in the interpretation and application of the [Treaty] the law is observed, to rule on such a question in accordance with the generally accepted methods of interpretation, in particular by reference to the fundamental principles of the [Community] legal system and, where necessary, general principles common to the legal systems of the Member States."

8 See, in particular, Opinion of AG Lagrange, in *Hoogovens v High Authority*, case 14/61, [1962] ECR 253, pp. 283-284.

9 See above, Opinion of AG Lagrange.

10 For an account of what the 'evaluative approach' entails, see, in particular, Lenaerts K. and Gutierrez-Fons Jose A (2013), "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice", in EUI Working Papers, AEL 2013/9, p. 39-41; see, also, f. 6 above, Lenaerts K., p. 7, and Lenaerts K. & Gutman K., pp. 152-153.

# 4 Concrete application of the 'general principles common to the laws of the Member States' to the ECB's non-contractual liability requirements

In formulating the Union's non-contractual liability as an EU concept of law with an 'autonomous character',[11] the Court has drawn on the 'general principles common to the laws of the Member States' in a more or less explicit manner. Undoubtedly, the matter cannot be dealt with exhaustively within the confines of the present contribution. What follows is an overview of the role that national law concepts, rules and principles have played in shaping the non-contractual liability regime applicable to the Union institutions – and to the ECB - with a focus on the substantive requirements of such liability: unlawfulness of conduct, damage and causation. Two additional aspects will be touched upon: reasonable diligence and unjust enrichment.

## 4.1 Unlawfulness of act or conduct

Brasserie du Pêcheur[12] is a seminal case on State liability. However, it is also a case that deserves attention for a quote included in the Court's ruling, namely that the principle of non-contractual liability of the Community (as it then was) is "an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused."[13]

Thus, for the Court the element of 'unlawfulness' traces its origins in the national legal systems. Taken from there, it was early on incorporated in EU law as one of the substantive non-contractual liability requirements, along with damage and causation.

Brasserie is noteworthy also on account of the Court's finding that the obligation for reparation of loss or damage caused to individuals cannot depend on any concept of fault going beyond that of a 'sufficiently serious breach' of EU law. Imposing such a supplementary condition would be "tantamount to calling into question the right to reparation founded in the [Community] legal order".[14]

The above-mentioned finding became particularly relevant in Malacalza,[15] where the general principles common to the laws of the Member States came into play, albeit in a different way. In that case, the ECB, with the support of the Commission, had

11 See *European Union Satellite Centre (SatCen) v KF*, C-14/19, EU:C:2020:492, para 82 and *Commission v Systran and Systran Luxembourg*, C-103/11, EU:C:2013:245, para 62, where the Court held that the concept of non-contractual liability, within the meaning of Article 235 and the second paragraph of Article 288 EC Treaty, which is of 'an autonomous character', must in principle be interpreted in the light of its purpose, namely that of allowing an allocation of jurisdiction between the EU Courts and the national courts.

12 See f. 7 above, *Brasserie du Pêcheur and Factotarme and others*, Joined cases C-46/93 and C-48/93.

13 See *Brasserie,* para 29.

14 See *Brasserie*, para 79 ; see also *BT v Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, para 121, where the Court held that EU law precludes national legislation that made the right of individuals to obtain compensation subject to the additional condition, going beyond a sufficiently serious breach of EU law, based on the intentional nature of the conduct, such as that resulting from Article 79(8) of the law on credit institutions.

15 See *Malacalza Investimenti Srl v ECB*, T- 134/21, EU:T:2024:362.

submitted that a comparative analysis of national laws had revealed that the majority of the Member States limits the non-contractual liability of supervisory authorities to cases of 'intentional fault' or 'serious misconduct'. On the basis of Article 340(3) TFEU, the same approach should be followed at EU level. However, in recollection of, *inter alia*, its ruling in Brasserie, the Court refrained from establishing a special liability regime in the supervisory field based on a concept of fault "going beyond that of a sufficiently serious breach of EU law".[16] The Court went on to clarify that EU law precludes the non-contractual liability of an EU institution from being made subject to conditions which "such as those relating to the existence of intentional fault or serious misconduct" go beyond the 'sufficiently serious breach of EU law' test.[17]

Clearly, the concept of 'unlawfulness' is well established in the case-law of the Court. The question that further arises is whether the Union can be held non-contractually liable in the event of a lawful act or conduct.

FIAMM[18] is enlightening in this respect. In its ruling, the Court observed that whilst a comparative examination of the Member States' legal systems had enabled it to ascertain – at a very early stage – that those legal systems converged in the recognition of a principle of liability in the case of an unlawful act or omission of the public authorities, including of a legislative nature, "that is in no way the position as regards the possible existence of a principle of liability in the case of a lawful act or omission of the public authorities, in particular where it is of a legislative nature".[19] The Court went on to conclude that, as Community law then stood, no liability regime existed under which the Community could incur liability for lawful conduct falling within the sphere of its legislative competence.[20]

The same position was reaffirmed in Accorinti[21], where the applicants had claimed that they had suffered unusual and special damage within the meaning of the case-law, which meant that they were entitled to compensation even in the absence of an unlawful ECB act. The Court, however, rejected their argument – reiterating its earlier stance in terms of a 'lawful conduct' – and concluded that, on the basis of consistent case-law applicable *mutatis mutandis* to the non-contractual liability of the ECB under Article 340(3) TFEU "as EU law currently stands, a comparative examination of the Member States' legal orders does not permit the affirmation of a regime providing for non-contractual liability of the European Union for the lawful pursuit of its activities falling within the legislative sphere."[22]

The Court's formulation refers, on the one hand, to Union law "as it currently stands" and, on the other hand, to the Union's lawful pursuit of its activities within the "legislative sphere". This has prompted commentators to suggest that the Court has maintained some leeway to refine its position, for instance as regards the Union's

16 See *Malacalza*, para 54.

17 See *Malacalza*, para 57.

18 See *FIAMM and others v Council and Commission*, Joined cases C-120/06 P and C-121/06 P, EU:C:2008:476.

19 See *FIAMM,* para 175.

20 See *FIAMM*, para 176.

21 See *Alessandro Accorinti v ECB,* T-79/13, EU:T:2015:756.

22 See *Accorinti,* para 119.

'non-legislative' acts.[23] It remains to be seen whether, to what extent and in which context the Court will exercise that leeway in the future.

## 4.2 Damage

The Court has relied on the general principles common to the laws of the Member States also in the context of formulating the requirement for damage,[24] in particular as regards its nature and extent (and the nature and extent of the corresponding restitution).[25]

Accordingly, the concept of damage encompasses both material damage and non-material harm[26] and the rule is full compensation, so that, in terms of material damage, compensation covers both the reduction of assets and loss of profits (default and compensatory interest are also considered in the context of an action for damages). Loss of opportunity may also be compensated on certain occasions.[27] The underlying idea is to place the injured party in the position it would have been, had the unlawful act or conduct not materialised.

The Court has recognized that compensation may not take exclusively the form of a monetary award. It is noteworthy that in Galileo[28] the Court considered that Articles 235 and 288 EC Treaty (as they then were) entitle the judicature to grant "any form of reparation that accords with the general principles of non-contractual liability common to the laws of the Member States, including, if it accords with those principles, compensation in kind, which may take the form of an injunction to do or not to do something".[29] A few years later, in Idromacchine, the Court reiterated the above, adding that an injunction to do or not to do something may lead the

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23 See eg. Gutman K. (2017), "The non-contractual liability of the European Union: principle, practice and promise", in P.Giliker (ed), Research Handbook on EU Tort Law, Edward Elgar, pp 33-35; see also, f. 2 above, Lenaerts K. et al, pp. 479-480.

24 Damage has to be actual and certain; for an analysis of the concept of damage see in particular, f. 2 above, Lenaerts et al, pp. 508-512.

25 This is vividly illustrated eg. in Kendrion, where AG Wahl stated the following: "Article 340 second paragraph, states that 'in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'. Accordingly, the EU Courts have consistently interpreted this provision as covering, as a matter of principle, both pecuniary losses (in the form of reduction of assets and loss of profits) and non-pecuniary losses." (see Opinion AG Wahl in case EU v Kendrion, C-150/17, EU:C:2018:612, para 103).

26 See eg. *Gascogne Sack Deutschland v Commission*, C-40/12, EU:C:2013:768, para 95, *Kendrion v Commission*, C-50/12, EU:C:2013:771, para 100, *Group Gascogne v Commission*, C-58/12, EU:C:2013:770, para 89.

27 Interestingly, in *Giordano v Commission*, C-611/12 P, EU:C:2014:195 and in *Buono and Others v Commission*, C-12/13 P and C-13/13 P, EU:C:2014:194, AG Villalón had found that loss of opportunity is 'a general principle common to the laws of the Member States' included in the damage concept for which compensation can be awarded.

28 See *Galileo International Technology v Commission*, T-279/03, EU:T:2006:121.

29 See *Galileo*, para 63; *Galileo* was a trademarks case, where the Commission had argued that the second paragraph of Article 288 EC Treaty permits compensation only in respect of past damage and does not confer any right to issue injunctions aimed at preventing future conduct that has been found to be unlawful. Forbidding the use of a name – as sought by the applicants – could not be regarded as compensation in kind. Such a prohibition would certainly prevent a continuation of the alleged damage, but would not have the effect of making good the damage already suffered. The Court, however, did not take up this argument.

Commission to adopt a particular conduct.[30] Thus, the Court has considered that an injunction preventing 'future unlawfulness' may constitute a suitable form of compensation under the EU non-contractual liability rules.

## 4.3 Causation

In addition to the unlawfulness and damage requirements, the Court has drawn inspiration from the general principles common to the laws of the Member States in order to develop an EU concept of causation. In accordance with the Court's case-law, for liability to be established, there must be a direct causal link between the unlawful conduct and the damage suffered.

Mauerhofer[31] is characteristic in this regard. Explicitly relying on the general principles common to the laws of the Member States, the Court held that those principles require a "sufficiently direct causal nexus" between the conduct and the damage allegedly suffered and went on to specify that the conduct complained of must be the "determining cause" of the damage.[32]

On this basis, the direct causal link concept developed by the Court requires that the offending conduct be both 'necessary' and 'sufficient' for the damage to occur. Necessity alone, does not suffice to establish a direct causal link between the conduct and the damage suffered.

What a sufficiently direct causal link between the conduct and the actual damage entails was further explored, by reference to the legal systems of the Member States, in Kone.[33] In her Opinion, AG Kokkot submitted that the requirement for a sufficiently direct causal link needs to be clarified. For this purpose, recourse must be had to a normative examination of the national legal systems. AG Kokkot's conclusion was that, despite differences in terminology among the national legal orders, there is sufficient support for the assumption of a sufficiently direct causal link if the conduct in question was – at least – a "contributory cause" of the pricing (even if it was not the "single cause").[34] The above-mentioned case is a vivid example of the way in which national laws keep nourishing the overall discussion on the different elements of the Union's non-contractual liability.

Causation is usually not addressed in detail in the ECB damages cases.[35] That said, in considering the causal link concept in the Versobank case,[36] the Court appears to follow the stance taken also in Mauerhofer, albeit with a variation: it states that, for a direct causal link to be established, the damage pleaded must be a "sufficiently

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30 See *Idromacchine v Commission*, C-34/12, para 29.

31 See *Mauerhofer v Commission*, C-433/10 P, EU:C:2011:204

32 See *Mauerhofer*, para 127.

33 See *Kone and Others v OBB Infrastruktur AG*, C-557/12, EU:C:2014:1317

34 See *Kone and Others*, Opinion of AG Kokkot, EU:C:2014:45, paras 34-40.

35 See, *inter alia*, *Steinhoff and Others v ECB*, EU:T:2019:353, paras 52 & 144, where the Court referred to the 'direct causal link' requirement, finding, however, that, since the applicants' claims for compensation should be rejected at the level of unlawfulness, there was no need to examine the actual damage and the existence of a causal link.

36 See *Versobank v ECB*, T-421/23, EU:T:2024:322.

direct consequence" of the conduct complained of, which must be the "determining cause" of the damage (there being no obligation to make good every harmful consequence, however remote, of an unlawful situation).[37] The applicant's action was dismissed as manifestly inadmissible, in the absence of any explanation or substantiation as regards the existence of a causal link between the ECB's conduct and the alleged damage (so that the application was found not to meet the requirements of clarity and precision necessary for the ECB to prepare its defence and for the Court to rule on the claim for damages).[38]

## 4.4 Special aspects

### 4.4.1 Reasonable diligence

Over the years, Union courts have expressly relied on the general principles common to the laws of the Member States to develop the notion of 'reasonable diligence' in avoiding or limiting the damage suffered. This was the case, for instance, in Mulder[39] and, more recently, in CW v Council[40], where the Court explicitly stated that "[i]t is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage or risk having to bear the damage itself."

The 'reasonable diligence' concept reflects what has been referred to as a "classical tort law defence",[41] which the legal systems of the Member States are familiar with. For Union courts, 'reasonable diligence' comes into play, first, in the context of assessing the existence of a direct causal link between the Union institution's unlawful conduct and the damage incurred (on the understanding that this link may be broken on account of the affected party's own negligence, where the latter constitutes the immediate or determinant cause of the damage) and, second, in the context of assessing the requirement for damage, i.e. in order to determine the extent of the damage for which compensation should be granted. [42]

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37 See *Versobank*, para 24; see also earlier case-law on the matter, eg. *Fresh Marine v Commission*, C-472/00, EU:C:2003:399, para 118.

38 See *Versobank*, paras 28-29.

39 See *Mulder and Others v Council and Commission*, C-104/89 and C-37/90, EU:C:1992:217, para 33.

40 See *CW v Council*, T-516/13, EU:T:2016:377, para 243.

41 See Machnikowski P. (2016), "The liability of Public Authorities in the European Union", in "The Liability of Public Authorities in Comparative Perspective", K.Oliphant (ed.), Intersentia, pp.559-585.

42 In its case-law, the Court refers both to 'reasonable diligence' and 'mitigation of damages'; see Gutman K. (2011), 'The evolution of the action for damages against the European Union and its place in the system of judicial protection', in CMLRev. 2011, Vol. 48, pp 729-734; see also f. 2 above, Lenaerts K. et al, p. 515; for a discussion on the limitation of damages notion see also Brüggemeier G., f. 3 above, pp. 164-166.

### 4.4.2 Unjust enrichment

Union courts have also recognized that unjust enrichment forms part of the general principles common to the laws of the Member States and that it may support an action for damages on the basis of Article 340(2) TFEU.

Grounding its assessment on the national legal systems, the Court explicitly acknowledged, in Masdar,[43] that a claim for unjust enrichment may be invoked under Article 340(2) TFEU (then Article 288 EC Treaty), despite the fact that it is not expressly stipulated therein (or in any other Treaty provision). In this context, the Court laid down the essential elements of unjust enrichment, namely that a person must have suffered loss that has increased the wealth of another person, without there being any valid legal basis for the enrichment[44] and irrespective of whether the impoverishment of the claimant and corresponding enrichment of the defendant derive from the latter's unlawful conduct or fault. In its ruling the Court found that, whilst actions for unjust enrichment do not fall under the rules governing non-contractual liability stricto sensu – which, among other things, require proof of unlawful conduct – any 'obligation' arising out of unjust enrichment is 'by definition non-contractual in nature'; denying the possibility of bringing an action for unjust enrichment against the Union merely on the ground that the Treaty does not expressly provide for an action of this sort would run counter to the principle of effective judicial protection laid down in the case-law of the Court and affirmed in Article 47 of the Charter of Fundamental Rights of the European Union.

## 5 Conclusion

The general principles common to the laws of the Member States have helped the Court develop the missing 'corpus' of EU rules on the non-contractual liability of the Union. By virtue of Article 340(3) TFEU and as confirmed by relevant case-law, these rules are applicable *mutatis mutandis* to the ECB. National laws have played a significant role in formulating the three substantive requirements for EU non-contractual liability, namely unlawfulness of an act or conduct, damage and causation. The Court has shaped these requirements using its comparative law method in a manner that allows it to evaluate the national concepts, rules and principles and to incorporate into EU law those that are best suited to attain the objectives of the Union. In this context, the Court has found that 'unlawfulness' can be traced in the national legal systems. It has further elaborated this concept, establishing that, in cases of discretion, a 'sufficiently serious breach' of a rule of Union law intended to confer rights on individuals must have occurred. The bar has been set high, notwithstanding the fact that the Court recently refrained from introducing, in the field of banking supervision, a special ECB liability regime based on 'intentional fault' or 'serious misconduct'. Damage and causation have been dealt with extensively in the case-law, though usually not as extensively in the ECB cases. The Court has refined its position over the years, on the basis of a case-by-case

43 See *Masdar (UK) v Commission*, C-47/07, EU:C:2008:726, paras 44-50.

44 Such a legal basis does exist in the case of a contract.

assessment. It has been submitted that there may be room for further clarity, in particular as far as the requirement for a direct causal link is concerned. In its recent ECB case-law the Court reiterated its earlier stance on the matter, namely, that, for a ‘sufficiently direct causal link’ to be established, the unlawful conduct must be the ‘determining cause’ of the damage. National laws have fed into the Court’s assessment also as far as certain additional liability aspects are concerned, in particular reasonable diligence and unjust enrichment. The general principles common to the laws of the Member States will continue to guide the Court in this field and assist it in refining its position in the future, as deemed appropriate in the Union context.

# The Liability of the ECB for Non-legal Conduct

## Opinions, Recommendations and Press Statements under Threat?

Hans-Georg Kamann* and Felix Boosβ

## 1 Introduction

It is a truism that the European Central Bank (ECB), like other central banks, to a great extent employs non-legally binding instruments when fulfilling its tasks. This applies particularly to the ECB's core responsibility, i.e. the definition and implementation of the monetary policy of the Union with a view to maintaining price stability and supporting the general economic policies in the Union (Article 127(1) and (2) TFEU). As Advocate General *Cruz Villalón* rightly noted in his opinion in the landmark *Gauweiler* case

> "[i]t is a fact that the communications strategy of central banks has become one of the central pillars of contemporary monetary policy. Given the impossibility of predicting rational behaviour on the markets, an effective way of managing expectations and, therefore, of ensuring the effectiveness of monetary policy is to exploit all the possibilities of public communication (communications strategies) open to central banks. Taking account not only of the reputation of central banks and the information available to them but also of the powers afforded them by conventional monetary policy instruments, announcements, opinions or statements by the representatives of central banks generally play a crucial role in the development of monetary policy today."[1]

A similar development can be observed in the second main function of the ECB, namely the prudential supervision of credit and financial institutions (Article 127(6) TFEU). Although banking supervision is based on legally binding regulations and decisions, these legally binding rules are often open-textured. This may lead to divergent enforcement practices across Member States and even within the same administrative authority. To provide guidance with regard to such open-textured rules, banking supervisors increasingly rely on non-legally binding instruments.

Particularly in the field of banking supervision, the primary remedy has been and is the action for annulment brought under Article 263(4) TFEU, since the prudential supervision measures often take the form of individual decisions that are directly

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1 Opinion of Advocate General Cruz Villalón, *Gauweiler and Others*, C-62/14, EU:C:2015:7, para. 87.

addressed to a financial institution.[2] Also with respect to ECB's monetary policy measures, legal and natural persons have attempted to bring annulment proceedings. These claims have been rejected in the majority of cases as the contested acts were incapable of directly affecting the applicants' legal situation[3] or had no legally binding effects at all.[4] According to standing case-law such non-legally binding acts can per se not be challenged by way of actions for annulment.[5]

It is therefore not surprising that economic operators affected by the non-legal conduct of the ECB have increasingly attempted to challenge this conduct by bringing actions for the compensation of damages on the basis of Articles 268 and 340(3) TFEU. During the last decade, the ECB has been the subject of more than two dozens of damage claims against non-legal acts.[6] Most of them concerned the ECB's actions (and alleged failure to take action) in response to the 2010-12 financial crisis facing the Greek State and the restructuring of the Greek public debt in the framework of the so-called private sector involvement (PSI)[7] and ECB's subsequent participation in the preparation of the financial assistance provided by the European Stability Mechanism (ESM) in 2013 in the framework of a macro-economic adjustment programme to the Republic of Cyprus to respond to the financial crisis that arose as a consequence of the financial difficulties encountered by two major Cypriot banks.[8] Many of those cases culminated in landmark judgments of the Court of Justice of the European Union (CJEU; General Court and Court of Justice), which not only developed the ECB's constitutional status as well as its fundamental obligations, but in addition shaped the general principles on non-contractual liability for non-legal conduct. A milestone in this respect was the General Court's statement in *Steinhoff* summarizing prior jurisprudence as follows:

> "Unlike actions for annulment, the admissibility of actions for damages does not depend on whether the measure causing the alleged damage was in the nature of a decision or was binding. All conduct causing damage is capable of establishing non-contractual liability."[9]

Looking back at ten years of litigation before the CJEU, this contribution intends to provide an overview over the status of the jurisprudence on the law of non-contractual liability for non-legal conduct of the ECB. After having identified the ECB

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2 Article 35(1) SSM Regulation; see e.g. *ECB v Trasta Komercbanka and Others*, C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923.

3 See e.g. *von Storch and Others v ECB*, T-492/12, EU:T:2013:702, paras. 34 et seq. (upheld on appeal by *von Storch and Others v ECB*, C-64/14 P, EU:C:2015:300, paras. 26, 40-41) regarding decisions concerning, respectively, a number of technical features relating to the Eurosystem's Outright Monetary Transactions (OMTs) on secondary debt markets (OMT Decision) and additional measures to safeguard the availability of collateral for counterparties in order to maintain their access to the Eurosystem's liquidity-providing operations (Collateral Decision).

4 See e.g. *Mallis and Malli v Commission and ECB*, T-327/13, EU:T:2014:909, para. 62 (upheld on appeal by *Mallis and Malli v Commission and ECB*, C-105/15 P, EU:C:2016:702, paras. 51 et seq.).

5 See e.g. *IBM v Commission*, 60/81, EU:C:1981:264, para. 9; *France and Others v Commission*, C-68/94 and C-30/95, EU:C:1998:148, para. 62.

6 Starting with *Accorinti v ECB*, T-79/13, EU:T:2015:756 and currently ending with the *D'Agostino v ECB cases, T-424/22,* EU:T:2023:443 (as well as *T-90/23, T-131/23, T-326/23)*.

7 As to the underlying facts see e.g. *Accorinti v ECB*, T-79/13, EU:T:2015:756, paras. 5 et seq. and *Steinhoff and Others v ECB*, T-107/17, EU:T:2019:353, paras. 1 et seq.

8 As to the underlying facts see e.g. *Chrysostomides, K. & Co. and Others v Council and Others*, T-680/13, EU:T:2018:486, paras. 1 et seq.

9 *Steinhoff and Others v ECB*, T-107/17, EU:T:2019:353, para. 55.

instruments, acts and behaviour which have been and might be concerned by actions for compensation for damages (see 2), it analyses how the CJEU has applied the requirements under Article 340(3) TFEU to non-legal conduct (see 3) and what legal remedies applicants have and may seek to obtain (see 4). Finally, it draws some general conclusions (see 5).

## 2 Non-legal conduct in contemporary monetary policy and banking supervision

The notion of "non-legal conduct" as used herein relates to all conduct which is not legally binding, i.e. against which an action for damages under Articles 268 and 340(3) TFEU is admissible, whereas an action for annulment under Article 263(1) and (4) TFEU is not (at least as the jurisprudence stands at this point). This conduct comprises legal acts and instruments listed and defined under the TFEU and the Protocol (No 4) on the Statute of the European system of central banks and of the European Central Bank (ECB Statute), but also a large variety of other acts and behaviour which are not explicitly identified thereunder, but still are a natural part of the ECB's reservoir of monetary and supervisory policy action.

The most relevant examples of conduct that have or could become the subject of compensation claims include:

- recommendations and opinions that the ECB makes and delivers to the appropriate Union institutions, bodies, offices or agencies, or to national authorities on matters in its fields of competence, respectively (Articles 127(4), 132(1) and 288(5) TFEU; Article 34.1 ECB Statute)[10]
- guidelines issued by the ECB under Article 4(3), subparagraph 2 of the SSM Regulation.[11] As the Court of Justice recognised, these non-binding instruments are intended to persuade, not to compel;[12]
- reports, publications, information, notes and other formal and informal communications that the ECB issues and makes, within or outside legislative or administrative proceedings, to national competent authorities or the public;[13]

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10 See e.g. *Steinhoff and Others v ECB*, T-107/17, EU:T:2019:353, para. 56.

11 Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, *OJ L 287, 29.10.2013, p. 63–89. These non-binding guidelines issued by the ECB under Article 4(3), subpara. 2 SSM Regulation are to be distinguished from guidelines adopted by the Governing Council under Article 12.1. ECB Statute, which are binding upon the Executive Board (Article 12.1, subpara. 2 ECB Statute) and the national central banks (Article 14.3 ECB Statute).*

12 See with respect to guidelines issued by the European Banking Authority (EBA) *FBF*, C-911/19, EU:C:2021:599, para. 48 ("by authorising the EBA to issue guidelines and recommendations, the EU legislature intended to confer on that authority a power to exhort and to persuade, distinct from the power to adopt acts having binding force").

13 See e.g. *Planistat Europe and Charlot v Commission (OLAF)*, C-363/22 P, EU:C:2024:20.

- press statements[14] and statements made by ECB officials during press conferences;[15]

ECB conduct that, according to the case-law, may not be contested by way of an action for annulment also includes “intermediate”, “preliminary” or “preparatory” acts. Examples of such acts are decisions, such as the OMT Decision, which announced, by way of a press release, that the Governing Council has set a certain framework for outright monetary transactions, the possibility of implementation of which the Governing Council could still consider to the extent that they were justified from a monetary policy perspective;[16] or an assessment made by the ECB on whether a bank is failing or is likely to fail as an intermediary step in the resolution procedure in accordance with Article 18(1) of the SRM Regulation.[17]

Finally, it is established jurisprudence that the ECB may not only be liable for “active” conduct but also for “passive” conduct, i.e. the omission or failure of the ECB to take a measure, where such omission infringes a legal obligation to act under a provision of EU law.[18]

## 3 The conditions for non-contractual liability under Article 340(3) TFEU

According to settled case-law, in order to incur non-contractual liability under Article 340(2) TFEU, three cumulative conditions must be satisfied: namely the unlawfulness of the conduct alleged against the EU institution or body (see 3.1), the fact of damage (see 3.2), and the existence of a causal link between the alleged conduct and the damage complained of (see 3.3).[19] With respect to the unlawfulness of the conduct complained of, an applicant must not only succeed in pleading the violation of an EU law provision, but rather demonstrate a serious breach of a provision that is intended to confer individual rights.[20] This legal standard is also applicable *mutatis mutandis* to the non-contractual liability of the

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14 See von *Storch and Others v ECB*, T-492/12, EU:T:2013:702, paras. 1 et seq. and *Gauweiler and Others*, C-62/14, EU:C:2015:400, paras. 3 et seq.

15 See e.g. the *D’Agostino v ECB* cases, T-424/22, EU:T:2023:443 (as well as T-90/23, T-131/23, T-326/23).

16 See e.g. *von Storch and Others v ECB*, T-492/12, EU:T:2013:702, paras. 1 et seq. and *Gauweiler and Others*, C-62/14, EU:C:2015:400, paras. 3 et seq.

17 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 1–90; as to the inadmissibility to bring an action for annulment against a FOLTF assessment see *ABLV Bank v ECB*, T-281/18, EU:T:2019:296, upheld by *ABLV Bank v ECB*, C-551/19 P, EU:C:2021:369.

18 See e.g. *Ledra Advertising* and Others *v Commission and ECB*, C-8/15 P, EU:C:2016:701, para. 57, 59, 66 et seq.; *Steinhoff and Others v ECB*, T-107/17, EU:T:2019:353, para. 98; *Malacalza Investimenti and Malacalza v ECB*, T-134/21, EU:T:2024:362, para. 61.

19 See e.g. *Ledra Advertising and Others v Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, para. 64.

20 See e.g. *Bergaderm und Goupil v Commission*, C-352/98 P, EU:C:2000:361, para. 42.

ECB provided for under Article 340(3) TFEU – particularly in respect of non-legal conduct.[21]

The conditions to succeed in an action under Article 268, 340(3) TFEU reflect a sliding scale between admissibility and substance in the systems of remedies established under the TFEU. In an action for annulment, the violation of any rule of law, such as the duty to state reasons, will result in the annulment of the contested act once the relatively high burden of proving legal standing under Article 263(4) TFEU has been satisfied. In an action for annulment, there is no requirement to plead that the breach was serious or to show that the applicant incurred any material or non-material damage.

In an action for damages, the relative burdens on admissibility and substance are somewhat reversed. Unlike in an action for annulment, the admissibility of an action for damages is relatively straightforward and less restrictive.[22] Conversely, the Union Courts require additional requirements in an action for damages on the substance, such as the requirement of a serious breach of rule conferring individual rights, as well as the conditions of causality and damage.

## 3.1 Serious breach of a rule capable of conferring individual rights

The first requirement to incur non-contractual liability has two elements, requiring the applicant to show, first, that the ECB violated a rule intended to confer individual rights (see 3.1.1) and, second, that the ECB manifestly disregarded its discretion, resulting in a serious breach (see 3.1.2).

### 3.1.1 Relevant rules intended to confer individual rights

The case-law makes it clear that a legal provision is intended to confer rights on individuals where it creates an advantage for individuals which could be defined as a vested right, is designed for the protection of their interests, or entails the grant of rights to individuals, the content of those rights being sufficiently identifiable.[23] The case-law shows that a wide range of legal rules entailing the grant of rights to identifiable individuals. Particularly relevant for the ECB when taking non-legal acts are the following:

As regards *substantive rules*, most importantly, the fundamental rights as recognised in the Charter of Fundamental Rights of the European Union (Charter), in the European Convention of Human Rights (ECHR), and as general principles of Union

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21 *Accorinti and Others v ECB*, T-79/13, EU:T:2015:756, para. 65.

22 See e.g. *Chrysostomides, K. & Co. and Others v Council and Others*, T-680/13, EU:T:2018:486 and *Bourdouvali and Others v Council and Others*, T-786/14, EU:T:2018:487 (upheld on appeal in *Council v K. Chrysostomides & Co. and Others*, C-597/18 P, EU:C:2020:1028) and *Basicmed Enterprises and Others v Council and Others*, T-379/16, paras. 59 et seq., where the General Court essentially dismissed all ECB pleas of lack of jurisdiction and inadmissibility.

23 *QI and Others v Commission and ECB*, T-868/16, EU:T:2022:58, para. 90.

law (Article 6(1) and (3) TEU)[24] confer individual rights which are actionable pursuant to Articles 268 and 340(3) TFEU. That is the entire point of a fundamental rights catalogue. In the context of the ECB's functions fulfilled by non-legal conduct, the freedom to conduct a business (Article 16 of the Charter), and the right to property (Article 17 of the Charter), as well as the principle of equal treatment (Articles 20 and 21 of the Charter) are often implicated by monetary policy action and the prudential supervision of significant financial institutions.[25]

Applicants who have attacked non-legal conduct, in particular public statements made by institutions and bodies, have particularly often invoked violations of fundamental rights and principles protecting certain information, such as the obligation to maintain professional secrecy (Article 339 TFEU; Article 27 SSM Regulation),[26] and the rights protecting private life and personal data guaranteed under Articles 7 and 8 of the Charter and Article 8 ECHR and concretised by Regulation 2018/1725.[27] Other relevant principles invoked against non-legal conduct have been, for instance, the principle of impartiality[28] and the presumption of innocence.[29]

So far, the EU Courts have generally denied that *rules of an institutional nature*, such as those concerning the allocation of competences, or the system of division of powers between the various institutions of the European Union, confer individual rights.[30] With respect to non-legal ECB conduct, the EU Courts confirmed the position that an isolated violation of a rule of an institutional nature, for example Articles 124 or 127 TFEU, does not satisfy the first requirement of Article 340(3) TFEU.[31]

It may be asked whether this approach could be revisited in light of the most recent judgment of the Court of Justice in *Illumina v Commission* (C-611/22 P). In that case, the Court of Justice invalidated the Commission's policy under Article 22 of the Merger Regulation, i.e. a rule on competence, to accept referrals of proposed mergers without a European dimension from national competition authorities when those authorities are not competent to review those mergers under their own national

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24 As to fundamental freedoms concretised by internal market rules see e.g. *AGM-COS.MET*, C-470/03, EU:C:2007:213, para. 79.

25 See e.g *Ledra Advertising and Others v Commission and ECB*, C-8/15 P, EU:C:2016:701, paras. 66 et seq.; *Steinhoff and Others v ECB*, T-107/17, EU:T:2019:353, para. 96 with respect to the right to property and *Accorinti and Others v ECB*, T-79/13, EU:T:2015:756, paras. 87 et seq. with respect to the principle of equal treatment.

26 See e.g. *Indomacchine v Commission*, T-88/09, EU:T:2011:641, paras. 42 et seq., confirmed by *Indromacchine v Commission*, C-34/12, EU:C:2013:552.

27 See e.g. *OC v Commission*, C-479/22 P, EU:C:2024:215, paras. 43 et seq.

28 *Malacalza Investimenti and Malacalza v ECB*, T-134/21, EU:T:2024:362, paras. 102-103.

29 *East West Consulting v Commission*, T-298/16, EU:T:2018:967, para. 143.

30 *Artegodan v Commission*, C-221/10 P, EU:C:2012:216, para. 81; *Pellegrini v Commission*, T-375/07, EU:T:2008:466, para. 19. The position is different, however, where the violation of a rule of an institutional nature is accompanied by an infringement of a substantive provision which has such an intention, is capable of giving rise to that liability, see *Artegodan v Commission*, C-221/10 P, EU:C:2012:216, para. 82.

31 See *Steinhoff and Others v ECB*, T-107/17, EU:T:2019:353, para. 139-149, confirmed on appeal by *EMB Consulting and Others v ECB*, C-571/19 P, EU:C:2020:208, paras. 55-56 on Article 124 TFEU and *D'Agostino and Dafin v ECB*, T-424/22, EU:T:2023:443, paras. 22-33, confirmed on appeal in *D'Agostino and Dafin v ECB*, C-566/23 P, EU:C:2024:743, paras. 62-65 on Article 127 TFEU.

law.[32] Notably, the Court of Justice reasoned that a clear and predictable allocation of powers is "an important guarantee of foreseeability and legal certainty for the undertakings concerned".[33] This indicates a willingness on part of the Court of Justice to view rules on the allocation of powers as more than mere institutional provisions, but also as rules which are intended to secure the "need of undertakings for legal certainty".[34] It is difficult to imagine that rules on the allocation of competences remain purely institutional simply because they are raised in an action in non-contractual liability, and not an annulment action as in *Illumina v Commission*.

Importantly, claims concerning the violation of *procedural rules* have been and may be advanced in actions in non-contractual liability. Here, it is settled case law that the observance of the principle of the rights of defence is intended to confer rights on individuals.[35] The most important fundamental right relevant in connection with non-legal conduct is likely the *right to good administration* which the Court of Justice has recognised ever since as a general principle of Union law,[36] and which the Lisbon Treaty has enshrined as an explicit fundamental right in Article 41 of the Charter.

Union institutions and bodies must, by virtue of Article 41(1) of the Charter, apply a duty of care which requires them to examine carefully and impartially all the relevant aspects of the individual case, and more generally to act with caution, failure of which would infringe a corresponding individual right.[37] In practice, this requires that, for instance, the exercise of public authority through public statements, warnings, and the provision of information must be based on information that is "sufficiently plausible and credible".[38] According to the case-law, although difficulties of interpretation and application following from complex facts may be such as to explain the ordinary careful and diligent conduct of an institution or body, including the ECB, in similar circumstances, they cannot, in contrast, qualify as excusable a manifest lack of diligence in the context of an examination when that lack of diligence consists in failure to address the questions that are at the heart of that examination or in drawing conclusions from it that are clearly inappropriate, deficient, unreasonable or unsubstantiated.[39]

The recognition of the right to good administration as a fundamental right equally entails that the *right to be heard* may form the basis of a damages action, since it confers an individual right (Article 41(2)(a) of the Charter). Notably, this means that Union institutions, including the ECB, may in certain circumstances be required to enable adversely affected persons to make observations when their conduct has a "significant influence" on third parties that are not part of the Union or a Member State administration. Accordingly, in *Vialto*, the Commission was held liable for violating the right to be heard and was ordered to pay damages because it had made a recommendation to a Turkish authority not to work with a contractor in the context

32 *Illumina v Commission*, C-611/22 P and C-625/22 P, EU:C:2024:677.

33 *Illumina v Commission*, C-611/22 P and C-625/22 P, EU:C:2024:677, para. 209.

34 *Illumina v Commission*, C-611/22 P and C-625/22 P, EU:C:2024:677, para. 210.

35 *Sison v Council*, T-47/03. EU:T:2007:207, para. 239.

36 *Technische Universität München*, C-269/90, EU:C:1991:438, para. 14.

37 *Planistat Europe and Charlot v Commission*, C-363/22 P, EU:C:2024:20, para. 68.

38 *Planistat Europe and Charlot v Commission*, C-363/22 P, EU:C:2024:20, para. 76.

39 See e.g. *IMG v Commission*, C-619/20 P, EU:C:2022:722, para. 192.

of a financing agreement with Turkey.[40] According to the Court of Justice, the Commission's recommendation was likely in practice to have a significant influence on the Turkish authority's decision to exclude a particular contractor, rendering it necessary to hear the affected contractor before making such a statement to the Turkish authority.[41] *Vialto* provides a valuable lesson for the ECB since the exercise of monetary policy is often intended to influence the actions of market participants that, like the Turkish authority, are not part of the Union or a Member State administration. Thus, where non-legally binding conduct of the ECB is intended to shape third-party conduct but has an adverse impact on a single operator or an identifiable group of operators, it may be necessary to hear that operator to avoid a future liability issue.

The EU Courts have so far rejected claims relating to the infringement of the *obligation to provide adequate reasons* (Article 296(2) TFEU). In *UPS v Commission*, it has been held that the requirement to state reasons for EU measures cannot entail material damage distinct from that resulting from the lack of a basis for the measure in question, although the reasons are relevant to assess the substantive legality of the decision.[42] The main reason is that the requirement for a statement of reasons is intended solely to enable the EU Courts to review the legality of acts, but does not serve an individual interest.[43] This view may not seem to square with Article 41(2)(c) of the Charter which expressly mandates the requirement to state reasons as an essential component of the right to good administration. With respect to the requirement to state reasons, the fundamental shift brought by the Lisbon Treaty and Article 41 of the Charter has not been fully accounted for in the jurisprudence on non-contractual liability.

Finally, the ECB might incur liability by violating *national rules that transpose Union directives* insofar as they intend to confer individual rights, since it is obliged to apply those national rules under Article 4(3) SSM Regulation. In a recent judgment, the General Court assessed whether Italian rules, which transposed Union directives, on early interventions measures conferred individual rights. The Court ruled that those specific rules exclusively pursued public interests and were not intended for the protection of individuals.[44]

### 3.1.2 Manifest and serious disregard of the limits of discretion

The decisive test for finding that a breach is sufficiently serious is whether the EU institution or body concerned manifestly and gravely disregarded the limits of its discretion.[45] In that respect, it is established case-law that non-legal conduct of the ECB taking place in the context of the tasks conferred on it for the purposes of

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40 *Vialto Consulting v Commission*, T-617/17 RENV, EU:T:2022:851.

41 *Vialto Consulting v Commission*, C-650/19 P, EU:C:2021:879, paras. 127-128.

42 *UPS v Commission*, T-834/17, EU:T:2022:84, paras. 188-189.

43 K. Lenaerts et al., *EU Procedural Law*, 2nd ed., Oxford University Press, Oxford, 2023, p. 502.

44 *Malacalza Investimenti and Malacalza v ECB*, T-134/21, EU:T:2024:362, paras. 129 and 138.

45 *Bergaderm und Goupil v Commission*, C-352/98 P, EU:C:2000:361, para.. 43; *Nausicaa Anadyomène and Banque d'escompte v ECB*, T-749/15, EU:T:2017:21, para. 69.

defining and implementing the EU monetary policy (Articles 127(1) and (2) and 282 TFEU and Article 18 ECB Statute), but also in the context of banking supervision (Article 127(6) TFEU) confer a broad discretion on the ECB, the exercise of which entails complex evaluations of an economic and social nature.[46] Thus, any sufficiently serious breach of the legal rules at issue must be based on a manifest and serious failure to have regard for the limits of the broad discretion enjoyed by the ECB when exercising its powers in monetary and supervisory policy matters.

However, it is also established jurisprudence that where an institution or body has only considerably reduced, or even no, discretion, the mere infringement of EU law may suffice to establish the existence of a sufficiently serious breach.[47] The ECB must exercise particular caution in respecting procedural rights of defence of economic operators concerned, in particular the right to be heard, be it in formal or informal administrative proceedings. In that respect, the Court of Justice recently established in *Vialto* that even where an institution or body only communicates with a competent national authority in the framework of an internal procedure it

> "ha[s] a duty to hear [the economic operator] before sending… its position on the measures to be taken in relation to [the economic operator]…, with the effect that the [institution or body] ha[s] no discretion in that respect."

It remains to be seen whether the CJEU might apply the no discretion standard beyond assessments on substance also with respect to the underlying right to good administration and the duty of care in general which would require the ECB to act with particular caution also when taking non-legal acts.

## 3.2 Damage

The second requirement of an action in non-contractual liability is the existence of damage. Traditionally, this referred to material harm, but it is by now clear that immaterial harm is likewise actionable in an action under Articles 268 and 340(3) TFEU.[48]

In the framework of liability for non-legal conduct, it must be noted that the threshold to demonstrate immaterial damage is not high. According to recent case-law dealing with infringements of the right to the protection of personal data, the Court of Justice held that the award of compensation does not require that the damage suffered by a data subject has reached a certain degree of seriousness.[49] Moreover, the Court of Justice found that the fear experienced by a data subject with regard to a possible misuse of his or her personal data by third parties as a result of an infringement of

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46 *Accorinti v ECB*, T-79/13, EU:T:2015:756, para. 68 (on broad monetary policy discretion) and *Malacalza Investimenti and Malacalza v ECB*, T-134/21, EU:T:2024:362, para. 45 (on broad discretion in banking supervision).

47 *Accorinti v ECB*, T-79/13, EU:T:2015:756, para. 67, citing *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)*, C-5/94, EU:C:1996:205, para. 28.

48 *Gascogne Sack Deutschland v Commission*, C-40/12 P, EU:C:2013:768, para. 95.

49 *Österreichische Post (Préjudice moral lié au traitement de données personnelles)*, C-300/21, EU:C:2023:370, paras. 42-51.

data protection rules,[50] or the loss of control over personal data, even for a short period of time,[51] may constitute non-material damage giving rise to a right to compensation, provided that the data subject can show that he or she has actually suffered such damage. Hence, it is not required for persons concerned, e.g. by public statements or similar non-legal acts, particularly if they disclose private information or personal data, to demonstrate pecuniary losses. It may be sufficient to prove the negative non-material consequences such conduct incurs.

It may be asked whether, in appropriate circumstances, a simple infringement of a rule of law may be sufficient to establish damage for purposes of Article 340(3) TFEU. The conventional answer is no.[52] This is the correct position insofar as an applicant claims monetary relief. Monetary compensation impacts the Union budget, and there is a policy interest in keeping an agile Union administration that does not refrain from acting out of fear over financial consequences. That is one of the reasons why non-contractual liability requires a serious breach.

## 3.3 Causal link

As a third requirement, Article 340(3) TFEU requires that the ECB shall compensate for any damage "caused" by it. The EU Courts have interpreted this as a sufficiently direct causal nexus between the conduct of the EU institutions and the damage, for which the applicant bears the burden of proof. The conduct complained of must be the determining cause of the damage.[53]

The boundaries of this direct causal link requirement are not entirely clear. On the one hand, an established line of cases considers that the EU institutions are not responsible for "every harmful consequence, even a remote one, of an unlawful situation" and that a possible contribution by the EU institutions alone may not satisfy the requirement of a direct causal link.[54] On the other hand, the Court of Justice has taken a less restrictive approach on causality as a common principle of non-contractual liability, which the EU Courts are tasked to apply. In *Kone*, the Court of Justice held that there is a sufficient causal link between an infringement of Article 101 TFEU and inflated prices, which cartel outsiders have benefited from by operating under the cartel's "umbrella".[55] Some scholars have advocated that this more lenient approach on causal link, which the Court of Justice applied in the context of antitrust damages, should also inform the case-law on Article 340(2) and (3) TFEU.[56]

In her Opinion in *Kone*, Advocate General Kokott emphasised that, in the context of Article 340(2) TFEU, the requirement of "a direct causal link must not be regarded as

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50 *Natsionalna agentsia za prihodite*, C-340/21, EU:C:2023:986, paras. 75-86.

51 *PS (Adresse erronée)*, C-590/22, EU:C:2024:536, para. 33.

52 See, with respect to damages in the data protection context, *juris*, C-741/21, EU:C:2024:288, para. 43.

53 *European Union v Kendrion*, C-150/17 P, EU:C:2018:1014, para. 52.

54 *Flying Holding and Others v Commission*, T-91/12 and T-280/12, EU:T:2014:832, para. 118.

55 *Kone and Others*, C-557/12, EU:C:2014:1317, paras. 33-34.

56 K. Gutman, "The non-contractual liability of the European Union: principle, practice and promise", in P. Giliker (ed.), *Research Handbook on EU Tort Law*, Edward Elgar, Cheltenham, 2017, p. 58.

being the same as a single causal link".[57] Rather, the case-law "does not by any means always assume as a matter of course that the chain of causality is broken where the action of a third party was a contributory cause of the loss sustained. Rather, it is always the specific circumstances of the individual case in question which are decisive".[58]

In this respect, it is settled case-law that there is a direct causal link where a Union act is binding on (i.e. instructs) a national authority,[59] even though that Union act may not be challengeable in an action for annulment because it is considered as a mere preparatory or intermediate act.[60]

The legal analysis is less straightforward if the Union act is not binding. Under a strict conception of causality, the damage which results from the implementation of a non-legal act, for instance a recommendation, guideline, or other communication, is the responsibility of the (national) authority alone which adopts a binding decision taking such act into account. But if Advocate General Kokott is correct, it is not excluded that a direct causal link may also be established in such a situation. In fact, the Court of Justice already held some time ago in *KYDEP* that a telex sent by the Commission which had no binding force, but was likely to prompt the competent authorities of the Member States to refuse to act in a certain way, as the Member States were at risk, had they ignored the interpretation given by the Commission in the telex at issue, of facing certain factual (financial) disadvantages, may be sufficient to be the direct cause of damage.[61] It cannot be excluded that the CJEU may take a similar approach also towards other non-legal acts, such as recommendations or guidelines, as they are intended to exert a power of exhortation and persuasion on the competent authorities and on financial institutions,[62] and therefore are supposed to cause a certain, even if only practical, impact.[63]

## 4 Legal Remedies

It is well-accepted case-law that applicants who can establish unlawful conduct, damage, and a direct causal link may not only request compensation for material and immaterial harm,[64] but also compensation in kind. Such restitution in kind may take the form of an injunction to do or not to act, which may lead the EU institution to adopt a particular course of conduct. This is the *Galileo* case-law.[65] Such a *Galileo* injunction, if the applicant succeeds in showing a serious breach of an individual right, merely ensures that EU law is complied with and reinstates unlawfully

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57 Opinion of Advocate General Kokott, *Kone and Others*, C-557/12, EU:C:2014:45, para. 36.

58 Opinion of Advocate General Kokott, *Kone and Others*, C-557/12, EU:C:2014:45, para. 37.

59 *Krohn v Commission*, 175/84, EU:C:1986:85, paras. 21-23.

60 *IBM v Commission*, 60/81, EU:C:1981:264, paras. 10-12.

61 *KYDEP v Council and Commission*, C-146/91, EU:C:1994:329, para. 26.

62 *FBF*, C-911/19, EU:C:2021:599, para. 69.

63 See, for instance, T. Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union*, Mohr Siebeck, Tübingen, 2014, p. 265.

64 *Gascogne Sack Deutschland v Commission*, C-40/12 P, EU:C:2013:768, para. 95.

65 *Galileo International Technology and Others v Commission*, T-279/03, EU:T:2006:121, para. 63; *Idromacchine and Others v Commission*, C-34/12 P, EU:C:2013:552, para. 29.

cancelled rights.[66] In short, it restores the situation which the institution or body was bound to respect in the first place.

Where an applicant simply espouses his or her individual rights by requesting a *Galileo* injunction, in particular in a non-legal conduct scenario, such injunction does not impact the Union budget and exerts no financial pressure on an agile Union administration. This is why some authors have considered the action in non-contractual liability as the default remedy or as an "alternative" annulment action.[67]

## 5 Conclusions

The claim for non-contractual liability is the only legal remedy reflected in the Charter and has itself, by virtue of Article 41(3) of the Charter, become a fundamental right. As long as annulment actions are in principle only available against legally binding acts, the action in non-contractual liability is and might become an even more central feature of the system of judicial remedies established by the TFEU to exercise judicial control over non-legal conduct. It cannot be ruled out that it might even be transformed into a type of "alternative" annulment action or default remedy in a system of remedies that, according to the Court of Justice,[68] is a complete one.

Given the ECB's exclusively positive track record in defending against applications for the compensation of damages under Article 340(3) TFEU, this is nothing the ECB needs to be afraid of. In fact, effective judicial review through damages action might even be seen as another way to enhance the ECB's institutional stature, as it gives the ECB the opportunity to defend the legitimacy of its actions in a court of law and, by consequence, in the court of public opinion. This, in turn, may allow cooling down allegations prominently voiced in some Member States that the ECB has overstretched the boundaries of its mandate in responding to financial crises. In that way, the action in non-contractual liability for the ECB's non-legal conduct has already demonstrated and may further demonstrate to be an important means to maintain the ECB's accountability under the rule of law in the European Union.

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66 See, by analogy, *"Grossmania"*, C-177/20, EU:C:2022:175, paras. 64-65.

67 T. Rademacher, "Die Amtshaftungsklage als allgemeine Rechtsverletztenklage des Unionsrechts", *Zeitschrift für Öffentliches Recht* 71(2), pp. 331-354, at pp. 342 and 348.

68 *Les Verts v European Parliament*, 294/83, EU:C:1986:166, para. 23.


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# Part IV

# Talking about cash when the euro turns 25: rediscovering the legal tender status of euro banknotes and coins and their continued role in society

# The role of cash in society and revitalisation of the notion of legal tender

Frederik Malfrère*

## 1 Setting the Scene

As the single currency enters a quarter century of its life, now is a good time to reflect on the evolution of euro cash, the role it plays in society, its status as legal tender, and some of the transformations it faces. As many may remember, the euro was introduced on 1 January 1999 as an 'invisible currency' – used only for accounting purposes and electronic payments.[1] On 1 January 2002, following a three-year transition period, the first euro banknotes entered circulation – cementing the euro as a fully-fledged 'tangible currency' that you could touch, hold, feel and pay with.[2] This rollout of euro cash was surrounded by much fanfare. European capitals held events to mark the occasion, and citizens noticed their wallets quickly filling with the colourful new euro banknotes – usable cross-border without cumbersome exchanges.[3]

However, the concerted push towards digital payments over the past decade, along with the Covid-19 pandemic, marks a stark reversal of this trend. As cash usage across the euro area declines in favour of digital payments, we risk seeing the euro transition from a 'tangible currency' back to an 'invisible currency' – where it started its life January 1999.[4] This transformation shouldn't be understated. Cash has been central to trade-based societies for thousands of years – with the first recorded coin minted in Lydia (modern day Turkey) in the 7th century BC.[5] Today we may think of 'cash' as merely the physical manifestation of 'money' – but 'cash' has historically been the most important manifestation of 'money'.

This brings us to an important conceptual question central to the way we think about the role cash plays in society – if not simply banknotes and coins, then what is money? Although we talk about it all the time and have no issue conceptualising it,

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1 European Union, 'The Euro: History and Purpose' (European Union Website)

2 ibid

3 This much celebrated cash changeover involved an initial production of more than 14 billion banknotes, with a total value of EUR 633 billion. The successful rollout made the euro available to 300 million citizens for day-to-day payments; European Central Bank, 'Initial Changeover (2002)' (European Central Bank Website)

4 European Central Bank, 'Study on the payment attitudes of consumers in the euro area (SPACE)' (European Central Bank Website, December 2022)

5 Britannica Money, 'Origins of Coins' (Encyclopaedia Britannica Website)

most people would be hard-pressed to provide a definition. The person on the street might tell you one thing, whilst an economist would tell you another, and a lawyer may offer an entirely different meaning altogether. Although some might frame their answers in terms of modern economies and legal systems, this question certainly isn't novel. The following three essential functions of money can be traced back to Aristotle's writings in the 4th Century BC:[6]

1. A medium of exchange – money must be widely accepted as a method of payment;

2. A unit of account – money must serve as common measure of the value of goods and services being exchanged; and

3. A store of value – money must retain its value over time.

These criteria laid the foundation for much of the analytical work in the two millennia since, and are still deemed essential to this day.[7] They provide a functional definition of money – meaning something is only 'good' money if it meets these criteria.[8] In modern economies, the State (through law) plays a central role in supporting these functions.[9] *First*, it prescribes a State's currency as legal tender – allowing it to effectively function as a medium of exchange. In practice, this means legal tender currency cannot be refused if offered in satisfaction of monetary debts – discharging payment obligations in any case. *Second*, it assigns permanent value to a currency – allowing it to effectively serve as a unit of account. This allows us to compare the worth of goods and services, as well as record assets and liabilities – central to trade and commerce. *Third*, it establishes and protects independent central banks who, through monetary policy measures, ensure a currency effectively functions as a store of value. This central bank independence permits monetary policy decisions to be taken free from political influence and based purely on economic indicators – better safeguarding price stability.[10]

In monetary systems premised on fiat money – where physical currency itself has no intrinsic value – money's medium of exchange function is a key feature.[11] It is ensured by prescribing central bank issued banknotes as legal tender. Where a payment obligation exists, the legal tender status of banknotes implies: 'first, mandatory acceptance of those banknotes; second, their acceptance at full face value; and, third, their power to discharge from payment obligations.'[12] Hence, the

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6 Case C-422/19 and C-423/19 *Johannes Dietrich and Norbert Häring v Hessischer Rundfunk* [2020] ECLI:EU:C:2020:756 (*Hessischer Rundfunk*), Opinion of AG Pitruzella, para 77; Deutsche Bundesbank, 'Special Exhibit: What is money? Why does money have value?' (Bundesbank Website)

7 Meikle Scott, 'Aristotle on Money' [1994] Phronesis, vol. 39, no. 1, 26–44

8 Charles Proctor, *Mann and Proctor on the Law of* Money (8th edn, Oxford University Press) 7

9 ibid 12

10 Kristalina Georgieva, 'Strengthen Central Bank Independence to Protect the World Economy' (IMF, 21 March 2024); Filiz D Unsal, Chris Papageorgiou and Hendre Garbers, 'Monetary Policy Frameworks: An Index and New Evidence' (IMF, 28 January 2022)

11 Mann (n 9) 7

12 *Hessischer Rundfunk* (n 7) para 49; Commission Recommendation (2010/191/EU) of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (Recommendation 2010/191) point 1

concept of 'legal tender' encompasses an obligation in principle to accept banknotes for payment purposes.[13]

Setting economics, law, institutions, and Aristotle aside, there is a final element central to the effective functioning of money: trust. Society must maintain confidence that money fulfils and will continue to fulfil these functions. Central banks lie at the heart of this. They operate independently with broad mandates designed to bolster trust in fiat currencies, which go beyond just ensuring money functions as a store of value. Legal tender (whatever form it takes) also plays a role here, giving people confidence they will be able to make retail payments and successfully discharge themselves from public and private debts.

## 2 The Role of Cash in Society

Euro banknotes fulfil the three functions of money outlined earlier – and do so very well. Yet, cash is increasingly being replaced by other payment methods with seemingly little impact on our lives. Many of us pay for goods and services using credit and debit cards, store 'money' online in digital-wallets, and receive salary payments into our bank accounts by electronic transfer. As these digital payment methods become the norm, the importance of cash becomes increasingly unclear to many.

Despite this, cash remains central to our society and continues to serve a critical role in the modern economy. To start with, cash has several day-to-day functions. *First*, it safeguards privacy of citizens – a fundamental EU right – by providing a direct and non-traceable payment method which doesn't involve third parties. *Second*, it is currently the only form of central bank money directly available to citizens – allowing instant discharge from payment obligations when settling transactions. *Third*, it is fast, widely accepted, and easy to monitor – guaranteeing citizens greater flexibility and control over their spending. *Fourth*, as legal tender, it serves an important stabilising institutional function in times of crises – permitting economies to continue operating despite capital controls and banking sector turmoil (as previously seen in Greece). And *fifth*, it ensures financial inclusion of societal groups which may have limited or no access to electronic payment methods –- such as those with disabilities, immigrants, the socially vulnerable, minors and the elderly.[14]

These are the classic pro-cash arguments that many are familiar with. However, cash also serves an essential role in maintaining trust in other payment methods. Cash itself represents a direct claim on the central bank - which guarantees its value. The balances we hold with banks, e-money institutions, and digital-wallets to facilitate digital payments are **not** legal tender and do not represent a direct claim on the central bank. Instead, they are 'book money' and represent a claim on the

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13 ibid

14 Opinions of the European Central Bank CON/2021/18, CON/2021/31, CON/2022/9, CON/2023/33, CON/2023/40, CON/2024/1, CON/2024/3, CON/2024/8, CON 2024/19, CON/2024/22, CON/2024/26; *Hessischer Rundfunk* (n 13); European Commission Proposal for a Regulation of the European parliament and of the Council (COM/2023/364) on the legal tender of euro banknotes and coins [2023]; European Central Bank, 'The Role of Cash' (European Central Bank Website)

organisation with which we hold the balance – in effect making us a 'creditor' and the organisation a 'debtor'. Should the organisation become insolvent, us depositor-creditors have no guarantee of recovering the money owed during insolvency proceedings. Deposit guarantee schemes mitigate this risk to an extent - but only cover bank balances up to EUR 100,000. Book money represents roughly 90% of the money supply – including all non-cash balances we hold to facilitate digital payments. The reason we are happy to pay, be paid, and hold our 'money' digitally as book money, despite it having no direct claim on the central bank, is because of our trust in the instant convertibility of our digital balances into cash at par. This trust stems from us being accustomed to regularly doing so – whether withdrawing cash at an ATM machine, a high-street bank branch, or the local corner shop through cashback or cash-in-shop services. Then having made a withdrawal at par, the physical nature of banknotes along with our knowledge they are legal tender means we never question their value, validity, or ability to discharge payment obligations.[15] So, whilst digital balances may appear to fulfil the three functions of money, they only do so because cash serves as an 'anchor' for other payment methods.[16]

## 3 The Revitalisation of Legal Tender

We have seen many Member States adamantly embrace innovations in digital payments, but some are starting to realise they may have gone too far. As non-cash payment methods begin crowding out banknotes – both in terms of acceptance and access – the notion of legal tender is suddenly 'trendy' again. This revitalisation has forced policymakers, the courts, Member States and central bankers to think critically and pragmatically about a previously abstract concept.

In the euro area, the Treaties designate euro banknotes as legal tender but give no definition to the notion.[17] Looking to remedy this, the Member States, Commission and ECB having been coordinating at a technical level for some time through the Euro Legal Tender Expert Group (ELTEG), culminating in the 2010 Commission Recommendation on the on the scope and effects of legal tender of euro banknotes and coins.[18] In 2021 we saw the ECJ bring some highly sought clarity to the topic in its *Hessischer Rundfunk* judgment [19] – where it provided a binding definition of legal tender and how it applied to euro banknotes.[20] Crucially, it highlighted how euro

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15 Prudential supervision of banks also plays an important role here. Centrally monitoring and ensuring the solvency of European banks contributes to public trust in non-cash payment methods and the convertibility of digital balances into cash *at par*.

16 Piero Cipollone, 'Modernising finance: the role of central bank money' (European Central Bank Website, 9 February 2024); Fabio Panetta 'A digital euro: widely available and easy to use' (European Central Bank Website, 24 April 2023); Fabio Panetta, 'Central bank digital currencies: a monetary anchor for digital innovation' (European Central Bank Website, 5 November 2021);

17 TFEU Art. 128(1)

18 Euro Legal Tender Expert Group (ELTEG): Report on the definition, scope and effects of euro banknotes and coins (Expert Group Report, 19 March 2010); Recommendation 2010/191 (n 13)

19 In the *Hessicher Rundfunk* judgment, the Court also clarified that the Union's exclusive competence in matters of monetary policy includes monetary law provisions linked to the status of the euro as single currency. This comprises the competence to adopt the legal rules governing the status of legal tender accorded to banknotes and cash in so far that is necessary for the use of the euro as the single currency (paras 33, 40, 52).

20 *Hessischer Rundfunk* (n 7)

banknotes (1) cannot generally be refused in settlement of euro-denominated debts; (2) at their full face value (without surcharges) and; (3) with the effect of discharging those debts.[21] However, it emphasised that restrictions on the use of cash in payment of debts may be permitted providing they are in the public interest, are proportionate, that other lawful payment methods are available, and those without access to such are able to pay in cash.[22]

*Hessischer Rundfunk* brought widespread attention to the notion of legal tender – acting as a catalyst for its revitalisation. Since the judgment, ELTEG has emphasised the importance of ensuring the uniform application of this legal tender definition.[23] It also highlights that cash acceptance in retail transactions should be the rule, whilst recognising the practical challenges of implementing this within domestic legal systems.[24] Notably, the interaction between mandatory acceptance of legal tender and freedom of contract remains a conceptual sticking point for some Member States.[25] On a more practical level, it has developed detailed proposals on how to safeguard cash acceptance and availability across the euro area.[26] These form the basis of the European Commission's proposal for an EU Regulation on the legal tender of euro banknotes and coins on (June 2023).[27] This aims to codify *Hessischer Rundfunk* and fleshes out some of the more technical elements of mandatory acceptance and the permitted restrictions. It also imposes an obligation on Member States to ensure sufficient access to cash. Whilst this last point does not strictly concern legal tender, ensuring sufficient access to cash is clearly a necessary complement/condition to ensuring mandatory acceptance. If cash cannot be accessed, it cannot serve its legal tender function.

At the same time, cash acceptance and access has entered the crosshairs of Member State legislatures. This is evidenced by an uptick in national laws obliging enterprises to accept cash payments, and requiring banks to operate adequate cash infrastructure networks.[28] The ECB has adopted opinions on draft national laws in several Member States, including Hungary, the Netherlands, Poland, Belgium, Slovakia, and Latvia.[29] The fact these questions of legal tender, cash acceptance and cash access have entered the national political debate shows this is increasingly being recognised as a societal issue – with many of the same concerns expressed earlier being cited. Importantly, it indicates that after years of encouraging the development and use of digital payment methods, Member States recognise that enshrining the continued role of cash in society is a necessary counterweight to the increasing dominance of digital payments.

In many respects, it appears that Member States have taken the notion of legal tender for granted until now – but are gradually rediscovering its importance and

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21 *Hessischer Rundfunk* (n 7) 45

22 ibid 78

23 Euro Legal Tender Expert Group (ELTEG): Final Report (6 July 2022)

24 ibid

25 ELTEG Report (n 19); ELTEG Report (n 24)

26 ibid

27 Proposal COM/2023/364 (n 15)

28 Opinions of the European Central Bank (n 15)

29 ibid

potential for safeguarding cash acceptance and access. At the same time, transformations in legal tender are happening on a second front – in the sphere of central bank digital currencies (CBDCs). The mooted 'digital euro' would serve the same function as cash in maintaining trust in other payment methods by ensuring the instant convertibility of digital balances into central bank money at par in an increasingly digitalised payments landscape.[30] As an electronic complement to euro banknotes, a digital euro would enjoy legal tender status – implying mandatory acceptance, at full face value, with the effect of discharging monetary debts.[31]

[30] Panetta, Cipollone (n 17)

[31] European Commission Proposal for a Regulation of the European parliament and of the Council (COM/2023/369) on the establishment of the digital euro [2023]

# The quest for a definition

## The concept of legal tender from the Treaties to the Commission's proposal for a regulation on the legal tender of euro banknotes and coins

Mireia Estrada Cañamares*

## 1 Introduction

Euro banknotes and coins started circulating in 2002[1]. Ever since, they have legal tender status according to the Treaties (banknotes) and Union secondary law (coins)[2]. Article 128(1) TFEU establishes that euro banknotes issued by the European Central Bank (hereinafter, "ECB") and the national central banks (hereinafter, "NCBs") are the only banknotes that enjoy legal tender status in the euro area[3]. Article 11 of Council Regulation EC (No) 974/98 determines the same for euro coins issued by euro area Member States.

The legal tender of euro banknotes and coins is a key concept of EU law. As stated by Advocate General Pitruzzella, the inclusion of the concept of legal tender in Article 128(1) TFEU is designed to create a constitutionally guaranteed "monopoly", whereby only the ECB and the NCBs can issue banknotes that have such status in the euro area[4]. The fact that only euro banknotes issued by the Eurosystem have legal tender status is a significant expression of the "monetary sovereignty" of the Union, which Member States whose currency is the euro have "totally, completely and exclusively" transferred to the Union[5]. The Court of Justice of the EU has referred to Article 128(1) TFEU as a monetary law provision which underpins the singleness of the euro and is a precondition for the effective conduct of the monetary policy of the EU[6].

It is therefore not self-evident why the Treaty-makers did not refer to any of the defining elements of the concept of legal tender, given the constitutional significance

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1 Council Regulation EC (No) 974/98 of 3 May 1998 on the introduction of the euro (OJ L 139, 11.5.1998) determines that, as from 1 January 2002, the ECB and the euro area NCBs shall put into circulation euro banknotes (Article 10) and the Member States of the euro area shall issue euro coins (Article 11).

2 The words "euro banknotes and coins" and "euro cash" are used interchangeably in this chapter.

3 The content of Article 128(1) TFEU was first introduced into EU primary law by the Treaty of Maastricht (1992) in Article 105a TEU. Article 10 of Council Regulation EC (No) 974/98 of 3 May 1998 on the introduction of the euro (OJ L 139, 11.5.1998) also refers to the legal tender status of euro banknotes.

4 See the Opinion of AG Pitruzzella of 29 September 2020, *Hessischer Rundfunk*, Joined Cases C-422/19 and C-423/19, EU:C:2020:756, point 94.

5 *Ibid*, point 67.

6 Judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk,* Joined Cases C-422/19 and C-423/19, EU:C:2021:63, paragraphs 40 and 43.

of the legal tender status of euro banknotes in the context of the Union's monetary policy. A possible explanation is the prevalence of cash as a means of payment when euro banknotes and coins first made it to EU primary law in the Maastricht Treaty (1992) and when the Treaties were subsequently amended (the last time by the Lisbon Treaty (2007))[7]. At that time, the legal tender of euro cash was a generally accepted concept as electronic means of payment were much less used than they are today[8]. Another reason could very well be that defining what "legal tender" means inevitably touches upon the issue of the division between Union competences (to regulate legal tender) and Member State competences (among others, in the field of contract law)[9]. This can be said to be the greatest stumbling block in any discussion on the status of legal tender of euro banknotes and coins[10].

This chapter takes us through the quest for a definition of the concept of legal tender of euro cash, from the first discussions of the "Euro Legal Tender Expert Group" (hereinafter, "ELTEG") in 2009 to the Commission's proposal for a regulation on the legal tender of euro banknotes and coins in 2023[11]. It argues that, far from being an empty shell, the concept of legal tender, as referred to in Article 128(1) TFEU and other sources of EU law, has a meaning and produces practical effects even in the absence of a precise definition in binding rules of EU secondary law. This was perfectly shown by the Court of Justice of the EU in its seminal judgment in the *Hessischer Rundfunk* case (2021)[12]. That the legal tender of euro cash, as enshrined in EU law, produces concrete effects had important implications for the Commission's room for manoeuvre when defining its proposal for a regulation. It also sets limits to what can be negotiated in the context of the ongoing legislative procedure that will lead to the adoption of the regulation.

## 2 ELTEG's first steps and Commission Recommendation 2010/191/EU

In January 2009, the Commission established ELTEG, which brings together experts from the Commission, the ECB, and the euro area Member States (NCBs and ministries of finance) to discuss issues regarding the legal tender status of euro banknotes and coins. The group was set up after it became clear that there was a

7 The last major amendment of the EU Treaties was introduced by the Treaty of Lisbon, which was signed on 13 December 2007 and entered into force on 1 December 2009.

8 "All Union and national legislations specify that euro banknotes and coins are legal tender but elements of the definition of this concept are rarely given. The reason for this is that it is the concept of legal tender is a generally accepted concept in national law". See the "Report of the Euro Legal Tender Expert Group (ELTEG) on the definition, scope and effects of legal tender of euro banknotes and coins", page 3.

9 "This oversight is no accident, given the sensitivity of the issue and the difference in the approach taken by the various Member States concerned". See the Opinion of AG Pitruzzella of 29 September 2020, *Hessischer Rundfunk*, Joined Cases C-422/19 and C-423/19, EU:C:2020:756, point 87.

10 This chapter does not focus on the scope of the Union's exclusive competence in the area of monetary policy and how to delimit this competence from the competences of Member States. This issue is addressed in the chapters by Andrea Westerhof Lofflerova and Jeffrey Dirix.

11 COM(2023) 364 final.

12 "It is implicit in the [*Hessischer Rundfunk*] judgment, but a necessary consequence of its reasoning, that Article 128(1) TFEU has direct effect in the sense that it creates subjective rights that can be invoked by individuals before national courts and must be protected by them. See the chapter by Julio Baquero Cruz, page 130.

degree of legal uncertainty at the euro area level regarding the interpretation of the concept of legal tender[13]. Since its inception, one of ELTEG's key objectives has been to reach a common understanding on such concept[14]. When working towards this goal, ELTEG's greatest challenge has been the position of a minority of Member States, according to which contractual freedom can limit legal tender[15] and "the issue is to ascertain which of the two prevails in any given circumstance"[16]. One should also keep in mind that the understanding of the implications of the legal tender status of national currencies, prior to the introduction of euro banknotes and coins, was not identical across Member States[17].

In March 2010 the Commission adopted Recommendation 2010/191/EU, which was based on the work carried out by ELTEG[18]. In fact, the three key elements of the concept of legal tender, as reflected in Commission Recommendation 2010/191/EU, had been unanimously agreed by ELTEG[19]. The Recommendation provided for the first time a "common definition of legal tender" in EU law. It established that the legal tender of euro banknotes and coins should imply: (a) their mandatory acceptance where a payment obligation exists, (b) at full face value, (c) with the power to discharge from payment obligations. The first element of the definition was further developed as meaning that the creditor of a payment obligation (often referred to as "payee") cannot refuse euro banknotes and coins unless the parties have agreed on other means of payment. The second element implies that the value of the banknote or coin is the one indicated on the banknote or coin. The third element entails that a debtor of a payment obligation (often referred to as "payer") can discharge herself from a payment obligation by tendering euro banknotes and coins to the payee. The Recommendation included three other points that are essential to the concept of legal tender. Point 2 states that the acceptance of payments in euro cash in retail transactions "should be the rule" and that a refusal thereof should be possible only if grounded on reasons related to the "good faith principle". Point 3 determines that refusing a high denomination banknote should only be possible if grounded on reasons related to the "good faith principle". Hence, these two points are connected to element (a) of the definition, as they include exceptions to the mandatory

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13 "According to the majority of the Group members, there is currently some legal uncertainty at the euro area level with regards to a common interpretation and definition of legal tender and the consequences flowing there from". See the "Report of the Euro Legal Tender Expert Group (ELTEG) on the definition, scope and effects of legal tender of euro banknotes and coins", available on the European Commission's website, page 2. See also recital 3 of Commission Recommendation 2010/191/EU of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (OJ L 83/70, 30.3.2010).

14 *Ibid* (ELTEG Report), page 3.

15 "Refusal of payments in cash in B to C relationships: the majority of the Members were in favour of the general acceptance of cash as a rule, refusal being the exception and always based on reasons related to the "good faith principle". For four Members -DE, FI, IE, NL-, contractual freedom provisions can qualify those provisions relating to legal tender". *Ibid* (ELTEG Report), page 17 (see also page 6).

16 *Ibid* (ELTEG Report), page 4.

17 See R. Freitag, "21. Euro as legal tender (and euro banknotes)", in F. Amtenbrink and C. Herrmann (eds.), *The EU Law of Economic and Monetary Union*, Oxford University Press, 2020, page 595.

18 See recital 4 of Commission Recommendation 2010/191/EU of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (OJ L 83/70, 30.3.2010).

19 The summary of the main conclusions of ELTEG lists the "common definition of legal tender", including (1) mandatory acceptance of euro cash, (2) acceptance at full face value, (3) power to discharge from a payment obligation, among the conclusions unanimously adopted by ELTEG. See the "Report of the Euro Legal Tender Expert Group (ELTEG) on the definition, scope and effects of legal tender of euro banknotes and coins", page 16.

acceptance of euro cash. Point 4 of the Recommendation is linked to element (c) of the definition since it establishes that surcharges imposed on the use of euro banknotes and coins are prohibited, which protects the face value of these banknotes and coins.

## 3 *Hessischer Rundfunk* (Joint Cases C-422/19 and C-423/19)

The Court of Justice's judgment in the *Hessischer Rundfunk* case is mandatory reading for anyone interested in EU constitutional law in the context of the Economic and Monetary Union[20]. The Court of Justice elaborated on the existence of a regulatory dimension of the Union's monetary policy, together with monetary policy in the strict sense (*Geldpolitik*, in German) for which the ECB is responsible[21]. The Court of Justice recognised that there is an important role for the EU legislature (that is, the European Parliament and the Council of the EU) to play in the regulatory dimension of the Union's monetary policy, for instance to establish rules on the legal tender of euro cash based on Article 133 TFEU. *Hessischer Rundfunk* also touches upon the scope of the Union's exclusive competence in the area of monetary policy and how to delimit it from the competences of Member States. There are, thus, several angles from which to assess the judgment. I will particularly focus on what the Court said on the concept of legal tender, which it was asked to interpret for the very first time.

The applicants in the main proceedings, Mr Dietrich and Mr Häring, two citizens based in Hessen (Germany) were asked to pay a radio and television fee to *Hessischer Rundfunk* (the public broadcaster in Hessen). They offered to pay in cash, which *Hessischer Rundfunk* rejected, based on its own rules, according to which payers of the radio and television licence fee may not pay such fee in cash. Mr Dietrich and Mr Häring challenged the payment notices they received from *Hessischer Rundfunk*. According to them, the cash restriction of the *Hessischer Rundfunk* rules was contrary to Article 128(1) TFEU and Paragraph 14(1) of the Bundesbank Act, as these two provisions (which refer to the legal tender status of euro banknotes) obliged *Hessischer Rundfunk* to accept euro cash as a means of payment. To put it very simply, the applicants were questioning why they were not allowed to pay in cash if cash is legal tender. Their action was unsuccessful at first and second instance. Mr Dietrich and Mr Häring then appealed before the Bundesverwaltungsgericht (Federal Administrative Court, Germany), which stayed the proceedings and referred three questions to the Court of Justice for a preliminary ruling. In essence, the referring court asked the Court of Justice: (1) whether the

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20 "This case is of considerable importance, not least because of its constitutional implications. (…). This case also concerns the interpretation of complex and undefined concepts of monetary law on which the Court has not yet had the opportunity to rule". See the Opinion of AG Pitruzzella of 29 September 2020, *Hessischer Rundfunk*, Joined Cases C-422/19 and C-423/19, EU:C:2020:756, points 3 and 30.

21 *Hessischer Rundfunk* followed other judgments in which the Court of Justice of the EU had elaborated on the Union's monetary policy in the strict sense, like the Judgment of the Court of Justice of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756; the Judgment of the Court of Justice of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400 and; the Judgment of the Court of Justice of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000.

Union's exclusive competence for monetary policy precludes a legal act by a euro area Member State that obliges a public authority of the Member State to accept euro banknotes for payment obligations imposed by that public authority (i.e., possibility to introduce an obligation to accept banknotes); (2) whether the legal tender status of euro banknotes precludes public authorities of a Member State from refusing the fulfilment of the payment obligations imposed by them in euro banknotes (i.e. possibility to introduce a cash restriction); (3) if the first question is answered positively and the second one is answered negatively, whether a legal act of a euro area Member State which is adopted in the context of the Union's exclusive competence for monetary policy can be applied as long as the EU has not exercised its competence.

Before analysing what the Court of Justice said about the concept of legal tender of euro cash, it is worth recalling that there was a considerable level of uncertainty on this issue before the judgment was delivered. This was, despite the efforts of ELTEG and the Commission to reach a common understanding on the concept of legal tender, as referred to in section 2 of this chapter. This uncertainty is very well demonstrated by the position of the Bundesverwaltungsgericht (the referring court in *Hessischer Rundfunk*), according to which the mandatory acceptance of euro banknotes "cannot automatically be inferred from the term 'legal tender'". The Bundesverwaltungsgericht argued that it was not clear whether the Union's exclusive competence for monetary policy "extends to governing the legal consequences associated with the status of legal tender of euro banknotes"[22]. This somewhat artificial separation between the concept of legal tender and its effects seems to imply one could separate a concept from its meaning. A similar distinction can also be found in an ELTEG minority view according to which the Union had already defined what legal tender is in a sufficient way, by saying that euro banknotes and coins should have that status, and further effects of legal tender are governed by national law[23]. Such reasoning fails to provide flesh on the bone of the definition of the concept of legal tender. This is because merely saying that euro banknotes and coins have legal tender status does not provide a definition of what the status of legal tender encompasses. It only indicates which banknotes, namely those denominated in euro, as opposed to those denominated in other currencies (e.g., US dollar, British pound), are to enjoy such status in the euro area[24].

When elaborating on the concept of legal tender, the Court of Justice[25] stated at the outset that, since Article 128(1) TFEU does not refer to national law to determine the meaning and scope of the concept, legal tender is a concept of EU law that must be given "an autonomous and uniform interpretation throughout the European Union". In line with its case law, the Court added that the interpretation of the concept of legal tender must take into consideration "not only the wording of the provisions in which it

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22 See the Judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk,* Joined Cases C-422/19 and C-423/19, EU:C:2021:63, paragraphs 22 and 25.

23 See the "Report of the Euro Legal Tender Expert Group (ELTEG) on the definition, scope and effects of legal tender of euro banknotes and coins", page 2.

24 "All of the aforementioned legislative acts limit themselves to ascribing the status of legal tender to certain physical emanations of the single currency, but do not hint at the consequences of such status". See R. Freitag, *op. cit*. footnote 17, page 97.

25 See the Judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk,* Joined Cases C-422/19 and C-423/19, EU:C:2021:63, paragraph 45.

appears but also the context of those provisions and the objective pursued by them". When interpreting the concept of legal tender, the Court first referred to the meaning of legal tender of a means of payment in its ordinary sense[26] (basically, the dictionary definition). According to this definition, the legal tender of a means of payment entails that the means of payment: (a) cannot generally be refused in settlement of a debt denominated in the same currency unit, (b) at its full face-value, (c) with the effect of discharging the debt. The Court then said that that the interpretation of the concept of legal tender according to its ordinary meaning is supported by Commission Recommendation 2010/191/EU[27], which provides "useful guidance" for the interpretation of the references to legal tender in EU law.

The Court concluded that the concept of legal tender includes a "fundamental obligation" to accept euro banknotes for payment purposes. It does not, however, impose an "absolute obligation" to accept banknotes as a means of payment. Exceptions to the obligation of mandatory acceptance (e.g., cash restrictions introduced by Member States in their own fields of competence) are, therefore, possible "provided that every debtor is guaranteed to have the possibility, as a general rule, of discharging a payment obligation in cash"[28]. Advocate General Pitruzzella nicely referred to the idea that mandatory acceptance is the rule by saying that euro banknotes and coins "constitute means of payment *by default*"[29]. The Court's interpretation of the scope and limits of the mandatory acceptance of euro cash was based on the ordinary sense of the concept and the definition provided for in Commission Recommendation 2010/191/EU[30]. It was also clearly influenced by the wording of Article 133 TFEU. The Court said that an absolute obligation of mandatory acceptance of euro banknotes "cannot be considered necessary for the use of the euro as the single currency" and "for the establishment of the status of legal tender of banknotes denominated in euro"[31], thus paraphrasing Article 133 TFEU, which empowers the Union legislature to establish measures "necessary for the use of the euro as the single currency", including rules governing the status of legal tender of euro cash[32]. Furthermore, to support that the legal tender of euro cash does not preclude Member States from introducing cash restrictions, the Court of Justice relied on recital 19 of Council Regulation EC (No) 974/98. According to this recital, cash restrictions established by Member States are compatible with the legal tender status of euro cash if other lawful means of payment are available. The Court said that, despite not producing binding legal effects, recital

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26 *Ibid*, paragraph 46. On Commission Recommendation 2010/191/EU of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (OJ L 83/70, 30.3.2010), see section 2 of this chapter.

27 *Ibid*, paragraphs 47-49.

28 *Ibid*, paragraphs 55-56.

29 See the Opinion of AG Pitruzzella of 29 September 2020, *Hessischer Rundfunk*, Joined Cases C-422/19 and C-423/19, EU:C:2020:756, point 125 (emphasis added).

30 "It follows from the information contained in paragraphs 46 to 49 of the present judgment that the status as legal tender calls only for acceptance in principle of banknotes denominated in euro as a means of payment, not for absolute acceptance". See the Judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, Joined Cases C-422/19 and C-423/19, EU:C:2021:63, paragraph 55.

31 *Ibid*, paragraph 55.

32 Article 133 TFEU reads as follows: "Without prejudice to the powers of the European Central Bank, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the measures necessary for the use of the euro as the single currency. Such measures shall be adopted after consultation of the European Central Bank".

19 helps understanding the meaning of Articles 10 and 11 of Council Regulation EC (No) 974/98, which enshrine the legal tender status of euro banknotes and coins (respectively)[33].

Interpreting the concept of legal tender, and in particular the obligation of mandatory acceptance as a key part of the concept, was necessary for the Court to reply to the questions raised by the Bundesverwaltungsgericht[34]. It was necessary to conclude that Member States can, within the sphere of their own competences, adopt legislation which limits cash payments. This is possible as the obligation to accept cash is not absolute[35]. Dwelling on the concept of legal tender was also necessary to determine that cash restrictions will, however, only be lawful if they comply with a set of cumulative conditions, like that the cash restriction pursues a public interest objective and that it is proportionate to the objective it pursues[36]. These conditions are essential to ensure that the mandatory acceptance of cash remains the rule.

## 4 Life after *Hessischer Rundfunk*: what room for the Union legislature?

In its judgment in *Hessischer Rundfunk*, the Court of Justice stated that Article 133 TFEU provides the legal basis for the Union legislature to define rules governing the legal tender status of euro banknotes and coins. The Court acknowledged that the Union legislature had not, to date, made use of that possibility but it could do so any time[37]. When interpreting the concept of legal tender of euro banknotes, the Court of Justice provided a definition of legal tender. This leads to the question on the extent to which the Union legislature can deviate from what the Court of Justice established in *Hessischer Rundfunk* when defining the concept of legal tender in EU secondary law measures based on Article 133 TFEU.

There is no doubt that the Court of Justice interprets EU law at a particular point in time[38]. At the same time, in *Hessischer Rundfunk* the Court did not interpret legal tender as a concept of secondary law. If this would have been the case, the Union legislature could modify the definition of legal tender and a potential future

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33 See section 1, pages 95-96, of this chapter.

34 See the three questions raised by the Bundesverwaltungsgericht in section 3, pages 98-99, of this chapter.

35 See the Judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk,* Joined Cases C-422/19 and C-423/19, EU:C:2021:63, paragraphs 56 and 67.

36 *Ibid*, paragraph 78. The Court of Justice focused on cash restrictions established in national law as this is what the case in the main proceedings referred to. It is however apparent that what the Court said on national cash restrictions also applies to restrictions introduced by the EU legislature, for instance in the context of the fight against money laundering and terrorist financing. This did not escape Advocate General Pitruzzella. See the Opinion of AG Pitruzzella of 29 September 2020, *Hessischer Rundfunk*, Joined Cases C-422/19 and C-423/19, EU:C:2020:756, point 118.

37 See the Judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk,* Joined Cases C-422/19 and C-423/19, EU:C:2021:63, paragraphs 51-54. See also the Opinion of AG Pitruzzella of 29 September 2020, *Hessischer Rundfunk*, Joined Cases C-422/19 and C-423/19, EU:C:2020:756, point 89: “although the EU legislature has not provided a precise definition of the concept of legal tender, it remains free to do so at any time”.

38 In its Opinion in *Hessischer Rundfunk*, Advocate General Pitruzzella said, at least five times, that the Court was being asked to interpret the concept of legal tender “as EU law currently stands”. See the Opinion of AG Pitruzzella of 29 September 2020, *Hessischer Rundfunk*, Joined Cases C-422/19 and C-423/19, EU:C:2020:756, point 124. See also points 99, 110, 119 and 158.

interpretation of the Court would need to adapt to that evolving definition. The Court of Justice interpreted the concept of legal tender as enshrined in Article 128(1) TFEU and, in doing so, it provided a definition that has become part of the meaning of that provision. Only the Court can revisit that definition.

When elaborating on the concept of legal tender, the Court first and foremost relied on the meaning of legal tender of a means of payment in its ordinary sense (i.e., the dictionary definition), thus using the literal interpretation as its preferred method of interpretation[39]. The Court then argued that the interpretation of the concept of legal tender according to its ordinary meaning is *supported by* Union secondary law, namely Commission Recommendation 2010/191/EU and recital 19 of Council Regulation EC (No) 974/98[40]. The Court of Justice thus referred to the core elements of the definition of legal tender in the broadest possible way. Although *Hessischer Rundfunk* was essentially about the introduction of a cash restriction by a German public entity, nothing in the judgment indicates that the definition of legal tender that the Court provided is in any way limited to the specific circumstances of *Hessischer Rundfunk*. By way of example, nothing indicates that what the Court said about the concept of legal tender of euro banknotes does not equally apply to other forms of the euro, like euro coins or the digital euro (when it is issued)[41]. Nothing indicates either that the concept of legal tender, as interpreted by the Court in *Hessischer Rundfunk*, does not apply to cases in which the payee is a private party, for example a retailer. In short, the Court of Justice interprets EU law at a particular point in time and in relation to a specific case. However, the Court's reliance on a definition of legal tender that is supported by secondary law but not specific to it means that the Union legislature cannot deviate from the definition of legal tender laid down by the Court of Justice in *Hessischer Rundfunk*.

Hence, the Court of Justice has already provided the key elements of the definition of legal tender. Yet the Union legislature still enjoys an ample room for manoeuvre to decide on the single rules that are necessary to preserve the *effectiveness* of cash as legal tender in the euro area. These rules are not necessarily limited to clarifying the concept of legal tender. The Court established that Articles 128 and 133 TFEU are monetary law provisions intended to guarantee the status of the euro as the single currency ("the *singleness* of the single currency")[42]. Turning to legal tender, Article 128(1) TFEU is concerned with "the *establishment* of the status of legal

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39 « L'interprétation littérale peut être définie comme l'action de donner une signification à un texte normatif à la lumière du sens courant de ses termes », K. Lenaerts and J. A. Gutiérrez-Fons, *Les Méthodes d'Interprétation de la Cour de Justice de l'Union Européenne*, Bruylant, Editions Juridiques, 2020, page 34.

40 See section 3, pages 100101, of this chapter. This departs from the Opinion of Advocate General Pitruzzella, who did not refer to the ordinary meaning of legal tender when proposing to the Court an interpretation of the concept of legal tender. Advocate General Pitruzzella went straight to the "law as it stands at present". See the Opinion of AG Pitruzzella of 29 September 2020, *Hessischer Rundfunk*, Joined Cases C-422/19 and C-423/19, EU:C:2020:756, points 99-125.

41 Article 7(2) of the proposal for a regulation on the establishment of the digital euro (COM(2023) 369 final) establishes: "The legal tender status of the digital euro shall entail its mandatory acceptance, at full face value, with the power to discharge from a payment obligation".

42 "If the status of the euro as the single currency could be understood differently and governed by different rules in the Member States whose currency is the euro, the singleness of the single currency would be called into question". See the Judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, Joined Cases C-422/19 and C-423/19, EU:C:2021:63, paragraph 39 (see also paragraphs 38-43). See the Opinion of AG Pitruzzella of 29 September 2020, *Hessischer Rundfunk*, Joined Cases C-422/19 and C-423/19, EU:C:2020:756, points 64-65.

tender of banknotes denominated in euro". Article 133 TFEU provides the legal basis to lay down measures necessary "for the preservation of the *effectiveness* as legal tender of cash denominated in euro"[43]. In fact, when referring to the powers of the Union's legislature under Article 133 TFEU the Court does not distinguish between the concept of legal tender and other aspects of legal tender necessary to preserve the effectiveness of the legal tender status of euro cash. It simply establishes that rules governing the status of legal tender of euro cash fall within the scope of Article 133 TFEU[44]. Establishing a clear dividing line between what belongs to the definition of the concept and other rules necessary to preserve the effectiveness of the legal tender status of euro cash is not only unnecessary, but it would also be no easy task. Given that one of the key aspects of the concept of legal tender is the fundamental obligation, in principle, to accept cash, defining the key exceptions to mandatory acceptance can be said to go hand in hand with the efforts to define the concept[45]. Laying down such exceptions is essential to ensure that mandatory acceptance remains the general rule.

## 5 ELTEG's next steps and the Commission's proposal for a regulation on the legal tender of euro banknotes and coins

On 28 April 2021, shortly after the Court of Justice delivered its judgment in *Hessischer Rundfunk* (on 26 January 2021), ELTEG met again (this time under the name "ELTEG III"). The group met five times between January 2021 and May 2022. The minutes of the meeting held on 28 April 2021 state that "the Commission may decide to take appropriate action to protect the acceptance *and availability* of euro cash at the end of 2021"[46]. The Terms of Reference of ELTEG III list among the group's key tasks establishing a forum for discussion between the Commission, the ECB and the Member States on questions relating to the acceptance *and availability* of euro cash and providing the Commission with factual analyses and legal expertise on these issues[47]. Hence, the extent to which citizens have sufficient and effective access to euro cash has become one of ELTEG's priorities, together with the issue of acceptance of cash as a means of payment, which is at the core of the concept of legal tender. In the meeting held on 24 March 2022, the Commission expressed the view that, if the digital euro would be given legal tender status, it would make sense to adopt a regulation on the legal tender of cash "in the interest of coherence and

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43 Judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk,* Joined Cases C-422/19 and C-423/19, EU:C:2021:63, paragraph 55 (emphasis added).

44 *Ibid*, paragraph 51.

45 In Commission Recommendation 2010/191/EU of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (OJ L 83/70, 30.3.2010), the possibility to refuse cash based on the existence of an agreement between payer and payee on another means of payment was presented as part of the definition of legal tender. In the Commission's proposal for a regulation on the legal tender of euro banknotes and coins (COM(2023) 364 final), on the contrary, the possibility to refuse cash on the same grounds is framed as one of the "exceptions to the principle of mandatory acceptance".

46 See the "Draft Report, Euro Legal Tender Expert Group III, 28 April 2021", available at the Commission's website, page 2 (emphasis added).

47 See the "Terms of Reference of the Euro Legal Tender Expert Group", available at the Commission's website, page 1 (emphasis added).

better law-making"[48]. On 6 July 2022, the Commission published the final report of ELTEG III, which it then used to define its proposal for a regulation on the legal tender of euro banknotes and coins[49].

On 28 June 2023, the Commission published a "single currency package", consisting of a proposal for a regulation on the legal tender of euro banknotes and coins (hereinafter, the "proposed regulation")[50] and two legislative proposals concerning the establishment of the digital euro[51]. In its Opinion on the former (hereinafter, the "ECB Opinion on the proposed regulation")[52], the ECB expressed its support for the Commission's legislative initiative, which aims at establishing rules on the legal tender status of euro banknotes and coins in Union secondary law. Moreover, the ECB particularly welcomed the obligation for Member States to ensure sufficient and effective access to cash[53]. The ECB argued that it fully shares the view that access to cash is necessary to preserve the effectiveness of its legal tender status[54]. If citizens do not have access to cash, they will not be able to pay with it and the mandatory acceptance of cash will be meaningless. Thus, having access cash is a precondition for the concept of legal tender to come into play at all.

The proposed regulation explains that it aims at *codifying* and clarifying the concept of legal tender, as dealt with in the case law the Court of Justice[55]. The Commission thus acknowledges that its room for manoeuvre when defining the concept of legal tender is very limited. This does not mean, however, that the quest for a precise definition of the concept of legal tender in binding rules of secondary law became irrelevant after *Hessischer Rundfunk*. Clarifying in measures adopted based on Article 133 TFEU that the concept of legal tender, as interpreted by the Court of Justice, generally applies to the settlement of debts denominated in euro is of utmost importance. It will contribute to ensuring the broadest possible compliance with the obligation of mandatory acceptance for payees across the euro area.

The proposed regulation contains a definition of the concept of legal tender (Article 4) and establishes the key exceptions (of a monetary law nature) to the obligation of mandatory acceptance of euro cash (Article 5). According to Article 4 of the proposed regulation, the legal tender status of euro banknotes and coins entails: (a) their mandatory acceptance, (b) at full face value (e.g., surcharges are prohibited) and (c) with the power to discharge from a payment obligation. Article 5 determines that, by way of derogation from the obligation to accept euro cash, payees can

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48 See the "Draft Report, Euro Legal Tender Expert Group III, 22 March 2022", available at the Commission's website, page 4.

49 "Final Report of the Euro Legal Tender Expert Group (ELTEG) of 6 July 2022", available at the Commission's website. See also the Commission's proposal for a regulation on the legal tender of euro banknotes and coins (COM(2023) 364 final), page 4.

50 COM(2023) 364 final.

51 COM(2023) 368 final and COM(2023) 369 final.

52 Opinion of the European Central Bank of 13 October 2023 on a proposal for a regulation on the legal tender of euro banknotes and coins (CON/2023/31).

53 See paragraphs 1.1 and 1.2 of the ECB Opinion on the proposed regulation.

54 See page 1 of the Explanatory Memorandum of the proposed regulation and paragraph 1.2 of the ECB Opinion on the proposed regulation.

55 "The acceptance of cash is dealt with in the jurisprudence of the European Court of Justice, and the aspects related to the acceptance of cash which are covered in the CJEU ruling are codified and clarified in this proposal". See the Impact Assessment of the proposed regulation, page 5.

refuse euro cash as a means of payment in the following two cases: (a) where the refusal is made in good faith, based on legitimate and temporary grounds, proportionate and results from concrete circumstances that are beyond the control of the payee (e.g., a 200-euro banknote is tendered for a 2-euro payment) (this is the so-called "good faith exception") and; (b) where, prior to the payment, the payer and the payee have agreed on a means of payment other than cash (generally referred to as the "prior agreement exception").

The "prior agreement exception" is very much linked to the debate on the interaction between the competence to set rules on the legal tender status of euro cash and the civil laws of certain Member States, in particular the provisions on the conclusion of contracts. It reflects "the need to strike a fair balance" between these different competences[56] by protecting the mandatory acceptance of euro cash as a rule, while facilitating that the parties who have freely agreed to use electronic means of payment to settle a debt can do so.

In the ECB Opinion on the proposed regulation, the ECB argued that it remains unclear in the proposal if "ex ante unilateral exclusions of cash" (e.g., the "no cash" signs we often see at the entrance door of a shop) are prohibited by the regulation[57]. If these practices are not clearly prohibited in the regulation, we cannot exclude that, depending on the provisions of national contract law, they are considered a case of an "agreement" between the parties on a means of payment other than cash, which could justify the refusal to accept cash. This would, however, be hard to reconcile with the Court of Justice's case law according to which exceptions to the obligation of mandatory acceptance must be justified on grounds of general interest and be proportionate to be lawful. If "no cash" signs are commonplace and they are used to refuse cash based on the "prior agreement exception", there is a high risk that the exception (i.e., the possibility to refuse cash) becomes the rule, and that the rule (i.e. the obligation of mandatory acceptance) becomes the exception, thus undermining the concept of legal tender of euro cash, as interpreted by the Court of Justice in *Hessischer Rundfunk*.

When laying down rules on the legal tender of euro cash, the Union legislature needs to preserve the "effectiveness as legal tender of cash denominated in euro", while at the same time not going beyond what is "necessary for the use of the euro as the single currency" within the meaning of Article 133 TFEU. Arguably, doing so requires limiting the scope of the "prior agreement exception" by clarifying that "ex ante unilateral exclusions of cash", which involve a non-negotiable condition for the payer to settle a pecuniary debt using electronic means of payment, do not fall under this exception and are therefore prohibited. "Ex ante unilateral exclusions of cash" should thus be distinguished from cases involving a real negotiation on the use of electronic means of payment to settle a debt, which would fall under the "prior agreement exception" and constitute legitimate grounds to refuse euro cash as a

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56 See the Opinion of AG Pitruzzella of 29 September 2020, *Hessischer Rundfunk*, Joined Cases C-422/19 and C-423/19, EU:C:2020:756, point 71.

57 See section 2 of the ECB Opinion on the proposed regulation on the "Clear prohibition of ex ante unilateral exclusions of cash". This situation contrasts with Article 10 of the proposal for a regulation on the establishment of the digital euro (COM(2023) 369 final), which clearly prohibits "the unilateral exclusion of payments in the digital euro".

means of payment. This distinction can certainly have an impact on the civil laws of certain Member States, according to which "ex ante unilateral exclusions of cash" constitute an implicit agreement between the parties on a means of payment other than cash[58]. Limiting the scope of the "prior agreement exception" is however necessary to strike a balance between legal tender and national contract law and thus avoid that the latter turns legal tender into an empty shell. Without limiting the scope of the "prior agreement exception", we will hardly be able to talk about a *uniform* interpretation of the concept of legal tender across the euro area and about *single rules* on the *single currency*. Let us imagine one day a citizen of Member State A finds she can hardly pay anywhere using euro cash in her home Member State as "no cash" signs are commonplace. She then goes on holidays in Member State B and realises cash is accepted everywhere. Will she get the impression that there is a uniform concept and single rules on the legal tender of euro cash in the euro area?

## 6 Concluding remarks

The status of euro banknotes as legal tender is constitutionally guaranteed by Article 128(1) TFEU. The lack of a definition of the concept of legal tender in binding rules of EU law has however been a source of concern for at least 15 years. It has created uncertainty surrounding the meaning and thus the practical effects of legal tender (e.g., does it mean that the supermarket where I do my groceries needs to accept my cash?). This uncertainty has been exacerbated by the significant growth in the use of electronic means of payment over the past few years, which is increasingly putting into question the acceptance of euro cash as the default means of payment.

The seminal judgment of the Court of Justice in *Hessischer Rundfunk* put an end to much of the uncertainty surrounding the concept of legal tender of euro banknotes and coins. The Court of Justice clarified that legal tender of euro cash is a concept of Union law, which must be interpreted in a uniform manner across the euro area, therefore without considering the specifics of the legal frameworks of Member States. The Court also established that only the Union legislature can determine the legal rules governing the status of legal tender of euro banknotes and coins, based on Article 133 TFEU, insofar as these rules are necessary "for the preservation of the effectiveness as legal tender of cash denominated in euro"[59]. To reply to the questions raised by the Bundesverwaltungsgericht (the referring court in *Hessischer Rundfunk*) the Court of Justice interpreted the concept of legal tender. By doing so, it provided a definition of legal tender that is not specific to the facts of *Hessischer Rundfunk* and has become an integral part of the meaning of Article 128(1) TFEU. To recall, the Court stated that the legal tender of a means of payment entails that that means of payment cannot generally be refused in settlement of a debt denominated in the same currency unit, at its full face-value and with the effect of

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58 Should this impact exist, the measures based on Article 133 TFEU would prevail over national contract law provisions because of the primacy of Union law, as is the case in other areas of Union competence like EU competition law. See the chapter by Andrea Westerhof Löfflerová, page 108.

59 See the Judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk,* Joined Cases C-422/19 and C-423/19, EU:C:2021:63, paragraph 55.

discharging the debt. The legal tender of euro banknotes and coins, therefore, creates a fundamental obligation, as a general rule, to accept those notes and coins as a means of payment. Exceptions to such obligation are only possible if a set of cumulative criteria are met (e.g., proportionality, public interest objective). This is essential to ensure that the mandatory acceptance of euro cash remains the rule.

Hence, the Court of Justice has already provided the key elements of the definition of legal tender in *Hessischer Rundfunk*. Yet the Union legislature still enjoys ample room for manoeuvre to decide on the single rules that are necessary to preserve the effectiveness of cash as legal tender in the euro area. The obligation for Member States to ensure sufficient and effective access to cash throughout their territory, which is included in the proposed regulation, is a great example of this. Furthermore, the quest for a precise definition of the concept of legal tender in secondary law has not lost its momentum after *Hessischer Rundfunk*. It is of utmost importance to clarify, in binding rules of Union secondary law, that the concept of legal tender, as interpreted by the Court of Justice, generally applies to the settlement of debts denominated in euro. Doing so will contribute to ensuring the broadest possible compliance with the obligation of mandatory acceptance by euro area payees.

The Union legislature has a great challenge ahead, namely, to reach an agreement on a regulation which ensures the effectiveness of the legal tender status of euro cash. There are clear limits to what can and cannot form part of that regulation. When it comes to the long-standing quest for a definition of the concept of legal tender, the Union legislature cannot do less than what is already enshrined in Article 128(1) TFEU, as interpreted by the Court of Justice in *Hessischer Rundfunk*. The logic of *Hessischer Rundfunk*, according to which the mandatory acceptance of banknotes and coins is the rule and the possibility to refuse them is the exception, needs to be respected. This requires limiting the scope of the “prior agreement exception” so “ex ante unilateral exclusions of cash” are not considered legitimate grounds to refuse cash. Without prohibiting unilateral exclusions of euro cash by retailers or service providers the logic of *Hessischer Rundfunk* could practically end up being turned on its head.

# Analysing exclusivity in the context of Union rules on the legal tender of euro banknotes and coins

Andrea Westerhof Löfflerová*

## 1 Questions of constitutional implications

The legal tender status of banknotes and coins affects the daily lives of many EU citizens. It, therefore, comes as no surprise that issues revolving around the concept of legal tender have given rise to questions of considerable importance. These questions have, without exaggeration, constitutional implications as they touch on many aspects that the Court of Justice of the EU has not previously had an opportunity to rule on.

What is the scope of monetary policy? What is the scope of the Union competence in that area? What is, more particularly, the scope of Articles 128 and 133 TFEU? Does the Union exclusive competence extend to specifying the status of legal tender accorded to banknotes and coins? What are the limits to that Union competence? Do Member States retain any powers as regards legal tender? If so, how the Union and Member State respective competences are exercised?

The Court had the opportunity to consider many of those questions in its seminal *Hessischer Rundfunk* judgment of 26 January 2021 in Joint Cases C-422/19 and C-423/19.

## 2 The scope of Union´s exclusive competence in monetary policy

The Union's competences are subdivided into exclusive and non-exclusive, depending on their relationship to the competences of the Member States. In this way, the Treaty of Lisbon introduced, for the first time in primary law, a clear definition of the different categories of competence in the Treaties, in particular, exclusive, shared and supporting (or coordinating) competences (Article 2 TFEU). Moreover, it added lists of the most important areas of competence by category of competence (Articles 3 to 6 TFEU).[1]

Article 3 TFEU establishes the areas where the Union competence is per definition exclusive. In so doing, it operates, to a large extent, a codification of the previous

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1 See, for instance, Lenaerts, van Nuffel, EU Constitutional Law, OUP 2021, paras 5.022 *et seq.*

case law of the Court of Justice. According to Article 3(1)(c) TFEU, the Union shall have exclusive competence in the area of monetary policy for the Member States whose currency is the euro. This *prima facie* unequivocal provision is, however, not easy to put into practice. This is because the TFEU provides no precise definition of what monetary policy is and thus does not specify the boundaries within which the Union monetary policy is situated.

As we know, the Court of Justice has repeatedly held that the Treaty provisions relating to the monetary policy define, on the one hand, the *objectives* of the monetary policy and, on the other hand, the *instruments* that are available to the European System of Central Banks (ESCB) for the purpose of implementing that policy. The concept of 'monetary policy' has been interpreted in particular in Court´s famous judgments in *Pringle*, *Gauweiler* and *Weiss cases*[2]. However, importantly, these judgments elucidated, in particular, the delimitation between different areas of Union, competence namely the monetary policy and the economic policy. They thus did not deal with a vertical delimitation of competences, namely between the Union competence, on the one hand, and that of its Member States, on the other.

In order to obtain the Court´s views on the vertical delimitation of competences with regard to monetary policy, it was necessary to wait for the Court´s *Hessischer Rundfunk* judgment. In so doing, the Court provided in particular valuable answers on the regulatory and operational dimension of the Union competence.

## 3 Regulatory dimension of monetary policy

In order to determine the concept of monetary policy, the Court underlines the important systematic role of Article 119 TFEU, a provision that introduces Title VIII of Part Three of the TFEU which is entitled "Economic and monetary policy". It follows from its second paragraph that the activities of the Member States and of the European Union comprise three elements, namely i) a single currency, the euro, ii) the definition and conduct of monetary policy, and iii) the definition and conduct of a single exchange-rate policy.

Therefore, the Court says, the concept of monetary policy is not limited to its *operational implementation*, which is one of the basic tasks of the ESCB under the first indent of Article 127(2) TFEU, but, importantly, entails also *regulatory dimension* which is intended to guarantee the singleness of the single currency[3]. Indeed, if the status of the euro as the single currency could be understood differently and governed by different rules in the Eurozone Member States, the singleness of the single currency would be called into question and the primary objective of the monetary policy, namely, maintaining price stability, would be seriously jeopardized.

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2 Judgment of 27 November 2012, Pringle, C-370/12, EU:C:2012:756; judgment of 16 June 2015, *Gauweiler*, C-62/14, EU:C:2015:400; judgment of 11 December 2018, *Weiss*, C-493/17, EU:C:2018:1000.

3 *Hessischer Rundfunk*, paragraph 38 *et seq*.

For the first time, thus, the Court establishes the existence of the regulatory dimension of monetary policy, or, if you prefer, *monetary law dimension*[4] or *lex monetae*[5]. On the basis of a textual, systematic and teleological analysis of the Treaty provisions, it is acknowledged that a difference exists between what Advocate General Pitruzzella calls the monetary policy in the strict sense and the monetary policy in the broad sense[6].

## 4 Articles 128 and 133 TFEU as provisions underpinning the singleness of the euro

The Treaty provisions that fall under the monetary law dimension are those that are linked to the status of the euro as the single currency, namely, Articles 128 and 133 TFEU. Both provisions are set out in Chapter 2 of title VIII of Part Three of the TFEU on monetary policy.

As regards Article 128 TFEU, that provision enshrines the status of euro banknotes as legal tender. Another contribution of this panel by Mireia Estrada explains that the concept must be given an autonomous and uniform interpretation throughout the Union, and the Court´s reasoning for that. Article 128 TFEU also provides a monopoly for the European Central Bank (ECB) and the national central banks (NCB) of the Eurozone to authorize and issue the euro banknotes and coins. According to that primary law, as well as Article 16 of the ESCB Statute, the banknotes issued by the ECB and the Eurozone NCBs are the only such notes to have the status of legal tender within the Union.

As for Article 133 TFEU, that provision empowers the EU legislature, i.e. the European Parliament and the Council of the EU, to lay down measures of secondary law necessary for the use of the euro as the single currency, without prejudice to the powers of the ECB. In order to interpret the scope of that provision, it is important to recall, among others, its genesis.

Article 133 TFEU replaced the third sentence of former Article 123(4) EC (which itself has replaced Article 109 L(4) of the EC Treaty), under which the Council, acting by a qualified majority of euro area Member States, could take measures[7] that were necessary for the rapid adoption of the ECU as the single currency of those Member States. Unlike the first two sentences of former Article 123(4) EC, the use of its third sentence has never been linked to the transition to the euro. The Court thus concludes that Article 133 TFEU reflects the need to establish uniform principles for all Member States whose currency is the euro, in order to safeguard the overall interests of the Economic and Monetary Union and of the euro as the single currency

4 *Hessischer Rundfunk*, paragraph 40.

5 Opinion of Advocate General Pitruzzella of 29 September 2020, C-422/19 and C-423/19, *Hessischer Rundfunk*, EU:C:2020:756, paragraph 31.

6 AG Opinion in *Hessischer Rundfunk*, paragraph 57. It is clear that both of these dimensions are called by exclusivity..

7 Measures other than those fixing the conversion rate for pre-euro currencies.

and, consequently, to contribute to the pursuit of the primary objective of the monetary policy, which is to maintain price stability[8].

It is useful to recall that it was on the basis of that third sentence of former Article 123(4) EC, as superseded by Article 133 TFEU, that important basic legal acts not linked to the transitional phase preceding the adoption of the euro have been adopted, most notably Council Regulation (EC) 974/98 on the introduction of euro, Regulation (EU) 651/2012 of the European Parliament and the Council on the issuance of euro coins. That Treaty provision served for granting euro coins the status of legal tender and for establishing common rules against counterfeiting, such as the Pericles programme, rules on the authentication of euro coins and handling of euro coins that are unfit for circulation, measures for cross-border transport of euro cash by road between euro area Member States, rules concerning medals and tokens similar to euro coins etc. It should also be recalled that the Commission used Article 133 TFEU to submit a proposal for a regulation on the legal tender of euro banknotes and coins and a regulation on the establishment of the digital euro.

Both Articles 128 and 133 TFEU underpin the singleness of the euro and are a precondition for the effective conduct of the EU monetary policy[9]. As the Court underlines, if the status of the euro as a single currency could be understood differently and governed by different rules in the Eurozone Member States, the singleness of the single currency would be called into question and the objective of maintaining price stability would be seriously jeopardized[10].

On the basis of the Court´s interpretation, I conclude that the terms "*measures necessary for the use of the euro as the single currency*" must be understood broadly. They may include measures whose introduction is necessary to preserve the singleness and effectiveness of the euro so as to address technological, payments, geopolitical and societal developments, including the advent of private currencies and crypto-assets, challenges that, if not addressed, would put in jeopardy the transmission of the monetary policy, create instability and even threaten monetary sovereignty. It must also be concluded that Article 133 TFEU may also be used for the adoption of measures necessary to underpin the international role of the euro and its strengthening as international currency, which is a fundamental dimension of the use of the single currency.

## 5 Union alone may specify the status of legal tender

It follows from the considerations on the regulatory dimension of the monetary policy that Article 133 TFEU empowers the *EU legislature alone* to specify the legal rules governing the status of legal tender that is accorded (i) to banknotes denominated in euro by Article 128(1) TFEU and by the third sentence of the first paragraph of Article 16 of the Protocol on the ESCB and the ECB and (ii) the status of legal tender

8 *Hessischer Rundfunk*, paragraph 50.

9 *Hessischer Rundfunk*, paragraph 43.

10 *Hessischer Rundfunk*, paragraph 39.

accorded to coins denominated in euro by Article 11 of Regulation No. 974/98[11], in so far as that is necessary for the use of the euro as the single currency[12]. The Union thus has exclusive competence in this field pursuant to Article 3(1)(a) TFEU.

What are the effects of such Union exclusive competence?

To put it simply, Union exclusive competence precludes any competence on the part of the Member States on the matter. Indeed, in accordance with Article 2(1) TFEU, when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts.

To avoid any doubt, the Court also recalls that it does not matter whether or not the Union has exercised its exclusive competence, or not[13]. This is because exclusive competences are those which have been definitively and irreversibly forfeited by the Member States by reason of their straightforward transfer to the Union. The loss of competency by the Member States occurs immediately and, unlike areas of shared competence, is not conditional on the Union´s exercise of that competence. An inaction of the Union legislature in the area of exclusive competence cannot in any case restore to the Member States the power and freedom to act unilaterally in that field[14]. As the AG Pitruzzela recalled[15], the immediacy and irreversibility of the loss of national competence in the areas of exclusive competence makes it possible to substitute, for the unilateral action by the Member States in the areas in question, a *common action based upon uniform principles on behalf of the entire EU, in order to defend the common interest of the Union*, within which the particular interests of the Member States must endeavour to adapt to each other[16].

## 6 Member States may act as Union agents but only if so empowered

Exceptions to the constitutionally exclusive nature of a competence conferred on the European Union exist and must derive from primary law. Under the second sentence of Article 2(1), the TFEU acknowledges two cases in which Member States may legislate and adopt legally binding acts in an area of exclusive Union competence: first, if they have been empowered by the EU to do and, second, when they implement Union acts.

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11 And, for that matter, the status of legal tender of the digital euro, if and when established as a new form of the single currency.

12 *Hessischer Rundfunk*, paragraph 51.

13 See *Hessischer Rundfunk*, paragraph 53 and a reference to judgment of 5 May 1981, *Commission* v. *United Kingdom*, 804/79, EU:C:1981:93, paragraph 20. This judgment concerned another area where the Union has been endowed with exclusive competence, as interpreted at the relevant time by the Court of Justice, namely, the conservation of marine biological resources under the common fisheries policy (this finding has been codified by the Treaty of Lisbon in Article 3(1)(d) TFEU).

14 AG Opinion in *Hessischer Rundfunk*, paragraph 44.

15 AG Opinion in *Hessischer Rundfunk*, paragraph 41.

16 See Opinion 1/78 of 11 November 1975, *OECD Understanding on a Local Cost Standard*, EU:C:1975:145, paragraphs 1363-1364.

While the latter case concerning implementation of EU law by the Member States under Article 291(1) TFEU is rather straightforward[17], the former case is to a large extent an unchartered territory as cases in which Member States have been empowered by the Union within the meaning of Article 2(1) TFEU are infrequent[18]. The TFEU determines neither the arrangements, nor the scope of the authorization. However, requirements can be extracted from the system of the Treaties and from the case law. As summarized by AG Pitruzzella[19], an authorization of a Member State to legislate in the area of Union exclusive competence must be based on a specific authorization[20]. An authorization thus cannot be presumed[21]. The Member States act as agents of the Union. Furthermore, in order to be compatible with the constitutional configuration of the exclusive Union competence, such authorization can only be limited in nature and cannot lead to a permanent change in the division of competences between the Union and the Member States resulting from the said configuration. It is advisable that, in each case, the Union specifies in what way and according to what procedure the Member States are to act.

It is in any event uncontested that the Member States have not been empowered by the Union to legislate as regards the status of legal tender of euro banknotes and coins, within the meaning of Article 2(1) TFEU and that, therefore, any specification of the legal rules governing the status of legal tender may be adopted by the EU legislature alone.

## 7 Interaction between the status of legal tender and fundamental rights and freedoms

An important question concerns a possible interaction between the Union exclusive competence to specify the status of legal tender of euro banknotes and coins and fundamental rights and freedoms. That question has been considered only

17 For instance when Member States implement inspections to ensure enforcement of the rules on the legal tender, including imposition of effective, proportionate and dissuasive penalties.

18 By way of example, Article 5(2) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council on the Common Fisheries Policy authorised Member States to adopt measures concerning fishing in their territorial waters within 12 nautical miles (Article 5(2) and recital 41). Another examples may be found in cases where an international convention does not allow regional economic integration organizations such as the Union to become party to it and acts under such convention come under exclusive EU competence and Member States are authorized by a Council decision to act in the interest of the European Union. Yet another example, in the Brexit context, is the authorisation by the Union legislator of France to negotiate an international agreement with the UK regarding the Channel (see Decision (EU) 2024/867 of the European Parliament and of the Council of 13 March 2024 empowering the French Republic to negotiate, sign and conclude an international agreement on the safety and interoperability requirements within the Channel).

19 AG Opinion in *Hessischer Rundfunk*, paragraph 43.

20 See judgment of 15 December 1976, *Donckerwolcke*, Case 41/76, EU:C:1976:182, paragraph 32; judgment of 17 October 1995, *Werner*, C-70/ 94, EU:C:1995:328, paragraph 12; judgment of 17 October 1995, *Leifer*, C-83/94, EU:C:1995:329, paragraph 12.

21 See judgment of 20 April 2023, *Brink*, C-772/21, EU:C:2023:305, paragraph 57-59, which indicates that the Court would require an explicit empowerment for Member States to act in a field of exclusive competence in the specific context of the Union's monetary policy. See also AG Opinion in *Hessischer Rundfunk*, paragraph 122, where the AG considers that Recital 19 of Regulation No. 974/98 does not by any means constitute specific authorisation within the meaning of Article 2(1) TFEU.

tangentially in *Hessischer Rundfunk*. Yet, it has been at the centre of considerations since the very start of discussions on the definition of legal tender[22].

For instance, does the principle of mandatory acceptance of euro cash, which is an essential elements of the specification of the status of legal tender, interfere with contractual freedom? Some have argued that this is the case. In some Member States, according to the principle of freedom of contract, traders and retailers are in principle free to decide on what terms they wish to conclude a contract. Imposing on them an obligation to accept cash as a means of payment might result in an interference with that freedom of contract.

As a preliminary comment, it should be observed that freedom of contract does not as such constitute a fundamental right or freedom under the EU Charter. However, it could be considered as a part of the freedom to conduct a business for the purpose of Article 16 of the EU Charter. That provision recognizes the freedom to conduct a business in accordance with Union law and national laws and practices. It follows from the explanations referred to in Article 52(7) of the EU Charter[23] that Article 16 of the EU Charter is based on case law of the Court of Justice of the EU which has recognised freedom to exercise an economic or commercial activity[24] and freedom of contract and Article 119(1) and (3) TFEU, which recognises free competition.

As the wording of Article 16 of the EU Charter indicates, the exercise of the freedom to conduct a business implies a reconciliation of the interests of its beneficiaries with other lawful interests that may deserve protection. In any event, the freedom to conduct a business may be subject to limitations under Article 52 of the EU Charter.

It is, in the first place, a question whether it could be argued at all that the freedom would be affected by determining the status of legal tender of euro banknotes and coins. That status, as interpreted by the Court of Justice of the EU, both on the basis of its significance in its ordinary sense and on the basis of the Commission Recommendation 2010/191, in particular point 1(a) if that Recommendation, entails mandatory acceptance of euro banknotes and coins, *unless* the parties have agreed on other means of payment. It would follow that the legal tender fully respects the contractual freedom of the parties and thus the freedom to conduct a business.

However, if ever the freedom to conduct a business could be considered affected by the specification of the rules on the legal tender on the mandatory acceptance of euro cash, the Union law would prevail over national rules as a result of primacy. It would also be considered to constitute a permissible limitation to the exercise of rights and freedoms within the meaning of Article 52 of the Charter. Indeed, the rules on the mandatory acceptance of euro cash would be provided by law (both primary and secondary), could be considered to respect the essence of the freedom to conduct a business as a result of striking a fair balance between various interests,

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22 Discussions that, as of today, have led to the adoption of Commission recommendation 2010/191 and that continue on the basis of the Commission proposal for a regulation on the legal tender of the euro banknotes and coins (COM(2023) 364 final).

23 Those explanations, although not having a status of law, are a valuable tool of interpretation intended to clarify the provisions of the Charter.

24 See judgments of 14 May 1974, *Nold*, 4/73, EU:C:1974:51, paragraph 14, and of 27 September 1979, *SpA Eridiana and others*, 230/78, EU:C:1979:216, paragraphs 20 and 31.

and would be undoubtedly considered as necessary and genuinely meeting objectives of general interest recognised by the Union. More particularly, it would meet the objective of providing uniform rules in order to ensure the singleness of the single currency and thereby contribute to the pursuit of the primary objective of the EU monetary policy, which is to maintain price stability.

It can thus be concluded that the specification by the Union of the legal rules governing the status of legal tender accorded to euro banknotes and coins respect the freedom to conduct a business and, should it result in any limitation of that freedom, such limitations would be permissible as complying with the conditions set out in Article 52 of the EU Charter.

## 8 Limits to the Union exclusive competence on legal tender

Last important question to elucidate concerns possible limits of EU exclusive competence to specify the rules on legal tender of euro banknotes and coins.

It has not escaped the attention of informed readers that, where the Court concludes, in paragraph 51 of *Hessischer Rundfunk*, that the Union exclusive competence under Article 133 TFEU empowers the EU legislature alone to specify the status of the legal tender, the Court adds that this is "*in so far as that is necessary for the use of the euro as the single currency*".

What is the meaning of that last part of paragraph 51? Is it an innocuous *obiter dictum* or is it hiding something more fundamental, such as a limitation of the scope of the Union exclusive competence? Some have purported that it must mean that measures that are not necessary for the use of the euro as the single currency may not be adopted by the Union and it remains for the Member States to regulate the matter. Could the criterion of "necessity" constitute a yardstick for the division of competence between the Union and the Member States in an area of Union exclusive competence? The answer cannot be but negative.

First of all, the last part of the sentence in paragraph 51 of *Hessischer Rundfunk* cannot be understood as a carve-out that would lead to a recognition of Member State competence as any such carve-out would directly contradict the exclusive Union competence enshrined in Article 3(1)(c) TFEU. It suffices to recall that, in an area of exclusive Union competence, Member States are not allowed to act, even in a situation where the Union has not acted yet. Unlike in areas of shared competence, where Member States may act to the extent that the Union has not exercised its competence and where they lose their competence to the extent that the Union actually exercises its competence, Union exclusive competence precludes any competence on the part of the Member States in the matter.

Second, unlike the principle of subsidiarity, which does not apply in the area of Union exclusive competence, the principle of proportionality, which requires that Union action does not exceed what is necessary to achieve the objectives of the Treaties, cannot be used to protect powers that Member States do not have as a result of an issue falling under Union exclusive competence.

Third, if the criterion of "necessity" were to constitute such a yardstick, who would be called upon to decide what is and what is not necessary for the use of the euro as the single currency? We know that, according to established case law, when adopting a specific measure, the EU legislature is allowed a broad discretion in areas involving political, economic and social choices in which it is to undertake complex assessments[25]. The monetary policy is without any doubt such an area. We also know that the Court may not substitute its views for those of the legislator. In other words, the Court does not replace the assessment of the authority concerned by its own *ex post facto* assessment.

What is then the *raison d´etre* of the last part of paragraph 51 in *Hessischer Rundfunk*?

For the reasons explained above, it must be concluded that the Court simply reproduces the wording of Article 133 TFEU. According to that provision, the EU legislator „*shall lay down the measures necessary for the use of the euro as the single currency*". The fact that the Court analyses, in paragraphs 55 *et seq.* of *Hessischer Rundfunk*, what is to be considered as "necessary" for the use of the euro as the single currency, must be understood as the Court interpreting the status of legal tender as it stood at the relevant moment. This is clear from the Court´s reference to paragraphs 46 to 49 of the judgment[26]. Therefore, paragraph 55 cannot be understood as the Court´s "prescription" of what is, and what is not, necessary to regulate as the status of legal tender, as such appreciation belongs solely to the legislator in the exercise of its broad margin of discretion. This reading of paragraph 55 is also confirmed by the answer that the Court gives in the *Hessischer Rundfunk* to the second question of the referring court (in paragraphs 59 *et seq.*), where the Court defines the criteria for circumscribing the action of Member States when, in exercising *their own competences*, the Member State action, while not encroaching on an area of exclusive competence of the Union, nonetheless touches on concepts that fall into that area. This fascinating issue will be addressed in the contribution of this panel by Jeffrey Dirix.

## 9 Conclusion

We have seen that these seemingly technical questions about the delimitation of competence between the Union and the Member States may have fundamental consequences on the way we pay in our everyday lives. It is the Union alone, namely its legislature – the European Parliament and the Council of the EU – that hold the competence to specify the legal rules governing the status of legal tender, whether accorded to euro banknotes, euro coins, or the (future) digital euro. Although the Member States have lost their competence in the matter, they may, subject to

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25 For example: Case C-58/08 Vodafone a.o., EU:C:2010:321, paragraph 51–53; Case C-176/09 *Luxembourg v Parliament and Council*, EU:C:2011:290, paragraph 62; Case C-304/16 *American Express*, EU:C:2018:66, paragraphs 85 *et seq.*; Case C-151/17 *Swedish Match*, EU:C:2018:938, paragraph 35 *et seq.*

26 Which in turn refer to Recommendation 2010/191 and Recital 19 of Regulation 974/98.

specific conditions, exercise their own powers, however, only provided they do not encroach on Union´s exclusive competence.

# The legal tender of euro banknotes and coins from a Member States' perspective

## What role is left for national lawmakers?

Jeffrey Dirix*

## 1 Introduction

Cash acceptance and access to cash are part of a much-debated topic. Preferences regarding the use of means of payment are evolving, given the greater availability of electronic options. Nonetheless, a significant proportion of the population still relies on cash. Within this context, there can be pressure on national politicians and legislators to counter declining trends in cash acceptance and, related to it, access to cash.

However, it is the European Union that has the exclusive competence in the area of monetary law, including the rules governing the status of legal tender of euro banknotes and coins. This has been confirmed by the Court of Justice of the EU in the Hessischer Rundfunk case.[1]

The Court has clarified that such exclusivity precludes any legislative action by the Member States, unless they are empowered by the EU to act or for the implementation of EU acts. Where competence is conferred exclusively on the EU, the loss of competence by the Member States occurs immediately and it does not matter, for the purposes of that loss, whether or not the EU has exercised its competence. As such, the adoption or retention by a Member State of a provision falling withing that competence cannot be justified by reference to the inaction of the EU alone.[2]

Therefore, at first sight, it would seem questionable that national lawmakers still have any leeway at all to issue rules on cash acceptance.

In this contribution, we take a closer look at this matter and explore its multiple dimensions. Considering established EU constitutional law doctrine as well as the ECB's views on the matter we examine which policy margin remains for the Member States, on the one hand when acting within their own sphere of competence and on

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1 Judgment of the Court of 26 January 2021 in joined Cases C-422/19 and C-423/19 Johannes Dietrich and Norbert Häring v Hessischer Rundfunk.

2 See Hessischer Rundfunk, paras 52-54.

the other hand when implementing EU law. A such, we analyse what options remain for Member States in view of restricting the use of cash or, on the contrary, with the objective of strengthening cash acceptance.

Analysing these issues is not an easy task. After all, there are many questions to which existing EU law does not (yet) provide final answers. The main objective of this contribution is to point out those questions to foster further debate. In doing so however, this article is likely to leave the reader with more questions than answers.

## 2 EU competence versus national competence

It is common practice for national lawmakers to adopt rules within their own sphere of competence that nevertheless have an impact on cash acceptance. By way of example, we can mention restrictions on the use of cash for the purpose of combating money laundering or tax evasion and rules clarifying or even strengthening the obligation to accept cash payments in a B2C-context with a consumer protection objective.

The first question we examine in this article is to what extent national lawmakers can (still) adopt such rules considering the exclusive nature of the EU competence on monetary law.

### 2.1 A balancing act

Pinpointing the exact boundaries between areas of EU competence and areas of competence left to the Member States may not be easy in practice, particularly in situations where there is interference between those areas of competence. Advocate General Pitruzzella addressed this matter in Hessischer Rundfunk.[3]

He formulates the problem as a search for ways of coordinating the (exclusive) sphere of competence of the Union and the exercise of the powers left to the Member States. This requires a balancing act between two different requirements. First, to avoid interference with EU law that would undermine its effectiveness when state powers are exercised and, second, to allow Member States some discretion in governing cases outside the competences conferred on the EU.

This brings up the question of which national competences might impact monetary law, and in particular rules on the legal tender of banknotes and coins, and, as such, would require such coordination and balancing act.

In Advocate General Pitruzzella's view the exclusive competence of the EU regarding monetary law does not go so far as to include a general competence to regulate the procedures for settling pecuniary obligations, whether under private law or public law, which has been left to the Member States.[4] This has been confirmed

[3] Joined Cases C-422/19 and C-423/19 Johannes Dietrich and Norbert Häring v Hessischer Rundfunk, Opinion of AG Pitruzzella, paras 45-48.

[4] Ibid., paras 71 and 98.

by the Court.[5] Accordingly, Advocate General Pitruzzella argues that there is a need to coordinate the EU's exclusive competence with those of the Member States both in civil law, regarding the fulfilment of obligations and the settlement of monetary debts of a private nature, the organisation and functioning of public and tax administrations, and the discharge of pecuniary obligations of a public law nature, and in criminal law, regarding the interrelationship between the circulation of money and the fight against crime and concerning matters of tax.

Furthermore, in the context of its opinions on draft legislative provisions[6], the ECB has referred to national rules within the fields of consumer protection[7] and internal security[8] when applying the Hessischer Rundfunk case law.

In the following sections we will examine how far Member States can go when exercising these and other national competences in case this leads to interference with the exclusive EU competence in the field of monetary law. We will address (i) national law provisions restricting the use of cash and (ii) national law aimed at clarifying or even strengthening the obligation to accept cash.

## 2.2 National law restricting the use of cash

In Hessischer Rundfunk the Court of Justice has found that the exclusive competence of the EU within the field of monetary law does not prevent a Member State in the exercise of its own powers, in casu the organisation of its public administration, from adopting a measure which introduces, on public interest grounds, national law provisions restricting the use of cash.

Legal tender status only calls for acceptance in principle of banknotes and coins denominated in euro, not for absolute acceptance.[9] Hence, national law provisions imposing restrictions are possible.

However, such restrictions are subject to compliance with a set of cumulative conditions, including a proportionality test.[10]

For a start, the national rules in question should not have the object or effect of establishing legal rules governing the status of legal tender of euro banknotes (and coins). Neither should they lead, in law or in fact, to the abolition of those banknotes (and coins), in particular by calling into question the possibility, as a general rule, of discharging a payment obligation in cash.

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5 See Hessischer Rundfunk, para 56.

6 In accordance with Article 127(4) TFEU the ECB shall be consulted by national authorities regarding any draft legislative provision in its fields of competence.

7 See the opinion of the ECB of 24 July 2024 on a constitutional law on cash as legal tender and access to cash (CON/2024/26).

8 See the opinion of the ECB of 8 December 2023 on the obligation for enterprises to accept payment in cash from consumers (CON/2023/40).

9 See Hessischer Rundfunk, para 55.

10 See Hessischer Rundfunk, paras 56 and 78. For a detailed overview of case law on proportionality and the legality of Member State action, see P. Craig, "EU Administrative Law", OUP, 2012, 616-640.

In addition, national law provisions restricting the use of cash must comply with a three-step proportionality test.

First, they can only be adopted for reasons of public interest. Not only “reasons of public policy”, e.g. relating to security or the fight against crime, but also “reasons of public interest”, e.g. ensuring the efficient organisation of payments in society - which is a broader expression - are acceptable according to the Court.[11]

Second, the measures in question should be appropriate for attaining the public interest objective pursued.[12]

Third, national law restrictions on the use of cash should not go beyond what is necessary in order to achieve that objective. As such, other lawful means of payment should be available.[13]

When providing guidance to the referring court on the application of these conditions, including the proportionality test, to the case at hand, the Court seems to take a balanced approach leaving some discretion to Member States acting within their own sphere of competence. The Court finds that an obligation to pay cashless imposed by a public authority with regard to, in this case, a radio and television license fee, can be acceptable. Ensuring an effective recovery of the fee without incurring substantial additional costs is a public interest reason justifying a restriction on cash payments. Such limitation may be both appropriate and necessary.[14]

However, the Court gives particular focus to considerations of social inclusion stating that where alternative means of payment are not readily accessible to everyone liable to the payment obligation, for those without such access a payment option in cash should be provided.[15]

When applying this proportionality test in its opinions on draft national law provisions, the ECB seems to take a stricter approach.

The ECB is of the view that the broader and more general a national restriction on the use of cash, the stricter should be the interpretation of the requirement for the limitation to be proportionate. In addition, the ECB argues that when considering whether a limitation is proportionate, the adverse impact of the limitation in question and whether alternative measures could be adopted that would fulfil the relevant objective with a less adverse impact should always be considered.[16]

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11 See Hessischer Rundfunk, paras 65-66. As such, the Court takes a balanced approach and leaves some leeway to the Member States when it comes to the objective pursued by national law measures restricting the use of cash.

12 See Hessischer Rundfunk, para 70.

13 See Hessischer Rundfunk, para 75. See also Recital 19 of Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro.

14 See Hessischer Rundfunk, paras 71-76.

15 See Hessischer Rundfunk, para 77.

16 See for example the opinion of the ECB of 5 December 2022 on the prohibition of cash payments in real estate transactions and on the presumption of unreliability of persons affected by the Union restrictive measures regime (CON/2022/43), para 2.7, the opinion of the ECB of 6 December 2023 on excluding the possibility of purchasing real estate with cash and expanding tax disincentives for the use of cash (CON/2023/39), para 2.8 and the opinion of the ECB of 8 December 2023 on the obligation for enterprises to accept payments in cash from consumers (CON/2023/40), para 2.3.6.

On this basis, the ECB has made critical observations regarding German and Greek draft legislation restricting the use of cash in real estate transactions with the objective of combatting money laundering and tax evasion and regarding a Belgian draft law providing for a temporary exception from mandatory cash acceptance in a B2C-context for security reasons.[17] It is debatable whether the Court would have reached the same conclusions.

## 2.3 National law strengthening cash acceptance

In the following section we examine to what extent Member States can adopt national law provisions within their own sphere of competence reinforcing cash acceptance. This question certainly has some relevance in view of the current policy debate on this topic.

In Hessischer Rundfunk the Court of Justice assessed a provision of German law, i.e. paragraph 14(1) of the Gesetz über die Deutsche Bundesbank that reads as follows:

"Without prejudice to Article 128(1) of the Treaty on the Functioning of the European Union, the Deutsche Bundesbank shall have the sole right to issue banknotes in the area in which this Act is law. Banknotes denominated in euro shall be the sole unrestricted legal tender ..."

Advocate General Pitruzzella analysed whether this provision is of a monetary law nature, establishing legal rules governing the status of legal tender, and, if so, whether one could argue that it is a mere reproduction of EU law. He concluded that the German law does not confine itself to a literal reproduction of EU but, instead, aims at supplementing EU monetary law by referencing to the "unrestricted" nature of the status of legal tender of euro banknotes. As such, the provision, by its objective and content, governs the status of legal tender of euro banknotes, is incompatible with EU law and should therefore be disapplied.[18]

However, the Court did not go that far and left it for the referring national court to ascertain whether the German law provision must be interpreted, in the light of its objective and content, as a measure adopted within the framework of the Member States' own competences.[19]

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17 See the opinion of the ECB of 5 December 2022 on the prohibition of cash payments in real estate transactions and on the presumption of unreliability of persons affected by the Union restrictive measures regime (CON/2022/43), para 2.8-2.11, the opinion of the ECB of 6 December 2023 on excluding the possibility of purchasing real estate with cash and expanding tax disincentives for the use of cash (CON/2023/39), para 3.7-3.11 and the opinion of the ECB of 8 December 2023 on the obligation for enterprises to accept payments in cash from consumers (CON/2023/40), paras 3.8-3.11.

18 See the Opinion of AG Pitruzzella in Hessischer Rundfunk, paras 147-155.

19 The Court recalled that, according to settled case-law, it does not have jurisdiction to interpret the internal law of a Member State. See Hessischer Rundfunk, para. 31. In the end, the referring court followed Advocate General Pitruzzella's reasoning and found that the German law provision was not adopted by the German legislator exercising its own powers, and, as such, was in violation of EU law.

Interestingly, the Court did clarify that, when acting in the exercise of its own powers, such as the organisation of its public administration, Member States can adopt a measure which obliges an administration to accept cash payments from citizens.[20]

The ECB has also weighed in on this topic in an opinion on a Slovenian legislative proposal.[21] According to the ECB Member States may introduce "stricter rules" when exercising their own powers, such as the organisation of their public administration or in the field of consumer protection.

It might be interesting to further reflect on this idea of "stricter rules" of national law. What would it mean for a Member State to adopt stricter rules on cash acceptance than existing EU law on this matter?

According to the Court of Justice the concept of "legal tender" encompasses an obligation in principle to accept banknotes and coins denominated in euro for payment purposes.[22] To put it in the words of the Advocate-General: "euro banknotes and coins constitute means of payment by default".[23] They must be accepted unless otherwise agreed independently by the parties or unless otherwise provided by regulations restricting their use for public reasons. Furthermore, according to Commission Recommendation 2010/191/EU euro banknotes and coins can also be refused for reasons related to the "good faith principle".[24]

Then, what does the ECB mean when it refers to stricter rules on a national level? It would seem that the ECB is of the view that a Member State can impose an "absolute" obligation to accept cash - for example when organising its public administration or in a B2C context when acting within its competence of consumer protection - excluding exceptions based on contractual freedom and good faith.

## 3 Member States acting within the sphere of monetary law

In the previous sections we have examined the discretion left to Member States to adopt national rules within their own sphere of competence that, nevertheless, have an impact on cash acceptance. In the following section we discuss whether the Member States also still have any leeway to act within the field of monetary law, an exclusive EU competence, and in particular regarding the legal tender of euro banknotes and coins.

In Hessischer Rundfunk the Court of Justice has found that where competence is conferred exclusively on the EU, which is the case for monetary law, the loss of competence by the Member States occurs immediately. As such, even in a situation where the EU has not exercised its exclusive competence, the adoption or retention

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20 See Hessischer Rundfunk, para 56.

21 See the opinion of the ECB of 24 July 2024 on a constitutional law on cash as legal tender and access to cash (CON/2024/26), para 3.2.2.

22 See Hessischer Rundfunk, para 49.

23 See the Opinion of AG Pitruzzella in Hessischer Rundfunk, para 125.

24 Articles 1(a), 2 and 3 of the Commission Recommendation of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (2010/191/EU).

by a Member State of a provision falling withing that competence cannot be justified by that circumstance alone.[25]

Consequently, Member States do not have an autonomous legislative competence in the field of monetary law regulating the concept of legal tender of euro banknotes and coins.[26]

However, the Court of Justice also held that any competence on the part of the Member States is precluded unless "they have been empowered by the EU" or "for the implementation of EU acts".[27]

Indeed, Article 2(1) TFEU reads as follows: "When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts."

In the following sections we examine if this means that some leeway is left to the Member States to adopt rules within the sphere of monetary law and, in particular, on the legal tender status of euro banknotes and coins.

## 3.1 Empowerment

Existing (binding) primary and secondary EU law refers to the legal tender status of euro banknotes and coins but does not provide a detailed definition of this concept.[28] The Court of Justice has established that "legal tender" encompasses an obligation in principle to accept euro banknotes and coins denominated in euro for payment purposes. Banknotes and coins constitute means of payment by default that must be accepted unless otherwise agreed independently by the parties or unless otherwise provided by regulations restricting their use for public reasons.[29]

There is no binding EU law, primary or secondary, with more detailed rules on cash acceptance, clarifying the definition, laying down the exceptions of a monetary law nature and establishing rules on sanctions and enforcement.[30]

The European Commission has proposed a draft regulation on the legal tender of banknotes and coins on 28 June 2023.[31] This draft regulation is currently being discussed by the Council of the EU. The on-going discussions show that the

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25 See footnote [3] of this contribution. See also the Opinion of AG Pitruzzella in Hessischer Rundfunk, para 90.

26 On the legal consequences of exclusivity see P. Craig and G. De Búrca, "EU Law", OUP, 2024, 107-108.

27 See Hessischer Rundfunk, para 52.

28 See Article 128(1) TFEU, Article 16(1) of Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank and Articles 10 and 11 of Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro.

29 See the Opinion of AG Pitruzzella in Hessischer Rundfunk, para 125.

30 For an overview of EU legislation relating to the euro as legal tender, see R. Freitag, "Euro as legal tender" in F. Amtenbrink and Ch. Herrmann, "The EU Law of Economic and Monetary Union", OUP, 2020, 600-611.

31 Proposal of 28 June 2023 for a regulation of the European Parliament and of the Council on the legal tender of euro banknotes and coins (2023/0208 (COD)).

positions of the Member States are quite divergent.[32] As such, it is still uncertain within which timeframe a regulation with binding provisions and direct effect might be adopted and what the final text will look like.

In the meantime, in addition to the case law of the Court of Justice in Hessischer Rundfunk reference can be made to the Commission Recommendation on the scope and effects of legal tender of euro banknotes and coins that was adopted on 22 March 2010.[33] This text addresses the definition of legal tender status and its recommended effects, some of which specifically in the context of retail transactions. As such, it deals with the matter in some more detail, although it remains rather high-level compared to the proposed draft regulation.

Even so, this Commission Recommendation has no binding force. In Hessischer Rundfunk, the Court of Justice recalled that recommendations are not intended to produce binding effects and are not capable of creating rights on which individuals may rely before a national court.[34]

Furthermore, the Commission Recommendation is addressed to, among others, the euro area Member States. Nevertheless, the text does not seem to contain a specific authorisation for the Member States to adopt legislation on the legal tender of euro banknotes and coins, and - in any case - a non-binding Commission Recommendation would not be an appropriate legal instrument for such empowerment[35]. As such, it seems safe to conclude that the EU has not authorised the Member States in the sense of Article 2(1) TFEU to take further action regarding cash acceptance within the field of monetary law.

## 3.2 Implementation

In the next section we examine what discretion the Member States have when implementing EU law on the legal tender of euro banknotes and coins.

Under the EU Treaties the Member States have an explicit obligation to implement binding EU law. According to Article 4(3) TEU “the Member States shall take any

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32 That the views of Member States are rather different should not be surprising. Member States had already prior to the introduction of the Euro a distinct understanding of the implications of its national currency being legal tender in its territory, see R. Freitag, “Euro as legal tender” in F. Amtenbrink and Ch. Herrmann, “The EU Law of Economic and Monetary Union”, OUP, 2020, 595. Differences in national traditions, preferences and situations on the ground undoubtedly also play a role in this. See also the Report of the Euro Legal Tender Expert Group (ELTEG) of 21 January 2009 on the definition, scope and effects of legal tender of euro banknotes and coins.

33 Commission Recommendation of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (2010/191/EU).

34 See Hessischer Rundfunk, para 48. The Court referred to Article 288(5) TFEU. Some authors have criticised the European Commission for issuing a mere recommendation on this matter. See R. Freitag, “Euro as legal tender” in the F. Amtenbrink and Ch. Herrmann, “The EU Law of Economic and Monetary Union”, OUP, 2020, 610-611. Even so, the Court took the Commission Recommendation into consideration as useful guidance for the interpretation of the binding EU law provisions on legal tender.

35 Advocate General Pitruzzella also addressed the question of authorisation to the Member States. See his opinion in Hessischer Rundfunk, paras 42-44 and 119-122. He also concluded that no authorisation has been granted to the Member States. For an interesting case on empowerment, its impact on the modalities for the exercise of an exclusive competence and the political choice it implies, see the judgement of the Court of 22 November 2022 in Case C-24/20, European Commission v Council of the European Union, paras 99-108.

appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union". Likewise, Article 291(1) TFEU provides that "Member States shall adopt all measures of national law necessary to implement legally binding Union acts".

It is interesting to further reflect on what this obligation for the Member States should mean in practice when it comes to cash acceptance as a fundamental aspect of legal tender.

Implementing existing EU law on legal tender can be challenging, especially since binding EU law as it currently stands only defines legal tender as a general rule without detailed provisions on exceptions, sanctions and enforcement.[36] Some more concrete guidance, albeit still rather high-level, is included in Commission Recommendation 2010/191/EU but this text is without binding force and, as such, not capable of creating rights on which individuals can rely before a national court.

So, what does this mean in concreto for the rights and obligations of EU citizens, companies, retailers and consumers, and how can they enforce those rights and obligations before national courts? How should the stakeholders involved apply the general rule of mandatory cash acceptance and, in particular, possible exceptions, for example those based on contractual freedom and good faith? And what can and should Member States do when it comes to sanctioning infringements of mandatory cash acceptance?

We do not yet find final answers to these questions in binding EU law. Does this mean that Member States have the right and, even, the obligation to legislate on these issues themselves in order to implement and give full effect to EU law on the legal tender status of euro banknotes and coins?

EU constitutional law doctrine indicates that the obligation to implement EU legislation also applies where its substance needs specifying, where it has to be applied in individual cases in order for it to be effective and in order to be able to impose sanctions. Members States often have to legislate themselves to that effect.[37]

This also applies when Member States adopt rules for the application of an EU legal instrument with direct effect, such as a regulation. However, when adopting national law provisions in view of implementing EU law, the Member States must not obstruct the direct applicability of the EU law provisions concerned, should not conceal their EU law nature and should remain within the parameters set by them.[38]

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36 See point 3.1 of this contribution.

37 K. Lenaerts, P. Van Nuffel and T. Corthaut (ed.), "EU Constitutional Law", OUP, 2021, 566.

38 With regard to national law provisions implementing EU regulations see the judgment of the Court of 2 February 1977 in Case 50/76, Amsterdam Bulb, paras 4-7, the judgment of the Court of 11 January 2001 in Case C-403/98, Azienda Agricola Monte Arcosu, paras 25-29, the judgment of the Court of 21 December 2011 in Case C-316/10, Danske Svineproducenter, paras 38-68, the judgment of the Court of 14 June 2021 in Case C-606/10, ANAFE, paras 71-76, the judgment of the Court of 25 October 2012 in Case C-592/11, Anssi Ketelä, paras 35-36, the judgment of the Court of 15 November 2012 in Joined Cases C-539/10 P and C-550/10 P, Stichting Al-Aqsa, paras 84-88, the judgment of the Court of 16 January 2014 in Case C-24-13, Dél-Zempléni Nektár Leader Nonprofit, paras 14-15 and P. Craig and G. De Búrca, "EU Law", OUP, 2024, 229.

It is not easy to determine in practice how far a Member State can go when implementing EU law on the legal tender status of euro banknotes and coins. One could argue that since the EU has only regulated the matter in a general way - giving more concrete guidance only in a non-binding Commission Recommendation[39] - it has left substantial leeway to the Member States when it comes to implementation.

However, one might also argue that Member States can and should wait for the outcome of the legislative process on the Commission proposal for a legal tender regulation, in view of the principle of sincere cooperation.[40] Even so, considering that this legislative process will take time and that in the meantime the situation is evolving on the ground, such approach could also be criticised.[41]

As such, the Member States might face a difficult dilemma when assessing the way forward regarding implementing EU law on the legal tender status of euro banknotes and coins.

In its opinions the ECB seems to take a strict approach when evaluating national legislative proposals that are presented as reproducing or implementing EU law on legal tender, leaving the Member States little or no discretion in this field. According to the ECB the Member States should not go beyond incorporating EU law via literal reproduction or reference. In the ECB's view the Member States should also not deviate from Commission Recommendation 2010/191/EU, e.g. regarding the examples of the good faith exception, and not even from the Commission proposal for a legal tender regulation, despite the fact that it is still being discussed on a political level.[42] However, the ECB welcomes national provisions imposing sanctions for breaches of mandatory cash acceptance. The ECB refers in that regard to the proposed regulation that would, de lege ferenda, empower the Member States to impose such sanctions.[43]

## 3.3 National law on access to cash

In this final section we discuss to what extent Member States can adopt national law provisions regulating access to cash.

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39 A recommendation that is, moreover, addressed, among others, to the Member States.

40 See Article 4(3) TEU.

41 In the Scheer case the Court of Justice has held that where detailed rules of application of a regulation have not yet been determined by the EU, Member States are entitled and even obliged to do everything in their power the ensure the effectiveness of this regulation in the meantime. Consequently, Member States can take any implementing measures compatible with the principles of the regulation on a transitional basis and without prejudice to any future action on the part of the EU. See the judgment of the Court of 17 December 1970 in Case 30/70, Scheer, paras 10-11. See also the judgment of the Court of 20 October 1981 in Case 137/80, Commission v Belgium, paras 7-9.

42 See the opinion of the ECB of 8 December 2023 on the obligation for enterprises to accept payment in cash from consumers (CON/2023/40), paras 3.1-3.7, the opinion of the ECB of 11 January 2024 on a constitutional law on cash as legal tender and access to cash (CON/2024/1), paras 3.3.1-3.3.3 and the opinion of the ECB of 24 July 2024 on a constitutional law on cash as legal tender and access to cash (CON/2024/26), paras 3.1.1-3.1.4.

43 See the opinion of the ECB of 8 December 2023 on the obligation for enterprises to accept payment in cash from consumers (CON/2023/40), paras 3.12-3.13. See Article 12 of the proposed regulation on legal tender.

According to the European Commission, access to cash is one of the two main aspects of the legal tender of cash, alongside cash acceptance. To preserve the effectiveness of the legal tender status of cash in practice, it is key to ensure the ease of access to euro cash. If citizens do not have access to cash, they will not be able to pay with it and its effective legal tender status will be undermined.[44] As such, the Commission proposal for a legal tender regulation also includes provisions on access to cash with an obligation for the Member States to monitor the situation throughout their territory and, if necessary, take remedial measures[45].

The proposed legal tender regulation refers to Article 133 TFEU as a legal basis. As such, the European Commission seems to hold the view that access to cash, as a main aspect of the legal tender of cash, can be regulated within the sphere of monetary law, an exclusive EU competence.

This raises the question if Member States, awaiting the adoption of a legal tender regulation, can already regulate access to cash and on what legal ground. Can they only act within their own sphere of competence, e.g. on consumer protection and credit institutions, or can they also act "to implement" EU law on legal tender, including access to cash?

When assessing national law initiatives on access to cash in its opinions, the ECB takes a rather pragmatic approach. It consistently supports Member States' legislative initiatives on the matter[46], with reference to the powers they would have under the Commission proposal for a legal tender regulation, stressing the importance "that all Member States take appropriate measures to ensure that credit institutions and branches operating within their territories provide adequate access to cash services, in order to facilitate the continued use of cash. Sufficient and effective access to cash is necessary to preserve the effectiveness of the legal tender status of cash. If citizens do not have easy access to cash, they will not be able to use it as a means of payment."

# 4 Conclusion

Cash acceptance and access to cash are subject to evolution. Since a substantial proportion of the population still relies on cash, the matter is heavily debated and can

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44 See the explanatory memorandum the Commission proposal of 28 June 2023 for a regulation of the European Parliament and of the Council on the legal tender of euro banknotes and coins (2023/0208 (COD)), pages 1 and 5.

45 See Article 8 of the proposed regulation.

46 See the opinion of the ECB of 20 April 2020 on reform of Sveriges Riksbank (CON/2020/13), para 9.2, the opinion of the ECB of 22 September 2020 on ensuring a minimum level of cash services in Hungary (CON/2020/21), paras 2.1-2.4, the opinion of the ECB of 26 February 2021 on the reform of Latvijas Banka (CON/2021/9), para 7.2, the opinion of the ECB of 28 November 2022 on amendments to the Law on the Magyar Nemzeti Bank (CON/2022/40), paras 3.1-3.3, the opinion of the ECB of 8 September 2023 on requiring credit institutions to provide a universal banking service and guarantee a minimum spread of automated teller machines (ATMs) (CON/2023/25), paras 2.1-2.4, the opinion of the ECB of 6 February 2024 on the cash infrastructure network (CON/2024/3), paras 2.1-2.3, the opinion of the ECB of 7 March 2024 on requiring credit institutions to provide a minimum cash infrastructure (CON/2024/8), para 2.3 and the opinion of the ECB of 18 October 2024 on the management of the cash withdrawal service (CON/2024/34), para 2.1. See also the opinion of the ECB of 13 October 2023 on a proposal for a regulation on the legal tender of euro banknotes and coins (CON/2023/31), para 1.2.

lead to pressure on national politicians and lawmakers. However, as the regulation of the legal tender status of banknotes and coins falls under the exclusive EU competence in the area of monetary law, the discretion that is left for the Member States is limited.

In this contribution we have examined to what extent Member States can still adopt national law provisions on cash acceptance and access to cash.

First, we have discussed how far Member States can go when acting within their own sphere of competence. To use the words of the Advocate General in the Hessischer Rundfunk case: pinpointing the boundaries between EU competence and areas of competence left to the Member States is not easy. It requires a balancing act.

In the context of this balancing act, the Court of Justice accepts that Member State action can impact cash acceptance, by restricting the use of cash or, on the contrary, by strengthening cash acceptance. It applies a proportionality test to national law cash restrictions, but it does so in a balanced way, leaving some discretion to the Member States. However, the ECB seems to take a stricter approach when applying the proportionality test.

Second, we have investigated the obligation for Member States to implement binding EU law, including the legal tender of euro banknotes and coins. The Member States face a difficult task since binding EU law as it currently stands only defines legal tender as a general rule, without detailed provisions on exceptions, sanctions and enforcement. Moreover, the ECB seems to take a strict approach when assessing national law initiatives that enter the sphere of monetary law.

Third, we have examined to what extent Member States can adopt legal provisions on access to cash. In general, the ECB has a positive view of such initiatives and takes a rather pragmatic approach.

Many questions have been left unanswered in this article. Indeed, EU law has not yet finally settled some of these topics. As such, there is plenty of room for further debate.

# Is there a right to euro cash?

Julio Baquero Cruz*

## 1 Introduction

I would like to analyse a very precise legal question: whether there is a subjective right to cash in the euro area.

This is not only an intriguing legal issue but also a sensitive societal question, in view of the attachment to cash in the Member States, particularly in some of them. Obviously, cash is not merely an economic or legal phenomenon, but also a cultural one, with old roots, and mobilising deep and ambivalent beliefs and feelings.

Let me clarify that I will approach this issue from a strictly legal perspective. Money can be analysed from an economic perspective, as an economic phenomenon, but official money (central bank money endowed with the status of legal tender, as opposed to what we call commercial bank money or credit money) is a creation of law. Therefore, its shape and main characteristics, the behaviour of people with money and the impact its use may have on their rights and obligations, are defined by legal rules. The capacity of an official currency to accomplish its main economic functions as unit of account, store of value and means of payment also depends, crucially, on how it is framed by law.[1]

I would add that while in the past the regulation of the legal characteristics of the euro has been minimalistic, with very succinct rules and scant jurisprudence, this field is currently open to new developments. The public sphere, in particular the Union's legislature and the European Central Bank, can frame the legal regime of the euro in the way that serves best the European society, within the limits of the respective powers of each institution, adapting it to technological, societal and economic change and demands. The Commission proposals on the digital euro and the legal tender of cash,[2] adopted on the basis of Article 133 TFEU and currently under discussion by the Union's legislature, reflect that potential.

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* Member of the Legal Service of the European Commission; professor of European Union constitutional law at Université Libre de Bruxelles. The opinions contained in this piece are personal and may not coincide with those of the European Commission or of its Legal Service. My thanks to the participants in the conference for questions and to Mireia Estrada Cañamares for her comments on a draft of this paper.

1 The so-called 'State theory of money' was developed by Georg Friedrich Knapp in his Staatliche Theorie des Geldes, 4th edition, Duncker & Humblot, Leipzig, 1923 (an abridged English translation was published by MacMillan in London in 1923 as The State Theory of Money). Knapp conceived money as a 'creature of law' (page 1 of the English translation). One continuator of that theory was Frederick Alexander Mann, with The Legal Aspect of Money, Oxford University Press, 1938. That work, updated and revised by Charles Proctor, is still the main reference book on the law of money in English (Mann and Proctor on the Law of Money, 8th edition, Oxford University Press, Oxford, 2023).

2 See the Commission's proposals for Regulations of the European Parliament and of the Council on the establishment of the digital euro [COM(2023) 369 final] and on the legal tender of euro banknotes and coins [COM(2023) 364 final], both adopted on 28 June 2023.

I announce already that my answer to the question will be positive: the continuing existence and availability of euro banknotes and coins is protected by Union law. In particular, for euro banknotes that protection is enshrined in primary law. Therefore, it is a constitutional guarantee: persons in the euro area do have a right to hold and use euro banknotes.

I will try to explain why a comprehensive legal analysis leads to that conclusion.

## 2 Legal Analysis

The applicable texts are different for banknotes and coins, the two forms of cash. Let's start with banknotes, the main physical form of the euro, leaving coins for later.

Article 128(1) TFEU reads as follows:

'The European Central Bank shall have the exclusive right to authorise the issue of euro banknotes within the Union. The European Central Bank and the national central banks may issue such notes. The banknotes issued by the European Central Bank and the national central banks shall be the only such notes to have the status of legal tender within the Union.'

The first sentence of this provision is about competence. It grants to the European Central Bank the exclusive 'right' ('power' or 'competence' would have been a more accurate terminological choice) to authorise the issue of euro banknotes. This must be put in connection with the second sentence, which attributes the possibility of issuing euro banknotes to the European Central Bank (acting directly) and to national central banks, if and when authorised by the European Central Bank.

The 'may' in the second sentence could be misread as implying that neither the European Central Bank nor national central banks are bound to issue euro banknotes and that the European Central Bank could, at any given time, decide to discontinue their issuance for whatever reason.

On a reasonable reading of the provision, however, this is not what that 'may' means. It should not be interpreted a contrario, a mode of interpretation that frequently leads to farfetched and risky conclusions. It simply means that both the European Central Bank and national central banks can actually issue euro banknotes. Nevertheless, the provision does not mean that they are granted the power not to issue them.

The key for the legal issue under consideration is rather in the third sentence of the provision that provides that those euro banknotes, issued by the European Central Bank and national central banks, 'shall be the only such notes to have the status of legal tender within the Union'.

This sentence, correctly read in the context of the chapter on monetary policy, is no longer about competence but about the legal characteristics of euro banknotes in their use by individuals. The European Court of Justice has interpreted it as a directly effective provision that contains a subjective right. It can certainly be subject to

restrictions, but only if they correspond to a valid justification in the general interest and if they are proportionate to the aim pursued. In consequence, Article 128(1) TFEU, interpreted by the Court of Justice with the same techniques it uses for the free movement rules, contains a constitutional protection of the legal tender of euro banknotes. The effet utile of that protection requires the continuing existence of those banknotes and effective access to them.

We can deduce as much from the judgment of the Court of Justice in the Hessischer Rundfunk case.[3] In that judgment the Court recalled that in accordance with Article 119(2) TFEU, economic and monetary policy 'shall include a single currency, the euro'. For the Court, this means that the concept of monetary policy 'entails a regulatory dimension intended to guarantee the status of the euro as the single currency'.[4] The existence of the currency, and its singleness, are therefore necessary preconditions for the existence and effective conduct of a monetary policy.[5]

For the Court, 'the concept of "legal tender" of a means of payment denominated in a currency unit signifies, in its ordinary sense, that that means of payment cannot generally be refused in settlement of a debt denominated in the same currency unit, at its full face value, with the effect of discharging the debt'.[6] It is implicit in the judgment, but a necessary consequence of its reasoning, that Article 128(1) TFEU has direct effect in the sense that it creates subjective rights that can be invoked by individuals before national courts and must be protected by them. The core content of the provision is that payers have a right to settle their pecuniary debts with euro banknotes in the euro area. The exceptions or restrictions, which may be adopted by the Union itself, as a matter of monetary policy or pursuant to other competences, or by the Member States in the exercise of their own competences (outside the realm of Union exclusive or pre-empted competences), do not 'affect the principle that, as a general rule, it must be possible to discharge a payment obligation in cash'.[7] Those limitations or restrictions can thus be subject to judicial review.

Is the legal tender of euro banknotes only guaranteed in so far as the European Central Bank and/or national central banks of the euro area issue them, or does it also mean that they should be issued? My view is that we can infer from these passages of the judgment that the Union's primary law also guarantees the continuing existence of euro banknotes, and access to them, as preconditions for the effectiveness of their legal tender. Indeed, without that existence and access the payers' constitutionally protected right to settle their pecuniary debts with euro banknotes in the euro area would be emptied of any real content, as would be the obligation to accept them by payees which is the other side of legal tender. From this perspective, a hypothetical decision of the European Central Bank to discontinue the issue of euro banknotes could be analysed as an absolute restriction of the payers' right to pay with euro banknotes. It is very difficult to conceive what could be a valid

3 Joined Cases C-422/19 and C-423/19, EU:C:2021:63.

4 Ibid., paragraph 38.

5 Ibid., paragraph 32.

6 Ibid., paragraph 46.

7 Ibid., paragraph 56.

justification in the general interest for that drastic restriction, and the arguments that could sustain its proportionality.

It is also doubtful to understand Article 133 TFEU as granting the Union legislature the power to take such a decision. It is difficult to argue that the discontinuance of euro banknotes would be a measure necessary for the use of the euro as a single currency, which is the legal criterion to be able to use that legal basis. Besides, its proportionality would be equally difficult to establish.

Beyond the judgment, other elements in the Treaties confirm the protection of euro cash. Article 3(4) TEU lists, among the objectives of the Union, the obligation to establish 'an economic and monetary union whose currency is the euro'. This reference to the euro as a currency is contained in many other provisions of the Treaties (such as Article 3(1)(c), Article 5(1), Article 119, Article 133 and Article 140(3) TFEU). The main definitions of the term currency in the Oxford English Dictionary (and the same will be true for other official languages of the Union) still refer the term currency to a physical reality in circulation in a given jurisdiction that is considered money. This is what the drafters had in mind, certainly, at the time of the Maastricht Treaty. The term currency must also be linked with Article 128 TFEU. Therefore, in primary law the term 'currency' is equated with the two existing physical manifestations of the euro: banknotes and coins. A situation in which the euro would be a mere unit of account, but without any actual reality in economic life, being only used as commercial bank money, would not be in line with the Treaties, as the euro would just be a purely notional currency. The interaction with a possible new form of the euro, the digital euro, will be discussed below.

Let me also mention, although these arguments are only additional, that Article 16, paragraph 2, of the Protocol of the European System of Central Banks and the European Central Bank, the provision on banknotes, provides that "[t]he ECB shall respect as far as possible existing practices regarding the issue and design of banknotes". And Article 49 of the same protocol refers to the obligation to exchange banknotes when Member States join the euro area. Both provisions seem to presuppose the existence of euro banknotes. Their implication is, it seems to me, that euro banknotes must be issued in accordance with Article 128(1) TFEU. This obligation to issue finds expression in Article 2 of the Decision of the European Central Bank on the issue of euro banknotes, which provides that "[t]he ECB and the NCBs shall issue euro banknotes".[8] My view is that this provision merely confirms an obligation that is inherent in primary law. This obligation will subsist for as long as there is demand for euro banknotes.

## 3 Does this undermine the independence of the European Central Bank?

Does this position endanger or affect the independence of the European System of Central Banks or of the European Central Bank in conducting monetary policy, as

[8] Decision of the European Central Bank of 13 December 2010 on the issue of euro banknotes, ECB/2010/29, OJ L 35, 9 February 2011, pages 26 to 30.

provided for by Article 130 TFEU? I do not think so. The obligation to issue banknotes does not affect the conduct of monetary policy. On the contrary, the continuing existence of official money in circulation provides the monetary anchor, which is a necessary precondition to ensure the transmission of monetary policy.

Second, the European Central Bank has the power to provide the volume, denominations and specifications of euro banknotes. It may change them, discontinuing certain denominations or types of euro banknotes. But it could not abolish them altogether, stopping their issue. In addition, it must ensure through effective measures that the volume of banknotes in circulation corresponds to the demand of the public and is enough to guarantee effective access to those banknotes, which is a necessary precondition for their use as legal tender as enshrined in the Treaties.

This is reflected in a recital of the European Central Bank's decision on this matter, which states that '[t]he issue of euro banknotes need not be subject to quantitative or other limits, since putting banknotes into circulation is a demand driven process'.[9] The understanding is that the Eurosystem must satisfy that demand at all times, to ensure the effectiveness of the legal tender of banknotes. The obligation to ensure access to banknotes, to be sure, is a wider one and the Union at large and the Member States must also take measures to make it effective on the ground. The European Central Bank could only discontinue issuing euro banknotes in the purely hypothetical and extreme case in which there would be no demand for them in the whole euro area. In such a case, not issuing euro banknotes would have no impact on their legal tender, as nobody would be willing to use them as a means of payment.

As regards euro coins, their legal tender status is enshrined in Article 11 of the Regulation on the introduction of the euro.[10] This is secondary law only, so in theory the legislature would be formally empowered to deprive euro coins of their legal tender status. However, such a decision could seem inconsistent with the official nature of the currency and the legal tender of banknotes, and could lead to paradoxical consequences.

I would add that, in order to preserve the effectiveness of the legal tender of euro coins, the euro area Member States also have the obligation, individually and collectively, pursuant to Article 128(2) TFEU, to make sure that those coins are produced and accessible within their territory in quantities sufficient to respond to demand. Euro coins must respect the Council's measures, adopted on the basis of a Commission proposal, on the denominations and technical specifications of euro.[11] The Commission has recently adopted a proposal that includes measures to ensure effective access to, and use of, euro banknotes and coins.[12]

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9 Ibid., recital 3.

10 Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ L 139, 15 May 1998, pages 1 to 5.

11 Council Regulation (EU) No 729/2014 of 24 June 2014 on denominations and technical specifications of euro coins intended for circulation, OJ L 194, 2 July 2014, pages 1 to 7.

12 Cited in footnote 2.

## 4 What about the digital euro?

What about the digital euro? Does this possible form of the currency affect the above analysis, if and when it would be issued? I do not think so. The legislature can create and regulate the digital euro as a new reality of monetary law, a new and additional form of the euro, as has been proposed by the Commission and is currently being discussed by the Union's legislature.[13] It would then be for the European Central Bank to take the relevant decisions on issuance, whether to issue, and when, and in what amounts. The existence of the digital euro or its legal tender are not guaranteed by primary law, contrary to the situation of euro banknotes. The legislature could not oblige the European Central Bank to issue the digital euro. This would hamper its independence.

The addition of the digital euro is justified as a necessary measure for the use of the euro as a single currency, in particular to adapt it to technological change, in view of the declining use of cash, which is an undeniable fact in many States of the euro area. However, as I have already argued, it is difficult to consider that the abolishment of cash could constitute a necessary measure that the legislature could adopt to that end, even if the digital euro is created and becomes widely available and used. Therefore, the digital euro has to be seen, in legal terms, as a possible complementary form of the currency, but not one that could replace euro cash and lead to its discontinuation. To abolish cash, and the right of payers' in the euro area to use it as legal tender, one would need to amend the Treaties.

I would like to recall, finally, that there is no obligation imposing on payers to continue to use cash. Technological and cultural changes in society and the economy of the near future may of course affect and reduce the demand for and use of cash. If at a given time there is no longer demand for it, the issue of euro cash could be discontinued de facto without breaching the Treaties – but this would be a matter of fact, not of law. It would not be the same as formally abolishing euro banknotes, which, as I have just argued, would require a Treaty revision.

In terms of policy, in any event, the Commission has concluded, when tabling its proposal on the legal tender of cash, that banknotes and coins, far from being an obsolete 'technology', have to be safeguarded because they remain essential as a payment choice, for the cohesion of society, especially for the vulnerable people that rely on cash, for the protection of privacy, and for resilience in the face of possible problems with other means of payment. This view seems to be widely shared by the European Central Bank and in the Member States.

[13] The proposal has been referred to in footnote 2.


David Baez Seara
European Central Bank

# Part V

# Fundamental right(s) to access to documents – similar tools for different purposes

# Fundamental right(s) to access to documents

## Similar tools for different purposes: an introduction

Emilie Yoo*

This year marks the tenth anniversary of the start of the Banking Union in 2014 as an essential complement to the EU's Economic and Monetary Union. As the first two pillars of the Banking Union – the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM) – have been in place and fully operational since 2014 and 2016 respectively, it is an opportune moment to reflect on how the fundamental rights of access to documents, namely (i) the right to access documents under the public access regime and (ii) the right to access the file relating to an administrative procedure are applied and ensured in the Banking Union, which are fundamental pillars of transparency and respect for due process within the European legal framework.

Thus, this panel discusses the relevant legal regimes of the European Central Bank (ECB) and the Single Resolution Board (SRB) in respect of these fundamental rights, with the benefit of being able to examine recent case-law of the Court of Justice of the European Union specifically examining ECB and SRB past cases, which provides further guidance on how to ensure the fundamental rights in the performance of public tasks in the Banking Union.

While both fundamental rights seem to be similar tools at first glance, it will appear from the analysis of the panel that there are essential differences in particular originating from the different legislative purposes. The starting point of the discussion is necessarily to distinguish, in their objectives and mechanisms, the legal regimes governing the exercise of the rights.

Public access to ECB documents is regulated by Decision 2004/258/EC[1], which implements the principles set out in Article 15 of the Treaty on the Functioning of the European Union (TFEU) and Article 42 of the EU Charter of Fundamental Rights. These provisions aim to ensure the greatest possible transparency of the decision-making processes, with the intention of enhancing the administration's legitimacy, effectiveness, and accountability. It is well known that the right of public access closely relates to the democratic nature of the institutions, which is reflected in its broad scope of application. The ECB Decision on public access provides that any citizen, as well as any natural or legal person residing or having its registered office

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1 Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) (OJ L 80, 18.3.2004, p. 42).

in a Member State, can request access to ECB documents without having to justify their request.

The legal framework for access to ECB's file is enshrined in Article 22 of the SSM Regulation[2] and further detailed in Article 32 of the SSM Framework Regulation[3], which implement the principles codified in Article 41(2)(b) of the EU Charter of Fundamental Rights. These provisions are part of the rules on due process for adopting supervisory decisions. In this regard, access to file is one of the procedural guarantees intended to protect the rights of defence and to ensure, in particular, that the right to be heard can be exercised effectively. The disclosure under the regime for access to the ECB's files is granted to the party concerned by a specific supervisory procedure. In contrast, the public access regime does not presuppose that an administrative procedure is pending, nor does it support the requester's rights of defence.

As mentioned at the beginning of this introduction, the interplay between the right of access to files and the right of public access affects not only the operations of the ECB, but also those of the SRB. The SRB framework[4] also provides two distinct legal regimes governing the exercise of the right of access to files and the right of public access and ensures that the disclosure of the SRB's documents is carried out in compliance with the principle of confidentiality and the other limits set by the law.

In conclusion, the analyses of the panellists will shed light on the different nature, objectives, and legal bases of the aforementioned rights in the first two pillars of the Banking Union in light of relevant jurisprudence.

David examines the ECB's public access regime to supervisory documents. He provides an overview of the specific provisions governing this regime, delves into the role of public access in request of supervisory documents by certain stakeholders and considers the relevant standards for the ECB's decision, taking into account relevant recent jurisprudence.

Asen explores the regime applicable to the right of access to the files relating to a supervisory procedure of the ECB, providing an overview of the relevant standards, and also touches on the interplay between the right to access the supervisory file and the right of public access, reflecting the latest case-law in this regard.

Last but not least, Laurent investigates the SRB regime concerning the access to the file and access to documents, and more specifically, also highlights some specificities of the SRB regime.

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2 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

3 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

4 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014.

Through these contributions, we aim to foster a deeper understanding of the right to public access and right to access to file, the challenges faced in their application, and the evolving jurisprudence that shapes their future in the Banking Union.

# Public access to ECB supervisory documents

David Baez Seara*

## 1 Introduction

This paper focuses on several salient aspects faced by the ECB in requests for public access to ECB supervisory documents, including the open issues derived from the incipient case-law on public access to this type of information. More specifically, it refers to (i) the specific legal regime applicable to requests for public access to ECB supervisory documents; (ii) the role of the public access regime in requests for supervisory information by shareholders of credit institutions; and, (iii) the relevant Union law provisions and judicially blended criteria applicable to the examination of whether supervisory information can be made publicly available, including the current non-existence of a general presumption of confidentiality for this type of information. The aim of this paper is to provide a structured understanding of the state of affairs and of the possible future avenues for action by the ECB in the field of public access to ECB supervisory documents.

## 2 The genesis of Decision 2004/258/EC on public access to European Central Bank documents

Article 15(1) of the Treaty on the Functioning of the European Union (TFEU) states that “the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible”. Openness is a legitimising tool of the EU institutions’ actions as it emphasises the capacity for the public to be aware of the activities of EU institutions – not only those of a legislative or policy character but also to a certain degree those of an administrative nature – and to be able to exercise their influence on those activities. If democracy seems to die in darkness, then opening the doors and windows of EU institutions would give life to the often-criticized policy and administrative activity of EU institutions, without prejudice to the direct results of such activity in improving the life of the EU citizens.

* Principal Legal Counsel, European Central Bank. The views and opinions expressed in this text are solely those of the author and do not necessarily reflect the official position of the ECB.I am grateful to Sandrine Letocart and Jorge Ruiz Jimenez for the comments provided in an earlier version of this paper.

Openness requires communication between EU institutions and bodies and the general public, and hence it materialises on specific transparency requirements.[1] Article 15(3) of the TFEU imposes on each Union institution or body the duty to "ensure that its proceedings are transparent". They must elaborate in their own rules of procedure specific provisions regarding access to their documents, in accordance with the regulations adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure establishing the general principles and limits to public access. For the purpose of this Article, the relevant regulation is Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereinafter, Regulation 1049/2001).[2]

Article 15(3) TFEU states that the Court of Justice of the European Union, the ECB and the European Investment Bank shall mirror the rules established in Regulation 1049/2001 "only when exercising their administrative tasks". On this basis, the ECB could have adopted its own rules on public access to documents mirroring Regulation 1049/2001 but only applicable to its administrative tasks. This would have excluded from the scope of public access all documents and information related to the ECB's non-administrative tasks. Similarly, to the limitations established in Article 27(2) of the ESCB/ECB Statute regarding the auditing powers of the European Court of Auditors vis-à-vis the ECB, a public access regime taking on board the prerogative granted by Article 15(3) TFEU to the ECB would then be limited to information related to budgetary matters, internal control systems, management of IT projects, public procurement procedures, the management of human resources or operational risks, and hence it would not touch upon the core activities of the ECB, including core aspects related to banking supervision.[3] However, in March 2004, the ECB adopted Decision 2004/258/EC on public access to ECB documents[4], which fundamentally mimics the content and the material scope of Regulation 1049/2001 with specific differences in the content of some of the exceptions to public access, tailored to the concrete activities of the ECB. As with Regulation 1049/2001, Article 4 establishes a list of exemptions to the right of public access that obliges the ECB to deny access when the protection of the public interest as regards certain scenarios is at stake, or when disclosure would undermine the privacy and integrity of the individual regarding protection of personal data (in section 1 of Article 4); when the protection of commercial interests of natural or legal persons, court proceedings and legal advice, and the purpose of inspections, investigations and audits is concerned (in section 2 of Article 4); and, finally, when there is a need to protect the

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1 Alberto Alemanno argues that "the principle of openness seems to normatively require various forms of active cooperation and communication between all EU institutions and the public whose practice typically presupposes access to information […] [i]ts major component (and ontological precondition) is therefore the principle of transparency". See Alemanno, A. "Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy", Vol 39, Issue 1, European Law Review, 2014, p. 72. See also, Coman-Kund, F. Karatzia, A., Amtenbrink, F. "The Transparency of the European Central Bank in the Single Supervisory Mechanism" Vol 51, Issue 1, Credit and Capital Markets – Kredit und Kapital, 2018, p. 60-62.

2 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31/05/2001, p. 43–48).

3 For a view on the scope of Article 27.2 of the ESCB/ECB Statute, see Baez, D, "Is there an audit gap in banking supervision" Vol 23, Journal of Financial Regulation, 2022, p. 73.

4 2004/258/EC: Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) (OJ L 80, 18.3.2004, p. 42–44)

internal documents used for deliberations and preliminary consultations within the ECB or for consultations between the ECB and national central banks or national competent authorities (in section 3 of Article 4). Unlike Regulation 1049/2001, section 1 of Article 4 shields from public access confidential information which is protected as such in other relevant provisions of EU law. This exception is notably relevant for the protection of confidential supervisory information from public disclosure. In addition, section 3 provides a wider protection to the ECB's "space to think" by not necessarily linking the protection of internal documents to a requirement that their disclosure would seriously undermine the decision-making process.[5]

## 3 A "frequent" dynamic of requests for public access to ECB supervisory documents

While any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State has a right of access to ECB documents and hence can make requests for public access to ECB supervisory documents, a frequent dynamic of this type of request – clear from the type of applicants lodging actions for annulment against confirmatory decisions on public access to ECB supervisory documents – involves shareholders of credit institutions that were subject to supervisory measures or had been assessed by the ECB as failing or likely to fail (FOLTF).[6]

The motivation behind these requests for public access is that these types of applicants do not have a right of access to the ECB supervisory file. The right of access to the ECB's file – laid down in Article 22 of Council Regulation (EU) No 1024/2013 (the SSM Regulation)[7] and Article 32 of Regulation (EU) No 468/2014 (the SSM Framework Regulation)[8] – aims at preserving the right of defence and due process of the parties in supervisory procedures leading to the adoption of supervisory decisions. In accordance with Article 26 of the SSM Framework Regulation parties to an ECB supervisory procedure are those making an application or those to which the ECB intends to address or has addressed an ECB supervisory

5 Judgment of 12 March 2019, Fabio de Masi and Yannis Varoufakis v ECB, in case T-798/17, ECLI:EU:T:2019:154, paragraph 29; and Judgment of 17 December 2020, Fabio de Masi and Yannis Varoufakis v ECB, in case C-342/19 P, ECLI:EU:C:2020:1035, paragraph 43.

6 See, judgment of 6 October 2021, Aeris Invest Sàrl v ECB and Others, T-827/17, EU:T:2021:660; judgment in OCU v ECB, T-15/18; judgment of 29 June 2022, Francesca Corneli v European Central Bank, in Case T-501/19; judgment in Francesca Corneli v European Central Bank ; judgment of 28 September 2022, Malacalza Investimenti Srl v European Central Bank, in Case T-552/19 OP, ECLI:EU:T:2022:587; Judgment of 6 November 2024, MeSoFa Vermögensverwaltungs AGv European Central Bank, in case T-790/22, ECLI:EU:T:2024:783.

7 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63–89).

8 See e.g. for ECB licence withdrawal decision (Judgment of 5 November 2019, ECB and Others v Trasta Komercbanka and Others, C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraphs 108 to 114 and 119). In the same vein, with respect to non-resolution decisions (C-364/20 P - Bernis and Others v SRB).

decision, which tends to exclude shareholders of credit institutions[9] that might have been subject to supervisory measures (i.e. ECB decision denying an authorisation or withdrawing the banking licence) or resolution measures if the bank is assessed as FOLTF (i.e. an SRB non resolution decision or a resolution scheme). While shareholders are not entitled to access the ECB's file relating to an ECB supervisory procedure concerning the bank in which they hold shares, they have recourse to other avenues, such as the public access to documents regime, to obtain relevant information if they attempt to challenge before the General Court legality of the supervisory decision affecting the credit institution in which they are shareholders or the resolution or non-resolution decision, or in case they want to institute an action for damages.

Hence, the absence of a right of access to the supervisory file, may encourage these shareholders to make their requests for access under the public access regime. In addition, and based on the case-law of the General Court, the ECB might ex officio convert requests for access to the supervisory file lodged by shareholders of credit institutions that do not have a right of access to the file into requests for public access to the supervisory documents falling within the supervisory file and process them under the public access regime. In this respect, the General Court in the Satabank case considered that "since no supervisory procedure was pending in respect of the applicant at the time of its request for access, and therefore no 'file' within the meaning of Article 32 of the SSM Framework Regulation exists, that request [for access to the file] should be examined as a request for access to documents concerning it on the basis of the general provisions, in particular Decision 2004/258".[10] Hence, the General Court demands the treatment of the public access regime as a default regime to the access to the file regime in those cases where a requester does not have a right of access to the ECB file. That conclusion of the General Court in the Satabank case derives partially from the plasticity that the Court of Justice has attributed to the public access regime in the Dragnea case where it recognised the absence of any obligation to make express reference to Regulation No 1049/2001 or to state reasons in a request for access to documents to enjoy the right of public access to documents.[11]

Requests for public access to supervisory documents by shareholders do not enjoy any privileged status, even if they state as motivation for these requests the aim of better substantiating their future or existing actions for annulment against supervisory decisions of the ECB or against the decisions adopted by the Single Resolution Board (SRB) finalizing a composite procedure (i.e.: a resolution decision or a decision of not resolving the credit institution). The argument of the privileged status of a request for public access made by a shareholder challenging a decision of the ECB or the SRB before the General Court was put forward by Aeris, a

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9 Judgment of 6 November 2024, MeSoFa Vermögensverwaltungs AG v ECB, in case T-632/22, ECLI:EU:T:2024:782, paragraph 51. This paragraph 51 states "the Courts of the European Union have stated that a request for access to a file is based on the exercise of the rights of the defence […] [s]uch a request has no purpose in the absence of an administrative procedure affecting the legal interests of the applicant for access and, consequently, in the absence of a file concerning that person". See also, judgment of 6 October 2021, OCU v ECB, T-15/18, EU:T:2021:661, paragraph 94, and judgment of 22 March 2023, Satabank v ECB, T-72/20, EU:T:2023, paragraph 63.

10 Judgment in Satabank v ECB, T-72/20, cited above, paragraph 131.

11 Judgment of 13 January 2022, Dragnea v Commission, C-351/20 P, EU:C:2022:8, paragraph 71.

shareholder of Banco Popular Español, in cases T-827/17 and C-782/21 P. According to Aeris, the absence of an obligation to state reasons does not prevent the requester from offering reasons which make clear that access to a document is necessary in order to safeguard his right to effective judicial protection, the Union institution cannot ignore this circumstance without infringing Article 47 of the Charter of Fundamental Rights.[12] However, the right to an effective remedy of Article 47 of the Charter of Fundamental Rights (the Charter) essentially requires that the persons concerned must be able to ascertain the reasons on which a decision taken in relation to them is based. Since the decision for which the documents are (allegedly) needed is not the confirmatory decision that the ECB might adopt putting an end to a request for public access to documents but the decision against which the action for annulment is directed, then it is in the framework of that action that the shareholder could invoke a breach of Article 47 of the Charter.[13] In addition, from the essential features of the right of public access to documents (i.e.: it is held by 'every citizen of the Union and any natural or legal person residing or having its registered office in a Member State' and the erga omnes effect of the documents made publicly available) follows that the aim of the public access regime is not to lay down rules intended to protect the specific interest that a particular person may have in accessing these documents, but to guarantee the right of access by the general public to ECB documents.[14] Finally, any shareholder might instead make use, within the context of the action for annulment against the decision affecting the credit institution, of the specific provisions of the Rules of Procedure and the Statute of the Court regarding the production and the use of documents in legal proceedings.[15]

## 4 Refusal to grant public access to supervisory documents: the exception of Article 4(1)(c) of Decision 2004/258/EC and the presumption of confidentiality

The fact that shareholders requesting public access to supervisory documents are not considered privileged applicants does not mean that the requested information will necessarily be granted by the ECB unless the ECB provides an adequate justification for its refusal to disclose based on the exceptions set out in Article 4 of the Decision 2004/258/EC. Within the context of public access to supervisory documents, Article 4(1)(c) of Decision 2004/258/EC is of particular practical relevance. This provision states that "the ECB shall refuse access to a document where disclosure would undermine the protection of the confidentiality of the information that is protected as such under Union law". Hence, Article 4(1)(c) of Decision 2004/258/EC requires the ECB to refuse the disclosure of documents that

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12 Judgment of 6 October 2021, Aeris Invest Sàrl v ECB and Others, T-827/17, EU:T:2021:660, paragraph 35.

13 Judgment in Aeris Invest Sàrl v ECB and Others, cited above, paragraph 313.

14 Judgment of 27 April 2023, Aeris Invest Sàrl v ECB, C-782/21 P, EU:C:2023:345, paragraph 37.

15 Judgment in Aeris Invest Sàrl v ECB and Others, cited above, paragraph 321. Regarding the relevant rules the production and the use of documents in legal proceedings, see Articles 88-92 of the Rules of procedure of the General Court (OJ L 105, 23.4.2015, p. 1–66); Articles 62-64 of the Rules of Procedure of the Court of Justice (OJ L 265, 29.9.2012, p. 1–42). Article 24 of the Protocol (No 3) on the Statute of the Court of Justice of the European Union (OJ C 202, 7.6.2016, p. 210–229).

are treated as confidential under another provision of Union law. In this respect, Article 27 of the SSM Regulation establishes that ECB staff carrying out supervisory duties shall be subject to the professional secrecy requirements set out in Article 37 of the ESCB/ECB Statute and in relevant acts of Union law. Moreover, the Union legislator introduced a professional secrecy obligation by way of Article 53(1) of the Credit Requirements Directive (CRD), addressed also to the ECB as competent authority, preventing the disclosure of confidential information received in the context of tasks relating to the prudential supervision of credit institutions.[16]

Article 4(1)(c) of Decision 2004/258/EC serves then as a bridge linking the public access regime to the confidentiality regime applicable to supervisory information by way of Article 27 of the SSM Regulation and Article 53(1) of the CRD. However, until the publication of the Baumeister judgment in June 2018[17], there was no clarity on whether supervisory information was per se confidential information or whether confidentiality only applied to specific types of supervisory information. Indeed, as Advocate General (AG) Bot states in its Opinion on Baumeister, "the Court has never ruled on the actual definition of professional secrecy or on the scope of the concept of 'confidential information' in the context of the system of supervision of the financial markets".[18] The same applies for the system of banking supervision. In Baumeister the Court of Justice ruled out the possibility, supported by AG Bot in its Opinion, of classifying all information held by the supervisory authorities as confidential, or in other terms, it refused to hold that that the principle of professional secrecy applies to all supervisory information held by the supervisory authorities.[19] By contrast the Court of Justice put forward the so-called Baumeister criteria or Baumeister test according to which confidential supervisory information is information (i) which is not public; and (ii) the disclosure of which is likely to adversely affect the interest of natural or legal persons who provided the information or of third parties, or the proper functioning of supervisory system.[20]

Therefore, refusing to grant public access to supervisory documents might involve the complex application of Article 4(1)(c) of Decision 2004/258/EC, Article 27 of the

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16 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, (OJ L 176, 27.6.2013 p. 338). According to Article 53(1) of this Directive "Member States shall provide that all persons working for or who have worked for the competent authorities and auditors or experts acting on behalf of the competent authorities shall be bound by the obligation of professional secrecy. Confidential information which such persons, auditors or experts receive in the course of their duties may be disclosed only in summary or aggregate form, such that individual credit institutions cannot be identified, without prejudice to cases covered by criminal law. Nevertheless, where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be disclosed in civil or commercial proceedings".

17 Judgment of 19 June 2018, Bundesanstalt für Finanzdienstleistungsaufsicht v Baumeister, Case C-15/16, EU:C:2018:464.

18 Opinion of Advocate General Bot in judgment of 19 June 2018, Bundesanstalt für Finanzdienstleistungsaufsicht v Baumeister, Case C-15/16, ECLI:EU:C:2017:958, paragraph 46.

19 Opinion of Advocate General Bot in Bundesanstalt für Finanzdienstleistungsaufsicht v Baumeister, cited above, paragraphs 54 and 55. Advocate General Bot is of the view that the terms confidentiality and professional secrecy are analogous. He nots in this respect that "there is an overlap between the terms 'professional secrecy' and 'confidential information' used in Article 54(1) of Directive 2004/39. Accordingly, the use of those two terms must be regarded as redundant, in as much as they in reality denote a single purpose and the same idea".

20 Judgment in Bundesanstalt für Finanzdienstleistungsaufsicht v Baumeister, cited above, paragraph. 35.

SSMR, Article 53(1) of the CRD together with the Baumeister test. In relation to the latter, the General Court clarified in the Aeris judgment that the ECB shall verify that the two Baumeister criteria are satisfied in respect of each item of information that falls within the scope of the public access request.[21] By this the General Court accepted the application of the Baumeister criteria to determine whether supervisory information is confidential within the public access regime under the justificatory standards usually applied in public access (i.e.: the examination on whether the exception to public access applies shall take place vis-à-vis each piece of information falling within the request).[22]

This specific and individual examination of the Baumeister criteria in relation to each piece of supervisory information hampers the possibility for the ECB to invoke a general presumption of confidentiality applied specifically to prudential supervisory information held by the ECB. General presumptions of confidentiality might apply to documents of the same nature or belonging to the same file based on the imperative need to ensure the correct functioning of ongoing administrative or judicial procedures and to guarantee that their objectives are not compromised by limiting the intervention of third parties (i.e.: those requesting public access) and based on the existence of specific rules applicable to the procedure to which the documents requested relate.[23] The Court of Justice has recognised general presumptions of confidentiality in the areas of competition law (state aid and mergers), judicial proceedings, EU pilot procedures, and in infringement procedures.

From a practical dimension, the need to ensure the correct functioning of the ongoing administrative procedure is materialised in the identification of the specific interest in the list of exceptions included in the public access regime that would be undermined in case of public disclosure. The general presumption of confidentiality is then derived from that exception invoked, without the need to carry out the aforementioned individual examination on how the exception relates to each piece of information within the scope of the request for public access.

In the Aeris, OCU, Corneli and Malacalza cases[24], the General Court assessed the legality of confirmatory decisions refusing public access to supervisory documents on the basis of a general presumption of confidentiality derived from Article 4(1)(c) of Decision 2004/258/EC. The General Court in all these judgments rejected the application of the general presumption of confidentiality on three grounds. First, it considered that a general presumption cannot be derived from Article 4(1)(c) of Decision 2004/258/EC as the latter provision is not clearly circumscribed in scope.

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21 Judgment in Aeris Invest Sàrl v ECB and Others, cited above, paragraph 196.

22 The need for an examination of the Baumeister criteria vis-a-vis each piece of information falling within the request of public access was repeated again by the General Court in the Corneli judgments on public access to documents. See, Judgment of 29 June 2022, Francesca Corneli v European Central Bank, in Case T-501/19, paragraph 94.

23 See, judgment of 4 October 2018, Daimler v Commission, in Case T-128/14, ECLI:EU:T:2018:643 paragraphs 13 and 138-140; judgment of 7 February 2018, PTC Therapeutics International v European Medicines Agency (EMA), in Case T-718/15, ECLI:EU:T:2018:66, paragraphs 39-41; judgment of 25 September 2014, Spirlea v Commission, in Case T-306/12, ECLI:EU:T:2014:816, paragraph 68.

24 Respectively, judgment in Aeris Invest Sàrl v ECB and Others, cited above; judgment in OCU v ECB, T-15/18; judgment in Francesca Corneli v European Central Bank, cited above; and, judgment of 28 September 2022, Malacalza Investimenti Srl v European Central Bank, in Case T-552/19 OP, ECLI:EU:T:2022:587.

According to the General Court, Article 4(1)(c) does not have a content of its own as the content and applicability of the provisions would be provided by the EU law applicable, which in turn would depend on the type of documents requested. The recognition of a presumption in such conditions would run contrary the principle of legal certainty.[25] Second, it acknowledged that the Baumeister criteria to determine the supervisory information that shall be qualified as confidential according to Article 53(1) of the CRD requires an individual and concrete assessment of each piece of information, which cannot be bypassed by applying a general presumption of confidentiality.[26] It should be noted in this respect that the confirmatory decisions that were targeted by actions of annulment in the above-referred cases were adopted by the ECB before the Court of Justice delivered the Baumeister judgement where it put forward the need for the individual and concrete assessment of the Baumeister criteria.[27] Third, the general presumption of confidentiality should be open for rebuttal by the requester of public access based on the existence of an overridden public interest in disclosure,[28] and hence, it cannot be invoked with the so-called "absolute" exceptions of the public access regime as the latter do not provide for any balancing exercise involving an overriding interest.[29] This type of rebuttal is only provided by "relative" exceptions (i.e.: Article 4.2 and 4.3 of Decision 2004/258/EC).

Since the considerations of the General Court in Aeris, OCU, Corneli and Malacalza refer to the application of a general presumption of confidentiality based on Article 4(1)(c) of Decision 2004/258/EC, the ECB may eventually attempt to invoke a presumption based on an exception of Article 4(2) or 4(3) of Decision 2004/258/EC with the purpose of avoiding the link between the public access regime and the professional secrecy/confidentiality regime applicable to banking supervision created by Article 4(1)(c) of Decision 2004/258/EC, and to provide for the possibility of a rebuttal. Therefore, the hypothetical applicability of a general presumption of confidentiality involving supervisory documents not based on Article 4(1)(c) of Decision ECB/2004/3 distances the application of the Baumeister test from the public access regime, potentially allowing for a feasible application of this general presumption.

In view of the case-law on general presumptions, the supervisory documents covered by that hypothetic general presumption might need to be further targeted to those of an ongoing supervisory procedure as defined in Article 2(24) of the SSM Framework Regulation,[30] which would leave out of the scope of the general

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25 Judgment in Aeris Invest Sàrl v ECB and Others, cited above., paragraphs 187-191.

26 Judgment in Aeris Invest Sàrl v ECB and Others, cited above., paragraph 191.

27 Judgment in Aeris Invest Sàrl v ECB and Others, cited above., paragraphs s 192-196.

28 Possible rebuttals due for manifest factual errors (i.e.: the inclusion within the general presumption of documents which do not belong to the ongoing administrative or judicial procedure) which might be invoked in cases of general presumptions of confidentiality derived from absolute exceptions do not meet the "rebuttal" condition imposed by the General Court as these are not substantiated in the existence of an overridden public interest. See in this respect, Judgment in Aeris Invest Sàrl v ECB and Others, cited above., paragraph 198.

29 Judgment in Aeris Invest Sàrl v ECB and Others, cited above., paragraphs 197-199.

30 According to this provision an "'ECB supervisory procedure' means any ECB activity directed towards preparing the issue of an ECB supervisory decision, including common procedures and the imposition of administrative pecuniary penalties".

presumption that ECB activity which is not directed towards preparing the issue of an ECB supervisory decision, such as the on-going supervision of banks or the FOLFT assessment procedure. Hence, such a case-law driven approach would considerably reduce the scope of the general presumption. One alternative to broaden the hypothetical general presumption on supervisory documents is to put forward a composite understanding of the administrative file in which the FOLTF assessment procedure would be considered within the broader context of a final decision of the SRB on the resolution or non-resolution of the credit institution, and hence within the scope of the hypothetical general presumption of confidentiality applicable to an ongoing administrative procedure. This composite understanding, however, would not be in line with the definition of supervisory procedure of Article 2(24) of the SSM Framework Regulation.[31]

## 5 Outside the general presumption: individual and concrete assessment of the Baumeister criteria by the ECB

Currently, due to the absence of a general presumption of confidentiality involving supervisory documents, any refusal to grant access requires a specific and individual examination of the applicability of the exception invoked. In the Aeris and OCU cases the ECB, despite having invoked a general presumption of confidentiality based on Article 4(1)(c) of Decision 2004/258/EC, also carried out a parallel specific and individual examination of the applicability of this exception on the supervisory information requested. That information mainly related to the integral version of the FOLTF assessment of Banco Popular Español (BPE), which was resolved by the SRB on 7 June 2017.[32] That parallel specific and individual examination was possible due to the specific characteristics of the request for public access (which involved a limited number of supervisory documents) together with the case-law-based constraints applicable to general presumptions, mainly the requirement to draw up a list of the relevant documents that fall within the request for public access as well as the justification of the applicability of a general presumption to the list of identified documents. Hence, the limited documentation involved, the listing of those documents and the justification provided by the ECB were considered by the General Court as equivalent to a specific and individual examination. A fundamental element for this conclusion was the practical understanding by the General Court of the requirement for a specific and individual examination in light of the public interest protected by Article 4.1(c) of Decision 2004/258/EC. In this respect the General Court, when confronted with the argument that the statement of reasons provided by the ECB to refuse access was generic and formulaic, noted that “it may be impossible to give the reasons justifying the refusal of access to each document […]

[31] It might also be argued that the considerations made by AG Bot in its Opinion in the Baumeister case were compatible with the application of a general presumption to all supervisory information in possession of the competent authority and hence, according to that rationale, a general presumption might also cover supervisory documents that go beyond the narrow definition of procedure provided by the SSM Framework Regulation.

[32] The requested supervised information also included information on BPE’s deposits months prior to the resolution and communications between the ECB and relevant authorities. See, Judgment in Aeris Invest Sàrl v ECB and Others, cited above., paragraphs 8-39; and judgment in OCU v ECB, T-15/18, cited above paragraphs 15-36.

without disclosing the content of the document or an essential aspect of it and thereby depriving the exception of its very purpose […] because the requested document was covered by the public interest exceptions relating to the proper functioning of the prudential supervision and resolution system, any more complete and individualised demonstration of its content could jeopardise the confidentiality of information intended to remain confidential".[33] A similar statement was also made by the General Court in the MeSoFa case on public access to documents.[34] Therefore, it could be argued that the specific nature of supervisory information as information emanating from a system of banking supervision which functions partly based on the trust between supervisees and supervisors – and without which that flow of supervisory information would probably not exist – pointed in favour of softening the statement of reasons needed for the justification of the Baumeister test to each piece of supervisory information. In this regard the General Court in Aeris and OCU was not far from the conclusions of the AG Bot in Baumeister when it stated that "if strict confidentiality of the information thus held by the national supervisory authorities were not guaranteed, there would be a risk of legal uncertainty and of a weakening of the system of supervision of the financial markets".[35]

The reasoning applied by the General Court in Aeris and OCU was not applied in Corneli and Malacalza. However, in these two cases, the General Court never considered that the ECB carried out – in parallel with the general presumption of confidentiality – a specific and individual assessment of the applicability of Article 4(1)(c) of Decision 2004/258/EC to the information requested. Therefore, the considerations of the General Court regarding the specific and individual examination put forward in Aeris, OCU and recently in MeSoFa, might not only be a punctual outcome linked to the specific characteristics of these cases, but it might be the "pragmatic" way forward in cases where the ECB undertakes a specific and individual assessment of the Baumeister test vis-à-vis the documents falling within the request for public access.[36]

An interesting matter in relation to the specific and individual examination in requests for public access to supervisory information is whether the use by the ECB of an absolute exception – other than Article 4(1)(c) of Decision 2004/258/EC – to justify non-disclosure still necessitates the Baumeister criteria. A formal approach would militate against an affirmative answer, as the absence of the bridging role between public access and confidential supervisory information performed by Article 4.1(c) of Decision 2004/258/EC makes Article 27 of the SSM Regulation, Article 53.1 of the

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33 Judgment in Aeris Invest Sàrl v ECB and Others, cited above., paragraph 264.

34 Judgment of 6 November 2024, MeSoFa Vermögensverwaltungs AGv European Central Bank, in case T-790/22, ECLI:EU:T:2024:783, paragraph 45.

35 Opinion of Advocate General Bot in Bundesanstalt für Finanzdienstleistungsaufsicht v Baumeister, cited above, paragraph 52.

36 The General Court has stated that the assessment on whether disclosure would undermine the protection of the proper functioning of the prudential supervision is a complex and delicate one which calls for the exercise of particular care on for which the ECB enjoys a broad discretion. Accordingly, "the EU Courts' review of legality in that regard must be limited to verifying whether the procedural rules and the obligation to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers". See, judgment of 6 November 2024, MeSoFa Vermögensverwaltungs AG v European Central Bank, cited above, paragraphs 75 and 76. See also, judgment in Aeris Invest Sàrl v ECB and Others, cited above, paragraph 161.

CRD, and by extension, the Baumeister criteria, irrelevant in the field of public access, despite the information being of a supervisory nature. There is no need to assess whether the supervisory information falling within the request for public access is “confidential”, precisely because the requirement of confidentiality is only provided by Article 27 of the SSM Regulation and Article 53(1) of the CRD. However, such a formalistic approach seems to miss the overarching reach of the Baumeister criterion on the protection of the proper functioning of the banking supervisory system. Indeed, this criterion is aligned, for instance, with the exception on the protection of the stability of financial system of Article 4(1)(a) of Decision 2004/258/EC. That formalistic approach would also disregard the legal certainty gains generated by a unified standard to be used in assessments of whether supervisory information could be publicly disclosed whenever the public interest to be protected is related to the proper functioning of the banking supervisory system.

## 6 Concluding remarks

Shareholders of credit institutions might continue to make requests for public access to supervisory documents as a substitute for their lack of access to the supervisory file. The Satabank doctrine of the General Court also requires the transformation of these requests for access to the supervisory file into requests for public access. The non-acceptance of a general presumption of confidentiality involving supervisory documents by the General Court might further incentivize this venue as the general rule of transparency continues to apply to this type of information.

The rejection of the general presumption based on Article 4(1)(c) of Decision 2004/258/EC, which follows the line put forward by the Court of Justice in the Baumeister judgement, opens up the possibility for the ECB to attempt invoking a new general presumption, this time of a likely narrower scope based on a relative exception of the public access regime. The ECB might also decide to undertake a specific and individual examination of the Baumeister criteria based on Article 4(1)(c) of Decision 2004/258/EC or another relevant exception of Article 4(1) of Decision 2004/258/EC. The latter course of action may benefit from a more flexible understanding by the part of the General Court on how that specific and individual examination applies to supervisory information when non-disclosure aims to protect the well-functioning of the system of banking supervision. Indeed, when faced with future actions of annulment against confirmatory decisions, the ECB might use Aeris, OCU and MeSoFa as relevant judgments justifying that pragmatic understanding of the Baumeister criteria within the public access regime, based on the aim of protecting the proper functioning of the banking supervisory system.

# Access to the ECB's file by parties to an ECB supervisory procedure

Asen Lefterov*

## 1 Introduction

The right of access to the ECB's file by the parties to ECB supervisory procedures is an important component of the right to good administration, which the ECB fully respects as part of the guarantees of due process in adopting supervisory decisions. As part of the rights of the defence, also the right of access to the ECB file serves a dual objective: to ensure that the administration disposes of all the relevant facts, which are established as precisely as possible, and, to ensure that the person concerned is, in fact, protected. Therefore, the exercise of the right of access to the ECB's file benefits both the party exercising it and the ECB, which is considering taking a specific decision affecting that party. That being said, the right of access to the ECB's file manifests only when the specific circumstances determined by law are present. This entails that the right only exists for a specific period of time, to the benefit of specific persons, linked to a specific contemplated ECB decision, and the access covers a specific collection of documents.

The right of access to the ECB's file by parties to an ECB supervisory procedure should be clearly distinguished from the right of public access to ECB documents. It is true that both rights, when exercised, can lead to obtaining access to documents which are being held by the ECB. However, the objectives of these two rights, the persons that benefit from them, and the scope of access are different and may be judicially enforced in a different manner. For parties to an ECB supervisory procedure, access to the ECB's file is the tool designed by the Union legislature to ensure that such parties can obtain the relevant information from the ECB to assist their defence. Conversely, the right of public access is the default approach that enables any EU citizen or another relevant person to access documents held by the ECB in relation to its tasks, regardless of their specific circumstances, i.e. irrespective of whether they are a party to a specific supervisory procedure or in the absence of any specific supervisory procedure.

## 2 The right of access to the file as part of the right to good administration and the rights of the defence

The right of access to the file is one of the fundamental rights in the European Union, codified by the Charter of Fundamental Rights in the European Union (the Charter).

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In accordance with the Charter, the right to access the file, as part of the right to good administration, benefits every person whose affairs are being handled by the institutions and bodies of the Union[1].

Article 41 of the Charter enshrines the right to good administration and, within it, several rights, which stem from the case law of the Court of Justice and have been codified therein[2]. In particular, the right to good administration includes three interlinked procedural rights protecting the rights of defence of a party to an administrative procedure.

The rights of the defence arise in specific situations and for specific persons. The rights of the defence materialise in all proceedings which are initiated against a person and are liable to culminate in a measure adversely affecting that person. Respect for the rights of the defence requires that any person who may be adversely affected by the adoption of a decision should be placed in a position in which he may effectively make known his views on the evidence against him which the Union institution has taken as the basis for the decision at issue[3]. Observance of the rights of the defence is a fundamental principle of European Union law, in which the right to be heard in all proceedings is inherent[4].

It is also established case law that the rights of the defence apply only at the stage when the authorities are minded to adopt, in respect of a person, a measure that will adversely affect that person[5].

An important element of the rights of the defence is the right to be heard, as enshrined in Article 41(2)(a) of the Charter. The right to be heard serves a dual objective: first, to enable the case to be examined and the facts to be established as precisely and correctly as possible, and, second, to ensure that the person concerned is in fact protected. The right to be heard is intended, in particular, to guarantee that any decision adversely affecting a person is adopted in full knowledge of the facts, and its purpose is to enable the competent authority to correct an error or to enable the person concerned to submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content[6].

The right of access to the file, enshrined in Article 41(2)(b) of the Charter, is designed to ensure the effective exercise of the rights of the defence[7]. Indeed, the

1 Article 41(2)(b) in conjunction with Article 41(1) of the Charter.

2 Explanations relating to the Charter of Fundamental Rights (OJ C 303, 14.12.2007, p. 17).

3 Judgment of 6 December 1994, *Lisrestal and Others v Commission*, T-450/93, EU:T:1994:290, paragraph 42 and judgment of 15 June 2006, *Dokter*, C-28/05, EU:C:2006:408, paragraph 74.

4 Judgment of 3 July 2014, *Kamino International Logistics BV*, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 28.

5 See to this effect, judgment of 25 March 2021, *Deutsche Telekom AG v Commission*, C-152/19 P, EU:C:2021:238, paragraph 105; judgment of 9 November 2017, *Ispas*, C-298/16, EU:C:2017:843, paragraph 26 and judgment of 17 December 2015, *WebMindLicences*, C-419/14, EU:C:2015:832, paragraph 84. See also judgment of 25 January 2007, *Dalmine v Commission*, C-407/04, EU:C:2007:53, paragraphs 58 to 61.

6 Judgment of 4 June 2020, *EEAS v De Loecker*, C 187/19 P, EU:C:2020:444, paragraph 69 and the case-law cited.

7 Judgment of 17 April 2024, *Cogebi and Others v Council*, T-782/22, paragraph 107; judgment of 2 October 2003, *Corus UK v Commission*, C-199/99 P, EU:C:2003:531, paragraph 126.

right of access to the file is a corollary of the principle of respect for the rights of the defence[8]. The right of access to the file is not an end in itself[9] but is intended to protect the rights of the defence[10]. Access to the file is thus one of the procedural guarantees intended to protect the rights of the defence and to ensure, in particular, that the right to be heard can be exercised effectively[11]. Conversely, in the absence of a right to be heard, there is no conceivable purpose for a right of access to the file pursuant to Article 41(2)(b) of Charter[12]. Therefore, the right to consult the file is another tool at the service of the right of defence and it also supports the right to be heard and its dual objectives. Conversely, Article 41 of the Charter does not grant a right of access to a file to persons who lack rights of the defence in the specific procedure[13].

These elements suggest that the right of access to the file has no independent existence of its own but needs to be seen and examined against the background of other rights and in light of the specific circumstances of each case. This holds true also in the context of ECB banking supervision and the administrative procedures opened in that context.

## 3 Legal framework governing the right of access to the ECB's file

ECB banking supervision[14] falls under Union administrative law and is characterised by frequent interactions between the Union administration (the ECB, in its role as a banking supervisor) and the parties to supervisory procedures[15]. Still, banking supervisory law is a branch of Union administrative law, and the due process

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8 Judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P, EU:C:2004:6, paragraph 68 and judgment of 1 July 2010, *Knauf Gips v Commission*, C-407/08 P, EU:C:2010:389, paragraph 22.

9 Opinion of Advocate General Léger of 13 December 1994 in C-310/93 P, EU:C:1994:408, points 97 and 98; opinions of Advocate General Mischo of 25 October 2001 in C-244/99 P, EU:C:2001:575, point 331 and in C-251/99 P, EU:C:2001:571, paragraph 125 and opinion of Advocate General Ruiz-Jarabo Colomer of 11 February 2003 in C-213/00, EU:C:2003:84, point 28.

10 Judgment of 30 September 2003, *Atlantic Container Line and Others v Commission*, T-191/98, EU:T:2003:245, paragraphs 376 and 377; judgment of 16 June 2011, *Solvay v Commission*, T-186/06, EU:T:2011:276, paragraph 214 and judgment of 18 December 1992, *Cimenteries CBR and Others v Commission*, T-10/92, EU:T:1992:123, paragraph 38.

11 Judgment in *Cimenteries CBR and Others v Commission*, T-10/92, cited above, paragraph 38 and judgment in *Hercules Chemicals v Commission*, C-51/92 P, cited above, paragraphs 75 and 76.

12 Judgment of 1 June 2022, *Antonio Del Valle Ruíz v Commission and Others*, T-510/17, EU:T:2022:312, paragraphs 464 and 465.

13 See, in this regard, judgments of 13 December 2018 in *Ryanair DAC and others v Commission*, T-53/16, EU:T:2018:943, paragraphs 50 to 53 and 63 and in *Ryanair DAC and others v Commission*, T-111/15, EU:T:2018:954, paragraphs 51 to 54 and 64. See also judgment of 22 March 2023, *Satabank v ECB*, T-72/20, EU:T:2023, paragraph 81.

14 This refers to the tasks carried out by the ECB pursuant to Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

15 In 2023, the ECB adopted 2403 supervisory decisions. See ECB Annual Report on supervisory activities 2023, March 2024, p. 68. Supervised entities are the primary subjects of ECB supervisory decisions. However, the legislator has conferred on the ECB the power to adopt certain types of decisions that are addressed to non-bank entities, such as for instance decisions concerning the acquisition of qualifying holdings in credit institutions (Article 15 of the SSMR).

provisions in that legal regime conform to the principles mentioned in the introduction.

The ECB is, like all Union institutions and bodies, subject to Article 41 of the Charter[16], but it also has its own detailed framework governing the right of access to the ECB's file. That framework is based on two acts in particular: Council Regulation (EU) No 1024/2013 (the 'SSMR') and ECB Regulation (EU) 468/2014[17] (the 'SSMFR').

As part of the due process for adopting supervisory decisions, Article 22 of the SSMR presents the right of access to the ECB's file as a means to effectively exercise the rights of the defence. In this regard, Article 22(2) of the SSMR provides that the rights of defence of the persons concerned must be fully respected in the proceedings, and these persons are entitled to have access to the ECB's file, subject to the legitimate interest of other persons in the protection of their business secrets[18].

Article 32 of the SSMFR further elaborates on the right of access to the ECB's file, again linking this procedural right to the rights of defence of the persons concerned, which shall be fully respected in ECB supervisory procedures. It is for this purpose, and after the opening of the ECB supervisory procedure, that the parties are entitled to have access to the ECB's file, subject to the legitimate interest of legal and natural persons other than the relevant party in the protection of their business secrets. The right to access the file does not extend to confidential information[19].

In this regard, Article 32 of the SSMFR makes explicit several conditions for the genesis of the right of access to the ECB's file. It refers to an ECB supervisory procedure and the timing of its opening, it refers to parties as the holders of the right of access to the file, and it alludes to the content of the file. Linked to this, Article 2(24) of the SSMFR defines an 'ECB supervisory procedure'[20], while Article 26(1) defines who is considered to be a "party to an ECB supervisory procedure". While no provision explicitly defines the temporal element, i.e. when a procedure is deemed to have been opened, one could infer from Article 26(1) and Article 28(1) of the SSMFR that this is either the point in time when an application was made to the ECB or, for procedures that are not initiated upon application, the point in time when it can be considered that the ECB intends to address an ECB supervisory decision to a party.

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16 Article 51 of the Charter, also mandating the application of the Charter by Member States when they are implementing Union law.

17 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

18 The provision of Article 22(2) of the SSMR is very similar to the provision of Article 27(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1). See in this regard, judgment of 28 March 2017, *Deutsche Telekom AG v Commission*, T-210/15, EU:T:2017:224, paragraph 37.

19 See also Article 41(2)(b) of the Charter and Article 22(2) of the SSMR.

20 With the clarification in Article 25(2) of the SSMFR that the rules do not apply to procedures carried out by the Administrative Board of Review.

The scope of the right of access to the file in the context of ECB banking supervision is fully consistent with the right of access to the file in other branches of Union administrative law. At the same time, this scope reflects the specificities of ECB banking supervision. It is therefore useful to analyse these specificities in the next section.

# 4 The specificities of the right of access to the ECB's file

The existence of the right of access to the ECB's file by parties to an ECB supervisory procedure can be understood by reference to several conditions, determined by the questions: *When*? *Who*? To *what*?

## 4.1 *When* does the right of access to the ECB's file arise?

The short answer is: after the opening of an ECB supervisory procedure.

The slightly longer answer, which derives from the general case law, is that the right of access to the ECB's file only exists once the rights of the defence materialise in relation to a potential ECB measure, which is liable to adversely affect a person. The text of Article 22 SSMR and Article 32 SSMFR explicitly links the right to access the file to the rights of the defence.

But in the context of ECB banking supervision, when do rights of the defence materialise? This is the case in particular once the ECB is minded to adopt a decision that will adversely affect a credit institution or another relevant party[21]. And the formulation of the ECB's tentative stance, including the intention to adopt a decision, could only manifest after the opening of an ECB supervisory procedure, whose objective is to form that ECB intention[22].

Indeed, as the General Court has held, a request for access to a file is based on the exercise of the rights of the defence, and such a request has no purpose in the absence of an administrative procedure affecting the legal interests of the applicant for access and, consequently, in the absence of a file concerning that person[23]. Moreover, the General Court has accepted that Article 22 of the SSMR and Article 32 SSMFR, in so far as they make access to the file subject to the opening by

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21 For example, a party which is adversely affected by an ECB supervisory decision could be the proposed acquirer of a qualifying holding in a credit institution, in case the ECB is minded to oppose the proposed acquisition or even if the ECB intends not to oppose the proposed acquisition, subject to ancillary provisions (e.g. conditions) other than those proposed by the proposed acquirers themselves. The ECB's intention will materialise by the notification to the proposed acquirer of a draft ECB decision opposing the acquisition, on which the proposed acquirer will be given the opportunity to provide comments in writing in the context of the right to be heard (Article 22(1) of the SSMR and Article 31 of the SSMFR).

22 See Article 32(1) of the SSMFR. The competence to carry out preparatory works regarding the supervisory tasks conferred on the ECB, and notably the preparation of supervisory decisions to be adopted by the Governing Council, is attributed to the Supervisory Board (See Article 26(8) of the SSMR).

23 Judgment in *Satabank v ECB*, T-72/20, cited above, paragraph 63 and case-law cited and judgment of 6 November 2024, *MeSoFa Vermögensverwaltungs AG v ECB*, T-632/22, EU:T:2024:782, paragraphs 34 and 51 and case-law cited.

the ECB of an administrative supervisory procedure, give credit institutions the opportunity to express their views during the decision-making process at issue, which adversely affects them, by acquainting themselves with the file compiled for the purposes of that procedure, and their provisions are therefore in line with Article 41 of the Charter[24]. What is quite certain from the above is that the right of access to the ECB's file does not exist in the absence of an ECB supervisory procedure[25].

### 4.1.1 The emphasis on a supervisory procedure raises the related question: What is an ECB supervisory procedure?

The ECB supervises directly a number of significant banks in the euro area, monitoring their management of risks and compliance with prudential requirements and imposing prudential supervisory measures, as appropriate. The ECB also adopts certain supervisory decisions in relation to less significant banks, which are otherwise directly supervised by national competent authorities. These facts do not entail that the mere competence of the ECB to adopt decisions addressed to a credit institution constitutes an ECB supervisory procedure giving rise to a right of access to the ECB's file[26]. Instead, an ECB supervisory procedure is the ECB activity liable to conclude with the adoption of an ECB decision, such as, for example, one of the 2403 supervisory decisions adopted by the ECB in 2023[27]. These decisions were preceded by ECB supervisory procedures in which the rights of defence for various parties may have been exercised[28].

A related question is: when does an ECB supervisory procedure start? The answer is not explicitly contained in the ECB legal framework but may be inferred from it and from the case law. In the first place, Article 26(1) and Article 28(1) of the SSMFR suggest that a procedure would be in place where an application has been made to the ECB by a person or when the ECB intends to address an ECB supervisory decision to a person. These two situations correspond to the mentioned case-law that refers to the fact that an institution is minded to adopt a decision which would adversely affect the individual[29]. On the one hand, in cases where an application has been submitted, the ECB is expected to form its position on the application and take a decision. On the other hand, where the ECB is proceeding to take a decision on its own initiative, the ECB will approach the possible addressees for a hearing[30].

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24 Judgment in *Satabank v ECB*, T-72/20, cited above, paragraph 82.

25 Judgment in *Satabank v ECB*, T-72/20, cited above, paragraph 81 and judgment of 6 October 2021, *OCU v ECB*, T-15/18, EU:T:2021:661, paragraph 94.

26 Judgment in *Satabank v ECB*, T-72/20, cited above, paragraphs 64 to 66.

27 ECB Annual Report on supervisory activities 2023, March 2024, p. 68.

28 One needs to be mindful that Article 31(1) SSMFR excludes the application of Article 31 on the right to be heard in relation to decisions taken on the basis of Section 1 of Chapter III of the SSM Regulation, namely requests for information.

29 Judgment of 18 December 2008, *Sopropé*, C-349/07, EU:C:2008:746, paragraph 36.

30 See Article 31(1) of the SSMFR regarding the implementation of the right to be heard in the context of ECB Banking Supervision.

Still, both of these scenarios show that the determination of the temporal element for the right of access to the ECB's file only by reference to the initiation of a procedure is not fully satisfactory. In particular, with respect to supervisory procedures triggered upon an application, a number of factors may mean that the genesis of the right of access to the ECB's file is not complete at an earlier stage. It may be that very early in the procedure the ECB has to conduct further investigation and to form its position on whether it is minded to approve or to reject the application, it may be that the applicant modifies or withdraws the application before the ECB reaches such a point and it may be that an applicant also applies for a decision which is not within the ECB's competence. With respect to supervisory procedures triggered at the ECB's initiative, a number of circumstances and findings may also lead to a modification of the tentative ECB position during the procedure, including the unilateral abandonment of any decision.

These elements suggest that while formally a right of access to the ECB's file may exist, in some respects, very early in the administrative procedure, its full manifestation as a tool guaranteeing respect for the rights of the defence may only come at a stage of the administrative procedure when the conclusions on which the ECB intends to base its decision have a certain stability. This is often the point in time when the ECB would give the persons concerned the possibility to make comments[31]. While this may not be the earliest possible time when the right of access to the ECB's file may theoretically be exercised, it is a time when it can nevertheless be exercised fully, ensuring effective protection of the rights of the defence, while at the same time ensuring procedural economy[32].

Irrespective of the above, in the vast majority of cases, a request for access to file is made only once a person receives a draft ECB decision and is hence seeking to make comments on it, in view of the file supporting such draft ECB decision.

### 4.1.2 What are the most common examples of ECB supervisory procedures where a right of access to the file has been exercised and scrutinised by the Union courts?

So far, the most common type of ECB supervisory procedure in which the right of access to the ECB's file has been confirmed has been the procedure leading to the ECB's decision to withdraw the licence of a credit institution[33]. In addition, the right of access to the file has been the subject of debate in annulment actions following a discussion about an ECB decision on the proposed acquisition of qualifying

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31 See Article 31(1) of the SSMFR.

32 See judgment in *Dalmine v Commission*, C-407/04, cited above, paragraphs 58 to 61. See also by analogy, order of the President of the Court of First Instance of 5 December 2001, *Commerzbank AG v Commission*, T-219/01 R, EU:T:2001:278, paragraph 38 and order of the President of the Court of First Instance of 27 January 2009, *Intel Corp. v Commission*, T-457/08 R, EU:T:2009:18, paragraph 57.

33 Judgment of 6 October 2021, *Ukrselhosprom PCF LLC and Others v ECB*, T-351/18 and T-584/18, EU:T:2021:669; judgment of 2 February 2022, *Pilatus Bank plc and Others v ECB*, T-27/19, EU:T:2022:46; judgment of 22 June 2022, *Anglo Austrian AAB AG and Others v ECB*, T-797/19, EU:2022:389; judgment of 30 November 2022, *Trasta Komercbanka AS v ECB*, T-698/16, EU:T:2022:737; judgment of 7 December 2022, *PNB Banka As v ECB*, T-230/20, EU:T:2022:782.

holdings[34]. Finally, the Court has reviewed the right of access to the file in a procedure leading to the adoption of an ECB decision classifying a supervised entity as significant[35]. The above-mentioned jurisprudence provides helpful clarifications about the right of access to the ECB's file, which are also discussed below.

### 4.1.3 Is the internal administrative review also an ECB supervisory procedure?

One additional element to be mentioned is that the right of access to the file could also be exercised during a review procedure before the Administrative Board of Review[36]. In this regard, Article 20 of the ABoR Operating Rules[37] generally follows the prescriptions of Article 32 of the SSMFR. As confirmed by the General Court, the entitlement to obtain access to the ECB's file within the internal administrative proceedings corresponds to the entitlement to obtain access to the ECB's file in an ECB supervisory procedure[38].

## 4.2 *Who* has the right of access to the ECB's file, once an ECB supervisory procedure is already ongoing?

The short answer is: the parties to an ECB supervisory procedure.

The slightly longer answer is that this would depend on the specific procedure and the scope of the decision which the ECB is minded to adopt.

As previously stated, the SSMFR defines parties to an ECB supervisory procedure as: (a) those making an application; and (b) those to whom the ECB intends to address or has addressed an ECB supervisory decision. In practice, the second category mostly comprises credit institutions, given the ECB's competences to adopt supervisory decisions, while the first category could comprise credit institutions, but also persons making an application, such as the proposed acquirer of qualifying holdings in a credit institution. An ECB decision may also be addressed to several persons at the same time, which could entail that there are several parties who may benefit from the right of access to the ECB's file.

In accordance with Article 32(1) of the SSMFR, only *the parties* to an ECB supervisory procedure can have a right of access to the file. Article 22(2) of the SSMR has a slightly different formulation, providing that *persons concerned* shall be entitled to have access to the ECB's file. This difference in formulation is not a

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34 Judgment of 11 May 2022, *Fininvest and Others v ECB*, T-913/16, EU:T:2022:279 (set aside on appeal) and judgment of 10 July 2024, *PH and Others v ECB*, T-323/22, EU:T:2024:460.

35 Judgment of 7 December 2022, *PNB Banka v ECB*, T-301/19, EU:T:2022:774.

36 See Article 24 of the SSMR.

37 Decision of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16) (OJ L 175, 14.6.2014, p. 47). However, the legal basis for granting access to the file during the administrative review procedure is not Article 32 SSMFR (see Article 25(2) of the SSMR).

38 Judgment in *Ukrselhosprom v ECB*, T-351/18 and T-584/18, cited above, paragraph 405.

difference in substance, since the meaning of both these expressions refers to those persons who may be adversely affected by an ECB decision. In this regard, the interchangeable use of the terms “persons concerned” or “undertakings concerned” and “parties to a procedure” as those being entitled to access the file of the procedure is well developed in Union law and in the related case law[39]. The terms “addressees of the decision”[40] and “addressees of the statement of objections”[41] are also often used. While various different terms are used, they denote the same circumstances – those persons which may be adversely affected by a contemplated measure by a Union authority will have a right of access to the file.

In the light of the above, it can be concluded that the type of ECB decision at the end of the supervisory procedure, its scope and its intended addressees, would define who would be the parties to the ECB supervisory procedure that are entitled to obtain access to the ECB’s file. For example, the General Court has considered that an ECB withdrawal decision is not addressed to the shareholders of the bank whose licence is being withdrawn and therefore such shareholders are not a party concerned for the purposes of Article 22(2) of the SSMR and Articles 26 and 32 of the SSMFR[42]. Similarly, the General Court held that, in the context of resolution, the right of access to the file concerns the entity that is the subject of the resolution scheme, and not its shareholders or creditors which “cannot claim a right of access to the file relating to the resolution procedure concerning [the resolved entity] and, consequently, a right of access to the confidential version of the FOLTF assessment of that entity[43]. Moreover, the Court of Justice has confirmed that the professional secrecy obligation limits the possibility for authorities to disclose confidential information to any other party than the entity which is itself failing or likely to fail[44].

## 4.3 To *what* does a party to an ECB supervisory procedure have access? *What* is in the ECB’s file?

The short answer is: to the ECB’s file.

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39 Judgment in *Cimenteries CBR and Others v Commission*, T-10/92, cited above, paragraphs 42 and 43, judgment in *Aalborg Portland and Others v Commission*, C-204/00 P, cited above, paragraph 72; judgment in *Deutsche Telekom AG v Commission*, T-210/15, cited above, paragraph 38; judgment of 16 January 2019, *Commission v UPS and Others*, C-265/17 P, EU:C:2019:23, paragraphs 31, 36 and 37 and judgment of 14 May 2020, *NKT Verwaltungs GmbH v Commission*, C-607/18 P, EU:C:2020:385, paragraph 263.

40 Judgment of 22 September 2022, GM, C-159/21, EU:C:2022:708, paragraphs 45 to 47 and judgment of 29 September 2021, *Ryanair DAC and Others v Commission*, T-448/18, EU:T:2021:626, paragraph 100.

41 Judgment of 27 April 2017, *FSL Holdings NV and Others v Commission*, C-469/15 P, EU:C:2017:308, paragraph 42.

42 Judgment in *Ukrselhosprom v ECB*, T-351/18 and T-584/18, cited above, paragraphs 402 and 403.

43 Judgment in *MeSoFa Vermögensverwaltungs AG v ECB*, T-632/22, cited above, paragraph 57, referring to the judgment of 1 June 2022, *Del Valle Ruíz and Others v Commission and SRB*, T-510/17, EU:T:2022:312, paragraphs 464 and 465. See also the judgment of 1 June 2022, *Eleveté Invest Group e.a. v Commission and SRB*, T-523/17, EU:T:2022:313, paragraph 503.

44 Judgment of 4 October 2024, *García Fernández and Others v Commission and SRB*, C-541/22 P, EU:C:2024:820, paragraphs 113 to 121 and judgment in *Eleveté Invest Group e.a. v Commission and SRB*, T-523/17, cited above, paragraphs 505 and 515.

The longer answer is that the boundaries of the ECB's file would depend on the specific procedure and the scope of the final decision which the ECB is minded to adopt.

Article 32(1) of the SSMFR already contains a definition of a file, referring to "all documents obtained, produced or assembled by the ECB during the supervisory procedure". Therefore, the General Court has held that, in the absence of an ongoing supervisory procedure, the documents in the ECB's possession, which mention a requester for access, cannot be equated with its 'file' within the meaning of Article 32 of the SSMFR[45].

These boundaries of the ECB's file within the SSM legal framework are fully consistent with the concept of a file as per the Charter. In particular, the General Court has considered that Article 41(2) of the Charter provides for a right of access to the file which is associated with the right of a person to have his or her affairs handled impartially, fairly and within a reasonable time by the administration. This right applies to access to the file of the person concerned by such cases, and not to all documents held by a given institution[46].

Indeed, in the context of the national tax provisions, Advocate General Bobek has considered that there is no right to see the complete file, but rather a right to have access to the key information or documents that form the basis for the administrative decision. Moreover, Advocate General Bobek considered that to the extent that documents do not form the basis of a decision, there is no obligation, as a matter of Union law, to give access to all the documents and information collected by the authority[47]. In line with this, the Court of Justice held that the file comprises the information and documents in the administrative file considered by the public authority when it adopted its decision[48].

In this regard, a number of documents which may refer to the party to an ECB supervisory procedure may nevertheless not be part of the specific ECB's file, if they are unrelated to that specific procedure and the decision that is to be taken at the end of that procedure. This is particularly the case for significant supervised entities which the ECB directly supervises on a daily basis and in respect of which the ECB is in possession of numerous documents. Still, each ECB supervisory procedure to which such a supervised entity would be a party would lead to the compilation of a dedicated ECB file which would include only the relevant documents in relation to the relevant decision, in turn representing a small fraction of all documents that the ECB holds in relation to the specific entity.

A similar situation may arise in relation to a less significant supervised entity, which is directly supervised by the national competent authority, for which the ECB is minded to adopt a certain decision. Not all documents relating to the entity, which were previously made available to the ECB by the national competent authority,

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45 Judgment in *Satabank v ECB*, T-72/20, cited above, paragraphs 63-67 and 92.

46 Judgment in *Satabank v ECB*, T-72/20, cited above, paragraph 80 and judgment in *MeSoFa Vermögensverwaltungs AG v ECB*, T-632/22, cited above, paragraph 49.

47 Opinion of Advocate General Bobek of 7 September 2017 in C-298/16, EU:C:2017:650, point 121.

48 Judgment in *Ispas*, C-298/16, cited above, paragraphs 32 and 39.

would form part of the respective ECB file. Instead, one would need to examine once more the scope of the decision which the ECB is minded to adopt. Hence, in the past, the General Court has held that a failing or likely to fail assessment adopted by the national competent authority on the basis of Article 32 of Directive 2014/59/EU[49] is not necessarily part of the ECB's withdrawal file[50].

### 4.3.1 Confidentiality exceptions

One additional clarification as to the scope of the ECB's file is warranted. Same as Article 41(2)(b) of the Charter, the ECB's legal framework circumscribes the right of access to the ECB's file, which does not extend to confidential information. In this regard, the well-known Baumeister[51] criteria become relevant once more in order to identify which information may be confidential[52]. One important example of documents that may be confidential and not made accessible as part of the ECB's file are internal documents and, in particular, some acts by national competent authorities as well as internal communications[53].

## 5 Interplay between the right of access to the ECB's file and the right of public access to ECB documents

The two rights – the right of access to a file and the right of public access – have existed in parallel for many years, being similar yet distinct tools to obtain access. Recent jurisprudence by Union courts has further clarified the interplay between these two rights, in particular the procedures for their exercise.

### 5.1 Historically these are separate tools

The Charter has established two distinct rights in Article 41(2)(b) and in Article 42 respectively. The first one is the right of persons concerned to access the file in the administrative procedure. The second one is the right of every EU citizen to access the documents of the European institutions and bodies. Since both of these rights refer to accessing certain documents held by Union authorities, they share some

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49 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

50 See in this regard, judgment in *Trasta Komercbanka AS v ECB*, T-698/16, cited above, paragraph 315 and judgment in *Ukrselhosprom v ECB*, T-351/18 and T-584/18, cited above, paragraph 181.

51 Judgment of 19 June 2018, *Bundesanstalt für Finanzdienstleistungsaufsicht v Baumeister*, Case C-15/16, EU:C:2018:464, paragraph 46.

52 See also Carmen Hernández Saseta, *The interaction between the rule of professional secrecy and the rights of defence. Access to files in supervisory procedures*., 2020 ESCB Legal Conference, p. 255.

53 See judgment in *Fininvest v ECB*, T-913/16 cited above, paragraph 194 (set aside on appeal). See also judgment of 13 September 2018, *UBS Europe and Others*, C-358/16, EU:C:2018:715, paragraph 66 and the case-law cited.

characteristics. Indeed, the Court of Justice has highlighted the similarity between the two rights, noting that:

*"Whatever the legal basis on which it is granted, access to the file enables the interested parties to obtain all the observations and documents submitted to the Commission, and, where appropriate, adopt a position on those matters in their own observations, which is likely to modify the nature of such a procedure."*[54]

However, a closer look at the rules governing these rights and at the case law confirms that these are clearly two distinct rights with two different contours. First, Articles 41 and 42 of the Charter refer to two different sets of beneficiaries of the rights. In one case, it is persons who would be affected by a decision of a Union institution or body[55]; in the other case it is any EU citizen or a person residing or having its registered office in a Member State[56]. Second, the objectives of the two rights are different: the regime for access to a file by concerned persons is intended to promote due process while the regime for public access to documents is intended to promote transparency[57]. Third, the scope of the access received may be quite different, given that in one case the content of the file is defined by reference to the link existing between a document and a specific procedure, while in the other case, it is for the requester to define the documents to which it seeks public access. Fourth, the exercise of the two rights is detailed in different legal acts, setting out two different procedures[58].

The Court of Justice confirmed that each of the two regimes is to be applied separately, but in a manner which is compatible with the other and which enables a coherent application of both[59]. Therefore, in the specific context where a public access request was made for documents part of the Commission's file, the Court of Justice has interpreted the public access provisions in such a way so as not to undermine the effectiveness of the access to file regime, thereby holding that generalised access, on the basis of Regulation (EC) No 1049/2001[60], to the documents in a file relating to a competition proceeding would jeopardise the

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54 Judgment of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 59.

55 Persons falling within the hypothesis of Article 41(2)(b) of the Charter enjoy the right of access to a file irrespective of their citizenship or whether the person resides or has its registered office in a Member State.

56 Any EU citizen enjoys the right of public access to documents, irrespective of whether any decision is contemplated or not.

57 See for example, judgment of 28 June 2012, Commission v Agrofert Holding, C-477/10 P, EU:C:2012:394, paragraphs 51 and 52; judgment of 28 June 2012, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraphs 109 and 110; judgment of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraphs 83 and 84; judgment of 13 September 2013, *Netherlands v Commission*, T-380/08, EU:T:2013:480, paragraph 31; judgment of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 59; judgment of 28 March 2017, *Deutsche Telekom v Commission*, T-210/15, EU:T:2017:224, paragraph 35 and judgment of 26 May 2016, *International Management Group v Commission*, T-110/15, EU:T:2016:322, paragraphs 32 and 36.

58 In the context of ECB supervision, the right of access to the file is governed by Article 22 SSMR and Article 32 SSMFR, whereas the public access to ECB documents is governed by Decision ECB/2004/3.

59 See to this effect, judgment in *Commission v Agrofert Holding*, C-477/10 P, cited above, paragraph 52.

60 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31/05/2001, p. 43).

balance which the Union legislature sought to ensure in the sectoral rules establishing the right of access to the Commission's file, which subject that access to the requirements of professional secrecy and business secrecy[61]. Still, there are very clear boundaries between the two regimes and the Court of Justice has rejected the request to obtain a 'privileged' public access, holding that the right of public access does not protect the particular interest which a specific individual may have in gaining access to specific documents and a person concerned cannot seek to exercise their right of access to a file through the mechanisms of public access[62].

## 5.2 Access to the ECB's file and public access to ECB documents are also distinct tools

The distinction between the right of access to the file and the right of public access to documents is equally maintained in the context of ECB banking supervision. The former is in place to preserve the rights of the defence and due process while protecting confidential information; the latter has the objective to ensure the greatest possible transparency of the ECB's decision-making process, subject to legitimate restrictions[63]. The exercise of the two rights is governed by the two different regimes. As noted, the right of access to the ECB's file is governed by the SSMR and the SSMFR, while the right of public access to ECB documents is governed by Decision 2004/258[64]. On the one hand, the right of access to the ECB's file can be exercised after the opening of the ECB supervisory procedure, by parties and only in respect of the documents on the file, which are not confidential. On the other hand, right to public access is not constrained by any specific supervisory procedure (its existence, the moment of its opening), the beneficiary need not be a party to any such proceedings or enjoy rights of the defence, and the confidentiality rules are slightly different (the requester for public access cannot invoke any specific status, while when access to the ECB's file is requested, the assessment takes into account that certain information is not confidential vis-à-vis the applicant in view of its prior knowledge[65]). The disclosure under the access to the ECB's file regime has *inter partes* effects, allowing the party to consult the documents, in order to exercise its rights of defence, while the disclosure under the public access regime has *erga omnes* effects[66]. It follows that, while a supervised credit institution may obtain access to the parts of the ECB's file containing confidential information of that same

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61 Judgment in *Commission v EnBW*, C-365/12 P, cited above, paragraphs 87 to 90.

62 Judgment of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraphs 43, 48 and 52; judgment of 6 October 2021, *Aeris Invest Sàrl v ECB and Others*, T-827/17, EU:T:2021:660, paragraph 319 and judgment of 6 November 2024, *MeSoFa Vermögensverwaltungs AG v ECB*, T-790/22, EU:T:2024:783, paragraphs 32 to 34.

63 Judgment in *Satabank v ECB, T-72/20*, cited above, paragraphs 80 and 123; judgment in *MeSoFa Vermögensverwaltungs AG v ECB*, T-632/22, cited above, paragraph 56 and judgment in *MeSoFa Vermögensverwaltungs AG v ECB*, T-790/22, cited above, paragraph 29.

64 Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) (OJ L 80, 18.3.2004, p. 42).

65 Judgment of 27 April 2023, *Aeris Invest Sàrl v ECB*, C-782/21 P, EU:C:2023:345, paragraphs 39 and 40 and judgment in *Satabank v ECB*, T-72/20, cited above, paragraphs 80.

66 Judgment of 21 October 2010, *Agapiou Joséphidès v Commission and Others*, T-439/08, EU:T:2010:442, paragraph 116 and judgment of 26 April 2016, *Guido Strack v Commission*, T-221/08, EU:T:2016:242, paragraph 128.

institution, such institution may not obtain access to these very same documents under the public access regime, since this disclosure would force the ECB to make them accessible to the public.

## 5.3 The interplay between the two rights

Given the significant differences between the two access regimes, it is important to correctly identify which regime applies in which case. As a rule, the nature of the request for access would determine which right the requester is seeking to exercise[67] and which regime the ECB must apply in assessing the request.

In theory, different requests made under these two different regimes with different objectives should be easy to distinguish, but is that the case in practice? The Court of Justice had encountered only a handful of cases where it had to consider potentially applying the two regimes for access in parallel in relation to the same facts. On those occasions, the Court of Justice sought to interpret the nature of the initial request for access, as well as the nature of the reply by the Union institution, in order to establish which regime applied[68].

A significant clarification on the interpretation of requests for access was made in the *Dragnea* judgment, in which the Court of Justice was faced with a request for access to OLAF's investigation file made on the basis of sectoral implementation of Article 41 of the Charter[69]. This request was processed by OLAF as being a request for access to a file only and was rejected[70]. The Court of Justice held, in essence, that Union authorities should be accommodative in interpreting requests for access, particularly where the authorities are minded to reject the entitlement of a person to obtain access to the file[71]. Hence, the judgment in *Dragnea* suggested that the public access regime may in specific cases act as a sort of fall-back solution to the access to the file that had been refused [72].

The *Dragnea* solution on the interaction between the right of access to the file and the right of public access to documents was implemented by the General Court, vis-à-vis the ECB, in the *Satabank* judgment[73]. In that specific case, *Satabank*, a less significant entity directly supervised by a national competent authority, made a request to the ECB for access to the file pertaining to that entity. Since there was no

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67 See, by analogy, judgment of 24 November 1992, *Buckl and Others v Commission*, C-15/91 and C-108/91, EU:C:1992:454, paragraph 22.

68 For example, judgment in *Deutsche Telekom AG v Commission*, T-210/15, cited above, paragraphs 112 and 115; judgment of 4 October 2018, *Daimler AG v Commission and Others*, T-128/14, EU:T:2018:643, paragraphs 55 to 65; judgment of 29 February 2016, *Schenker v Commission*, T-265/12, EU:T:2016:111, paragraph 349; judgement of 14 February 2019, *RE v Commission*, T-903/16, paragraphs 35 to 39; judgment of 20 December 2023, *OCU v SRB*, T-496/18, EU:T:2023:857, paragraph 38; and judgment of 13 November 2024, *Rems Kargins v Commission*, T-110/23, EU:T:2024:805, paragraphs 137 and 138.

69 Judgment of 13 January 2022, *Dragnea v Commission*, C-351/20 P, EU:C:2022:8.

70 Judgment in *Dragnea v Commission*, C-351/20 P, cited above, paragraph 18.

71 Judgment in *Dragnea v Commission*, C-351/20 P, cited above, paragraph 75.

72 See also judgment of 30 November 2023, '*Sistem ecologica' production, trade and services d.o.o. Srbac, v Commission*, C-787/22 P, EU:C:2023:940, paragraphs 79 to 81.

73 Judgment in *Satabank v ECB*, T-72/20, cited above.

ECB supervisory procedure at that time, the ECB refused to grant any access to a file. The General Court confirmed the ECB's reasoning with regard to the absence of a right of access to the ECB's file[74], but considered that in the specific case, since no supervisory procedure was pending, and therefore no 'file' within the meaning of Article 32 of the SSMFR existed, that request should have been examined by the ECB as a request for public access to ECB documents on the basis of the general provisions, in particular Decision 2004/258[75].

With this in mind, the *Satabank* judgment suggests that, in those specific circumstances, the ECB had to conduct two subsequent examinations of the very same request for access, under the two different regimes. Still, the *Satabank* judgment does not suggest that the parameters of the two distinct regimes need to be merged[76]. *Satabank* only suggests that a request by a specific person who seeks to exercise the right of access to the ECB's file may, in specific circumstances, be interpreted also as a request seeking to exercise a distinct right: the right of every EU citizen[77] to have public access to the ECB documents.

## 5.4 Practical considerations and outcomes

What does the *Satabank* judgment entail in practice?

Supervised entities and those persons that may be the addressee of an ECB supervisory decision would usually be made aware that the ECB is minded to adopt such a decision when they are invited to exercise their right to be heard on a draft ECB supervisory decision adopted by the Supervisory Board[78]. It is on that occasion that those parties may exercise their right of access to the respective ECB file[79] by making a request to the ECB.

Outside such situations, and where the requester does not have such a right of access to the ECB's file, the ECB must be accommodative in interpreting any request for access, and if the request fulfils the requirements of Decision 2004/258 – notably, be made in writing and sufficiently precise – process it also as a request for public access to documents. In such a case, however, a requester cannot rely on any particular alleged status vis-à-vis an ECB supervisory procedure or a decision, but will exercise a right with the same content as the right of access of any other EU citizen[80]. This latter point could suggest that parties may have a lesser incentive to request public access, as they will likely obtain less comprehensive access under

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74 Judgment in *Satabank v ECB*, T-72/20, cited above, paragraphs 49 to 93.

75 Judgment in *Satabank v ECB*, T-72/20, cited above, paragraph 131.

76 See also judgment in *MeSoFa Vermögensverwaltungs AG v ECB*, T-790/22, cited above, paragraphs 35 and 36.

77 As well as any natural or legal person residing or having its registered office in a Member State.

78 Article 31 of the SSMFR.

79 The ECB is not required to proactively grant access in the absence of a request to this end. See judgment in PNB Banka v ECB, T-301/19, cited above, paragraph 127.

80 As well as any natural or legal person residing or having its registered office in a Member State.

that regime than under the access to the file regime, where they may seek to benefit from a special status.

The *Satabank* judgment confirms this setup, also from the perspective of judicial review. A requester who had requested access to a file may seek to challenge the ECB reply to that request against the conditions of both Article 41 and Article 42 of the Charter. It is true that if the requester was in fact a party to an ECB supervisory procedure for which it requested access to the corresponding file, it is likely that its action referring to Article 41 of the Charter would be inadmissible as it would be addressed against an ECB preparatory act[81]. However, such a party still has the conventional route of challenging any ECB reply based on the SSMR and the SSMFR in the context of the action against the final ECB decision. In those proceedings, the party can also invoke its specific status and any purported infringement of its rights of defence and on that basis alone seek to have the decision annulled. Conversely, an action challenging the ECB reply, which is based on Article 42 of the Charter, may be admissible on its own, but the party status would not be a relevant consideration.

## 6 Conclusion

The right of access to the ECB's file by parties to an ECB supervisory procedure is regulated by the detailed SSM legal framework and has been extensively clarified in recent case law relating to ECB banking supervision. Consistently with the prescriptions of Article 41 of the Charter, the right of access to the ECB's file only materialises once the ECB is minded to adopt a specific supervisory decision and once the ECB has initiated a supervisory procedure to that end. The right extends only to parties to the procedure and does not extend to all documents in the ECB's possession, but only to those documents that are considered by the ECB for the adoption of its prospective decision.

The right of access to the ECB's file is distinct from the right of public access to ECB documents. Each of these rights is exercised in accordance with a distinct procedure, and that exercise is likely to yield different outcomes. While recent case law suggests that the ECB should be accommodative in interpreting requests for access, it remains the case that each of the two rights is designed and best-suited for different specific purposes. Parties to an ECB supervisory procedure, once notified of the ECB's intention to adopt a decision affecting them, would likely obtain a more meaningful access through exercising their right of access to a file, which would also allow them to seek to argue what should be the content of the final ECB decision. Conversely, in the absence of an ECB supervisory procedure, or lacking

[81] Judgment in *Cimenteries CBR and Others v Commission*, T-10/92, cited above, paragraph 48. See also judgment in *Satabank v ECB*, T-72/20, cited above, paragraphs 16 and 17. However, it should be noted that in the case where no ECB supervisory procedure was pending at the time of the request, the General Court held that the ECB's response to a request for access to the ECB's file was a separately reviewable act. See judgment in *Satabank v ECB*, T-72/20, cited above, paragraphs 18 to 20 and judgment *MeSoFa Vermögensverwaltungs AG v ECB*, T-632/22, cited above, paragraphs 29 to 31.

party status, any EU citizen, even be it an SSM credit institution, may have a better route to obtaining access to ECB documents via a simple public access request.

# Access to the file and access to documents under the SRB regime

Laurent Forestier*

## 1 Introduction

The right of access to the file and the right of public access to documents are both, yet distinct, fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union ("Charter"). They apply in the context of the Banking Union including its Second Pillar, the Single Resolution Mechanism (SRM).

As the central resolution authority within the Banking Union, the Single Resolution Board (SRB) has to ensure that those two rights can be effectively exercised. To that end, the SRB founding regulation, Regulation 806/2014 (SRMR),[1] includes specific provisions on the right of access to the file and the right of public access to documents.

The present contribution will examine how the right of access to the file (1.) and the right of public access to documents (2.) can be exercised under the SRMR.

## 2 Right of access to the file

The right of access to the file is guaranteed by Article 41(2)(b) of the Charter. That provision states that "[e]very person" has "the right […] to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy". The right of access to the file is designed to ensure that a person who may be adversely affected by a measure to be adopted by an European Union (EU) body can effectively exercise her/his rights of the defence, in particular her/his right to be heard.[2] The right of access to the file, together with the right to be heard, is part of the due process.[3]

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* Senior Member of the Legal Service of the Single Resolution Board. The views and opinions expressed in this article are the personal views and opinions of the author, and do not necessarily reflect the position of the organisation that the author works for. The author is grateful to Karl-Philipp Wojcik, Joan Rius Riu and his co-panellists for their comments on the presentation made during the ESCB Legal Conference and the present contribution. Any remaining errors are the responsibility of the author.

1 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 1-90.

2 See above the contribution of Lefterov, A. *"Access to ECB's file by parties to an ECB supervisory procedure"*.

3 Wojcik, K-P. (2016), "Primary law requirements for administrative procedures in the caselaw of the Court of Justice" in *ESCB Legal Conference 2016*, p. 214 et seq., available at: https://www.ecb.europa.eu/pub/pdf/other/escblegalconference2016_201702.en.pdf

In the context of the SRM, the right of access to the file is governed by Article 90(4) of the SRMR. According to that provision, "[p]ersons who are the subject of the Board's decisions shall be entitled to have access to the Board's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or internal preparatory documents of the Board". Article 90(4) of the SRMR essentially mirrors the content of Article 41(2)(b) of the Charter. It guarantees the right of access to the file, but also introduces two limits to that right.

The first limit concerns the persons who can exercise the right of access to the SRB's file. Article 90(4) of the SRMR limits that right to the "persons who are the subject of the Board's decisions". The identity of those persons will depend on the nature of the SRB's[4] decisions. When the SRB adopts a resolution scheme in accordance with Article 18 of the SRMR, the General Court found that "persons who are the subject of the Board's decisions" mean the bank which is subject to the resolution scheme, and not its shareholders or creditors[5] or an association of former shareholders.[6]

The second limit concerns the nature of information included in the SRB's file. The right of access to the SRB's file is "subject to the legitimate interest of other persons in the protection of their business secrets". In other words, the SRB must not grant access to its file, where that access would lead to the disclosure of information that may adversely affect the commercial interests of other persons.

In the same vein, the right of access to the SRB's file does not extend to "confidential information or internal preparatory documents of the Board". That limit ensures that the SRB will protect confidential information collected in the course of its activities, in accordance with the obligation of professional secrecy set out in Article 88(1) of the SRMR. That provision essentially prohibits the SRB from disclosing confidential information received during the course of its activities, to third parties.

In the *Baumeister* judgment, the Court of Justice found that the rationale behind the obligation of professional secrecy set out in Article 54(1) of Directive 2004/39 (MiFID I) was to ensure the effective monitoring of the activities of investment firms through supervision by giving the confidence to the supervised entities and the competent authorities that the confidential information they exchange will remain confidential.[7] In the *Buccioni* judgment, the Court found that the same rationale applied in the context of prudential supervision.[8]

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4 For the purpose of this contribution, the terms "Board" and "SRB" are used interchangeably.

5 Judgment of 1 June 2022, *Del Valle Ruiz* v *Commission and SRB*, case T-510/17, EU:T:2022:312, para. 464.

6 Judgment of 20 December 2023, *Organización de Consumidores y Usuarios* (*OCU)* v *SRB*, case T-496/18, EU:T:2023:857, para. 37.

7 Judgment of 19 June 2018, *Bundesanstalt für Finanzdienstleistungsaufsicht* v *Ewald Baumeister*, case C-15/16, EU:C:2018:464, para. 31 ; see also, Sarmiento, D. (2021), "Confidentiality and access to documents in the Banking Union", para. 11.35, in Zilioli, C. and Wojcik, K-P. (eds), *Judicial Review in the European Banking Union*.

8 Judgment of 13 September 2018, *Enzo Buccioni* v *Banca d'Italia*, case C-594/16, EU:C:2018:717, para. 27.

In several judgments rendered in cases involving the SRB, the General Court referred to that specific finding of the *Baumeister* judgment and found that Article 88(1) of the SRMR was the equivalent of Article 54(1) of MiFID I.[9] In a recent order rendered in the *Aeris Invest v SRB* case, the General Court found the *Baumeister* judgment applied by analogy in that case.[10] It can be inferred from those judgments and order that the rationale behind the obligation of professional secrecy identified in the *Baumeister* judgment applies in the context of bank resolution.

Article 88 of the SRMR does not define what confidential information is. Instead, Article 88(5) of the SRMR requires the SRB to identify whether a given piece of information is confidential by assessing, "in particular", the potential effects of the disclosure "on the public interest as regards financial, monetary or economic policy, on the commercial interests of natural and legal persons, on the purpose of inspections, on investigations and on audits". The use of "in particular" suggests that there may be other ways to identify confidential information.[11]

Article 88(5) of the SRMR requires that, when the information concerns the contents and detail of resolution plans, the result of resolvability assessment or the resolution scheme, the SRB has to conduct a specific assessment of the effect of the disclosure. The General Court however acknowledged that there is a presumption resulting from recital 116 of the SRMR that some of the information contained in the resolution scheme, in valuation 2 and in the documents upon which the SRB relies when it adopts a resolution scheme, is covered by professional secrecy and is confidential.[12]

## 3 Right of public access to documents

The right of public access to documents is guaranteed by Article 15(3) of the Treaty on the Functioning of the European Union (TFEU) and Article 42 of the Charter. The right of public access to documents is intended to promote transparency.[13] The Council and the Parliament adopted Regulation 1049/2001[14] in accordance with Article 15(3) of the TFEU. That Regulation lays down the principles and limits on the right of public access to the documents of the EU bodies.

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9 *Del Valle Ruiz* v *Commission and SRB*, case T-510/17, para. 473; judgment of 1 June 2022, *Eleveté Invest Group, SL* v *SRB*, case T-523/17, EU:T:2022:313, para. 518; and, judgment of 1 June 2022, *Aeris Invest* v *SRB*, case T-628/17, EU:T:2022:315, para. 372.

10 Order of 16 July 2024, *Aeris Invest* v *SRB*, case T-62/18, para. 86.

11 See for example, *Bundesanstalt für Finanzdienstleistungsaufsicht* v *Ewald Baumeister*, case C-15/16, para. 35.

12 *Eleveté Invest Group, SL* v *SRB*, case T-523/17, paras. 486 and 515.

13 See above, Lefterov, A. "Access to ECB's file by parties to an ECB supervisory procedure".

14 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31/05/2001, p. 43-48.

Public access to documents held by the SRB is governed by Regulation 1049/2001.[15] The SRB adopted "practical measures for applying" that Regulation[16] by means of its own decision on public access to its documents.[17]

Two notable aspects of public access to documents under the SRB regime are the recourse to the SRB Appeal Panel in case of refusal to grant that access (A.) and, the "indirect" public access to documents originating from the European Central Bank (ECB) through the SRB (B.).

## 3.1 Legal remedy: the SRB Appeal Panel

Regulation 1049/2001 provides for a two-step administrative procedure. The applicant has, first, to file an initial application.[18] If the EU body refuses totally or partially to grant access to the documents requested, the applicant may then file a confirmatory application asking the EU body to reconsider its position.[19] If the EU body maintains its refusal to grant access in a confirmatory response, the applicant may then lodge an action for annulment against that confirmatory response before the General Court or file a complaint before the European Ombudsman.[20]

Article 90(3) of the SRMR provides for an additional remedy, an appeal before the SRB Appeal Panel ("Appeal Panel"), that has to be exercised before initiating proceedings before the General Court or the European Ombudsman. The Appeal Panel is an internal board of appeal, independent from the SRB,[21] that is responsible for reviewing the legality of certain decisions of the SRB, including confirmatory responses refusing to grant public access to documents.[22]

According to Article 90(3) of the SRMR, when the SRB maintains its refusal to grant public access to documents in a confirmatory response, the applicant must appeal that confirmatory response before the Appeal Panel. If the Appeal Panel dismisses the appeal, the Applicant may then lodge an action for annulment against the decision of the Appeal Panel before the General Court or file a complaint before the European Ombudsman. The judgment of the General Court may be appealed before the Court of Justice, subject to the filter mechanism laid down in Article 58a of the Statute of the Court of Justice.

The jurisdiction of the Appeal Panel is limited to the review of the legality of the confirmatory response. The Appeal Panel does not have jurisdiction to examine an appeal against a decision refusing to grant access to the file.[23] The Appeal Panel

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15 Article 90(1) of the SRMR.

16 Article 90(2) of the SRMR.

17 Decision of the Executive Session of the Board of 9 February 2017 on public access to the Single Resolution Board documents (SRB/ES/2017/01).

18 *Article 7 of Regulation 1049/2001.*

19 Article 8 of Regulation 1049/2001.

20 Article 8(1) of Regulation 1049/2001.

21 Article 85(5) of the SRMR.

22 Article 85(3) of the SRMR, which refers to Article 90(3) of the SRMR.

23 *Organización de Consumidores y Usuarios* (*OCU)* v *SRB*, case T-496/18, para. 49.

does not have the power to amend the confirmatory response, or to decide whether the documents requested have to be disclosed.[24]

The Appeal Panel has the power to either dismiss the appeal against the confirmatory response or, it finds that the appeal is founded, to remit the confirmatory decision to the SRB. In that latter case, the SRB has the obligation to amend the confirmatory response,[25] notably in light of the findings of the Appeal Panel.

## 3.2 The "indirect" public access to ECB Documents

As part of their cooperation, the ECB and the SRB may exchange documents, and the SRB may end up holding documents originating from the ECB ("ECB documents"). Since Regulation 1049/2001 applies to documents "held by an institution", including documents "received by it and in its possession",[26] ECB documents held by the SRB fall within the scope of that Regulation. Thus, it may be possible to gain "indirectly" public access to those documents, through the SRB.

The "indirect" public access to ECB documents raises two main concerns:[27]

- The risk to circumvent the specific rules adopted by the ECB on public access to its own documents; [28] and,
- The risk to undermine the effectiveness of bank resolution, and more specifically the confidence of the ECB that it can share confidential information with the SRB that will not be eventually disclosed to third parties.

There are, however, safeguards in place in order to address those concerns. Those safeguards can be divided into "substantive" and "procedural" safeguards.

There are two "substantive" safeguards. The first one is the exceptions to the right of public access to documents set out in Article 4(1) to (3) of Regulation 1049/2001. Those exceptions protect interests which could be undermined by the disclosure of documents. When the SRB considers that the disclosure of ECB documents would undermine the protection of one, or more, of the interest(s) set out in Article 4(1) to (3) of Regulation 1049/2001, it must refuse to grant access to the documents requested.

Exceptions to the right of public access to documents are divided into two categories: the "absolute" exceptions listed under Article 4(1) of Regulation 1049/2001, which always prevail over the right of public access to documents; and, the "relative" exceptions listed under Article 4(2) and 4(3) of Regulation 1049/2001,

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24 *Aeris Invest* v *SRB*, case T-62/18, para, 31.

25 Article 85(8) of the SRMR.

26 Article 2(3) thereof.

27 Decision of the Appeal Panel of 10 May 2023, case 7/22, para. 99.

28 Decision of the ECB 2004/258/EC of 4 March 2004 on public access to ECB documents, OJ L 80, p. 42-44.

which can be overridden if the applicant can demonstrate that there is a public interest justifying the disclosure of the documents requested.[29]

The second “substantive” safeguard is the obligation of professional secrecy set out in Article 88(1) of the SRMR. The obligation of professional secrecy is not among the exceptions to public access set out in Article 4(1) to (3) of Regulation 1049/2001. Therefore, the SRB cannot rely upon Article 88(1) of the SRMR to refuse to grant public access to ECB documents. However, confidential information included in ECB documents is protected by professional secrecy. Its disclosure would constitute a breach of Article 88(1) of the SRMR.

The SRB has therefore to reconcile the right of public access to documents with the obligation of professional secrecy by applying Article 88(1) of the SRMR and Regulation 1049/2001 in a manner which is compatible with each other and enables them to be applied consistently.[30]

A consistent application of Article 88(1) of the SRMR and Regulation 1049/2001 is facilitated by the fact that they both ensure the protection of the same interests.

Article 88(5) of the SRMR requires the SRB to identify confidential information protected by professional secrecy by assessing the potential effects of the disclosure of the information concerned on (i) the public interest as regards financial, monetary or economic policy, (ii) on the commercial interests of natural and legal persons, (iii) on the purpose of inspections, on investigations and on audits. Those three interests correspond to the interests protected by the exceptions listed under Article 4(1)(a), fourth indent and Article 4(2) first and third indent of Regulation 1049/2001 respectively.

There is therefore an overlap between Article 88(5) of the SRMR and Article 4 of Regulation 1049/2001, which the General Court acknowledged in its order rendered in the *Aeris Invest v SRB* case. The General Court held when the Appeal Panel had found certain information included in the documents requested may be covered by the exception set out in Article 4(1)(a), fourth indent of Regulation 1049/2001, the Appeal Panel had merely reminded the scope of the duty to confidentiality set out in Article 88(5) of the SRMR.[31]

It follows that, if ECB documents were to contain confidential information within the meaning of Article 88(5) of the SRMR, the SRB may likely consider those documents (or part(s) thereof) are covered by one, or more, of the exception(s) set out in Article 4(1)(a), fourth indent, and Article 4(2), first and third indent of Regulation 1049/2001.

The “procedural” safeguard is the consultation mechanism set out in Article 4(4) of Regulation 1049/2001. When the SRB receives a request for public access to ECB documents, the SRB must consult the ECB in order to assess whether an exception set out in Article 4(1) to (3) of Regulation 1049/2001 is applicable, unless it is clear

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29 Judgment of 1 February 2023, *ClientEarth* v *Commission*, case T-354/21, EU:T:2023:34, para. 92 and the case-law cited.

30 See to that effect, judgment of 28 March 2017, *Deutsche Telekom* v *Commission*, case T-210/15, EU:C:2014:112, para. 25 and the case-law cited.

31 *Aeris Invest* v *SRB*, case T-62/18, para. 76.

that the documents must or must not be disclosed. It is the SRB which decides ultimately whether the exception applies.

## 4 Conclusion

The SRMR, either directly or indirectly, guarantees the right of access to the file and the right of public access to documents, but it also introduces limits to them. The SRMR thereby strikes a balance between the effective exercise of those fundamental rights and the effective functioning of the SRM.[32]

[32] See also, Sarmiento, D. (2021), "Confidentiality and access to documents in the Banking Union", para. 11.68, in Zilioli, C. and Wojcik, K-P. (eds), *Judicial Review in the European Banking Union*.


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# Part VI

# The new EU anti-money laundering framework, its impact on the banking sector and its relevance for central banks

# AMLA's role and powers in supervision

Claude Bocqueraz*

## 1 Background

Money laundering and terrorism financing (ML/TF) pose a serious threat to the integrity of the EU economy and financial system and to the security of its citizens. On 7 May 2020, the Commission presented an Action Plan for a comprehensive Union policy on preventing money laundering and terrorism financing. The Action Plan set out the measures that the Commission will undertake to better enforce, supervise and coordinate the EU's rules in this area, with six priorities:

4. Ensuring effective implementation of the existing EU AML/CFT framework
5. Establishing an EU single rulebook on AML/CFT
6. Bringing about EU-level AML/CFT supervision
7. Establishing a support and cooperation mechanism for Financial Intelligence Units
8. Enforcing EU-level criminal law provisions and information exchange
9. Strengthening the international dimension of the EU AML/CFT framework.

Pillars 2, 3 and 4 of the Action Plan required legislative action. On 20 July 2021, the European Commission proposed an ambitious package of legislative proposals to deliver a stronger and consistent set of anti-money laundering and countering the financing of terrorism (AML/CFT) rules at EU level.

This package has now been agreed by the co-legislators. The new Union's AML/CFT framework will rest on four legal acts which constitute an ambitious set of measures to modernise the EU's AML/CFT regime:

- A Regulation establishing an EU AML/CFT Authority in the form of a decentralised EU regulatory agency[1];
- A Regulation on AML/CFT, containing directly applicable AML/CFT rules, including a revised EU list of entities subject to AML/CFT rules (known as obliged entities)[2];

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1 Regulation - EU - 2024/1620 - EN - EUR-Lex (europa.eu)

2 Regulation - EU - 2024/1624 - EN - EUR-Lex (europa.eu)

- A Directive on AML/CFT, replacing the existing EU AML/CFT Directive (Directive 2015/849 as amended) and containing provisions not appropriate for a Regulation and requiring national transposition, such as rules concerning national supervisors and Financial Intelligence Units in Member States[3];

- A recast of the 2015 Regulation on Transfers of Funds (Regulation 2015/847)[4].

When proposing the AML/CFT package in July 2021, the objective of the Commission was to move away from the current minimum harmonization framework. The AML Regulation and TFR recast set out rules that apply directly to the private sector across the internal market, ensuring that the same measure is applied in response to the same level of risk.

The agreement also covers the institutional side of the Union AML framework with the creation of a new EU authority to fight money laundering (AMLA). AMLA will be at the core of the system implementing the new framework. The Authority was established in June 2024, with the aim to start most of its activities in mid-2025, reach full staffing in 2027, and begin direct supervision of certain high-risk financial entities in 2028.

## 2 The governance of AMLA

The Authority will have a Chair and an Executive Director. The Chair will represent the Authority and be responsible for preparing the work of the two collegial governing bodies, the General Board and the Executive Board. The Executive Director will be in charge of the day-to-day management of the Authority.

The governance system of AMLA reflects AMLA's two main areas of activity: supervision and supporting cooperation and joint analysis by national Financial Intelligence Units (FIUs). AMLA will therefore have a General Board in two compositions: a) the heads of the Member States supervisory authorities and 2) the heads of the Member States FIUs. The General Board will take all the policy and regulatory decisions of the agency, in the appropriate composition. AMLA will have an independent Executive Board (composed of the Chair and five more full time permanent members), which will take decisions addressed to obliged entities and individual supervisors as well as the decisions on administrative and budgetary matters. AMLA's two tier governance model aims to ensure an efficient process for taking pertinent decisions (specifically in the area of direct supervision and administration) and at the same time also reflects one of the guiding principles of the reform which has been to enhance cooperation between EU authorities, cooperation among supervisors, among FIUs and between them, as well as cooperation with all bodies with competences in the fight against money laundering and the financing of terrorism. Other institutions, bodies or agencies are to be invited to the meetings of

[3] Directive - EU - 2024/1640 - EN - EUR-Lex (europa.eu)

[4] Regulation - 2023/1113 - EN - EUR-Lex (europa.eu)

the General Board of AMLA. The General Board shall invite a representative of the Supervisory Board of the ECB where matters within the scope of its mandate are discussed. OLAF, EUROPOL, EPPO or EUROJUST will also be invited and able to attend as observers when the General Board in FIU composition will meet and discuss matters within the scope of their mandates (Article 57 of the AMLA Regulation).

Furthermore, AMLA shall establish cooperative relations with the authorities competent for prudential supervision in the form of memoranda of understanding or agreements, and AMLA and the ECB shall conclude a memorandum of understanding by 27 June 2025 (Article 92 of the AMLA Regulation).

# 3 The role of AMLA in supervision

As mentioned, AMLA will have two main areas of activity: AML/CFT supervision and supporting EU FIUs. AMLA will become the centre of an integrated system of national AML/CFT supervisory authorities, ensuring their mutual support and cooperation. The aim is supervisory convergence and a common supervisory culture in the financial and non-financial sectors. In the financial sector, AMLA will directly supervise some of the riskiest cross-border credit and financial institutions, based on periodic selection in line with its own risk methodology. It will also be able to take over supervision on request from the national supervisor, or on its own initiative, where there is a Union interest to do so. Concerning FIUs, the Authority will facilitate cooperation, information exchange and joint production of financial intelligence, as well as identification of best practices among FIUs. It will carry out these tasks by establishing standards for reporting and information exchange, by initiating or organising and supporting joint operational analyses of cross-border suspicious transactions or activity, organising peer reviews among FIUs, and by hosting and developing the FIU.net system. Where necessary for carrying out its tasks, AMLA will itself be an end-user of the system and its functionalities.

## 3.1 Selection of entities directly supervised by AMLA

Financial institutions directly supervised by AMLA will be determined in two ways:

- A regular selection exercise based on objective AML/CFT risk criteria (Article 12 of the AMLA-Regulation). Financial sector obliged entities that are active in at least six Member States and have a high risk profile will be selected for ongoing direct supervision by the Authority. The list will be reviewed periodically every three years. In order to ensure equal and fair selection, the methodology for risk categorisation of entities by national supervisors will be harmonised prior to the first selection. The first selection process based on a harmonised methodology will be carried out by AMLA in 2027, with the selected entities transferred to EU-level supervision as of 2028. The actual criteria and benchmarks for the assessment will be developed in regulatory technical standards to be prepared

by AMLA, which the EBA has started working on.[5] In the first selection round, 40 entities will be retained for direct supervision by AMLA (40 high risk entities operating in the highest number of Member States or with the highest ratio of cross-border transactions, Article 106 of the AMLA Regulation on transitional arrangements). As of the second selection round, at least one entity per Member State should be subject to direct supervision by AMLA.

- Two exceptional transfer mechanisms (Article 14 of the AMLA Regulation, triggered at the request of a national supervisor, and Article 32 of the AMLA Regulation triggered by AMLA following indications of serious, repeated or systematic breaches):
    - Under Article 14 of the AMLA Regulation, a national supervisor may request the Authority to take over direct supervision of an obliged entity. A number of conditions must be met. Such a request can be made in cases of serious, repeated or systematic breaches of applicable requirements by an obliged entity and where it can be demonstrated that supervisory action at national level is not effective. The decision to take over direct supervision of the obliged entity is taken by the Authority's Executive Board.
    - Under Article 32 of the AMLA Regulation, following indications of serious repeated or systematic breaches, AMLA may investigate and request the financial supervisor to adopt an individual decision addressed to an entity (requiring it to undertake all necessary actions to comply with its obligations). In case of absence of action by the supervisor, AMLA may request the Commission to grant permission to transfer the supervision of the entity to the Authority.

## 3.2 Direct and indirect supervision by AMLA

Supervision of directly supervised entities will be carried out by Joint Supervisory Teams led by the staff of the Authority and including staff of the relevant national supervisors. This model is drawn from the working methods of the EU Single Supervisory Mechanism for prudential supervision of banks. AMLA will have general investigation powers to carry out direct supervision, will be able to request information, carry out on-site inspections, and take decision addressed to obliged entities inc. imposing administrative measures and sanctions (pecuniary sanctions and penalty payments). Decisions addressed to obliged entities will be taken by the Executive Board (Article 27 of AMLA Regulation). AMLA will also have a Board of Review (Article 74 of the AMLA Regulation) in front of which obliged entities will be able to bring a request for review of a decision taken by AMLA. Enforcement of the Authority’s decisions will be carried out in accordance with national law and will only be suspended by a decision of the Court of Justice of the European Union.

[5] Provisional request for advice to the European Banking Authority (EBA) regarding regulatory technical standards and guidelines under the future anti-money laundering / countering the financing of terrorism (AML/CFT) framework (europa.eu)

AML/CFT supervision of the rest of the financial sector will continue to be performed at national level. To ensure that supervisory actions at national level are consistent and of a high quality across the Union, the Authority will have at its disposal tools for convergence and improvement of supervisory practices, such as:

- Developing and maintaining common supervisory methodology and standards (Article 8 of the AMLA Regulation);
- Carrying out assessments of the state of supervisory convergence (review of all or parts of the AML common supervisory methodology) and publishing reports with the findings, and, where necessary, follow-up measures in the form of guidelines and recommendations, including individual recommendations addressed to financial supervisors (Article 30 of the AMLA Regulation);
- Facilitating the functioning of the AML/CFT supervisory colleges including a power to establish a college (Article 31 of the AMLA Regulation);
- A power to settle disagreements with binding effect between financial supervisors concerning the measures to be taken in relation to a non-selected obliged entity (Article 33 of the AMLA Regulation);
- The possibility to identify and act in cases of systematic failures of supervision caused by breaches of Union law resulting from the non-application or improper application of national measures transposing Union directives (Article 34 of the AMLA Regulation).

As far as the non-financial sector is concerned, the Authority will also have a coordination and convergence role.

This system will be underpinned by common methodologies and standards, more cooperation, and knowledge sharing among AML supervisors. AMLA will establish and keep up to date a central database covering the financial and non-financial sectors (Article 11 of the AMLA Regulation). Any data relevant for the purpose of AML supervision provided by prudential authorities will have to be entered into that database. AMLA will also have to make the information available to authorities (AML and prudential) on a need to know and confidential basis, where it is necessary for the fulfilment of their tasks. Those authorities may also address to AMLA a reasoned request for information.

# The relevance of AML/CFT legal frameworks for basic central banking tasks

Carla Susana Silva Costa*

## 1 Introduction

The importance of Anti-Money Laundering (AML) and Counter-Financing of Terrorism (CFT) in today's world cannot be overstated. AML/CFT efforts are crucial for combating financial crimes, ensuring global security, safeguarding the financial system, and promoting economic development.

ML and FT due to the cross-border nature of financial crimes, the global financial system interconnectedness and to the transnational organized crime is an issue that requires international coordinated efforts. By working together, hopefully it will be possible to develop and implement consistent AML/CFT standards, share information, best practices and enhance overall effectiveness in addressing these issues.

Also, for central banks' basic functions AML/CFT legal frameworks plays a crucial role by promoting financial stability, protecting the integrity of the financial system, ensuring the secure and efficient operation of payment systems. That is why it is essential for central banks to be aware of AML/CFT risks and requirements and to effectively integrate them into their policies and processes.

In this presentation, more than a set of certainties, we will find some reflections that allow us to think about some problems and eventually find solutions together.

## 2 Are Central Banks obliged entities?

Following the approach of the AML Directive, Article 3 of the Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AMLR)[1] contains a list of obliged entities, which do not include central banks.

In the opinion of the European Central Bank (ECB) of 16th February 2022 on a proposal for a directive and a regulation on the prevention of the use of the financial

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1 Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

system for the purpose of money laundering or terrorist financing (CON/2022/5), it is stated that “central banks do not fall into any of the categories of obliged entities within AMLR1, such as credit institutions or financial institutions, as these terms are used separately from central banks in the Treaty and in the Statute of the ESCB”. It is also underlined that “The Union legislative acts regulating the activities of credit institutions and other financial market operators (…) contain explicit provisions clarifying that central banks do not fall within their scope.”. And although there was a suggestion on the ECB opinion to clarify that central banks do not fall into any of the categories of obliged entities, it was not clarified, i.e. there is no explicit exclusion of central banks from the definition of obliged entities.

Looking at the reality of most central banks we conclude that, at the present, most of them are not subject to AML/CFT laws or legislation.

But does this mean they simply don´t apply AML/CFT rules or procedures? No. For different reasons even in those jurisdictions in which the central bank is not considered an obliged entity, they apply voluntarily, and at least partially, AML/CFT procedures to ensure that the highest standards are reached and prevent operational and reputational risk derived from ML/FT.

For those central banks that are legally required to comply with AML/CFT requirements there is a subset of them that may apply those AML/CFT requirements only for specific activities. Usually this happens with services that are provided to the public such as exchange of damaged banknotes. It is also very common regarding report of suspicious transactions.

The different organisation of each central bank depends largely on whether they are considered obliged entities. It is possible to find various organisations either with a central unit that deals with these matters or with more decentralised approaches, with functions distributed across several departments. The same applies to the number of resources allocated to these tasks.

As for EU Sanctions, meaning for this purpose, restrictive measures adopted under the EU´s common foreign and security policy, they are applied within the territory of the Union and to any business done in whole or in part in the Union, so all central banks are legally required to comply.

And here we have also to consider that, even in a situation where the central bank is not failing to comply with the restrictive measure, the fact of having a relationship with an entity that has serious flaws in their internal control system may have major impacts on the reputational risk of that central bank.

It is also important to underline that there may be advantages in the complementarity that may exist between measures related to compliance with sanctions and procedures applied to prevent the risk of AML/CFT. For example, screening through sanctions lists may determine results with information that can be very relevant to the assessment of AML/CFT risks.

Even if not legally required, central banks should still consider the EU AML/CFT legislative framework and have good AML/CFT procedures in place.

Considering the existing rules and procedures that are designed for obliged entities and using them to improve the internal systems not only reduces the AML/CFT/Sanctions risks which can be relevant not also for preventing image and reputational risk, but also sets a good example for the rest of the financial system promoting the financial stability and transparency.

Having AML/CFT procedures in place is also important to be able to establish common bases that allow the promotion of international cooperation, also by complying with internationally defined standards.

Finally, it is worth remembering that central banks have been receiving more and more Know-Your-Customer (KYC) requests from their counterparties. In these questionnaires central banks should be able to identify the AML/CFT/Sanctions controls that are in place and if they don´t have enough controls and are not able to answer in a satisfactory way these KYC requests, there is a risk that it will not be possible to maintain the execution of contracts with those counterparties.

We can ask whether it would be beneficial for central banks to be considered obliged entities. In my personal view, it would be very beneficial – not only because there could be a harmonization of procedures at European level, facilitating the exchange of information and encouraging compliance with the rules, but this harmonization would also bring advantages in terms of the responses given to KYC questionnaires, since in many cases the counterparties are the same.

In conclusion, I would say that, in my opinion, it does not even make sense that central banks, at least in the tasks they perform in similar terms to financial institutions (here we are typically talking about services provided to bank costumers) do not have to comply with the same rules. I would even say that from a certain perspective one could even raise the question of whether the provision of the same services with different AML/CFT requirements does not actually constitute a situation of unfair competition.

## 3 Relevance of AML/CFT framework for basic central banking tasks

Article 3 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank[2], in accordance to the article 105(2) of the Treaty establishing the European Community refers to the basic tasks that shall be carried out by the ESCB:

(i) define and implement the monetary policy of the Community;

(ii) conduct foreign-exchange operations[3];

[2] Protocol annexed to the Treaty establishing the European Community.

[3] Consistent with the provisions of Article 111 of the Treaty.

(iii) hold and manage the official foreign reserves of the Member States;

(iv) promote the smooth operation of payment systems.

AML/CFT framework is highly relevant to basic central banking tasks, as it is essential for maintaining the integrity and stability of the financial system and promoting public confidence in the currency and the broader economy. As it will not be possible to cover the analysis of all the tasks, we will only highlight some points that seem most important to us.

What is the relevance of AML rules in the context of monetary policy implementation?

The ECB, as well as the National Central Banks (NCBs) of all EU Member States, regardless of whether they have adopted the euro or not, constitute the "European System of Central Banks" (ESCB). The "Eurosystem" is made up of the ECB and the NCBs of the EU Member States that have adopted the euro[4]. This structure allows for a division of responsibilities, with the ECB setting the overall monetary policy framework and the NCBs implementing it at the national level. This collaboration between the ECB and the NCBs allows the monetary stability across the euro area, ensuring a cohesive approach to the economic challenges that we face every day.

In this mostly decentralized implementation of monetary policy within the Euroystem, euro area national central banks implement the policy at national level, facilitating transactions with counterparties. The counterparties are financial institutions, like banks and other eligible entities that meet the eligibility criteria set by the ECB and NCBs. The implementation of monetary policy by national central banks is a complex and dynamic process that requires careful analysis, decision-making, and communication to achieve desired economic outcomes.

As regards the monetary policy operations in which euros are provided to the Eurosystem eligible monetary policy counterparties, the NCBs provide euros to private counterparts and receive in exchange eligible collateral. All Eurosystem credit operations, as well as all access to the Marginal Lending and Deposit facility are implemented by NCBs.

If there is a serious breach of AML/CFT requirements in one of the counterparties, of course this situation can affect not only the reputation of the counterparty, but also of the Central Bank that has entered in relation with that institution. That is why it is important for NCBs to monitor counterparties' compliance with regulations, regarding AML/CFT procedures. The question is: are NCB's applying AML/CFT/Sanctions-specific Controls to the Eurosystem eligible monetary policy counterparties in their jurisdictions?

[4] https://www.ecb.europa.eu/ecb/orga/escb/html/index.en.html

The ECB legal framework for operations with Eurosystem counterparties, under Article 189 of the General Documentation[5] (the GD) establishes that: "Counterparties to Eurosystem monetary policy operations shall be aware of, and comply with, all obligations imposed on them by anti-money laundering and counter-terrorist financing legislation.". And although the GD does not have a clause for the national implementation in the contractual framework of the NCBs that would require counterparties to comply with AML/CFT rules, we can easily understand that some concerns in this field could raise issues regarding the eligibility of counterparties or issuers for monetary policy operations. We could also ask if it wouldn't make sense to extend this provision also for sanctions, especially EU sanctions.

AML/CFT measures can also affect the transmission of monetary policy by influencing the behaviour of financial institutions and their customers. For instance, stricter rules may imply more costs to the institution, which will translate into more costs, ultimately, for the entity's customers.

In the future maybe it will be possible to have common ground regarding potential consequences of non-compliance with AML/CFT requirements under the Eurosystem counterparty framework in the context of monetary policy implementation.

Own funds are critical for the operational effectiveness and stability of central banks. They support monetary policy implementation, ensure financial stability, and maintain market confidence, as well as enhance the institution's credibility and independence in a globally interconnected economy.

Regarding asset management (own funds) and foreign exchange activities it cannot be excluded that assets of illicit origin are acquired or purchased from a counterparty that supports terrorism, that is why it is important to consider the counterparty risk, as well as the operational and reputational risk. Also, here we should additionally be looking at EU sanctions.

By this time probably central banks already have in place policies including both risk screening for counterparts and instruments purchased.

Looking for central banks as "customers" while subject to customer due diligence (CDD)

Central Banks have been receiving higher number as well as more deep requests of information from its counterparties (in the context of Know Your Customer procedures - KYC), aimed at understanding how the Central Bank manages its ML/TF/Sanctions risks.

In 2019, in result of the introduction of stricter KYC rules on an EU level and the transposition of the revised AML Directive across various jurisdictions, there was an increased number of KYC requests as well as an increase in the scope of these questionnaires. Here it is important not to forget that there may be potential

[5] Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (General Documentation Guideline) (ECB/2014/60).

differences on the national legislative framework due to potential differences in the transposition by the Member States.

Over time we have felt that this increase in the number of questionnaires received has continued to increase, as has the depth of the questions asked.

Given the specificities of central banks, there have been attempts to exclude these entities from the customer due diligence procedures to which obliged entities are subject, but these attempts were unsuccessful. Taking into acount the reduced risk of having an EU central bank as counterparty, taking into account the nature and the mandate of central banks, the possibility of applying lighter due diligence measures regarding market counterparties and/or intermediaries should be on the table.

While this does not happen, and due to the specificities of central bank´s activities, there is a need to adapt these questions to the reality of central banks. And this is very important because if there is no adequate response from the NCBs to the requests received, there is a serious risk of termination of the contractual relationship.

## 4 Impact of the new AML/CFT package on basic central banking tasks

The AML package emphasizes the importance of international cooperation in the fight against ML/TF, so Central banks will need to work closely with their counterparts and cooperate with the new EU-level bodies to contribute to the global efforts to combat financial crime.

### i. Eu cash payment limit

There are studies that conclude that banning high cash payments is an effective way to strengthen fight against ML, TF and other crimes especially because cash transactions thresholds enable the identification of suspicious activities (in this regard it should also be remembered that de 500-euro note is no longer produced based on the same arguments). But the implementation of these limits also has costs not only enforcements costs, but also affecting economic freedoms and privacy impacts.

During the last years an increasing number of EU member states implemented restrictions on cash payments to counter illegal activities, but the measures differ not only regarding the thresholds applicable but also to whom they are applied to, as well as regarding the monitorization of the operations. These differences had obvious consequences regarding the global effectiveness. In reality, if you wanted to have an illegal activity you would just move from one member state to another that didn´t had the same restrictions. This will also create inequality because some business sectors in countries with restrictions are disadvantaged compared to countries without restrictions, so clearly creating an inequality in the EU market.

The ECB's opinion on a proposal for a directive and a regulation on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing[6] states that: "Under the treaty, the ECB has the exclusive right to authorise the issue of euro banknotes within the Union. The euro banknotes issued by the ECB and the NCB's of the euro area are the only banknotes with legal tender status within the euro area. The use of the only means of payment with legal tender status enshrined in primary law would this be rendered illegal above the indicated threshold by the intended prohibition (…). It is important that such restrictions are evidence-based and comply with the principle of proportionality, i.e. are appropriate for attaining the legitimate objective and do not go beyond what is necessary.".

The Opinion also explains the clarification made by the Court of Justice (case Hessicher Rundfunk) on the concept of "legal tender" "of a means of payment denominated in a currency unit signifies that this means of payment cannot generally be refused in settlement of a debt denominated in the same currency unit, as its full face value, with the effect of discharging the debt."

Based also on that case the ECB underlines that "for any planned review, the Commission should provide solid research and empirical evidence about the impact of cash payment limits and their effectiveness in achieving the objectives pursued. Moreover, such empirical evidence would not automatically lead to a need to further lower the cash limits. Therefore, the scope of the review required of the Commission should be revised so that both the need for and the proportionality of adjusting the cash limits are assessed, instead of this review being conducted solely from the perspective of lowering them further."

So, we already had national limits on cash payments, but not on an EU level.

Now, Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [7] settled a single limit of €10,000.

This matter is likely to be on the table again in three years' time because the Commission will be able to re access this matter and propose to lower the limit now introduced. It will also be important to monitor the implementation of cash payment limit (above the €10,000 threshold) as a way to combat ML/TF. It will be important that we study the real consequences of the implementation of these limits to combat ML/TF. Because if we don´t have concrete data that shows us a direct connection between the introduction of this limit and the diminishing of ML/TF than we´ll have to be very careful allowing to lower thresholds that imply directly on freedom and privacy.

[6] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022AB0005

[7] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401624

# 5 Conclusions

Issues related to the prevention of ML/FT will be increasingly discussed given their current relevance and impact on the global economy. Both private institutions and supervisors will have to be very vigilant to monitor and be able to follow up the developments of offender's methods, who unfortunately manage to be one step ahead of the authorities.

Only by working together and joining forces will we be able to combat these offences. The new legislative package and in particular the new AMLA authority will play a crucial role in this fight.

Central banks can play a very important role by assuming, albeit voluntarily, the application of the same rules that are applied to obliged entities, thus setting an example for other entities. Here are some of the main reasons: a) the Central Banks inherent ML/TF/Sanctions risks are arguably lower compared to commercial banks however the risks are not zero; b) even if not legally required, the Central Banks should still consider the EU AML/CFT legislative framework, as some provisions may be useful for improving its existing set of rules and procedures addressing its ML/TF risks; c) even if the Central Bank itself is not subject to AML/CFT requirements but needs to comply with EU Sanctions; d) the Central Banks should also consider the legislative framework for reputational reasons, especially in light of the increased public awareness about the fight against ML/TF and Sanctions evasion in the EU; e) the Central Banks should ensure that its ML/TF/Sanctions risk controls are on par with its peers and should also give "example" for other institutions.

All said, we can conclude that AML/CFT legal framework plays a crucial role in promoting financial stability, protecting the integrity of the financial system and ensuring the security and efficient operation of payment systems, that is why it is essential for central banks to be aware of AML/CFT risks and requirements and to effectively integrate them into their policies and processes.

# Relevance of the AML/CFT legal framework for supervisory and non-core tasks of central banks

Pavel Sykora*

## 1 Introduction

Beside the core central banking tasks, central banks often have multiple other mandates. Commonly held mandates identified in a 2021 FSI paper[1] include, for example, safety and soundness, financial stability, anti-money laundering (AML) and countering the financing of terrorism (CFT), financial inclusion or resolution.

This article focuses on central banks within the European Union and three specific mandates:

- prudential supervision of credit institutions,
- crisis management of credit institutions, and
- supervision of compliance with international sanctions.

The article analyses the relevance of the EU AML/CFT framework for the aforementioned mandates, and the changes brought by the recently adopted new EU AML/CFT legal framework, which consists of the following legal acts:

- Regulation (EU) 2024/1620 of the European Parliament and of the Council of 31 May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010, OJ L, 2024/1620, 19.6.2024 (AMLAR);
- Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, OJ L, 2024/1624, 19.6.2024 (AMLR1);
- Directive (EU) 2024/1640 of the European Parliament and of the Council of 31 May 2024 on the mechanisms to be put in place by Member States for the prevention of the use of the financial system for the purposes of money

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1 Kirakul, S., Yong, J., Zamil, R. (2021): “The universe of supervisory mandates – total eclipse of the core?”, Financial Stability Institute, available at https://www.bis.org/fsi/publ/insights30.htm .

laundering or terrorist financing, amending Directive (EU) 2019/1937, and amending and repealing Directive (EU) 2015/849, OJ L, 2024/1640, 19.6.2024 (AMLD6);

- Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849, OJ L 150, 9.6.2023, p. 1–39 (FCTR[2]).

The article further refers to several changes brought by the recently adopted CRD VI[3], and Directive (EU) 2024/1226[4]. The transposition and application dates of these new Directives and Regulations range from December 2024 to July 2029. But nearly all the provisions of the new framework are required to be in place and apply as of 10 July 2027 or sooner.

# 2 Prudential supervision of credit institutions

## 2.1 Authorisation

The AML/CFT framework interacts with the prudential supervisory framework in multiple areas. Starting with granting authorisation, Articles 8 and 10 CRD[5] are of particular importance. Article 10 CRD requires applications for authorisation to be accompanied by a description of the internal governance arrangements of the applicant institution. On the basis of Article 8 CRD the EBA developed and the European Commission adopted regulatory technical standards specifying the information to be provided to the competent authorities in the application for the authorisation of credit institutions.[6] Pursuant to Article 8(5) CRD the EBA further issued guidelines specifying a common assessment methodology for granting authorisations.[7]

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2 The acronym is derived from the short name of the Regulation – Funds and Crypto-assets Transfers Regulation.

3 Directive (EU) 2024/1619 of the European Parliament and of the Council of 31 May 2024 amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, and environmental, social and governance risks, OJ L, 2024/1619, 19.6.2024.

4 Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673, OJ L, 2024/1226, 29.4.2024.

5 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance, OJ L 176, 27.6.2013, p. 338.

6 Commission Delegated Regulation (EU) 2022/2580 of 17 June 2022 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be provided in the application for the authorisation as a credit institution, and specifying the obstacles which may prevent the effective exercise of supervisory functions of competent authorities, OJ L 335, 29.12.2022, p. 64.

7 EBA Guidelines on a common assessment methodology for granting authorisation as a credit institution under Article 8(5) of Directive 2013/36/EU (EBA/GL/2021/12).

Article 5(1) of the technical standards requires that the submitted information on the internal control framework of the applicant credit institution needs to include also an explanation of how the applicant credit institution will satisfy its legal and prudential requirements, including AML/CFT requirements. The said EBA guidelines then specify how the competent authorities should work with this information, for example in paragraph 127 in connection with paragraph 129, and paragraphs 175 – 177. In the latter provision the Guidelines specify that competent authorities should verify that the outline covers all elements set out in Article 8(4) AMLD5[8] and substantiate how the applicant credit institution will ensure that it can mitigate and manage effectively the money laundering (ML) and terrorist financing (TF) risks to which it is exposed as of the day of access to the market. This necessitates an assessment conducted by the relevant AML/CFT supervisory authority. For this purpose the EBA guidelines adopted under Article 117(6) CRD (AML Cooperation Guidelines)[9] envisage cooperation between the prudential and AML/CFT supervisory authorities. In particular in paragraph 46 the said guidelines envisage that AML/CFT supervisors should, upon request from prudential supervisors, share all relevant information available to them and provide their assessment of the application from an AML/CFT perspective.

This part of the assessment of the internal control framework of the applicant credit institution will be substantially affected by the new AML/CFT framework, as the requirements against which the assessment will be made will shift from the individual national transpositions of AMLD5 to AMLR1. Beside the fundamental shift towards a single directly applicable EU regulation, a significant change will stem from the requirement imposed on the applicant credit institutions by Article 9(1)(b) AMLR1 to put in place also policies, procedures and controls to mitigate and manage the risks of non-implementation and evasion of targeted financial sanctions. AMLR1 will need to be complemented by a number of technical standards and guidelines. For the purpose of the assessments conducted by AML/CFT supervisors in the context of granting authorisation procedure, the guidelines which shall be developed by the AML/CFT Authority (hereinafter 'AMLA') under Article 9(4) AMLR1 seem to be particularly relevant. The said guidelines shall specify the elements that obliged entities should take into account, based on the nature of their business, including its risks and complexity, and their size, when deciding on the extent of their internal policies, procedures and controls.

In the course of authorisation procedure, the competent authorities conduct also the assessment of the suitability of the proposed holders of qualifying shareholdings in the applicant credit institution. As such assessments are undertaken also outside authorisation procedures, they are addressed in a standalone section below.

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8 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, p. 73.

9 EBA Guidelines on cooperation and information exchange between prudential supervisors, AML/CFT supervisors and financial intelligence units under Directive 2013/36/EU (EBA/GL/2021/15).

## 2.2 Suitability assessments of proposed acquirers of qualifying holdings

Notifications of acquisitions of qualifying holdings in credit institutions are assessed on the basis of the criteria set out in Article 23 CRD. Pursuant to Article 23(1)(e) CRD the competent authority needs to consider whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering (hereinafter 'ML') or terrorist financing (hereinafter 'TF') as defined in AMLD5 is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof. With the new EU AML/CFT framework the ML and TF definitions used for this assessment will become the ones set out in AMLR1.

CRD VI brings several amendments of Article 23 CRD:

(a) It introduces a requirement for the prudential supervisory authorities to consult AML/CFT supervisors. The consultations are already today envisaged in the AML Cooperation Guidelines (see their paragraphs 48 - 54), therefore this change will probably not result in substantial changes in how prudential and AML/CFT supervisors cooperate in this respect.

(b) It specifies that competent authorities may object to the proposed acquisition where the proposed acquirer is situated in a high-risk third country that has strategic deficiencies in its AML/CFT regime.

(c) It clarifies that a negative opinion of the AML/CFT supervisor may constitute a reasonable ground for opposing the acquisition.

## 2.3 Suitability assessments of management body members and selected key function holders

When credit institutions or their prudential supervisors assess the suitability of the management body members and selected key function holders, the EBA and ESMA Fit and Proper Guidelines are applied[10]. The Guidelines include a number of references to the ML/TF risk or the AML/CFT framework, both in the context of the initial assessments (e.g. paragraphs 58, 196) and re-assessments (e.g. paragraphs 26, 31, 36, 154, 182). The multitude of references regarding re-assessments of suitability is a reflection of Article 91(1) CRD which requires that the competent authorities shall in particular verify whether the suitability requirements are still fulfilled where they have reasonable grounds to suspect that ML or TF is being or has been committed or attempted, or there is increased risk thereof in connection with that institution.

As in the case of assessments related to authorisations and acquisitions of qualifying holdings, cooperation with AML/CFT supervisors is embedded already in the existing

[10] Joint EBA and ESMA guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU (EBA/GL/2021/06)

regulatory framework: both in the Fit and Proper Guidelines (see in particular paragraph 196) and in the AML Cooperation Guidelines (see paragraphs 55 – 59).

CRD VI elaborates Article 91 CRD in that prudential supervisors may seek input from AML/CFT supervisors (see new paragraph (1i) of that Article). Considering the already existing provisions of the Fit and Proper Guidelines and the AML Cooperation Guidelines mentioned in the previous paragraph, this new CRD provision does not seem to bring any substantial novelty.

The amendment to Article 91 set out in CRD VI further specifies that in the context of the suitability assessment the prudential supervisor may also request access to the central AML/CFT database which will be set-up and administered by AMLA pursuant to Article 11 AMLAR, and that AMLA shall decide whether to grant such access. At the moment it is unclear whether the 'access to the database', referred to in Article 91 CRD as amended by CRD VI, entails anything else than the possibility of the prudential supervisor to address to AMLA a reasoned request for information, as envisaged in Article 11(5) AMLAR.

Lastly the CRD VI brings a requirement for the EBA to issue guidelines, by 10 July 2026, specifying, inter alia, the criteria to determine whether there are reasonable grounds to suspect that ML or TF is being or has been committed or attempted, or that there is an increased risk thereof, in connection with the entity (Article 91(11) CRD as amended by CRD VI).

As regards the new EU AML/CFT framework, Article 11 AMLR1 establishes a requirement that obliged entities shall appoint a member of the management body in its management function to be a 'compliance manager', responsible for ensuring compliance with AMLR1, FCTR and administrative acts issued by any AML/CFT supervisor. For many credit institutions this will not be a completely new role to fill, as already Article 46(4) AMLD5 requests that Member States shall require that, where applicable, obliged entities identify the member of the management board who is responsible for the implementation of the laws, regulations and administrative provisions necessary to comply with the Directive. As the compliance manager under Article 11 AMLR1 will be a member of the management body, in credit institutions he/she will be subject to suitability assessment.

Article 11 AMLR1 further requires that obliged entities shall have a compliance officer with sufficiently high hierarchical standing, who shall be responsible for the policies, procedures and controls in the day-to-day operation of the obliged entity's AML/CFT requirements, including in relation to the implementation of targeted financial sanctions. The officer shall also be a contact point for competent authorities and be responsible for reporting suspicious transactions to the financial intelligence unit (FIU). Also, this requirement will not be completely new for most credit institutions considering:

(i) Article 8(4)(a) AMLD5 which requires, where appropriate with regard to the size and nature of the business, the appointment of a compliance officer at management level, and

(ii) the EBA Guidelines on policies and procedures in relation to compliance management and the role and responsibilities of the AML/CFT Compliance Officer[11] published in 2022.

The AMLR1, however, sets out a requirement that in the case of obliged entities subject to checks on their senior management or beneficial owners pursuant to Article 6 of Directive (EU) 2024/1640 or under other Union legal acts, compliance officers shall be subject to verification that they comply with those requirements. CRD will likely qualify as one of the 'other legal acts', therefore compliance officers in credit institutions will need to be subject to such suitability assessments. AMLR1 does not specify which supervisory authority (if any) will be responsible for the suitability assessments. For the potential case when the suitability assessment would be conducted by the prudential supervisor of credit institutions, the ECB proposed, in its opinion on the proposed AMLR1[12], a provision clarifying some aspects of the necessary cooperation between the prudential and AML/CFT supervisor in the course of such suitability assessments. That ECB's proposal was, however, not embedded in the final version of AMLR1 by the co-legislators.

## 2.4 Supervisory Review and Evaluation Process (SREP)

Pursuant to Article 97 CRD the competent authorities review in SREP the internal governance arrangements and evaluate, inter alia, the risk to which the institutions are or might be exposed. The EBA SREP Guidelines[13] specify in numerous provisions how prudential supervisors should take into account the prudential implications of ML/TF risks during SREP. In particular in paragraph 146 the Guidelines envisage that when analysing the internal governance framework and institution-wide controls, competent authorities should also take into account the assessments received from AML/CFT supervisors, and evaluate whether these give rise to prudential concerns. In paragraph 147 the Guidelines envisage that competent authorities should assess whether the institution's overall governance framework includes also the management of the ML/TF risks.

The EBA SREP Guidelines do not include their own definition of ML/TF risk, and instead defer to the definition set out in the EBA Risk-Based Supervision Guidelines[14] (see paragraph 8 of the EBA SREP Guidelines). As the EBA will lose the mandate to issue the latter guidelines, at some point it time those guidelines will be repealed or will cease to apply. This may impact the definition of ML/TF risk in the

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11 EBA Guidelines on policies and procedures in relation to compliance management and the role and responsibilities of the AML/CFT Compliance Officer under Article 8 and Chapter VI of Directive (EU) 2015/849 (EBA/GL/2022/05).

12 Opinion of the European Central Bank of 16 February 2022 on a proposal for a directive and a regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (CON/2022/5), OJ C 210, 25.5.2022, p. 15.

13 Guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP) and supervisory stress testing under Directive 2013/36/EU (EBA/GL/2022/03).

14 EBA Guidelines on the characteristics of a risk-based approach to anti-money laundering and terrorist financing supervision, and the steps to be taken when conducting supervision on a risk-sensitive basis under Article 48(10) of Directive (EU) 2015/849 (amending the Joint Guidelines ESAs 2016 72) ('The Risk-Based Supervision Guidelines') (EBA/GL/2021/16).

EBA SREP Guidelines, depending on whether AMLA will use the same definition in its regulatory products, or it will develop a new one. The exact point in time when EBA Risk-Based Supervision Guidelines (and the definitions of ML/TF risk therein) will be replaced, is unclear at this moment. According to Article 54(5) AMLAR, provided that they are still relevant, the guidelines issued by the EBA (or by supervisors and FIUs pursuant to AMLD5) shall remain applicable until such time as the new guidelines and recommendations issued by the AMLA on the same subject start to apply. Article 40(2) and (3) AMLD6 require AMLA to develop draft technical standards and guidelines on risk-based supervision by 10 July 2026 and 10 July 2028 respectively, however, the new definition of ML/TF risk (if any) can be included in another regulatory product adopted earlier.

Under Article 97(6) CRD, where SREP gives competent authorities reasonable grounds to suspect that, in connection with the relevant institution, ML or TF is being or has been committed or attempted, or there is increased risk thereof, the prudential supervisor shall immediately notify EBA and the relevant AML/CFT supervisor. In the event of potentially increased ML/TF risk, the prudential and the AML/CFT supervisors shall liaise and notify their common assessment immediately to EBA. Neither CRD VI nor AMLD6 amends this provision. However, AMLD6 introduced in its Article 64(2) a requirement for AML/CFT supervisors corresponding to the requirement set out for prudential supervisors in Article 97(6) CRD. Pursuant to Article 64(2), where the AML/CFT supervisor identifies weaknesses in the AML/CFT internal control system and application of the AMLR1 which materially increase the risks to which the institution is or might be exposed, the AML/CFT supervisor has to immediately notify the EBA and the prudential supervisor. This provision will likely not substantially affect cooperation between prudential and AML/CFT supervisors as this type of communication among them should already today take place pursuant to Article 117(6) CRD and the AML Cooperation Guidelines.

Assessments conducted within SREP will likely be affected also by the upcoming EBA guidelines on internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures[15], which are being finalised at the time when this article is written. These guidelines are mentioned for completeness here, as they are issued in connection with the new AML/CFT framework, specifically Article 23 FCTR.

## 2.5 Authorisation withdrawals

Pursuant to Article 67 CRD the authorisation of a credit institution can be withdrawn, inter alia, if an institution is found liable for a serious breach of the national provisions adopted pursuant to the AMLD5. When AMLR1 starts to apply, the current reference

[15] See EBA public consultation document on this proposal: https://www.eba.europa.eu/publications-and-media/press-releases/eba-consults-guidelines-internal-policies-procedures-and .

to Directive 2005/60/EC in Article 67(1)(o) CRD which is now interpreted as a reference to AMLD5[16] will need to be interpreted as a reference to AMLR1[17].

AMLD6 and AMLAR include similar provisions which, however, are not fully aligned. Under Article 21(2)(g) AMLAR where a selected obliged entity (i.e. an obliged entity under the direct supervision of AMLA) is subject to authorisation, AMLA will have the power to propose the withdrawal or suspension of that authorisation to the authority that has granted it. Where the authority which has granted that authorisation does not follow the AMLA's proposal to suspend or withdraw, AMLA shall request it to provide the reasons thereof in writing.

On the other hand, Article 56(2)(f) AMLD6 requires Member States to ensure that the AML/CFT supervisors are able withdraw or suspend the authorisation of obliged entities that are subject to an authorisation. This wording has been taken over from the current AML/CFT legislation, specifically Article 59(2)(c) AMLD5. In its opinion on the proposed AMLR1 the ECB suggested bringing the formulation in the proposed AMLD6 closer to the text in AMLAR. Specifically, the ECB proposed that where an obliged entity is subject to an authorisation, the AML/CFT supervisor should have the power to withdraw or suspend the authorisation, or propose the imposition of these or similar measures where the corresponding powers rest with another authority. However, the ECB's proposal was not embedded in the final version of AMLD6 by the co-legislators. As regards the credit institutions within the single supervisory mechanism, the broad formulation used in 56(2)(f) AMLD6 does not pose a problem, as it is clear from the SSM Regulation[18] that the power to withdraw authorisation of such credit institutions rests exclusively with the European Central Bank.

## 2.6 Cooperation between AML/CFT supervisors and prudential supervisors

Since 2018 several authorisations, requirements and platforms for cooperation between AML/CFT and prudential supervisors were introduced, either by the EU co-legislators, or by the EBA. First, Directive (EU) 2018/843[19] introduced in Articles 57a AMLD5 and 56 CRD an explicit authorisation for prudential supervisors to disclose confidential supervisory information to AML/CFT supervisors and vice versa. Further it brought a requirement for the ECB in its prudential supervisory role and AML/CFT supervisors across the European Economic Area to conclude an agreement on the practical modalities of mutual information exchange. Subsequently Directive (EU)

16 In line with Article 66 AMLD5.

17 In line with Article 89 AMLR1.

18 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63.

19 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L 156, 19.6.2018, p. 43.

2019/878[20] introduced in Article 117 CRD a new requirement for AML/CFT supervisors, prudential supervisors and financial intelligence units to cooperate and exchange information. In addition, the EBA was required to develop guidelines specifying the manner for cooperation and information exchange between the said authorities. The EBA has done so by adopting in 2022 the AML Cooperation Guidelines.

In addition, in 2019 the Joint Committee of the EBA, ESMA and EIOPA adopted, on its own initiative, the AML/CFT Colleges Guidelines[21]. On the basis of the latter Guidelines AML/CFT colleges should have be established if AML/CFT supervisors from three or more Member States are involved in the AML/CFT supervision of the same firm operating on a cross-border basis. The Guidelines envisage also the participation of prudential supervisor and FIUs in these colleges to facilitate cooperation and information exchange. The ECB in its prudential supervisory role nowadays participates as an observer in many AML/CFT colleges.

Lastly, Article 9a of the EBA Regulation[22], introduced by Regulation (EU) 2019/2175[23], required the EBA to establish a central database for AML/CFT-related weaknesses of various financial sector operators, including credit institutions, and the establishment of a permanent internal committee on AML/CFT where the ECB had an observer role.

The new AML/CFT framework builds on these developments, but also transforms some of the elements and brings new cooperation channels and requirements:

(a) The legal basis for AML/CFT colleges will change. AML/CFT colleges were embedded in the AMLD6, therefore the AML/CFT Colleges Guidelines will be replaced by the national transpositions of Article 49 AMLD6, and the technical standards developed by AMLA under Article 49(14) AMLD6. The draft technical standards shall be developed by 10 July 2026.

(b) The AML Cooperation Guidelines developed by the EBA under Article 117(6) CRD will eventually cease to apply, as the EBA will lose the power

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20 Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures, OJ L 150, 7.6.2019, p. 253.

21 Joint guidelines on cooperation and information exchange for the purpose of Directive (EU) 2015/849 between competent authorities supervising credit and financial institutions (The AML/CFT Colleges Guidelines) (JC 2019 81).

22 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331, 15.12.2010, p. 12.

23 Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds (Text with EEA relevance), OJ L 334, 27.12.2019, p. 1.

to develop guidelines addressed to AML/CFT supervisors. The EBA guidelines will be replaced by new guidelines developed (by 10 July 2029) by AMLA in consultation with the EBA, pursuant to Article 64(6) AMLD6.

(c) The AML/CFT database established by the EBA on the basis of Article 9a of the EBA Regulation will be replaced by the central AML/CFT database established by AMLA on the basis of Article 11 AMLAR. When exactly the EBA database will be discontinued is unclear at the moment, it will depend on an agreement between the EBA and AMLA pursuant to Article 106(1) AMLAR; the functioning of the EBA database can be extended up to 30 June 2027. The technical standards developed be the EBA for its database[24] will be replaced by technical standards developed by AMLA (by 27 December 2025) based on Article 11(6) AMLAR.

(d) The EBA's internal committee on AML/CFT based on Article 9a of the EBA Regulation (AMLSC) will cease to exist. The new mechanism to facilitate cooperation among AML/CFT supervisors will be the AML/CFT supervisory system established by AMLAR. Pursuant to Article 7 AMLAR AMLA shall be responsible for the effective and consistent functioning of that system. The ECB's observer role in the AMLSC will be replaced by observer role in the General Board of the AMLA in supervisory composition pursuant to Article 57(4) AMLAR.

(e) A new cooperation requirement is introduced in 53(9) AMLD6. In the exercise of their powers to impose pecuniary sanctions and apply administrative measures, AML/CFT supervisors shall cooperate and, where relevant, coordinate their actions with other authorities as appropriate. Prudential supervisor of credit institutions will fall among the 'other authorities' referred to in this provision. This cooperation requirement was introduced in AMLD6 in response to the ECB's proposal set out in its Opinion CON/2022/5.

(f) Article 92 AMLAR requires AMLA to conclude a memorandum of understanding with prudential authorities of credit institutions, including the ECB acting under the SSM Regulation. The memoranda shall set terms for cooperation and exchanging information in the performance of the authorities' respective supervisory tasks under the Union law.

## 3 Crisis management of credit institutions

The AML/CFT framework affects the crisis management framework for credit institutions in multiple ways. Application of the early intervention tools may result, for

[24] Commission Delegated Regulation (EU) 2024/595 of 9 November 2023 supplementing Regulation (EU) No 1093/2010 of the European Parliament and of the Council with regard to regulatory technical standards specifying the materiality of weaknesses, the type of information collected, the practical implementation of the information collection and the analysis and dissemination of the information contained in the Anti-money laundering and counter terrorist financing (AML/CFT) central database referred to in Article 9a(2) of that Regulation, OJ L, 2024/595, 16.2.2024.

example, in removal of senior management or the management body of the credit institution (Article 28 BRRD[25]), or sale of its business (Article 38 BRRD). This may be linked with conducting suitability assessments which were already discussed above in this article.

Several challenges arise in situations where payouts from the deposits guarantee schemes (DGS) are provided. These payouts are required to be provided in very short deadlines after the deposits have become unavailable (see Article 8 of the DGSD[26]). If, for example, the credit institution has not conducted proper customer due diligence on its customers, it may be difficult to conduct such due diligence before the pay-out is due.

The EBA opined repeatedly on this topic. In its 2019 opinion on deposit guarantee scheme payouts (EBA-Op-2019-14)[27] the EBA identified the following groups of issues concerning DGS payouts for which there are ML/TF concerns:

- the treatment of cases in which there is a suspicion of ML/TF;
- the responsibilities of different authorities in a DGS payout process, including challenges posed by systematic failures of credit institutions to tackle ML/TF risks;
- informing depositors when they are excluded from payout or when the payout is deferred or suspended;
- cooperation between relevant AML/CFT and DGS authorities.

The EBA concluded, inter alia, that the current EU framework was not sufficiently clear on:

- whether a DGS can suspend or defer a payout to a depositor when there is a suspicion of ML/TF;
- whether a relevant AML/CFT authority has the power to instruct a DGS to suspend a payout because of ML/TF concerns; and
- the AML/CFT-related obligations of the credit institution supporting the payout by the DGS and insolvency practitioner in a DGS payout.

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25 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014, p. 190.

26 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ L 173, 12.6.2014, p. 149.

27 https://www.eba.europa.eu/sites/default/files/document_library/EBA%20Opinion%20on%20DGS%20Payouts.pdf

In its 2020 Opinion on the interplay between the EU Anti-Money Laundering Directive and the EU Deposit Guarantee Schemes Directive (EBA/Op/2020/19)[28] the EBA identified 11 proposals for improvements in this area, including:

- Establishing a clear legal basis to enable DGSs to defer payouts in case of ML/TF suspicions.
- Requiring the failed credit institution or the insolvency practitioner to share with the FIU information on depositors with a high-risk profile.
- Establishing a legal basis for cooperation and information exchange between DGSs and AML/CFT authorities during DGS payouts.

Importance of improving cooperation between AML/CFT supervisors and the authorities responsible for crisis management of credit institutions and investment firms, was recognised by the co-legislators in the recital No 115 of the AMLD6, and some of the EBA's proposals were implemented in the new AML/CFT framework. In particular Article 64(4) AMLD6 requires Member States to ensure that financial AML/CFT supervisors

(g) cooperate with resolution authorities as defined BRRD and designated authorities as defined in the DGSD, and

(h) inform the said authorities where they identify on AML/CFT grounds an increased likelihood of deposits becoming unavailable, or a risk that a credit institution or a financial institution will be deemed failing or likely to fail (as defined in BRRD).

Resolution and DGSD-designated authorities are also included in the definition of 'non-AML/CFT authorities' in Article 2(1)(4) AMLAR, therefore these authorities will also have the possibility to make reasoned requests for information from the central AML/CFT database under Article 11 AMLR, and are covered in the general cooperation requirement set out in Article 92(1) AMLAR.

## 4 Supervision of compliance with restrictive measures (international sanctions)

Restrictive measures are adopted by the European Union on the basis of Article 29 TEU or Article 215 TFEU, or by Member States in compliance with their national legal order. Outside the EU legal framework the term 'international sanctions' is used more commonly used than 'restrictive measures', therefore in this article I use both the terms interchangeably. An overview of the EU restrictive measures is available at www.sanctionsmap.eu .

28 https://www.eba.europa.eu/sites/default/files/document_library/Publications/Opinions/2020/961347/EBA%20Opinion%20on%20the%20interplay%20between%20the%20AMLD%20and%20the%20DGSD.pdf

Until the adoption of the new EU AML/CFT framework the internal governance requirements defining how credit institutions shall comply with EU restrictive measures have not been, in general, harmonised at the EU level. The individual EU regulations setting out the EU restrictive measures typically include a provision requiring Member States to:

- lay down the rules on penalties applicable to infringements of the provisions of that Regulation, and
- take all measures necessary to ensure that they are implemented.

So far it has been largely left out to the Member States to decide how they would implement this requirement. Already before the adoption of the new EU AML/FCT framework there have been several links between the AML/CFT framework and restrictive measures:

(i) Some of the EU restrictive measures target terrorism, therefore internal governance measures adopted on the basis of Article 8 AMLD5 to manage the CFT risk automatically need to take into account also such restrictive measures.

(j) Annex III of the AMLD refers to "sanctions, embargos or similar measures issued by, for example, the Union or the United Nations" as an indication of potentially higher ML/TF risk.

(k) The definition of criminal activity (predicate offence) in the 3(4) AMLD5 includes also all offences, as defined in the national law of the Member States, which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards Member States that have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months. The criminal punishments for violation of EU restrictive measures in most EU Member States meet those thresholds[29].

In the new EU AML/CFT framework the aforementioned links are preserved (with the corresponding provisions being incorporated in AMLR1), but it brings two important changes:

(a) Pursuant to Article 9(1) AMLR1 obliged entities shall have in place internal policies, procedures and controls in order to ensure compliance with AMLR1, FCTR, and administrative acts issued by AML/CFT supervisors in order to (a) mitigate and manage the ML/TF risk, and (b) in addition to the obligation to apply targeted financial sanctions, mitigate and manage the risks of non-implementation and evasion of targeted financial sanctions.

[29] See EUROJUST, Genocide Network Secretariat (2021): "Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis", available under this link: https://www.eurojust.europa.eu/sites/default/files/assets/genocide_network_report_on_prosecution_of_sanctions_restrictive_measures_violations_23_11_2021.pdf

(b) Pursuant to Article 23 FCTR payment service providers and crypto-asset service providers shall have in place internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures when performing transfers of funds and crypto-assets under this Regulation. By 30 December 2024 the EBA shall issue guidelines specifying the measures referred to in the said Article. In parallel with the developing those guidelines the EBA is working on a second set of guidelines on internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures. While the first set of guidelines is required by the FCTR, the second set of guidelines is being developed on the EBA's own initiative. [30]

In addition, Directive (EU) 2024/1226 harmonises the definition of criminal offences and penalties for the violation of Union restrictive measures. This indirectly affects also the definition of predicate offence (criminal activity) within the AMLD5.

These regulatory developments will create a system of partly harmonised internal governance requirements to ensure the implementation of EU and national restrictive measures. The system has important limitations:

(a) Article 23 FCTR covers all the EU and national restrictive measures (of the Member States), however it only applies to payment services providers and crypto-asset services providers.

(b) Article 9(1)(b) AMLR1 applies to all obliged entities within the scope of AMLR1, but it covers only targeted financial sanctions, i.e. only a subset of restrictive measures. The definition of targeted financial sanctions is set out in Article 2(1), point (49) AMLR1.

For a large portion of financial institutions the new system therefore does not seem to specify harmonised requirements on internal policies, procedures and controls to ensure the implementation of (i) Union restrictive measures other than targeted financial sanctions, and (ii) national restrictive measures.

[30] The related EBA consultation document is available under this link: https://www.eba.europa.eu/publications-and-media/press-releases/eba-consults-guidelines-internal-policies-procedures-and. At the time when this article was finalised, the work on the two sets of the EBA guidelines was still in progress. Therefore I do not go into the detail on this topic.


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# Part VII

# The principle of equal authenticity: interpretation of Union legislation in cases of linguistic divergence

# The principle of equal authenticity: interpretation of Union legislation in cases of linguistic divergence

Metoda Paternost Bajec*

## 1 Introduction

The European Union offers a unique multilingual environment, operating in 24 official Union languages. Seeing the diverse audience in this session, comprising participants from many of the national central banks in the European System of Central Banks, it occurs to me that we may be very close to having all these languages present at this very moment. It is likely that the conference participants are drawn from the majority of the Union's 27 jurisdictions, with the diverse cultural and legal traditions that that implies. The principle now to be discussed requires Union legislation to be interpreted in a uniform way and convey the same meaning in all of them. Some scholars have compared the endeavour to create clear and understandable law in such an environment to the quest for the Holy Grail[1].

## 2 Principle of multilingualism

We cannot discuss the principle of equal authenticity without first understanding the underlying principle it is intended to reflect.

Multilingualism in the Union is enshrined in the Charter of Fundamental Rights of the European Union[2]. Within the realm of the principle of equality, the Union is bound to respect linguistic diversity, and every form of discrimination – including on the ground of language – is prohibited. In the context of the right to good administration, every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language (Article 21(1), Article 22 and Article 41(4) of the Charter).

The Treaty on the Functioning of the European Union (TFEU) lays the foundations for multilingualism in ensuring that citizens of the Union have the right to address the institutions and advisory bodies of the Union and to write to the Union institutions

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1 See van der Jeught, S., 'Current practices with regard to the interpretation of multilingual EU law: How to deal with diverging language versions?', *European Journal of Legal Studies* Vol. 11, No. 1, p. 37.

2 OJ C 326, 26.10.2012, p. 391.

and the European Ombudsman in any of the Treaty languages[3] and to obtain a reply in the same language (Article 20(2), point (d), and Article 24, fourth paragraph, TFEU).

It is telling that it was the very first Regulation – Regulation No 1[4], adopted in 1958 – that set out the rule on the use of languages in the Union. Article 1 of Regulation No 1 lists the official and working languages of the Union institutions and has been updated upon every enlargement of the Union (the last update was in 2013 upon the accession of Croatia), starting from four languages (Dutch, French, German and Italian) and increasing to the present total of 24 languages[5]. The sheer number of official languages in the Union is indeed unprecedented – and its de facto linguistic diversity is far greater, reaching way beyond the officially acknowledged languages – and the Union does not seem to have a comparable counterpart in this respect[6].

Article 2 of Regulation No 1 reflects Article 41(4) of the Charter and provides that documents which a Member State or a person subject to the jurisdiction of a Member State sends to Union institutions may be drafted in any one of the official languages selected by the sender, and the reply shall be drafted in the same language. In the same vein, Article 3 of Regulation No 1 provides that documents which a Union institution sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State. Regulation No 1 explicitly enshrines multilingualism in the legislative field: regulations and other documents of general application shall be drafted in the official languages, and the Official Journal of the European Union shall be published in the official languages (Articles 4 and 5 of Regulation No 1).

## 3 Principle of equal authenticity

In the Union setup, the principle of equal authenticity – the corollary of multilingualism – is one of the main pillars of the lawmaking process, which involves different institutions with different internal language regimes. According to that principle, all language versions of a Union legal act of general application convey the same meaning and are of equal legal force. The principle has its foundations in Union law and is considered by the Court of Justice of the European Union when it is called upon to interpret Union legislation.

At Treaty level, the concept of the equal authenticity of language versions is introduced in Article 55 TEU, which explicitly stipulates that the Treaty is equally authentic in each of the listed languages in which the Treaty was ‘drawn up in a

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3 The Treaty languages are defined in Article 55(1) of the Treaty on European Union (TEU).

4 Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385, and Regulation No 1 determining the languages to be used by the European Atomic Energy Community, OJ 17, 6.10.1958, p. 401.

5 The official languages in the Union currently are the following: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish, with Irish joining last as a fully-fledged official and working language in 2022.

6 See ‘Legal aspects of EU multilingualism’ – *Briefing*, European Parliament, January 2017.

single original' (the Treaty languages). Similarly, Article 358 TFEU extends the provisions of Article 55 TEU to also apply to the TFEU.

While the Treaties only define the equal authenticity of language versions of the Treaties, the foundations for the equal authenticity of language versions of secondary legislation were laid in the Court's case-law. In its 'CILFIT I' judgment[7], the Court clearly stated that Union legislation is drafted in several languages and that the different language versions are all equally authentic, and therefore interpretation of a Union law provision involves a comparison of different language versions. Among others, that stance was further reiterated and upgraded in the Court's 'CILFIT II' judgment[8]: according to the Court's settled case-law, one language version of a provision of Union law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions, and provisions of Union law must be interpreted and applied uniformly in the light of the versions existing in all Union languages.

## 4 The balancing act between the principle of equal authenticity and other principles applicable in the Union

In order to fully live the principle of equal authenticity, some scholars argue that the Court should examine all official language versions of any Union legal act at issue and that should be the core feature of all reconciliation methods[9]. However, is it realistic to expect the Court to do such a thing? Or, as indicated in the panel discussion, is it rather an unworkable option and therefore an impossible dream?

A particularly sensitive balancing act is required in the face of the 'multilingualism paradox'[10]. Multilingualism is primarily intended to bring the Union and its legislation closer to individual citizens and to ensure that an individual citizen is able to rely on their understanding of their rights and obligations as they are presented in the language version of the legal act that they consult. According to the principle of equal authenticity, all language versions deliver an identical message. Consequently, it should not matter which language version is consulted, as the reader will always get the same story – unless, of course, there are discrepancies among the language versions. In that situation, because the interpretation cannot only be based on one single language version, the individual citizen concerned then finds themselves in a multilingualism paradox: the very principle that is intended to facilitate their understanding of a provision places a question mark over that same understanding until the initial interpretation is confirmed by consulting other language versions. This process thus reduces the legal certainty that the principle of equal authenticity is

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7 Judgment of the Court of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA* v *Ministry of Health*, C-283/81, EU:C:1982:335, paragraph 18.

8 Judgment of the Court (Grand Chamber) of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi SpA* v *Rete Ferroviaria Italiana SpA*, C-516/19, EU:C:2021:799, paragraphs 42 and 43.

9 See Paluszek, K., 'The equal authenticity of official language versions of European legislation in light of their consideration by the Court of Justice of the European Union', *Comparative Legilinguistics* 18/2014, p. 51.

10 See van der Jeught, op. cit., p. 38.

designed to support. The question therefore arises as to how legitimate expectations based on an individual citizen's reading of their native language version can be balanced against uniform interpretation of Union law based on equal authenticity of all language versions. Should legal certainty prevail over non-discrimination as between languages?

These are big questions, as the panel discussion confirmed, and many more could be asked in discussing the principle of equal authenticity.

## 5 What are the main aspects of the principle of equal authenticity covered in this chapter?

The contributions analyse the 'quasi-constitutional' nature of the principle and its foundations in Article 55(1) TEU, Article 358 TFEU, and Regulation No 1.

They present how the Court applies the principle and what methods of interpretation it uses when it is requested to determine the meaning of Union legislation in circumstances where there are discrepancies between language versions of the provision under scrutiny.

The contributions explore the interaction between the principle of equal authenticity and other Union legal principles – including the principle of legal certainty – and other methods of legal interpretation used by the Court.

Finally, the contributions address the practical implications of these legal foundations and of the Court's case-law, and investigate the translation methods used by lawyer-linguists at the Court and the European Central Bank (ECB) in seeking to ensure concordance between language versions and thus contribute to uniform interpretation of the Union law.

This chapter comprises contributions prepared by the following distinguished speakers who contributed to the panel discussion on the principle of equal authenticity:

**Professor C.J.W. (Jaap) Baaij**, Associate Professor of Law at the Utrecht University School of Law. Professor Baaij is an established multidisciplinary scholar, academic researcher and lecturer who – among the many other legal topics in which he maintains an active interest – dedicated a decade of his academic work to researching the Court's application of the equal authenticity principle in its interpretation of Union law. To this end, Professor Baaij analysed 50 years of the Court's jurisprudence. He shares in his contribution some findings drawn from that research and most interesting reflections on the interaction between the principle of equal authenticity and other principles in the Union.

**Mr Nikolaos Sortikos**, Head of the Greek Language Translation Unit in the Directorate General for Multilingualism of the European Court of Justice. Having held different positions at the Court, Mr Sortikos is very well placed to bring a valuable 'Court insider' perspective to the discussion on the principle of equal authenticity. He

presents the Court's multilingual system and explains how it organises its proceedings to ensure the equal treatment of languages, including how the Court lawyer-linguists and other colleagues involved in the process contribute to supporting multilingualism and the principle of equal authenticity.

**Ms Petra Uroda Svoboda**, Lead Lawyer-Linguist in the Legislation Division in the ECB's Directorate General Legal services. Based on her vast experience of lawyer-linguist work and coordinating multilingual translation work and official legal publication tasks, Ms Uroda Svoboda presents specificities relating to ECB legal acts and the applicable language regime. She also focuses on the role of the ECB's lawyer-linguists and how they ensure linguistic concordance in the legislative process in practice.

# The Flexibility of Equal Authenticity

C.J.W. Baaij*

## 1 Introduction

The principle of equal authenticity of EU legislation's language versions stems from the commitment of the European Union (EU) Institutions to democracy and transparency. It is the cornerstone of EU law, asserting that all official language versions of EU legislation hold equal weight and authority. The underlying idea is that no single language version should be privileged over others and that the interpretation of EU law should consider all available language versions to arrive at a comprehensive and accurate understanding. However, a notable inconsistency exists between the theoretical presentation of this principle and its practical application. The discrepancy lies in the contrast between the unyielding and comprehensive nature of the principle's wording and the more pragmatic and flexible approach in its implementation adopted by the European Court of Justice of the European Union (hereafter, 'ECJ' or the 'Court').

This contribution will argue that practical considerations that call for a more curtailed application of equal authenticity should not be considered a limitation or imperfection of the principle but should instead be woven into its fabric. To this end, I will first examine the ECJ's established canons, or guiding principles, on equal authenticity. Subsequently, I will juxtapose these canons with the practices observed in the Court's application of this principle. Lastly, by exposing these inconsistencies, I contend that a more coherent and transparent policy justification for the EU's model of institutional multilingualism is imperative. This offers a way forward to coherently and transparently align the principle of equal authenticity with the pragmatic approach to its application. It ensures a nuanced and flexible approach that acknowledges the ideals and practicalities of language policy and strives to find effective and inclusive solutions.

## 2 The Postulated Principle of Equal Authenticity

### 2.1 Rooted in Democracy and Transparency

Before delving into the Court's interpretation canons, it is crucial to examine the foundational regulation governing language use in the EU: Regulation No. 1, enacted

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by the European Council in 1958.[1] This regulation, which has undergone revisions and has existed in its consolidated form since July 2013, delineates the official and working languages of the EU institutions and prescribes their usage. The regulation serves as the bedrock for the EU's multilingual framework, establishing the languages recognised and used within the institutions and outlining the principles for their application.

The regulation establishes a distinction between internal and external institutional multilingualism. External institutional multilingualism refers to how EU institutions communicate with the public in all official EU languages. Conversely, internal institutional multilingualism deals with the languages staff use in the internal decision-making within the institutions themselves. Regarding the external dimension, Article 4 of the Regulation mandates that EU institutions draft regulations and other general application documents in all official languages. This pertains to EU secondary legislation, encompassing rules and directives, which are legal acts that directly or indirectly affect EU citizens and member states. The requirement to draft these documents in all official languages stems from the EU's commitment to principles of democracy and transparency of government. It ensures that citizens across the EU have access in their own language to the laws that govern them.[2] According to Article 6, internal institutional multilingualism allows institutions to determine their own internal rules of procedure regarding language use in specific scenarios. This underscores the importance of everyone involved in the EU's internal decision-making process, from elected officials to experts, being able to participate in internal discussions and processes in their own language. Allowing individuals to use their native language is crucial for democracy and effective representation.

## 2.2 The Stringency of the Principle of Equal Authenticity

The obligation for EU institutions to enact regulations and directives in all official EU languages does not inherently imply that these versions are all equally authentic. The principle of equal authenticity must be postulated separately.

As for the EU Treaties, Article 55 of the Treaty on the European Union and referenced in Article 358 of the Treaty on the Functioning of the European Union explicitly state that the Treaties are drawn up in a single original in the applicable languages, and the text in these languages is equally authentic.

Conversely, for secondary legislation, the applicability of the concept of equal authenticity was not apparent until the Court developed the contours of the principle of equal authenticity in its case law in the later decades of the 20th century. Notably, in the 1982 landmark Cilfit case, the ECJ ruled that "it must be borne in mind that community legislation is drafted in several languages and that the different language

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1 Regulation No. 1/ 1958, determining the languages to be used by the European Economic Community, 15 April 1958, OJ B 17, 6.10.1958, p. 385, consolidated text. Currently, these are Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish. Article 1, Regulation No. 1/ 1958.

2 Communication COM(2005), 596 final, pp. 3, 12-13.

versions are all equally authentic."[3] This ruling presented a landmark decision as it established the principle of equal authenticity for secondary legislation, ensuring that all language versions are considered in the interpretation and application of EU law. Moreover, in Cilfit, the Court explained that due to this equal authenticity, "an interpretation of a provision of Community law thus involves a comparison of the different language versions."[4]

In subsequent case law, the Court elaborated that equal authenticity implies that all existing language versions are included in the linguistic comparison. For instance, in the 1998 EMU Tabac case, the Court affirmed that "a uniform interpretation of Community regulations … requires … that it should be interpreted and applied in the light of the versions existing in the other official languages," which entails that "all the language versions must, in principle, be recognised as having the same weight," regardless of "the size of the population of the Member States using the language in question."[5]

In later decisions, the Court indicated that the comparative language analysis in interpreting EU law must include all language versions. After all, as EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages, "according to settled case-law of the Court, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions in that regard."[6] No language version will be given undue weight or preference based on the number of speakers. The principle of equal authenticity thus ensures the equality of all official languages.

Then, in the 1977 Bouchereau decision, the Court clarified what to do when the comparative language analysis, required by the principle of equal authenticity and the need for a uniform interpretation and application of EU law, reveals language versions diverging. Then, "the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part."[7]

These landmark decisions, reiterated by the Court in a recent case in 2021,[8] underscored that equal authenticity does not amount to all language versions having identical meanings by decree. Instead, it means that all existing language versions contribute equally to the interpretation of the provision's meaning. Hence, equal authenticity does not so much state a fact as it imposes a responsibility on the part of European judges to actively compare and align the various language versions.

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3 Case 283/ 81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982], ECR 3415, par. 18.

4 *CILFIT*, par. 18.

5 Case 296/ 95, *The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham* [1998], ECR I- 01605, par. 36.

6 Case C-173/ 15, *GE Healthcare GmbH v Hauptzollamt Düsseldorf Par* [2017], EU:C:2017:195, par 65. See, also, C-294/ 16, PPU *JZ v Prokuratura Rejonowa Łódź — Śródmieście* [2016], EU:C:2016:610, pars. 37-40.

7 Case 30– 77, *Régina v Pierre Bouchereau* [1977], ECR 01999, par. 14.

8 Case C-950/19, *Patentti- ja rekisterihallituksen tilintarkastuslautakunta* [2021], ECLI:EU:C:2021:230, pars. 37-38. See also Case C-476/19, *Allmänna ombudet hos Tullverket v Combinova AB*, [2020], ECLI:EU:C:2020:802, par. 30-31.

This line of case law encapsulates the genesis and evolution of the postulation of equal authenticity for secondary regulation, as developed by the ECJ. It demonstrates the EU's commitment, in firm and resolute language, to ensure that all language versions of EU law are treated equally and contribute to the overall understanding and application of the law. For these reasons, rooted in the EU's commitment to democracy and the transparency of government, institutional multilingualism is considered a fundamental principle and a vital support of the EU.[9]

# 3 The Court's Application of Equal Authenticity in Its Own Cases

## 3.1 The Court's Application of Equal Authenticity: An Empirical Study

It turns out that, notwithstanding the strong and broad language of the ECJ's postulation, the Court's application of the principle of equal authenticity is less rigid or stringent than expected. In fact, the Court itself has demonstrated a flexible approach in this regard. This finding was revealed in a comprehensive empirical study I conducted for my book, Legal Translation and Language Diversity: Rethinking Translation in EU Lawmaking, published by Oxford University Press in 2018.[10] Focusing on how the Court addresses discrepancies between language versions and resolves potential conflicts, this quantitative case law analysis provides empirical insights into how the nature and workings of the principle of equal authenticity must be understood from the Court's own practices rather than its canons discussed in the previous section. Understanding how the Court navigates the complexities of interpreting legislation in twenty-four official languages contributes to a more holistic and realistic understanding of the nature, import, and effectiveness of the principle of equal authenticity.

This empirical study encompasses the first 50 years of the CJEU's jurisprudence on multilingual interpretation, from 1960 to 2010. This period covers a significant portion of the Court's history. It allows for an examination of its evolving approach to language. The dataset comprises all judgments within this period. The decisions in which the Court explicitly engaged with multiple language versions in its reasoning will be called "language cases." These were identified through a systematic search of the EUR-Lex database using a range of keywords and phrases related to language versions, including "language version," "linguistic version," "language," "linguistic," "text," and "version," across the full English text of all CJEU judgments. Following this initial retrieval, each judgment underwent a manual review to confirm that the Court had genuinely considered multiple language versions in its decision-making

9 See, e.g., Parliament Resolution on the use of the official languages in the institutions of the European Union (1995) and Communication COM(2005), 596 final, p. 13.

10 C.J.W. Baaij, *Legal Translation and Language Diversity: Rethinking Translation in EU Lawmaking*. Oxford: Oxford University Press (2018).

process. This rigorous selection process resulted in a final dataset of 246 language cases.

One of the research objectives of this quantitative analysis serves to explore how often the Court conducts a comparative language analysis to begin with, the number of languages included when such analysis took place, which language versions were included more than others, and – in case of versions diverged – the meaning of which versions ended up being most often consistent with the Court's eventual interpretation of the legal provision at hand. The ensuing findings will be discussed next.

## 3.2 How Regularly the Court Compares Language Version

The first key objective of the empirical study was to determine how frequently the Court engages in comparative language analysis when interpreting EU law, a practice seemingly mandated by the principle of equal authenticity as the Court has postulated it. Surprisingly, the data reveals a stark contrast between theory and practice.[11] Despite the EU's commitment to multilingualism and the Court's stated guidelines, comparative language analysis remains rare in its jurisprudence. Of the 8,716 judgments issued between 1960 and 2010, only 246 (a mere 2.8%) explicitly compared or assessed multiple language versions. Furthermore, this practice has remained remarkably consistent over time, with the proportion of judgments involving comparative language analysis fluctuating between 1% and 4% per 5-year interval throughout the study period. This consistent pattern underscores the infrequency of such analysis in the Court's decision-making process, despite its importance in upholding the principle of equal authenticity and ensuring accurate and unbiased interpretation of EU law.

This finding is particularly remarkable given the Court's own canons, which explicitly state that interpretation must be conducted in light of all language versions, not just one. This suggests a tendency to rely on a single language version, even when dealing with potentially divergent interpretations. This discrepancy between the principle of equal authenticity and its practical application, as unveiled by the quantitative analysis, reveals the extent to which the Court itself understands the requirements set by the principle of equal authenticity that it has postulated.

## 3.3 The Scope of the Court's Comparative Analysis

Secondly, in instances where the Court does compare language versions, the subsequent question that the empirical study explored is how often it compares all existing language versions and, when not, how many languages it includes.[12]

Here, as a preliminary matter, a distinction must be made between all language versions that existed when the relevant legislation was enacted (ex tunc) and all

[11] See Baaij 2018, p. 70-71.

[12] See Baaij 2018, p. 72-74.

language versions that existed when interpreting this legislation (ex nunc). When courts are expected to take an ex-nunc approach, the principle of equal authenticity implies a more stringent standard than an ex-tune alternative. The reason is that the number of official EU languages has grown throughout the EU's history as more countries joined the EU over time. Consequently, legislation enacted earlier in the EU's history may have been passed in far fewer authentic language versions than the number of languages recognised when the Court is asked to interpret it – in the early years, only four languages were recognised; today, there are twenty-four.

Consequently, adopting the ex-nunc approach, which considers all language versions existing at the time of interpretation and would thus involve a higher number of languages than the ex-tunc alternative, places a more significant burden on the Court regarding resources and time. While the ex-nunc approach might be seen as more inclusive and reflective of the principle of equal authenticity for all current member states, it demands that the Court consider all current official languages, even for legislation enacted when fewer languages were recognised. On the other hand, the ex-tunc approach, which focuses on the language versions existing at the time of enactment, may be more manageable for the Court while emphasising the historical context of the legislation. Still, it could also be perceived as less inclusive and overriding the more recent language versions, thus indirectly disenfranchising the citizens who access EU law through these languages. Hence, while adopting an ex-nunc approach requires more effort from courts, the ex-nunc approach is more lenient, limiting the analysis to the languages in which the legislation was initially drafted.

The Court's case law does not present unambiguous support for an ex-tune or an ex-nunc approach. Only in a handful of decisions did the Court expressly limit its analysis to the languages recognised at the time of enactment.[13]

Either way, the empirical study adopted the ex-tunc measure to provide the most generous assessment of the Court's application of the principle of equal authenticity. This means it evaluates the Court decisions based on the minimum number of language versions it should have considered. By using the ex-tunc approach, this study offers a more charitable evaluation of the Court's commitment to multilingualism, as fewer languages would be regarded as 'all' languages.

The ensuing findings indicate that in the first 50 years of its case law, the Court explicitly considered more than all versions at the time of enactment in 13% of the so-called language cases. Typically, in these cases, the Court itself assumed an ex-nunc approach. In another 6%, the Court looked at all versions, hence, those that existed at the time of enactment and subsequently became official. In 31% of decisions, the Court did not name the individual language versions it compared. Instead, it merely stated that it looked at "all" language versions without specifying which ones were included. Consequently, in half of the language cases, the Court

[13] See, e.g., Case C- 85/ 95, John Reisdorf v Finanzamt Köln- West [1996], ECR I- 06257, par. 22, and Case C- 189/ 11, European Commission v Kingdom of Spain [2013], EU:C:2013:587, pars. 21, 49, 53–57. See, also, Opinion of AG Stix- Hackl in Case C- 152/ 02, Terra Baubedarf- Handel GmbH v Finanzamt Osterholz- Scharmbeck [2004], ECR I- 05583, par. 39.

consulted or stated to have consulted at least all language versions existing at the time of the legislation's enactment.

Therefore, the Court examined fewer than all language versions in the remaining half of the language cases. In approximately 11% of decisions, the Court explicitly conducted a comparative analysis, including most or fewer than half of all language versions. In 18% of the decisions, the Court did not clarify which language versions it consulted. Still, it did indicate that it reviewed "most." In 5%, it stated that it had reviewed "some" versions. In the remaining 9% of decisions in which the Court conducted a comparative language analysis, the decision did not make clear how many or which language versions the Court had consulted.

The latter data underscores a discrepancy with the principle that all languages carry equal weight in determining the meaning of a legal provision and that no single version should be allowed to override others. This analysis reveals a noteworthy nuance in how the Court applies the principle of linguistic equality in practice. While the Court consistently emphasises the equal authenticity of all language versions and the importance of considering them collectively, the data indicates a more selective approach in half of the cases involving comparative language analysis.

## 3.4 The Language Versions Consulted

The third research question is, which languages are given precedence over others, given that the Court does not consistently compares all versions? An analysis of the language versions used by the Court in its comparative analyses reveals a notable pattern. In the entire dataset, between 1960 and 2010, the Court most frequently consulted German (100), English (82), and French (81), the same languages predominantly used as vehicular and drafting languages within the legislative EU institutions.[14] Closely following are Italian (74), Dutch (64), Danish (49), and Spanish (49).[15]

These figures do not appear to be influenced by the longer-standing status of these languages as official EU languages. The reason is that the same seven languages – albeit with a slightly different relative ranking among the French, Italian, and Spanish languages – are the most often cited in the Court's case law between 2005 and 2010, the final five years in the dataset where most of the current official languages were in place.[16] Moreover, these seven most frequently cited languages are among the most widely spoken in Europe, particularly within the Germanic and Romance language families.[17] This aligns with French, English, German, Spanish, and Italian functioning as so-called "pivot" languages within the Court, often used for drafting opinions and internal communication. The frequent inclusion of Dutch and Danish may stem from their linguistic proximity to German, enabling those proficient in

[14] Court of Auditors, Special Report (No 9/ 2006), C284/ 8. Parliament's Replies to Court of Auditors, in Special Report (No 9/ 2006), C284/ 26.

[15] See Baaij 2018, p. 78-79.

[16] See Baaij 2018, p. 79-80. Bulgarian, Irish and Romanian became official languages in 2007. Croatian became an official EU language in 2013, hence, outside of this study's dataset.

[17] Special Eurobarometer 386 (2012).

German to readily comprehend them.[18] This may suggest a potential predisposition, within the Court or EU Institutions generally, towards older and more established languages, which may have deeper roots in the EU's legal and institutional structures.

Naturally, the Court may reference a particular language version because that language happens to be the language of the case, i.e., the language in which the proceedings of the case formally takes place. To ascertain whether the Court prefers including specific language versions in the comparative language analysis even when they are not the language of the case, we need to examine instances where it mentions a language that is not the primary language of the case. The data reveals that between 2005 and 2010, all seven of the most mentioned languages were cited more frequently in cases where they were not the language of the case than when they were. Notably, the Romance languages – Italian, French, and Spanish – were most often mentioned even when they were not the language of the case, along with English and Danish.

These findings suggest that the Court's selection of language versions for its comparative analyses mirrors trends observed in national courts, where widely used European languages are often prioritised. This judicial practice reflects an overall pragmatic approach to multilingual interpretation, balancing the ideal of equal authenticity with the practicalities of managing a complex linguistic landscape.[19]

## 3.5 Language Versions Consistent with the Correct Interpretation

When the Court finds the language versions to diverge, any reconciliation results in one or more versions turning out to have expressed the 'incorrect' meaning of the legislative instrument. In effect, a uniform interpretation of diverging language versions results in citizens retroactively having relied on the 'wrong' language version.[20] Therefore, the fourth and final question pertains to which version is more often correct than others. Here, the study examines how often the Court's eventual interpretation of the law aligns with each of the seven most frequently cited language versions.

The quantitative analyses indicate that between 1960 and 2010, as well as in the 2005-2010 segment, specific language versions may hold more weight than others in the Court's interpretive practices.[21] Notably, when the meaning of language versions diverges, the Court's interpretation of the law almost always aligns with the meaning conveyed by the English version. Between 1960 and 2010, in sixty-two out of the

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18 McAuliffe, K. (2008) "Enlargement at the European Court of Justice: Law, Language and Translation," 14(6) European Law Review, 806, p. 810– 811, 817, and McAuliffe, K. (2009) "Translation at the Court of Justice of the European Communities," in F. Olsen, A. Lorz, and D. Stein (eds.), Translation Issues in Language and Law, 99–115. London: Palgrave Macmillan, p. 110.

19 See Derlén, M. (2011) "In Defence of (Limited) Multilingualism: Problems and Possibilities of the Multilingual Interpretation of European Union law in National Courts," in A. L. Kjær and S. Adamo (eds.), *Linguistic Diversity and European Democracy*, 143– 166. Farnham, UK: Ashgate, p 153.

20 Paunio (2013: 77). See, e.g., Case C- 132/ 99, *Kingdom of the Netherlands v Commission of the European Communities* [2002], ECR 2002 I- 02709, pars. 23-25.

21 See Baaij 2018, 83-85.

eighty-two decisions (75.6 %) where the English version was explicitly included in the Court's comparative exercises, the reading of this version was consistent with the Court's interpretation. Between 2005 and 2010, it held true for twenty-five out of twenty-eight decisions (89.3%). In both periods, no other language version turned out to have the 'correct' meaning of the law as often as the English version. While this does not prove that the Court deliberately or, as a matter of course, prioritises the English version, it simply shows that it most often finds the English version to be the most accurate expression of EU legislation.

So, there appears to be something 'special' about the English language version, for it to be on the right side of the Court's interpretation of the law more often than any other version. This distinctive feature mirrors the English version's unique role in the legislative procedure. In contemporary times, English has become the predominant language in which legislative drafts are written, discussed, and debated. Translation into other language versions often occurs only at specific junctures and is not always comprehensive. Furthermore, English is employed as a lingua franca in discussions, particularly informal ones.[22] This dominance of English in the legislative process inevitably influences the interpretation of EU law despite the principle of equal authenticity.

In conclusion, the empirical data, in response to these four questions, reveals that the Court's practices show an inclination towards equal authenticity that does not necessitate a complete comparison of all language versions and a practice that prioritises linguae franca and grants the English version the statistical presumption of correctness. Applying the principle of equal authenticity highlights a potential tension between the ideal of equal authenticity and the practice of legal interpretation in a multilingual context. It raises important questions about how to reconcile these practices with the principle's resolute and firm wording and underpinning principles of democracy and transparent government, on the one hand, and the flexibility by which the Court itself understands the principle's requirements. That will be the focus of the following section.

# 4 A More Transparent and Coherent Policy of Equal Authenticity

## 4.1 The Need for a Coherent, Public Account of Institutional Multilingualism

The empirical evidence presented thus far might lead one to infer that the practical implementation of institutional multilingualism within the EU falls short of its theoretical ideals. The noble aspiration of complete linguistic equality, where all language versions are treated equally in every facet of the EU's operations, may encounter significant hurdles in its realisation. From this viewpoint, the sheer

[22] See demonstrated and explained in more detail, Baaij 2018, p. 63-66.

multitude of languages spoken across the member states, the inherent complexities of translation and interpretation, and the inevitable limitations of resources all contribute to this gap between theory and practice.

However, succumbing to such a gloomy outlook on the reality of institutional multilingualism is unnecessary. A pragmatic approach to institutional multilingualism and equal authenticity, in particular, means acknowledging the limitations of resources and the need to balance the ideal of complete linguistic equality with the practicalities of translation, interpretation, and communication within the EU institutions.

Given these complexities, a more forthright, transparent, and coherent approach is needed to reconcile the normative language of equal authenticity with its practical application.

The rationale for needing a more transparent and coherent presentation of equal authenticity lies in the fundamental tenet of any liberal society: a government must provide its citizens with a public justification for its policies.[23] It must explain its exercise of power and delineate the state's appropriate role in society. Such a public account of policies is inherently deficient if it lacks transparency—meaning it is not aligned with the reality of its policies—or if it lacks coherence, as any internally inconsistent justification is essentially no justification.[24] A transparent and coherent policy fosters trust and legitimacy and facilitates understanding and compliance among citizens. It ensures that the reasons behind policy decisions are clear and the principles guiding them are applied consistently, promoting accountability and acceptability. As a supranational entity, the EU is responsible for being transparent and accountable to its citizens, given its complex structure and diverse interests.

A more transparent and cohesive policy would enhance the legitimacy of the EU's language practices and foster trust and understanding among its citizens. It would involve openly acknowledging the practical constraints and trade-offs in implementing multilingualism while still upholding the core principles of linguistic equality and accessibility. The EU must strike a delicate balance between idealism and realism, ensuring its language policy is both principled and practical.

## 4.2 The Democratic Underpinnings of Equal Authenticity

In building towards a principle of equal authenticity that embraces rather than conceals real-life obstacles in its application, it should be underscored that the EU's constitutional framework holds room for the foundations of both the previously mentioned principles of democracy and transparent government, on the one hand, and pragmatic consideration in applying the principle of equal authenticity, on the other.

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23 John Rawls, *Political Liberalism*. Columbia University Press (2005), p. 387. Rainer Forst, *The Right To Justification: Elements Of A Constructivist Theory* Of Justice 21 (Jeffrey Flynn trans., 2011) Columbia University Press (2014), p. 21.

24 John Rawls 2005, p. 144-145. Rainer Forst 2014, p. 6, 21.

The principle of democracy is deeply woven into the fabric of the EU, as evidenced by Articles 10 and 11 of the Treaty on the European Union.[25] Regarding external institutional multilingualism, Article 10, Section 3 guarantees every citizen the right to participate in the democratic life of the Union, with decisions being made as openly and as closely as possible to the citizen. This provision emphasises the importance of citizen participation and engagement in the democratic process, ensuring their voices are heard and their interests are represented. It underscores the idea that the EU is not just a bureaucratic entity but a union of people, the legitimacy of which rests on the active involvement of its citizens. Regarding internal institutional multilingualism, Article 11, Section 2 further mandates that the institutions maintain an open, transparent, and regular dialogue with associations and civil society representatives. This underscores the EU's commitment to engaging with civil society and fostering a participatory democracy where citizens have a say in the decisions that affect them. It recognises the role of civil society in holding the EU institutions accountable.

These articles prohibit discrimination based on language or other grounds while upholding cultural, religious, and linguistic diversity. In essence, the EU's commitment to democratic values in the context of multilingualism entails that language does not become a barrier to accessing and understanding EU law, thereby promoting inclusivity and equal participation for all citizens. It seeks to empower citizens and their representatives by enabling them to engage with the law in their own language, fostering a sense of ownership and belonging within the EU. Language, in this sense, is not just a tool for communication but also a marker of identity and a means of cultural expression. This is further supported by recognising cultural and linguistic differences enshrined in Article 3, Section 3 of the Treaty on the European Union, and Articles 21 and 22 of the Charter of Fundamental Rights.[26]

## 4.3 Finding a Constitutional Foothold for a Pragmatic Approach

A pragmatic approach to applying equal authenticity finds support in the current EU constitutional framework, in addition to the value of democracy. Article 13, Section 1 of the Treaty on the European Union states that the EU shall have an institutional framework that ensures the consistency, effectiveness, and continuity of its policies and actions. Moreover, there have been further indications that the EU legal framework leaves room for a pragmatic understanding of equal authenticity.

One of the earliest explicit defences of a pragmatic understanding of equal authenticity was offered by Advocate General Poiares Maduro in his Opinion on the 2004 Eurojust case.[27] He argued that the principle of multilingualism is not absolute but relative to the practical constraints of institutional and administrative life, as long as these constraints are limited and justifiable. The Advocate General emphasised the importance of balancing the ideal of multilingualism with the practical realities of running a complex and diverse organisation like the EU. He recognised that while

[25] Treaty on European Union (Consolidated version 2016), OJ C 202, 7.6.2016.

[26] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

[27] Case C- 160/ 03, *Kingdom of Spain v Eurojust* [2005], ECR I- 02077.

linguistic diversity is valuable, it must be managed in a way that is both effective and efficient, ensuring that the EU can function smoothly and achieve its objectives. He rationalised that a system of all-encompassing linguistic pluralism, where every language is treated equally in every situation, is practically unfeasible and economically unsustainable.[28] Poiares Maduro's argument entails that the number of languages spoken within the EU, coupled with the complexities of translation and interpretation, makes achieving complete linguistic equality in all institutional operations impractical. Therefore, a degree of pragmatism is necessary to ensure that the EU's multilingual system is both functional and sustainable. Notwithstanding, he did not elaborate on why the principles of democracy and transparent government do not require a greater effort or investment, i.e., which standard must be employed to determine how these principles must be weighed against practical and budgetary needs.

Furthermore, the Commission also explicitly invoked the need for EU institutions to have a degree of "operational autonomy" in a 2012 case between Italy and the Commission.[29] The Court concurred, emphasising that practical considerations, such as translation capacity, can legitimately limit the principles of non-discrimination and proportionality. It acknowledged that while non-discrimination and proportionality are important principles, they must be balanced against the practical realities of operating in a multilingual environment.[30] From this view, the limited resources available for translation and interpretation may necessitate prioritising specific languages or documents, even if it results in some degree of inequality in language access. This ruling emphasises the tension between the ideal of equal authenticity and EU institutions' practical constraints in implementing multilingualism. It underscores the need for a nuanced and flexible approach that considers both the principles and practicalities of language policy.

More recently, the Court has explicitly acknowledged a pragmatic take on equal authenticity in the 2021 Consorzio Italian Management case. Here, the Court invoked the acte clair doctrine in interpreting EU law. The acte clair doctrine, derived from the Latin maxim in claris non fit interpretation, is a legal principle that allows national courts to refrain from referring a question to the Court of Justice for a preliminary ruling if the answer to the question is so obvious that there is no reasonable doubt as to its interpretation. In this respect, in Consorzio, the Court stated that a national court cannot be obligated to examine every language version of a provision, though it must take into account any divergences of which it knows, especially when highlighted by the parties involved.[31] In the context of multilingualism, this doctrine allows national courts to bypass the potentially time-consuming and resource-intensive process of comparing all language versions of a provision if its meaning is clear and unambiguous in the language of the case.[32] This

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28 Opinion, AG Poiares Maduro in Case C- 160/ 03, *Kingdom of Spain v Eurojust* [2005], ECR I- 02077, par. 40-47.

29 Case C- 566/ 10 P, *Italian Republic v European Commission* [2012], ECR 00000, par. 27.

30 Case C- 566/ 10 P, *Italian Republic v European Commission* [2012], ECR 00000, pars. 76, 88, 98.

31 Case C-561/19 *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* [2021], ECLI:EU:C:2021:799, par. 44.

32 See Case C-561/19 *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* [2021], ECLI:EU:C:2021:799, par. 33.

approach reflects a pragmatic recognition that, in some instances, the effort and resources required to compare all language versions may outweigh the potential benefits, mainly when the meaning of the law is clear and there is no genuine ambiguity.[33]

The Court has previously indicated the possibility of an acte-clair approach to the comparative language analysis involved in applying the principle of equal authenticity, suggesting that a court need not compare language versions when a legislative provision is ambiguous on its face.[34] The acte clair doctrine allows for a more efficient and streamlined approach to legal interpretation while acknowledging the importance of considering linguistic diversity in cases of genuine doubt or ambiguity. Still, logic dictates that without comparing all language versions, it cannot be known whether versions diverge and thus require reconciliation. That much, the Court acknowledged in the 1997 Ferriere Nord case. The case involved a situation where the appellant relied on a specific language version. Still, the Court noted discrepancies with other versions. It emphasised the importance of considering all language versions of EU legislation, even when one version seems clear and unambiguous on its own.[35]

These instances where the practicalities of applying found official recognition testify to the argument that institutional multilingualism and the equal authenticity of language versions must be managed in a way that is both effective and efficient, ensuring that the EU can function smoothly and achieve its objectives.

## 4.4 Integrating Pragmatic Considerations into the Principle of Equal Authenticity

Acknowledging that both democracy and efficiency are part of the same constitutional tapestry of the EU opens the door towards a principle of equal authenticity that recognises and incorporates the acknowledgment of the pragmatic considerations involved in applying this principle. In this respect, practical considerations should not be seen as an excuse or a limitation on equal authenticity but rather as an integral part of the normative framework underpinning the principle of equal authenticity. Giving in to pragmatic solutions is not an imperfection in implementing equal authenticity but a justified means of optimizing multilingualism to achieve its core objectives.

Put differently, while democracy is not served with a principle of equal authenticity that is unworkable in practice, transparent governance is not served with a principle of equal authenticity that does not openly reflect its practical limitations.

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33 See for an earlier expression of this view, Opinion of AG Jacobs in Case C- 338/ 95, *Wiener S.I. GmbH v Hauptzollamt Emmerich* [1997], ECR I- 6495, par. 65.

34 For an early example, see Case 19– 67, *Bestuur der Sociale Verzekeringsbank v J. H. van der Vecht* [1967], ECR 00345, p. 353. A later instance is Case C-484/ 14, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH* [2016], par. 52.

35 Case C- 219/ 95, *Ferriere Nord SpA v Commission of the European Communities* [1997], ECR I-04411, par. 15.

In at least two ways, a rationale for the limitations on multilingual practices due to budgetary and efficiency concerns may become part of the principle of equal authenticity.

First, a pragmatic approach to equal authenticity allows for a more realistic and efficient approach, prioritising the most widely spoken and understood languages while still striving to provide access to information in other languages when feasible. It acknowledges that while linguistic diversity is valuable, it must be balanced against the need for efficiency and effective governance. The EU institutions must ensure their resources are used to maximize their impact and benefit all citizens. It recognises that the ideal of complete linguistic equality may not always be achievable in practice and that compromises may be necessary to ensure the smooth functioning of the EU institutions. Translating and interpreting all documents and proceedings into official languages would require vast resources and slow the decision-making process.

Second, The apparent importance of English in the ECJ's comparative language analyses raises the possibility of a de facto English-first interpretation canon. On its surface, this observation contradicts the principle of equal authenticity's basic tenet that no language is to take precedence over others in the uniform interpretation and application of EU law. However, it is not too farfetched to accept an interpretation canon that attributes a unique role to the language in which legislation is principally drafted, at least when language versions are found to diverge. Such a canon was contemplated by Advocate General Stix-Hackl in the Opinion to the 2005 Simutenkov case.[36] As English is nowadays the de facto legislative lingua franca, such a canon would, in effect, attribute the function of the tiebreaker to the English version. This would indeed fit the data as found in this empirical study. Furthermore, national courts have also been observed to rely on the English version as the de facto original.

Hence, a pragmatic take on the principle of equal authenticity allows for a transparently flexible and adaptive approach to language policy, recognizing that the ideal of complete linguistic equality may need to be balanced against practical considerations in certain situations. It acknowledges that there may always be a trade-off that fully satisfies all principles, not to weaken but to strengthen equal authenticity and, in a broader sense, institutional multilingualism.

The challenge lies in finding the right balance between these principles, recognizing that the ideal of complete linguistic equality may need to be tempered by the practical realities of operating in a multilingual environment. Striking the right balance requires careful consideration of the costs and benefits of different language policies and the potential impact on citizens' ability to participate in the democratic process. Doing so coherently and publicly is crucial for EU institutions to offer a transparent and coherent justification for their policy of institutional multilingualism, which is intrinsically linked to the EU's legitimacy and authority.

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[36] Case C- 265/ 03, *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* [2005], ECR I- 2579, Opinion of AG Stix- Hackl, par. 19.

# 5 Conclusion

The EU's approach to institutional multilingualism should be guided by a commitment to transparency, coherence, and the continuous pursuit of a balance between the competing demands of democracy and efficiency. This requires a nuanced and flexible approach to the principle of equal authenticity that integrates and acknowledges the ideals and practicalities of the EU's language policy and strives to optimise its results. The goal is then to create a language policy that upholds the theoretical ideals of equal authenticity and functions effectively in the real world, promoting communication, understanding, and participation across all linguistic communities within the EU.

Equal authenticity of EU legislation's language versions is the cornerstone of the EU's multilingual legal system. However, its implementation faces challenges due to the practical realities of operating in a multilingual environment. The empirical data presented in this contribution highlights the need for a more transparent and coherent approach to institutional multilingualism in the EU. By integrating pragmatic considerations into the very principle of equal authenticity – rather than presenting these as a limiting, diminishing force – the EU Institutions can ensure that their language policy remains both principled and practical, upholding the values of democracy, diversity, and efficiency that are at the heart of the European project.

# A strength and a challenge: linguistic pluralism at the Court of Justice of the European Union

Nikolaos Sortikos*

This contribution briefly examines the principle of equal authenticity within the broader context of the multilingual regime of the Court of Justice of the European Union (CJEU). It discusses how this concept influences procedures before the CJEU and briefly touches on relevant case-law from a substantive point of view (section 1). Next, it examines how the CJEU and, in particular, its support services ensure multilingual coverage (section 2) and offers some thoughts on the present and future challenges for multilingualism (section 3), before drawing final conclusions (section 4). This article is not intended to cover this broad subject exhaustively or even extensively. It is necessarily fragmented and aims to highlight only a few of the many elements that contribute to ensuring language equality in the EU and at the CJEU in particular.

## 1 The foundations of multilingualism and equal authenticity

Institutional multilingualism has been regarded as an integral part of the EU since its very beginning. It has rightfully been linked to the democratic legitimacy of the EU institutions, to transparency, and ultimately, to the engagement of European citizens with the EU project. Multilingualism is enshrined in the Charter of Fundamental Rights of the European Union as an obligation to respect linguistic diversity (Article 22). Furthermore, Article 21 of the Charter lists language as one of the prohibited grounds of discrimination, while Article 41(4) establishes that every citizen has the right to address any EU institution in one of the languages of the Treaties and to receive a reply in the same language, which forms part of the right to good administration. When it comes to the Treaties, Article 55 of the Treaty on European Union (TEU) states that the 24 official languages in which the TEU's text is drafted are considered original and, therefore, equally authentic. Article 348 of the Treaty on the Functioning of the European Union (TFEU) provides that the same applies for this Treaty. Moreover, Article 342 TFEU stipulates that the rules governing the languages of the institutions of the Union shall be determined by the Council, acting unanimously by means of regulations. Regulation 1/1958, the very first regulation adopted by the then European Economic Community and frequently amended to account for the languages of the new Member States, establishes 24 official and working languages of the EU. From this set of provisions derives the principle of equal authenticity, according to which all language versions of EU legislation are considered original texts and have the same meaning. The principle of equal

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authenticity is thus the necessary corollary of institutional multilingualism and a pillar of EU law-making.

## 1.1 Equal authenticity and multilingualism at the CJEU: the procedural aspects

At the same time, each EU institution is allowed to provide for internal rules on multilingualism. Indeed, article 6 of Regulation 1/1958 states that the EU institutions may stipulate in their Rules of Procedure which languages are to be used in specific cases. For the CJEU, the provisions concerning language arrangements[1] for proceedings before the Court of Justice (ECJ) are set out in Articles 36 to 42 of its Rules of Procedure, while for the General Court, the relevant provisions are Articles 44 to 49 of its own Rules of Procedure.

Two distinct notions must be distinguished here: the "working language" of the CJEU and the "language of the case" before the CJEU. On the one hand, the working language refers to the language in which the Members of the CJEU communicate between them, conduct their deliberations, discuss, and decide on every case. This working language must inevitably be a single, common language, which at the CJEU is traditionally the French language. On the other hand, the language of the case (or language of the proceedings) can be any of the 24 official languages of the EU. This is a very important concept for any person seeking judicial protection before the CJEU or for any national court seeking interpretation of an EU legal provision, because it determines the language in which the case is introduced and argued among the parties before the CJEU. In direct actions brought before the General Court by natural or legal persons, the fact that the applicant has the right to choose the language of the case exemplifies the intention to ensure equal access to justice in the European Union, without language being a barrier, even for applicants from Member States with less widely used or spoken languages. It would indeed constitute a serious constraint for all applicants if they were required to seek legal representation in a specific language that they do not master, only because it is a language which is thought to be more easily understood by the General Court (for example, French or English).

When it comes, more specifically, to upholding the principle of equal authenticity by addressing linguistic discrepancies between different language versions of EU legislation, it should be noted that such issues arise less frequently in direct actions brought before the General Court but occur more often in preliminary references. As is well known, the preliminary reference procedure is a cornerstone of the EU judicial system, as the ECJ has repeatedly emphasised. It secures the uniform interpretation

[1] A comprehensive analysis of the language regime of the CJEU can be found in the first volume of the comprehensive work published by the CJEU in 2023: Court of Justice of the European Union, *Multilingualism – 1. Multilingualism at the Court of Justice of the European Union,* Publications Office of the European Union, 2023, https://data.europa.eu/doi/10.2862/012811, pp. 20-44.

of EU law by establishing a dialogue between the CJEU and national courts[2]. In this system, national courts have the power and, in some cases, the obligation to refer a question on interpretation of EU law to the CJEU. In preliminary ruling proceedings, the language of the case is precisely the language of the referring court. Again, the fact that the referring national court, which is best placed to refer interpretation issues that arise within its jurisdiction, has the right to do so in its own language (and not in a predefined language of preference of the CJEU) enables the national court to express itself with all the precision and nuance that it deems necessary and thus to adequately address the doubts it faces regarding the interpretation of EU legislation. These doubts may often stem from linguistic issues in the language of the referring national court, particularly when differences are identified between the version of the relevant EU legislation in that language and the versions in other official EU languages. Since the reference for a preliminary ruling is notified to all Member States, the latter have the possibility to clarify whether the version of the relevant EU legislation in their respective language coincides with the version in the language of the referring court or whether the doubts raised by the referring court do not arise in their own legal order thanks to a different and non-ambivalent wording of the EU legislation at hand in their own language.

In both direct actions and preliminary proceedings, written and oral pleadings are submitted primarily in the language of the case or they are translated in this language if submitted by a Member State other than the one from which the referring national court originates. The CJEU then deliberates the case in its working language, i.e., French, relying on translations of the parties' observations into French. An interesting feature of this system is that while the judgment is also drafted in French, it is the version in the language of the case, namely the translation from French into this other language, which shall be authentic. This is further proof of the importance of multilingualism at the CJEU and reflects the trust that the CJEU places on its linguistic services.

These language arrangements have no equivalent in any other jurisdiction in the world. They enable the CJEU to fully uphold the principles of multilingualism and language equality, in the sense that:

(i) all main actors in a specific case, and in particular the ones initiating it, have the right to express themselves in the language of their choice;

(ii) Every official language and every language combination required for a specific case can be covered at any time, and

(iii) The final judgment of the CJEU is equally accessible in all Member States, as it is translated from French into all other official EU languages (in most cases simultaneously with the translation into the language of the proceedings).

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[2] It is worth noting that, from October 1st 2024, this dialogue has been extended to include the General Court, which obtained jurisdiction over preliminary references in six specific areas of EU law. See "Jurisdiction to hear and determine questions referred for a preliminary ruling is conferred on the General Court of the European Union in six specific areas", Press Release No 125/24: https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-08/cp240125en.pdf

## 1.2 Equal authenticity and multilingualism at the CJEU: the substantive aspects (a case-law example)

If the previous remarks mainly concern the procedural aspects of language equality before the CJEU, it is clear that a significant part of the CJEU's case-law addresses directly the substantive aspect of equal authenticity and the handling of potential linguistic discrepancies between language versions of EU legislation. This body of case-law is extensive, so this discussion will only focus on one case that summarises previous rulings and sets the tone for future developments. It is the case *Consorzio Italian Management*[3], commonly referred to as "*CILFIT II*" as it follows in the footsteps of the 1982 landmark *CILFIT* judgment[4]. According to the doctrine of "*acte clair*", first established in CILFIT (1982), national courts of last instance are not obligated to refer to the ECJ a question on the interpretation of EU legislation if the correct application of the relevant EU provision leaves no scope for any reasonable doubt. In this respect, the national court of last instance must be convinced that the matter would be equally clear to courts in other Member States and to the ECJ itself. This entails, at least to some extent, a comparative analysis and a linguistic assessment of other language versions of the relevant EU provision.

In CILFIT II, the ECJ reaffirmed and stressed the principle of equal authenticity, emphasising the fact that EU legislation is drafted in multiple languages, all of which are equally authentic. A single language version of an EU legal provision cannot serve as the sole basis for its interpretation or override the other language versions, as this would be incompatible with the requirement for the uniform application of EU law. The ECJ went further, stating that while a national court facing a question on the interpretation of an EU provision is not required to examine every language version, it nevertheless must remain mindful of any divergences between the various language versions of which it is aware of — especially if these divergences are identified and substantiated by the parties. It becomes clear that, following that reasoning, national courts of last instance bear a significant responsibility to analyse and assess these linguistic discrepancies. A reasonable question arises regarding how extensively the national court must examine the other language versions of EU legislation, particularly if it lacks the linguistic expertise and/ or the resources necessary to perform such linguistic comparisons and analysis. Here, the role of the parties before the national court becomes prominent. It is primarily the responsibility of the parties to detect and highlight possible linguistic discrepancies that could influence the interpretation of the EU provision at hand. It is up to the parties to bring these discrepancies to the attention of the national court, to substantiate them, and to explain why they warrant a referral to the ECJ for clarification. If the parties have fulfilled this obligation and the national court is now aware of the linguistic discrepancies between language versions that cast doubt on the correct and unanimous interpretation of EU legislation, then the national court cannot, without

[3] Judgment of 6 October 2021, Consorzio Italian Management and Catania Multiservizi (C-561/19, EU:C:2021:799).

[4] Judgment of 6 October 1982, Cilfit and Others (283/81, EU:C:1982:335).

substantial justification, deviate from its obligation to initiate a preliminary reference procedure and engage in dialogue with the ECJ[5].

In the same CILFIT II judgment, the ECJ reiterated that EU law employs terminology that is particular to it, and legal concepts in EU law may not correspond precisely to similar concepts in the laws of the Member States. The ECJ also hinted to the interpretation methods it uses when a literal interpretation is not conclusive, namely contextual interpretation which considers the general scheme of the EU act at hand, and teleological interpretation which considers the objectives and purpose of the legislation. It is only when, with the help of these interpretation criteria, a national court of last instance concludes that there is no circumstance capable of giving rise to any reasonable doubt as to the correct interpretation of EU law that it may refrain from referring to the ECJ a question concerning the interpretation of EU law and that it may take upon itself the responsibility in resolving this question.

# 2 Ensuring equal authenticity at the CJEU

Having briefly examined the foundations of the principles of equal authenticity and multilingualism, as well as their procedural and substantive implications for the CJEU, this analysis will now provide a brief overview of the methods and procedures employed by the CJEU, in particular those at the level of its support services, in order to ensure the practical application of these principles.

## 2.1 The CJEU as interpreter of multilingual law

Indeed, the CJEU itself must perform with the utmost attention the same task that, according to the aforementioned case-law, is required of the national courts in preliminary reference proceedings — namely, the task of taking into consideration possible discrepancies between different language versions of the same EU provision and consequently interpreting the meaning of that provision in light of those discrepancies.

Firstly, a network of legal professionals will begin working on a case as soon as it arrives to the Registry of the CJEU, even before it is assigned to a Judge-rapporteur. This network is composed mainly by research and national law experts from the Research and Documentation Directorate, terminology experts from the Projects and Terminological Coordination Unit and lawyer-linguists from the Legal Translation Units of the Directorate-General for Multilingualism. While conducting a preliminary analysis of the case, these experts will also examine linguistic issues that the referring national court may have explicitly raised or they will identify and highlight themselves such issues if those were not directly evident from the preliminary reference. This pre-processing forms a preparatory body of work, which is then

[5] For an interesting example from the Danish legal order, see Kjær A. L., Interpretation of EU law by the Danish courts: lack of focus on linguistic differences, in Court of Justice of the European Union, *Multilingualism – 3. Multilingual postcards,* Publications Office of the European Union, 2023, https://data.europa.eu/doi/10.2862/724038, pp. 52-60.

transmitted to the Members of the CJEU, who will ultimately deliver the legal assessment of the case. After an initial analysis of the case from their side, the Members of the judicial formation deciding the case may take the initiative to consult the support services for further specific comparative legal or linguistic analysis. They then proceed to their core task of delivering the judgment. With the help of their legal secretaries (référendaires), they will conduct further research, compare language versions where appropriate, analyse previous-case law, and apply established methods interpretation. Their confidential deliberations will result to a draft judgment in French, which must be translated into all official languages. When this draft judgment reaches the lawyer-linguists for translation, it is not entirely improbable, even at this final stage, for lawyer-linguists from the various language units to identify, for the first time, issues that are specific to their language version of the EU provision at hand. If these issues reveal substantial discrepancies with other language versions regarding the relevant EU provision — particularly with the French version of that provision or with the version in the language of the case — then these discrepancies may need to be taken into account by the CJEU in its reasoning. It is then the responsibility of the lawyer-linguists to notify the Judge-rapporteur and ask for guidance or clarifications.

It is true that an explicit comparative analysis of all language versions of the EU provision at hand does not always appear in the reasoning of the CJEU. However, the fact that the CJEU does not explicitly state in a judgment that it has undertaken a comparison of the different language versions of a provision requiring interpretation does not mean that such a comparison did not take place or that relevant issues were entirely overlooked. In fact, it would rather go against the principle of procedural economy if the CJEU were to include a full-scale comparative linguistic analysis in its reasoning in every case, especially when the EU provision at hand is clear and presents no ambiguity. At the same time, the judges deciding a case typically have at their disposal sufficient information on possible divergences between language versions of the provision in question that could potentially influence its interpretation. Depending on the case, this information may be traced back to the analysis that the judges themselves conduct with their chambers, the opinion of the Advocate General, indications provided by the national court, or the input provided by the support services of the CJEU, particularly by the translation services. It should also be reminded that, since every preliminary reference from a national court is translated by the CJEU into all official languages and then communicated to the government of each Member State in its respective language, any observations submitted by a Member State in a specific case can serve as an additional source of information. These observations may bring to light discrepancies between the language version of the Member State intervening in the case and the language version of the Member State of the referring national court. In light of all the above, it can be argued that several safeguards are in place to ensure that divergences between language versions of EU legislation that could affect the CJEU's interpretation are sufficiently taken into account in the decision-making process of a case, even if this is not explicitly reflected in the text of the judgment[6].

[6] For a detailed but also more nuanced analysis, see: Baaij C.J.W., *Legal integration and language diversity – Rethinking translation in EU lawmaking*, Oxford University Press, 2018, pp. 70-86.

## 2.2 The CJEU as author of multilingual law

The CJEU does not participate in the law-making process and, therefore, cannot influence the drafting of EU law. It can only intervene at a later stage as an external actor to ensure equality and uniform interpretation across all language versions of an EU legal provision. Preventing discrepancies between language versions of EU legislation is the responsibility of the EU legislator. However, when it comes to its own judgments, the CJEU is indeed the author of texts that need to be translated into all official languages. In that respect, the CJEU must ensure internal equal authenticity, i.e., equality and consistency between all language versions of its judgments, even though the judgments are originally drafted in French and considered authentic only in the language of the case. To achieve this, the Members of the CJEU strive for maximum precision and clarity in the drafting of judgments and opinions, keeping in mind that the case-law will be translated into all official languages. From the point of view of the support services of the institution, the role of lawyer-linguists is also fundamental in that regard[7]. When translating into their respective languages, they rely extensively on reference documents specific to a case, such as relevant EU legislation and the CJEU's case-law, relevant national legislation and national case-law, written submissions of the parties, and established terminology. To that effect, they use various databases and research tools. The aim is to achieve textual and terminological coherence and to ensure that the CJEU's decisions, which produce legal effects and are a source of law, are understood and interpreted uniformly in all legal orders. The lawyer-linguist translating towards the language of the case (and thus contributing in the "authorship" of the authentic text of the judgment) shoulders a particular responsibility in that regard. Furthermore, lawyer-linguists must be ready and inspired to tackle novel concepts and autonomous EU concepts, which appear regularly in EU legislation and case-law. More generally, lawyer-linguists will apply all translation methods available to them such as word-for-word translation, sense-for-sense translation, source-oriented translation, or target-oriented translation, depending on the nature and scope of the document. More often than not, they will resort to these different methods even within the same document. Their commitment lies in fully comprehending the legal and linguistic issues at play in order to make the most appropriate translation choices[8].

This commitment echoes more broadly the CJEU's unwavering adherence to multilingualism. By putting into motion all the aforementioned human resources, practices, tools, and collaborative actions, the CJEU is guided by the firm conviction that only high quality multilingualism can efficiently serve the proper administration of justice in the European Union. By addressing the operational challenges of multilingualism daily, the CJEU reaffirms that linguistic pluralism is not merely an integral part of its functioning but also an indispensable instrument for promoting

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7 Article 42 of the Rules of Procedure of the Court of Justice provides that the language service of the Court is staffed by experts with adequate legal training and a thorough knowledge of several official languages of the EU.

8 For an overview of the role of lawyer-linguists at the CJEU, see McAuliffe K., Hidden Translators: The Invisibility of Translators and the Influence of Lawyer-Linguists on the Case Law of the Court of Justice of the European Union, *Language and Law/Linguagem e Direito*, 3(1), 2016, pp. 5-29.

uniform interpretation and application of EU law across diverse national legal systems.

## 3 Future challenges for multilingualism

Although it is clear that the equality of languages and institutional multilingualism are major assets for every EU institution and for the Union as a whole, there are present and foreseeable challenges that will shape the future of these principles. First, economic considerations dominate the debate on multilingualism in the same way that they are central to all decision-making on public spending in the EU and in the Member States. Budgetary constraints dictate cost-saving measures, which result in a scaling down of human resources and the search for fit-for-purpose solutions. Second, with the ever-deepening integration of the EU and the expansion of EU law-related domains of activity for both citizens and businesses, the instances requiring multilingual legislation, multilingual communication, and multilingual resolution of legal conflicts are increasing as well. This creates a very significant workload linked to multilingualism. For the CJEU, for example, which has witnessed in the recent past both the expansion of its jurisdiction ratione materiae and the increased willingness of national courts to refer for interpretation more cases than ever before, the volume of work related to multilingualism has more than doubled over the last 20 years. From 550,000 pages to be translated in 2004, that number had risen to almost 1,300,000 pages by 2023, even after taking into account all the measures which the CJEU has implemented in order to limit its translation needs to what is truly essential for proceedings and the publication of its case-law. Third, while the multilingual workload increases, the imperative of speed remains paramount, especially at the CJEU, where multilingualism must accompany and facilitate proceedings without ever delaying them. Finally, it is a fact that advanced technologies and artificial intelligence, which accelerate and facilitate human work, are already a reality in the field of languages. The width and depth of their immersion in linguistic professions is so significant that many believe multilingualism, as we know it, might look very different in the future. The need to fully exploit these support technologies, which create huge expectations in terms of efficiency, productivity and celerity, has led the CJEU to invest significantly in the use of computer-assisted translation tools and automated translation, specifically neural machine translation, while offering ongoing training to the users.

These challenges can only be met with the expertise and dedication of the people who remain at the heart of the process. Only humans, for example, can initiate and cultivate the dialogue, which is often necessary, between colleagues of the same service, between services, or between services and the chambers of Members of the CJEU in order to identify and tackle divergences between language versions of EU legislation that could affect the CJEU's interpretation. This network of close contacts and (often face-to-face) cooperation can only exist between humans. Moreover, the issues posed by discrepancies between language versions of EU legislation are always subtle and nuanced. The people providing linguistic services for the CJEU are subsequently the only ones who can analyse and resolve such issues, since they possess the essential knowledge, critical thinking and capacity to take into

consideration contextual elements. These are still intellectual processes that cannot be assigned to a machine tool. No software can propose solutions for such delicate questions, much less verify their accuracy. In the specific case of lawyer-linguists, this intellectual work is preceded and complemented by extensive research, revision of earlier drafts, and specific attention to coherence and consistency with previous case-law and solutions that have been given in similar cases in the past. This is why the plethora of tasks, duties, and actions carried out by lawyer-linguists cannot be performed adequately by machine tools.

## 4 Conclusions

In conclusion, I have argued that the principle of equal authenticity, particularly in conjunction with institutional multilingualism, is not an outdated concept from the past, nor is it a burden in the present, and it certainly cannot be seen as a hurdle for the future. This linguistic pluralism is a strength in the sense that it has worked rather seamlessly since the beginning of the EU and has contributed greatly to the acceptance of EU law within national legal systems, as well as to the commitment of European citizens to the EU project as a whole. For the CJEU, multilingualism is deeply rooted in judicial proceedings as a mechanism that ensures equal access to European justice for all European citizens and businesses. Multilingualism also profoundly influences the case-law of the CJEU, first by enabling the legal analysis and determination of cases, and then by ensuring the dissemination of the CJEU's judgments in all Member States, in each of the EU's official languages. There are, of course, present and future challenges. These stem from the ever-growing presence of new technologies, the increased workload linked to multilingualism, the pressing need for speed and efficiency, as well as from the omnipresent cost/benefits considerations.

The CJEU is aware of these challenges. It recently launched a campaign to promote the idea that, despite of these challenges, multilingualism remains a fundamental value worth preserving. As part of this campaign, the CJEU opened a public website dedicated to multilingualism[9] and invited prominent figures from all Member States to share their personal views and testimonies on the topic in a three-volume book, which is now available online in all official languages[10]. In his contribution to this book, the former European Ombudsman, Nikiforos Diamandouros, pointed out that "multilingualism is not a restriction on effectiveness and efficiency, but, on the contrary, a precondition for achieving them. In other words, multilingualism is one of Europe's defining characteristics and must remain so in the continuously developing model of its political structure."[11]

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9 CURIA - Home - Court of Justice of the European Union (europa.eu)

10 CURIA - Discovering multilingualism and legal multilingualism (europa.eu)

11 Diamandouros N., Multilingualism: the citizen's viewpoint, in Court of Justice of the European Union, *Multilingualism – 3. Multilingual postcards,* Publications Office of the European Union, 2023, https://data.europa.eu/doi/10.2862/724038, pp. 92-100 (99).

One can only hope that policymakers and decision-makers in the EU will continue to share this view in the future.

# ECB legal acts – specificities of the language regime and ensuring concordance

Petra Uroda Svoboda*

## 1 The European Central Bank as a legislator

The Treaty on the Functioning of the European Union (the 'TFEU') and the Statute of the European System of Central Banks and of the European Central Bank (the 'ESCB Statute') empower the European Central Bank (ECB) to adopt legal acts and instruments as described in section 2.1 below. These include regulations, decisions, guidelines, recommendations and instructions, as well as the opinions that the ECB adopts on draft Union and national legislation within its fields of competence.

ECB legal acts and instruments must comply with the Union Treaties, Union law, and the principles and conventions of Union legislative drafting, in order to ensure their legal soundness and legal certainty. Further, the principle of multilingualism requires that certain types of ECB legal acts and instruments mut be prepared in all official languages of the Union. In preparing its legal acts and instruments based on these requirements and principles, the ECB produces well-founded legal acts and ensures necessary quality standards.

## 2 ECB language regime and types of legal acts

The ECB follows the language regime applicable to Union legal acts set out in EEC Council Regulation No 1 determining the languages to be used by the European Economic Community[1] (hereinafter 'Regulation No 1'). Article 4 of that Regulation provides that regulations and other documents of general application must be drafted in all official languages. However, Union institutions are free to regulate which languages are to be used in specific cases in their rules of procedure. In this regard, the ECB's Rules of Procedure[2] are aligned with Regulation No 1 and explicitly provide that Regulation No 1 applies to legal acts specified in Article 34 of the ESCB Statute[3]. In line with Article 6 of Regulation No 1, the ECB's Rules of Procedure further stipulate specific rules applicable to ECB guidelines, stating that they must be adopted by the Governing Council and notified in one of the official languages of the

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1 EEC Council: Regulation No. 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10. 1958, p. 385).

2 Decision ECB/2004/2 of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (OJ L 80, 18.3.2004, p. 33).

3 Article 17.8. of the ECB Rules of Procedure.

Union. However, if a guideline is to be officially published, it must be translated into all official languages of the Union[4].

## 2.1 ECB legal acts

Legal acts are those provided for in Article 34.1 of the ESCB Statute, i.e., regulations, decisions, recommendations, and opinions.

Further, Article 288 of the TFEU distinguishes between binding and non-binding legal acts[5]. Binding legal acts establish rights and obligations which may be legally enforced. Binding legal acts and instruments adopted by the ECB are regulations, decisions, guidelines, and instructions.

## 2.2 Binding ECB legal acts

### 2.2.1 Regulations

Regulations have general application and are binding in their entirety. They are directly applicable in all euro area Member States without the need for transposition at national level. ECB regulations are adopted by the ECB in all official languages of the Union. Regulations generally enter into force 20 days after publication in the Official Journal of the European Union[6]. However, this period may be reduced, or the entry into force date may be specifically stated, if required in the circumstances.

### 2.2.2 Decisions

Decisions, like regulations, are binding in their entirety. However, a decision that specifies addressees is binding only on those to whom it is addressed. As is the case for regulations, decisions without addressees are said to ‘enter into force’, whereas decisions with addressees are said to ‘take effect’ upon notification to the addressees. Additionally, there are specificities of the language regime applicable to decisions adopted by the ECB that need to be considered. A decision without addressees but which affects only the members of the European System of Central Banks (i.e., only has ‘intra-system effect’) is adopted in English only. However, a decision without addressees which affects third parties is adopted in all official languages of the Union. Where a legal act is adopted in all official languages, all language versions of the act are required before the start of the adoption procedure by the relevant ECB decision-making body.

4 Article 17.2. of the ECB Rules of Procedure.

5 Article 288 of the TFEU.

6 Article 297(2) of the TFEU.

## 2.3 Non-binding ECB legal acts

### 2.3.1 Recommendations

Recommendations are generally instruments of legislative initiative but can also be used for other purposes and they have no binding force. Recommendations for the adoption by another Union institution of a legislative act are adopted in all official languages of the Union, while recommendations with addressees are adopted in English and the language(s) of the addressees.

### 2.3.2 Opinions

Requests for consultation can be submitted to the ECB by Union institutions or national authorities. The ECB adopts opinions on any proposed Union act in its fields of competence, and on any draft national legislative provision in its fields of competence. It can also submit opinions to Union bodies on its own initiative. When a request for consultation is submitted to the ECB by a Union institution, the opinion will be adopted by the ECB in English. If a national authority submits a request for consultation, the opinion will be adopted by the ECB in English and the language(s) of the addressee. An exception is an opinion regarding the appointment of a member of the ECB Executive Board, which is adopted in all official languages of the Union.

### 2.3.3 ECB legal instruments

Legal instruments are those set out in Article 14.3 of the ESCB Statute, i.e., guidelines and instructions. Both types of instruments are binding.

Guidelines

ECB guidelines are designed to address specific issues arising within the Eurosystem. They ensure the performance of the tasks entrusted to the ESCB under the Treaties and the ESCB Statute. They are binding on euro area national central banks (NCBs) and national competent authorities (NCAs) in certain cases as regards the results to be achieved, but require implementation. Guidelines take effect when notified to addressees and are adopted in English only.

Instructions

Instructions are legal instruments that implement other measures, such as guidelines, by giving specific and detailed instructions to an NCB or NCA. In practice, instructions are usually produced in the form of a letter. They are binding on the addressees and are adopted in English only.

# 3 The role of the ECB's Legislation Division

## 3.1 Tasks and responsibilities

The Legislation Division in the ECB's Directorate General Legal Services is responsible for legal revision and legal translation of draft ECB legal acts and instruments. Legal revision is carried out by English lawyer-linguists in accordance with Union legislative drafting principles and conventions, and they also provide legislative drafting support. Translation of ECB legal acts and instruments (in the fields of both central banking and banking supervision) is provided in all official languages of the Union by lawyer-linguists with relevant national legal and linguistic expertise, in a manner that ensures legal and linguistic concordance.

It is important that legal acts and instruments are 'drafted for translation', meaning that the text should be clear and consistent and 'translatable' into all official languages of the Union, avoiding ambiguities and ensuring concordance between language versions, and ultimately, legal certainty.

The Legislation Division is also responsible for the publication of ECB legal acts and instruments in the Official Journal of the European Union, thereby ensuring legal effect and transparency.

## 3.2 Involvement in the ECB legislative process

The Legislation Division is involved in all stages of the ECB's legislative process. ECB legal acts and instruments are, as a general rule, prepared by drafting panels that usually consist of a business area expert, legal counsel, an English lawyer-linguist (responsible for legal revision and legislative drafting assistance) and one or two lawyer-linguists (responsible for coordinating multilingual translation and, if necessary, carrying out translatability checks or multilingual drafting).

An initial meeting is scheduled with all those involved in the drafting, legal revision and legal translation of the legal act or instrument. Here, an approximate timeline for the adoption of the legal act or instrument is discussed, as well as the timing and deadlines for legal revision and legal translation, and the potential need for translatability checks or multilingual drafting.

The business area experts and legal counsel provide the initial draft, which is then submitted for legal revision to the English lawyer-linguists, ideally before the committee consultation procedure. Each time there is an update to the draft, another round of legal revision is carried out. If necessary, a multilingual drafting exercise or translatability check is conducted before the start of the consultation of the Legal Committee (LEGCO). The process for translation of the draft is usually launched at the start of the LEGCO consultation, as this is the point when the draft is sufficiently stable for translation. Any changes arising from the LEGCO consultation are again revised and a translation update is launched.

As described earlier, the language regime applicable to the type of legal act or instrument may require that language versions need to be finalised before the start of the adoption procedure (e.g., regulations and decisions with third-party effect), or, where adoption is in English only, at the time of adoption (e.g., guidelines).

# 4 Ensuring concordance of language versions of ECB legal acts and instruments

Checks to ensure concordance between language versions of ECB legal acts and instruments can be carried out before the translation process is launched, as well as afterwards. Where it is done at the pre-launch stage, this is by means of a targeted translatability check or a multilingual drafting exercise.

The process of ensuring concordance after the translation process has been launched is based on responses from the relevant business area experts and legal counsel to translation queries raised by the lawyer-linguists in a table of queries (ToQ). Types of queries typically include requests for clarifications of content, and queries related to legislative drafting aspects, as well as errors and inconsistencies. The responses to these queries contribute to improving translatability, consistency and the overall quality of the translation of ECB legal acts and instruments.

Concordance between language versions can be improved through informal cooperation between ECB lawyer-linguists and NCB experts and translators, as well as through consultations with other EU institutions (including in interinstitutional meetings), and with national authorities. In the case of ECB guidelines that require implementation, there is a standard established practice for the review of language versions of the draft text, whereby the ECB lawyer-linguists submit their draft translations to NCB counterparts (who may be relevant NCB business area experts and/or legal counsel) for comments. Where comments regarding a translation into a particular language are received, the relevant ECB lawyer-linguist, as author of the translation, decides whether the comments will be accepted, and finalises the translation accordingly. This exercise has proven beneficial to the overall quality and accuracy of the translations, especially as regards expert and technical terminology.

## 4.1 Multilingual drafting

A multilingual drafting exercise (‘MLD exercise’) is an optional stage in the preparation of language versions of an ECB legal act or instrument. It serves to improve the quality and translatability at an early stage of the legislative process. By analysing the draft from the perspective of different languages and jurisdictions, the MLD exercise helps to produce a clear, simple, and precise legal act or instrument that can be consistently translated into all required languages with equal legal effect in all relevant jurisdictions. An MLD exercise is optional, and the ECB lawyer-linguists involved in the particular dossier decide whether it is necessary. Where time is a constraint, a targeted translatability check can also be carried out on part of a draft text (e.g., key provisions, complex sections, etc.). An MLD exercise is carried

out in the case of legal acts and instruments that are complex and/or deal with novel legal subject areas, introduce new terminology, add significantly new content to existing legal acts or instruments, etc. Lawyer-linguists review and/or pre-translate the text for the purpose of:

(c) identifying translatability issues and any errors;

(d) ensuring clarity and readability;

(e) ensuring consistency of language and terminology;

(f) identifying issues with the structure of the legal act;

(g) checking interaction with other ECB and Union legal acts.

An MLD exercise is carried out by a group of lawyer-linguists, ideally from different language groups and jurisdictions and with some subject-matter knowledge. It generally takes place after the first round of legal revision, before the LEGCO consultation. Participating lawyer-linguists raise questions and comments on the draft in a dedicated ToQ, and these are first assessed by the English lawyer-linguists and then by the relevant business area experts and legal counsel. Where suggestions from the lawyer-linguists are taken on board, changes are introduced in the draft legal act or instrument. Lawyer-linguists apply their best efforts to improve the draft text, and particularly signal any major issues which may affect translatability and clarity of the text. Where their suggestions cannot be taken on board due to policy considerations or other constraints, further clarification of the original text is provided with the aim of assisting them in finalising their respective language versions. In certain cases where a draft legal act or instrument introduces particularly complex terminology (e.g., expert terms not previously translated), a dedicated translatability meeting may be organised with the relevant business area and legal counsel, in order to gain a better understanding of the terminology and to enable the lawyer-linguists to produce accurate translations.

Checks for concordance between language versions of ECB legal acts and instruments is an important element in the multilingual translation process which not only produces high quality translations, but ultimately also serves to ensure legal certainty.

# Concluding remarks

**By Chiara Zilioli***

In line with previous editions of the ESCB Legal Conference, our aim is to address emerging topics of interest for legal professionals from the ECB, national central banks, national competent authorities, financial institutions, academia, and the wider legal community. It is our hope that these discussions have instilled in all participants a renewed sense of enthusiasm for the work that lies ahead and have strengthened our commitment to collaborate on forthcoming challenges.

In concluding this volume, I would like to briefly review the novel insights that contributed to our discussions and to offer a few concluding thoughts.

## 1 Overview of the contributors

The first chapter of the book deals with **"AI and the Management of Legal Risk: A Transformative Impact on Legal Practice?"**. **Bart Verheli** emphasised that generative AI is based on past data, while law is rule-based – rather than law-governed – and open textured. Legal questions often have multiple possible answers and can evolve over time. That is why AI will continue to need the expertise of lawyers to make sense of what LLMs produce.

**Felicity Bell** argued that legal education and practice should focus on cultivating those “soft skills” that AI cannot replace. Abilities such as sound judgement, emotional intelligence, professional integrity, creativity, communication, and effective collaboration are already essential attributes for today’s lawyers and will only grow in importance in the years to come.

**Sandra Watchers** highlighted two specific challenges to AI regulation in the Union. First, the EU AI Act focuses on transparency, but does not establish performance requirements and standards related to AI tools in order to prevent hallucinations – hallucinations are all inaccurate and/or misleading outputs generated by LLM technologies. Second, the AI Liability Directive does not adequately address emerging risks posed by AI, such as economic loss, discrimination, and privacy infringements.

After attending this panel, I am reassured by the fact that AI is likely to evolve into a valuable companion for our work—an essential tool that will help us manage our time more efficiently, and that we lawyers will remain responsible for ensuring that fundamental principles and ethical standards are respected when exercising our creativity and judgement in applying and interpreting the law. Moreover, we can be proud of the fact that the Union is at the forefront of AI regulation. As Union and

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Member State lawyers, this presents a unique opportunity for us to shape the ongoing development of the AI legal framework.

The second chapter of the book focuses on **"The non-contractual liability of the ECB: comprehensive overview"**. **Marta Szablewska** offered us an overview of the basic tenets of ECB non-contractual liability. She concluded that non-contractual liability cases against the ECB face a low threshold for admissibility, allowing many cases to proceed. However, litigants must meet high-threshold substantive requirements to win in court. This is also demonstrated by the fact that, thus far, no case concerning the ECB's non-contractual liability has been successful.

**Olga Stavropoulou** observed that Article 340(3) TFEU, which refers to the "general principles common to the laws of the Member States", has encouraged the Court of Justice of the European Union to dynamically develop the concept of non-contractual liability for Union institutions. By using a comparative law method, the Court can progressively expand the body of Union rules on a case-by-case basis, providing further clarification on key elements such as the causality link in the application of non-contractual liability standards.

**Hans-Georg Kamann** brought our attention to the ECB's non-contractual liability potentially arising from its non-binding conduct, such as its opinions, guidelines, and press statements. He noted that there is increasing momentum for legal actions concerning violations of data protection rights and professional secrecy, including against Union institutions. The takeaway from this panel is that, although the risk of non-contractual liability cases being brought against the ECB remains low, we must remain vigilant. These cases are rapidly evolving and will require careful monitoring.

The third chapter of the book looks at **"Talking about cash when the euro turns 25: rediscovering the legal tender status of euro banknotes and coins and their continued role in society"**. **Mireia Estrada** analysed the obligation of mandatory acceptance of cash as the key element of the concept of legal tender, and cash access as a precondition for the effectiveness of the legal tender status of cash.

**Andrea Westerhof** reflected upon the exclusive Union competence under Article 133 TFEU, as part of the exclusive Union competence on monetary policy, and its relationship with Member State legislation, such as national contract law.

**Jeffrey Dirix** pointed out that Member States face a dilemma as whether to wait for the approval of the Commission's proposed Regulation or to legislate the issues of access to cash and acceptance of cash as a way of implementing existing Union law on legal tender.

**Julio Baquero Cruz** argued that the second sentence of Article 128(1) TFEU (which states that the ECB and national central banks 'may' issue euro banknotes) should not be interpreted as meaning that the ECB and national central banks have the power to stop issuing euro banknotes while there is still demand for cash on the part of EU citizens. According to him, this provision enshrines a right to pay with euro banknotes in the euro area. The discussion raised several questions that merit further reflection. Right now, I would like to focus your attention on one aspect, which

is the question of whether, and to what extent, there is leeway for Member States to legislate on some aspects of cash access and cash acceptance, especially taking into consideration the ongoing negotiations in Brussels on a proposed Regulation on legal tender. I have the feeling that we will continue to have thought-provoking discussions on this question in the near future.

The fourth chapter of the book revolves around "**Fundamental right(s) to access to documents – similar tools for different purposes".** More specifically, it focuses on the two fundamental rights of access to documents enshrined in the EU Charter of Fundamental Rights: the right of public access and the right of access to the file, and on their two different legal regimes. In the context of public access requests, **David Baez** explained that the ECB must conduct a case-by-case assessment to justify the potential non-disclosure of information. However, the General Court might allow some flexibility in cases where the refusal cannot be justified without disclosing confidential information.

**Asen Lefterov** discussed the relevant case-law indicating that when the right to access a file is denied – such as in the absence of a supervisory procedure conducted by the ECB – Union institutions should assess the request also as if it were a request for public access.

**Laurent Forestier** explored the specificities of these two frameworks from the perspective of another Union institution – the SRB. In particular, he mentioned the possibility of filing an appeal before the SRB appeal panel as an additional remedy when public access to documents is denied. Public access to documents and the right to access one's file have different purposes, even though the two tools are similar: while public access is intended to ensure transparency as to the actions of the administration for any citizen, access to the file ensures the right of defence for the interested party. The takeaway from this discussion is that under specific circumstances, the ECB should, or better shall, examine a single request under both regimes.

This year's keynote speech of our Executive Board member, **Frank Elderson**, focused on **"Nature-related risk – legal implications for central banks, supervisors and financial institutions"**. First, Mr Elderson outlined that, while nature-related litigation is still in its infancy, the number of cases is expected to grow rapidly. These cases may have significant implications for banks and other financial institutions, not only when they are directly taken to court, but also when their clients and counterparties are targeted. Second, Mr Elderson flagged that nature-related financial risk is already being considered in the context of the ECB's banking supervision, and emphasised the need to properly consider nature-related risks in our monetary policy. He further considered that we have the duty and the legal tools – thanks to the EU sustainable finance framework – to start taking nature-related risks into account when we exercise our mandate.

The fifth chapter of the book examines **"The new EU anti-money laundering framework, its impact on the banking sector and its relevance for central banks"**. **Claude Bocqueraz** offered an overview of the main developments of the AML/countering the financing of terrorism (CFT) framework in the Union. In

particular, she delves into AMLA tasks as AML supervisor and coordinator of financial intelligence units (FIUs), as well as the topic of collaboration between AMLA and prudential supervisors.

**Carla Costa** noted that, even when they are not legally required, it is important that central banks have AML/CFT procedures in place to prevent operational and reputational risks. She also recalls that the Commission is expected to review the EU cash payment limit three years from now – which brings us back to our debate on the legal tender of cash. At that point, we will be able to assess whether restricting cash access directly correlates with a reduction in money laundering and terrorist financing activities.

**Pavel Sykora** discussed how the new AML/CTF framework may impact the prudential supervision and non-core tasks of central banks around the world, such as crisis management, supervision of compliance with international sanctions and consumer protection.

**John Edward Conway** stressed the importance of a single AMLA rulebook to improve the efficiency and effectiveness of the AML framework for commercial banks, particularly those operating across multiple Member States. He notes that this rulebook should enable obliged entities to restructure their controls based on a risk-based approach.

From the discussion, it emerged that the new AML/CFT framework is aiming at creating a common EU culture and sensitivity on AML/CFT topics – which will also require further engagement from central banks and supervisory authorities. Moreover, we can observe that the landscape of AML/CFT rules, practices and investigations is rapidly evolving in the face of new challenges, such as international sanctions, human trafficking, and environmental crimes.

The last chapter of the book explores **"The principle of equal authenticity: interpretation of Union legislation in cases of linguistic divergence"**. **Jaap Baaij** underscored that the wording used in all language versions of a Union provision needs to be taken equally into consideration for the interpretation of that provision, and that interpretation in cases of discrepancy should be made by reference to the purpose and general scheme of the rules of which the provision forms part. He also points to the challenges of balancing the principles of multilingualism and equal authenticity, which draw their raison d'être from the principles of democratism and federalism, with the principles of pragmatism and operational efficiency.

According to **Nikolaos Sortikos**, equal authenticity in the context of multilingualism is a strength, but also a challenge, especially considering the increasing workload at the Court. He argues that developing robust operational tools and procedures can significantly help safeguard and efficiently apply the principle of equal authenticity on a day-to-day basis.

**Petra Uroda** emphasised the importance of the multilingual drafting tool in ensuring concordance between language versions of ECB legal acts at an early stage in the legislative process.

These elements highlight a common element among Union institutions: the ongoing and systematic effort to ensure the highest quality of legislative drafting to safeguard the consistent interpretation and application of Union law. Lawyer-linguists within the Union institutions play a vital role in this process, contributing to reinforcing the democratic principles at the heart of the European project. However, as the complex nature of the European project continues to evolve, our current approach to the principle of multilingualism may require further consideration.

## 2 Acknowledgements

The ESCB Legal Conference 2024 attracted an average of 170 participants, with peak attendance reaching around 200. This success is entirely the result of our panellists, speakers and contributors, whose active participation and expertise significantly enriched our event.

I would like to extend special thanks to our Executive Board Member, Frank Elderson, for his generous support of this event – and for his call to action in his insightful keynote speech.

Furthermore, I would like to express my heartfelt gratitude to the colleagues at the ECB's Directorate General Legal Services. Thank you to Antonio Riso, who once again took the lead in organising this conference, and to Monica Bermudez Leyva, Sophia Merker, Ana Miletic (Legal Services Section), and Martina Menegat (Financial Law Division), who worked tirelessly to make this possible.

Finally, I would also like to thank the other colleagues in the Legal Services and other areas of the ECB who contributed to the success of this year's event. Although you are too numerous to be mentioned individually, your dedication and hard work are deeply appreciated.

# Biographies

## Frank Elderson

Frank Elderson is a member of the Executive Board of the European Central Bank. He oversees the ECB's Legal Services and is Vice-Chair of the ECB's Supervisory Board.

Mr Elderson previously served as Executive Director of De Nederlandsche Bank (DNB). At DNB he held several senior positions before joining its Governing Board in 2011.

Frank Elderson co-chairs the Task Force on Climate-related Financial Risks of the Basel Committee on Banking Supervision. From January 2018 to January 2022 he served as the first Chair of the newly founded Network of Central Banks and Supervisors for Greening the Financial System.

Mr Elderson studied various courses at the University of Zaragoza, Spain. He graduated in Dutch law at the University of Amsterdam in 1994 and obtained an LL.M. Degree at Columbia Law School, New York, in 1995.

## C. J.W. (Jaap) Baaij

Cornelis J.W. (Jaap) Baaij is an interdisciplinary scholar specializing in the use of contract law to address social issues. He holds dual PhDs from Yale Law School (contract law & arbitration) and the University of Amsterdam (European contract law, cum laude).

Jaap's research explores the critical role of contracts and contract law in driving positive change. At the Montaigne Center for the Rule of Law and Justice, his research focuses on enhancing sustainability in global trade through commercial contracts and empowering consumers in the energy transition through contract design.

Jaap has extensive teaching experience in Europe and the United States, covering contract law, private law theory, commercial arbitration, and corporate social responsibility. He held visiting positions at institutions like Columbia Law School and the National University of Singapore. Additionally, he has delivered guest lectures at Yale and Princeton, among others.

Jaap's international work appears in journals like the Harvard International Law Journal and King's Law Journal and in books published by Oxford University Press and Kluwer Law International. His approach blends legal theory with quantitative research, political theory, social sciences, and philosophy of language.

## David Baez Seara

David Baez Seara is a Principal Legal Counsel at the Institutional Law Division of the ECB's Legal Services.

Before joining the ECB's Legal Services, he worked at the European Commission. He holds a PhD in Law from the European University Institute in Florence, LLM degrees from the King's College London and the Université Saint-Louis in Brussels and a degree in Law from the Universidad Complutense in Madrid.

He is furthermore a visiting lecturer at the Université Catholique de Lille. He has published on institutional and administrative aspects of EU law. His recent publications include an analysis of the principle of financial independence and it implications for euro area central banks and an assessment of the compatibility of the Spanish windfall levy on credit institutions with EU law.

## Julio Baquero Cruz

Julio Baquero Cruz (b. 1972) has been a member of the Legal Service of the European Commission since 2009. He holds a Ph.D. from the European University Institute (Florence) and an LL.M. from the College of Europe (Bruges). He teaches EU law at Université Libre de Bruxelles and for many years he was a visiting professor at Sciences Po in Paris. From 2000 to 2004 he was a référendaire at the European Court of Justice, in the chambers of President Rodríguez Iglesias and with Advocate General Poiares Maduro. He is the author of numerous publications on Union law, including his recent book What's left of the law of integration? Decay and resistance in European Union law (Oxford University Press, 2018).

## Felicity Bell

Felicity Bell is a Senior Lecturer and Deputy Director of the Centre for the Future of the Legal Profession at UNSW Law and Justice.

Felicity has a Bachelor of Laws (Hons I) from the University of Melbourne and a PhD from the University of Sydney. Previously, she was a Senior Research Fellow for the Future of Law and Innovation in the Profession (FLIP) research stream at UNSW Law and Justice, and a Lecturer at the University of Wollongong.

Felicity is internationally recognised as an expert in family law and legal professionalism; and in new technologies and their impact on lawyers' practice and regulation. Her research combines her expertise across these areas often with a basis in empirical projects. She is the co-author with Professor Michael Legg of *Artificial Intelligence and the Legal Profession* (Hart, 2020).

## Claude Bocqueraz

Claude Bocqueraz is Deputy Head of the Financial Crime Unit in the European Commission's Directorate-General for financial stability, financial services, and capital markets union (DG FISMA).

She started her professional career in the private sector before joining the European Commission's Directorate-General for research in 2007. She moved to DG FISMA in 2009 where she has served in various positions and has been responsible for policy development in fields as asset management, insurance and pensions, corporate reporting, audit and credit rating agencies. She also worked for the policy coordination and international relations unit.

Claude holds a PhD in Economics and Social Sciences from the University of Geneva, Switzerland. She is also qualified as a chartered accountant.

## Carla Costa

Born in 1977 in Lisboa (Portugal), Mrs Costa studied law at the Faculdade de Direito (Universidade de Lisboa, Portugal), where she obtained a degree in law in 2000. She continued her studies at the NOVA School of Law where she did the academic part of the doctorate.

In 2000 she joined Banco de Portugal where she has worked in the Supervision Department, Law and enforcement Department and more recently in Issue and Treasury Department.

Between 2002 and 2010 she has been lawyer member of the bar association.

In September 2023 she has joined ECB – Legal Services Department as secondee under the Schuman programme, working closely with the Anti-Money Laundering (AML) and Counter-Terrorism Financing (CTF) Task Force.

She is a proud mother of two daughters: Catarina and Inês.

## Jeffrey Dirix

Jeff Dirix joined the National Bank of Belgium (NBB) in 2011, immediately after finishing his law studies at the university of Leuven (KU Leuven). Currently he works as a senior legal counsel and head of the Corporate Law Division in the Legal Department of the NBB. In 2017, Jeff was seconded to the ECB on a short-term basis where he worked for the Institutional Law Division of the Directorate General Legal Services.

Jeff has experience in various areas of law, in particular institutional law, corporate governance, accounting law, fiscal law, public access law and public procurement law.

Within the Eurosystem, Jeff is member of the LEGCO Task on VAT issues and of the Ethics and Compliance Committee.

Besides his job as legal counsel of the NBB, Jeff is active as a musician (pianist and conductor). Among other musical activities, he is the conductor and cofounder of The Bank Notes, a choir of NBB staff members.

## Mireia Estrada Canamares

Mireia Estrada is a member of the Legal Services of the ECB since 2018. She currently provides legal advice in the field of euro banknotes, including on legal issues concerning the production of euro banknotes and the legal tender of euro cash.

Prior to joining the ECB, Mireia worked at the Madrid office of Cuatrecasas (a leading Spanish law firm), mainly on the area of private enforcement of EU competition law. She also lectured EU administrative law and economic regulation at Instituto de Empresa (IE) and published several academic articles in the field of EU external relations law.

She holds an LLM and a PhD in EU law from the European University Institute (EUI). Her PhD research focused on the institutional legal principles that underpin the foreign policy of the EU to ensure consistency in the Union's action in the world.

Mireia studied law at the University of Barcelona.

## Laurent Forestier

Laurent Forestier is a Senior Member of the SRB Legal Service. Prior to joining the SRB, Laurent worked at the Directorate-General for Competition of the European Commission and the International Court of Justice, the principle judicial organ of the United Nations. He started his career in private practice.

Laurent studied law in France, Belgium and the United Kingdom.

## Hans-Georg Kamann

Prof. Dr. Hans-Georg Kamann is an honorary professor for European and International Economic Law at the University of Passau, Director of the Centre of European Law at the University of Passau and an attorney at law and partner in the regulatory and government affairs department of the international law firm WilmerHale in Frankfurt and Brussels. Prof. Kamann's expertise comprises questions of European constitutional and administrative law, inter alia in the areas of banking supervision and resolution, data protection and digital regulation, European and German competition, state aid and procurement law, as well as representation of public institutions and private entities in more than 100 cases before the European Court of Justice.

Prof. Kamann studied law and economics at the Universities of Passau and Bonn (1988-1994). He received a doctor's degree (Ph.D. in law) in European Union Constitutional Law ("summa cum laude") at the University of Passau (1996). Before entering private practice, he served as a stagiaire with the European Department of the German Federal Ministry of Commerce (1997) and with the European Commission's Legal Service (1998). Prof. Dr. Kamann has lectured on European and international regulation topics at the University of Passau, the University of Saarbrücken, the Frankfurt School of Finance & Management, and the Management Center Innsbruck.

## Asen Lefterov

Asen Lefterov is Senior Legal Counsel at the Supervisory Law Division of the ECB.

He has been with the ECB since 2011 in various roles, including as a participant in the ECB Graduate Programme, working in the field of banking supervisory law, financial law as well as policy matters. Mr Lefterov is representing the ECB in court on litigation relating to banking supervision.

Prior to joining the ECB, Asen Lefterov has worked in law firms in Bulgaria specialising in civil and company law.

Mr Lefterov holds a Master's degree in law from Sofia University and an LLM in EU Business Law from the University of Amsterdam. He has published articles on various aspects of the EU financial services regulation.

## Frederick Malfrère

Frederik is the Head of the Institutional Law Division (ILA) at the ECB's Legal Services. In addition to provide advice on civil service law, procurement law and other institutional legal issues like accounting, audit and banknotes, ILA's fields of legal expertise covers matters relating to central bank independence, rules of procedure, decision-making, confidentiality and access to ECB documents and information regimes, the monetary financing prohibition, privileges and immunities and EU constitutional and administrative law of relevance to the ECB, ESCB, Eurosystem and SSM.

Frederik has been an agent for the ECB in various cases before the Court of Justice of the European Union.

Prior to joining the ECB in 2005, Frederik practiced law at the Brussels' bar.

Frederik is a graduate from the University of Leuven (Belgium). He holds a postgraduate in EU law from the University of Saarbrücken (Europa Institute - Germany) and a postgraduate in Management of the Legal Profession at the St. Gallen Executive School of Management (University of St Gallen - Switzerland).

## Metoda Paternost Bajec

Metoda is Head of Section - Legal Revision Central Banking - in the Legislation Division in DG Legal Services. She has dedicated more than two decades to quality of legislation and working for Europe.

After several years of working as legal counsel in the banking sector, Metoda joined the ECB in 2003. She has been engaged with the ECB legal acts from the very beginning, starting as the lawyer-linguist charged with producing Slovenian language versions of the adopted legal acts. In the last ten years – in her management role – Metoda has focused on effectiveness of the multilingual translation and publication process, developing the ECB practices in legislative drafting and legal revision applying the EU drafting principles and conventions, and – last but certainly not least – embracing new technologies to support the lawyer-linguist work in pursuit of quality and efficiency.

Metoda holds a Master's degree in law from the University of Ljubljana.

## Antonio Riso

As Head of the Horizontal Services Section in DG-L, Antonio leads a team managing horizontal business processes and promoting the digitalization of legal processes to enhance efficiency and knowledge sharing. Antonio contributes to DG-L knowledge management and coordinates research activities, including the yearly ECB Legal Conference and the Legal Research Programme.

From January 2016 to June 2021, Antonio was Team Lead in the Supervisory Policy Division of DG-HOL, dealing with the finalization of Basel III, regulatory issues of the Banking Union, Brexit-related topics, and the regulation of international banks in the EU.

Between 2017 and 2019, Antonio was seconded to DG-FISMA in the European Commission, focusing on financial services aspects of Brexit, including banking, market infrastructures, and payments regulation.

From 2008 to 2016, Antonio worked in various DG-L divisions, contributing to the institutional setup of the SSM and acting as an ECB agent before the Court of Justice. Prior to 2008, Antonio worked as a lawyer in Italy and briefly with the Italian Antitrust Authority.

Antonio Riso graduated in law cum laude from the University of Perugia, is a member of the Italian Bar Association, holds a PhD in International Law and Economics from Bocconi University of Milan and an LLM in Law and Finance from the Goethe University of Frankfurt.

## Nikolaos Sortikos

Nikolaos Sortikos is Head of the Greek language Translation Unit at the Court of Justice of the European Union.

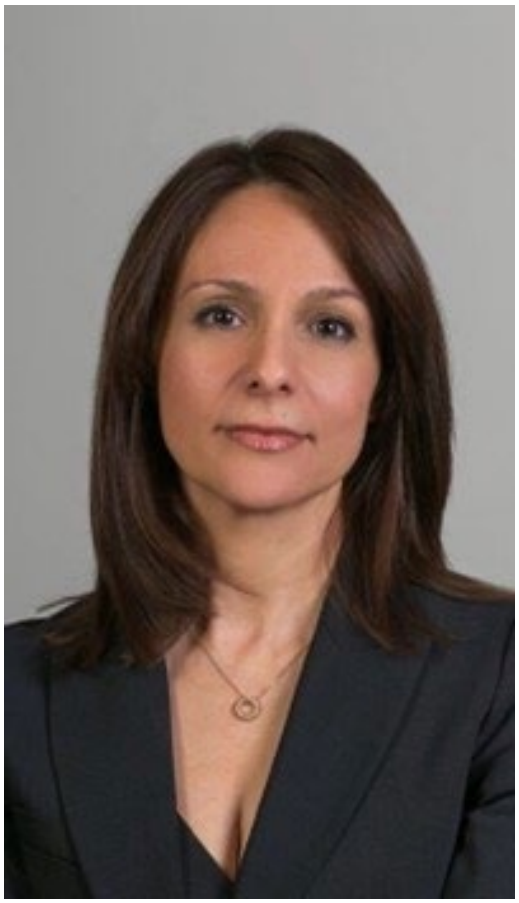
He holds a Bachelor in Law from the Aristotle University of Thessaloniki and an LL.M in EU Law from the Europa-Institut in Saarbrücken.

He joined the Court of Justice in 2003, where he worked as a lawyer-linguist, then as a référendaire in the chambers of the former President of the Court of Justice, Mr Vassilios Skouris, before becoming Head of the Greek language Translation Unit in 2016.

## Olga Stavropoulou

Olga Stavropoulou is Head of the Financial and ESCB Law Section at the Legal Department of the Bank of Greece. In this capacity, she deals with a range of financial law matters, including monetary policy, payments and securities settlement systems, own funds management, financial arrangements with international organisations, financial regulation and, more recently, the digital euro project, where she also contributes as member of the Bank of Greece's team working on the EU single currency package.

She has been actively involved, including from a litigation perspective, in the legal aspects of the Greek debt crisis, with a focus on the EFSF and the ESM financial assistance facility agreements and the Greek debt restructuring (PSI) and has acquired extensive expertise in emergency liquidity-related matters. She is a member of the ESCB Legal Committee. Before joining the Bank of Greece, she had practiced banking and financial law at the legal department of a Greek commercial bank and at a Law firm specialising in banking and capital markets. She holds an LL.B from the University of Athens – Faculty of Law and has obtained her specialisation in commercial and corporate law and in banking and finance law from the University of London (LL.M., University College London & King's College London).



## Pavel Sykora

Pavel Sykora (*1979) holds master's degrees in law and economics, worked in commercial banking (KBC Group), subsequently in the Financial Markets Regulation Department of the Czech National Bank and since 2016 in the DG Legal Services of the European Central Bank. He has been working on AML/CFT (anti-money laundering and countering the financing of terrorism) topics since 2010. He is a member of the Expert Group on Money Laundering and Terrorist Financing of the European Commission on behalf of the ECB, and a member of the ECB's representation at the Financial Action Task Force.

## Marta Szablewska

Marta Szablewska is Principal Legal Counsel in the Financial Law Division of the ECB's legal services and acts as an agent of the ECB before the CJEU.

She joined the ECB in 2014 and since then has worked on financial law aspects relevant to the ECB's monetary policy implementation. She has also represented the ECB before CJEU in several cases relating, amongst others, to the ECB's involvement in the Greek sovereign debt crisis and the Cypriot bank restructuring measures.

Prior to joining the ECB, she worked as a solicitor in the Banking Team of Freshfields Bruckhaus Deringer, in London and Frankfurt, where she advised borrowers and lenders in a variety of financing and restructuring transactions.

## Petra Uroda Svoboda

Petra is currently the Lead Lawyer-Linguist in the Legislation Division. She is responsible for coordinating multilingual translation work in the areas of central banking and banking supervision and for coordinating legal publication tasks.

Petra holds a Master of Laws degree from University of Rijeka, Croatia. She joined the ECB in 2012 as a Croatian lawyer-linguist and also worked with the ECB Data Protection officer's team and in DG Human Resources.

Prior to joining the ECB she worked for more than 10 years in the private sector practising as a lawyer in the fields of civil and criminal law and as a certified legal translator.

## György Várhelyi

György K. Várhelyi is Lead Legal Counsel in the ECB's Directorate Legal Services and an agent of the ECB before the CJEU. He focuses on financial law-related matters such as the legal aspects of the ECB's monetary policy implementation, including non-standard measures. He previously worked as an attorney at law with Skadden, Arps, Slate, Meagher and Flom LLP and then in investment banking at BNP Paribas. He was in charge of equity and equity-linked capital market transactions and M&A activities in and outside Europe. Mr Várhelyi has been admitted to the Paris Bar Association.

He graduated from the Magistère and holds an LL.M. in commercial and corporate law from the University Panthéon-Assas Paris II.

## H.B. (Bart) Verheij

Bart Verheij holds the chair of artificial intelligence and argumentation as full professor at the University of Groningen. He is head of the department of Artificial Intelligence in the Bernoulli Institute of Mathematics, Computer Science and Artificial Intelligence, Faculty of Science and Engineering. He participates in the Multi-Agent Systems group and the NWO Zwaartekracht Hybrid Intelligence project, in which he co-coordinated its `Responsible Hybrid Intelligence' line. His research focuses on the connections between knowledge, data and reasoning, as a contribution to responsible artificial intelligence. He uses an argumentation perspective, inspired by the domains of law and evidence. He led a research project on the connections between arguments, scenarios and probabilities in forensic reasoning with evidence, funded by the NWO Forensic Science program (2012-2017). More information: http://www.ai.rug.nl/~verheij/nwofs/.

He was resident fellow at Stanford University (at the CodeX Center for Legal Informatics), was invited researcher at the Isaac Newton Institute for Mathematical Sciences (University of Cambridge), and taught graduate courses at Sun Yat-Sen University (Guangzhou, China), Central South University (Changsha, China), University of Potsdam (Potsdam, Germany) and Universidad Nacional del Sur (Bahia Blanca, Argentina). He has an MSc degree in Mathematics (University of Amsterdam, algebraic geometry) and obtained his PhD degree at Maastricht University (Faculty of Law, Department of Metajuridica; Faculty of General Sciences, Department of Computer Science), on a dissertation about the formal modeling of argumentation, with applications in law.

He has published on artificial intelligence and argumentation in more than a hundred peer-reviewed publications. His h-index is 35+ (see his Google Scholar author profile). He is co-editor-in-chief of the journal Argument and Computation, section editor of the journal Artificial Intelligence and Law, and participates in professional organisations (COMMA, president; JURIX, vice-president/secretary; BNVKI, community builder; CLAIRE, member informal advisory group ethical, legal, social Issues/National Advisory Board NL chapter; IPN, member Special Interest Group AI). He was president of the International Association for Artificial Intelligence and Law (IAAIL).

## Andrea Westerhof Löfflerová

Andrea Westerhof Löfflerová is a Senior Legal Adviser in the Legal Service of the Council of the EU.

During her 20-year long career in the Council Legal Service (CLS), Andrea has gained extensive experience in various areas of EU Law. In the CLS Directorate for Economic and Financial Affairs, Budget and Structural Funds (Ecofin), she has made a decisive contribution to key files such as the Next Generation EU, the SURE Regulation, the Banking Union, the Carbon Border Adjustment Mechanism and the reform of the European Stability Mechanism. She currently advises the Council on the proposals on the digital euro and the legal tender of cash.

Andrea acts as an agent for the Council and the European Council before the Courts of the European Union in respect of files in her purview, including banking resolution and other aspects of the Banking Union.

Before joining the CLS, Andrea has been practicing law as advocate in Prague and in Brussels.

Andrea earned her PhD in law from Charles University in Prague and her diploma of post-graduate studies in European Law from University Paris I - Panthéon-Sorbonne.

## Emilie Yoo

Emilie Yoo is currently Adviser in the Supervisory Law Division within the Directorate General Legal Services of the European Central Bank.

She advises on banking supervisory law and has been an agent representing the ECB in numerous court cases before the General Court and the Court of Justice of the European Union. She previously worked in the Policy Division within the Banking and Financial Supervision Department of the Deutsche Bundesbank and was a member in the preparatory legal workstream setting up the Single Supervisory Mechanism. She also gained professional experience at international law firms.

Emilie obtained her law degrees at the Goethe-Universität Frankfurt and Université Paris X-Nanterre and holds an LL.M. Finance degree from the Institute for Law and Finance. She was a research assistant at the House of Finance and a Visiting Research Fellow at the Columbia Law School in New York and has conducted extensive research in the area of financial regulation and supervision. Emilie qualified for the bar in Germany in 2006.

## Chiara Zilioli

Chiara Zilioli has dedicated her entire working life to the European integration project. In 1989 she joined the Legal Service of the Council of Ministers in Brussels, moving to the Legal Service of the European Monetary Institute in 1995 and subsequently to the ECB as Head of Division in Legal Services in 1998, where she was appointed Director General in 2013.

Ms Zilioli holds an LLM from Harvard Law School and a PhD from the European University Institute. Since 1994 she lectures at Goethe University Frankfurt, at its Institute for Law and Finance and at the European College of Parma, Parma University. In 2016 she was appointed Professor of Law at Goethe University Frankfurt. She has published numerous articles and four books. She is also a member of the Parma Bar Association.

Chiara Zilioli has been married to Andreas Fabritius for more than 30 years; they have four children.

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For specific terminology please refer to the ECB glossary (available in English only).

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