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# Fundamental rights and banking supervision

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## Abstract

This paper examines the intersections of fundamental rights and European banking supervision. It contributes to a more nuanced and refined understanding of the importance of European Union (EU) fundamental rights for supervised banks in the absence of an EU-wide administrative code. Since 2014, the European Central Bank (ECB) has assumed prudential supervisory tasks for supervised entities. Fundamental rights set clear boundaries as to how the ECB may exercise supervisory discretion to adopt measures that may adversely affect a supervised bank. The Court of Justice of the European Union declares void any measure whose adoption infringes upon a person's fundamental rights. Thus, fundamental rights are a powerful counterbalance to the standard of limited review established by the EU judiciary for European Banking Supervision activities. Every supervised entity may unequivocally enjoy the same rights of defence faced with any measure adversely affecting it, irrespective of whether the measure has been adopted under EU or national law.

**Keywords** Banking supervision · Right to good administration · Right to a fair trial

**JEL Classification** K23

## Introduction

In December 2009, the Member States of the European Union (EU) adopted the Charter of Fundamental Rights of the European Union (the Charter);<sup>1</sup> it came into force with the adoption of the Treaty of Lisbon. The Charter was the culmination of nearly 60 years of work on the part of the Member States to create uniform protection of fundamental rights across Europe. The Charter applies to European institutions and to Member States when they implement EU law according to Article 51(1) of the Charter.

On 4 November 2014, the ECB assumed the tasks of prudential supervision which were conferred upon it by the Member States. For the past eight years, European banking

supervision has been engaging in supervisory procedures that lead to supervisory decisions, which may involve granting or rejecting permissions for supervised entities, imposing capital or liquidity requirements or administrative penalties on them, or granting or revoking licenses, etc.

The Charter applies to European Banking Supervision. Natural and legal persons that are subject to prudential supervisory proceedings enjoy the protections afforded by the Charter, such as the right to good administration and the right to a fair trial. These fundamental rights may only be restricted under the conditions specified in the Charter.

After a short discussion regarding the adoption of the Charter in the EU (part I), this paper reviews the

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The views are those of the author and do not necessarily represent the views of the European Central Bank.

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<sup>1</sup> OJ C 326, 26.10.2012, p. 391. Lenaerts Koen and José Antonio Gutiérrez-Fons, 'The Place of the Charter in the European Legal Space' in S. Peers/T. Hervey/J. Kenner/A. Ward (Eds), *The EU Charter of Fundamental Rights*, 2nd edition (Hart Publishing 2021), 1580



jurisprudence of the Court of Justice of the EU concerning the right to good administration (part II) and the right to a fair trial (part III). Part IV discusses the case law relating to limitations of fundamental rights in order to protect financial stability within the EU. This paper concludes that fundamental rights set boundaries for the ECB's supervisory discretion and counterbalance the standard of limited judicial review that the EU judiciary applies to European Banking Supervision activities.

## The protection of fundamental rights in the EU

*'In the centre of our movement stands the idea of a Charter of Human Rights, guarded by freedom and sustained by law'.* These words, spoken by Sir Winston Churchill on 7 May 1948, epitomise the efforts of all countries to protect human rights in a legally binding way at the European and global level.

In the same year, the Universal Declaration of Human Rights (the Declaration) was adopted by the United Nations (UN). The Declaration is a legally binding, international public law agreement. The right to life, the ban on genocide, slavery, torture and race discrimination are also binding for the states that are not parties to this Declaration. The Declaration established the International Court of Justice in the Hague.

Two years later, in 1950, the European Convention on Human Rights (the Convention) was agreed upon and in 1953 it entered into force. The Convention is an international public law agreement, which is legally binding for the 47 parties—the members of the Council of Europe. The European Union is not a party to the Convention.<sup>2</sup> Any person, legal or natural, may invoke the protections of the Convention against a state which is a party to the Convention.

In 1959, and in conformity with Article 19 of the Convention, the European Court of Human Rights (ECHR) was established in Strasbourg. Its judgements are legally binding on the states which are parties to the Convention. The European Union's Charter of Fundamental Rights entered into force on 1 December 2009 and has the status of primary EU law.<sup>3</sup> Any legal or natural person may invoke the protections

of the Charter against any EU institution and any Member State implementing EU law.<sup>4</sup>

Traditionally, the Court of Justice of the European Union (the Court) does not examine the compatibility of EU acts with national constitutional law.<sup>5</sup> Yet, in 1973 and 1974 respectively, the Italian and German constitutional courts adopted judgements asserting their powers to review European legal acts if the national constitutions, and in particular the fundamental rights foreseen by them, were threatened by these acts.<sup>6</sup> This form of review by national constitutional courts is no longer warranted since the EU has now provided explicit constitutional protection of fundamental rights. The Charter has reaffirmed the fundamental rights of all citizens vis-à-vis the EU institutions, as they result from the constitutional traditions and international obligations common to the Member States.<sup>7</sup>

Until the adoption of the Charter, the Court protected fundamental rights as reflecting general principles of EU law (under Article 6 of the Treaty on European Union) that underly the constitutional traditions common to the Member States. These principles are also laid down in the Convention, and the principles on which the Convention is based were taken into consideration in EU law.<sup>8</sup> Thus, the protection of persons, both natural and legal, against arbitrary or disproportionate intervention by the public authorities in the

Footnote 3 (continued)

2022); S O'Leary, 'The EU Charter Ten Years On: A View from Strasbourg' in M. Bobek and J. Adams/Prassl (Eds), *The EU Charter of Fundamental Rights in the Member States*, (Oxford, Hart Publishing 2022).

<sup>4</sup> Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 26.2.2013, ECLI:EU:C:2013:105, para 29. For example, the GATS agreement forms part of Union law, and Member States are implementing Union law, Case C-66/18, *European Commission v Hungary*, 6.10.2020, ECLI:EU:C:2020:792, para 213.

<sup>5</sup> Case 1-58, *Friedrich Stork and Cie v High Authority of the European Coal and Steel Community*, 4.2.1959, ECLI:EU:C:1959:4, para 3 and 4; Joined cases 36, 37, 38–59, and 40–59, *Ruhrkohlen-Verkaufsgesellschaft mbH v High Authority of the European Coal and Steel Community*, 15.7.1960, ECLI:EU:C:1960:36, p. 438.

<sup>6</sup> Solange I, BVerfG 37, 271; The approach was changed in Solange II, BVerfG 73, 339; Judgement of 27 December 1973, *Frontini v Ministero delle Finanze*, Corte. cost., Italy, 18 Giur. Cost. I 2401, 2420, para 17; Cartabia, Marta, 'The Italian Constitutional Court and the Relationship between the Italian Legal System and the European Community', 12 *Michigan J.I.L.*, (1990), 173, 181.

<sup>7</sup> Hancox, Emily, 'The relationship between the Charter and General Principles: Looking back and looking forward', *Cambridge Yearbook of European Legal Studies*, Vol. 22, 2020, 233, 235.

<sup>8</sup> Case C-222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, 15.5.1986, ECLI:EU:C:1986:206, para 18; Case 222/86 *UNECTEF v Heylens*, 15.10.1987, ECLI:EU:C:1987:442, para 14. See generally Tridimas, Takis, *The General Principles of EU law*, (Oxford University Press, 2013).

<sup>2</sup> Owing to the autonomy of Union law, Opinion 2/13 (2014) of the Court of Justice on EU accession to ECHR. On the relationship between EU and international law, see 'Reconciling fundamental social rights and economic freedoms: The ECtHR's ruling in *LO and NTF v. Norway* (the *Holship* case)', *Common Market Law Review*, Vol. 59, Issue 1 (2022), p. 583.

<sup>3</sup> Jarass GrCh, 4th edition, 2021, EU-Grundrechte-Charta Art. 41, Rn 5; Nazzini, Renato, 'Administrative enforcement, judicial review and fundamental rights in EU competition law: A comparative contextual-functional perspective', 49 *Common Market Law Review*, (Kluwer 2012), 971; Mark Dawson, *The Governance of Fundamental Rights*, (Cambridge University Press 2017), 31; Sejla Imamovic, *The Architecture of Fundamental Rights in the European Union*, (Bloomsberry



sphere of those persons' private activities has constituted a general principle of EU law.<sup>9</sup>

After the Charter's adoption, the Court of Justice of the EU developed its own case law. The articles of the Charter were given the same meaning and the same scope as the respective articles of the Convention in line with the interpretation by the European Court of Human Rights.<sup>10</sup>

The Charter foresees rights related to dignity (e.g. the right to life), to freedoms (e.g. the right to liberty), to equality (e.g. non-discrimination), to solidarity (e.g. workers' rights to information and consultation), to justice (e.g. the right to a fair trial) as well as citizen's rights (e.g. the right to good administration). This article will now focus on two fundamental rights, namely on the right to good administration and the right to a fair trial, and on how these fundamental rights apply in the context of European Banking Supervision against the background of the Court's case law.

## The right to good administration

The guarantees afforded by EU law in administrative proceedings include, in particular, the principle of sound administration, which is enshrined in Article 41 of the Charter. The right to good administration is multifaceted. Therefore, this part discusses the duty of diligence, the right to be heard, to access one's file and to receive a statement of reasons, which all come under the umbrella of the right to good administration.

### a. Duty of diligence

The right to good administration entails the duty of the authority to examine all aspects of an individual case fairly, impartially and within a reasonable timeframe; this is known as the duty of diligence.<sup>11</sup>

Only in this way can the EU judiciary verify whether the competent authority has taken into account all factual and legal elements that are the subject of the discretion exercised by an administrative authority.

The duty of diligence set out in Article 41(1) of the Charter<sup>12</sup> is reflected in Article 28(2) of Regulation 468/2014 (the SSM Framework Regulation or SSMFR).<sup>13</sup> This article requires European Banking Supervision to take account of all relevant circumstances.<sup>14</sup> Article 41(2) of the Charter further provides that the right to good administration includes the right to be heard, the right to access one's file, and the obligation of the authority to give reasons for its decisions. Best practices which are associated with a sound administration include the obligation to document an administrative procedure, to keep registers, to be service minded, to indicate the remedies available, etc.<sup>15</sup> These practices do not form part of a legally binding administrative code in the EU.

On 4 November 2014, the ECB assumed its banking supervision responsibilities by exercising the micro-prudential tasks conferred upon it by the Member States in line with Articles 4 and 5(1) of Regulation No 1024/2013<sup>16</sup> (the Single Supervisory Mechanism Regulation or SSMR). Banking supervision is the most recent administrative law field that has been added to the other types of administrative law developed at the EU level.<sup>17</sup> Consequently, the protections of Article 41 of the Charter are reflected in Article 22 of the SSMR.

The title of Article 22 of the SSMR is 'due process', and this term is used for the first time in secondary EU law related to banking supervision.<sup>18</sup> Similarly, Title 2 (Articles

<sup>12</sup> Case T-745/16, *BPCE v. ECB*, 13.7.2018, ECLI:EU:T:2018:476, para 67, 94, 98; Case 269/90, *TU München v Hauptzollamt München-Mitte*, 21.11.1991, ECLI:EU:C:1991:438, para 14.

<sup>13</sup> Regulation (EU) No 468/2014 of the ECB 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), OJ L 141, 14.5.2014, p. 1.

<sup>14</sup> Case T-122/15, *Landeskreditbank Baden Württemberg—Förderbank v ECB*, 16.5.2017, ECLI:EU:T:2017:337, para 148.

<sup>15</sup> Articles 16, 17, 19, 24 of the European Code of Good Administrative Behaviour, 2002, which is a non-binding document endorsed by the European Parliament.

<sup>16</sup> 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, recitals 54 and 58.

<sup>17</sup> Teleki, Cristina, *Due process and fair trial in EU competition law*, (Brill/Nijhoff, 2021), 91.

<sup>18</sup> The term 'due process of law' was introduced by the Fifth Amendment to the Constitution of the United States, which restricts the powers of the federal government in that no person 'shall be deprived of life, liberty or property without due process of law'. In addition, the Fourteenth Amendment similarly restricted the powers of the states using the same wording in the so-called 'Due Process Clause'. It is a variation of Magna Charta's wording, see Ratner Leonard, 'The Function of the Due Process Clause', 116 *U. Pa L. Rev.* (1968), 1049; Barnett Randy E. and Evan D. Bernick, *The original meaning of the fourteenth amendment: its letter and spirit*, (Harvard University Press, 2021) p. 261.

<sup>9</sup> Joined cases C-46/87 and 227/87, *Hoechst AG v Commission*, 21.9.1989, EU:C:1989:337, para 19, 13; C-358/16, *UBS Europe and Others*, 13.9.1988, EU:C:2018:715, para 56.

<sup>10</sup> Case T-590/10, *Thesing and Bloomberg v ECB*, 29.11.2012, ECLI:EU:T:2012:635, para 72.

<sup>11</sup> Joined case T-191/98, 212/98 and 214/98, *Atlantic Container Line and others v Commission*, 30.9.2003, ECLI:EU:T:2003:245, para 404; Case 269/90, *TU München v Hauptzollamt München-Mitte*, 21.11.1991, ECLI:EU:C:1991:438, para 28; Boustia Rita, 'Who said there is a 'Right to Good administration'? A critical analysis of the Article 41 of the Charter of Fundamental Rights of the European Union', *European Public Law*, Vol. 19, issue 3, (Kluwer 2013), pp. 481–488. See generally Wakefield, Jill, *The right to good administration*, (Kluwer 2007).



25–35) of the SSMFR<sup>19</sup> lays down provisions relating to ‘due process for adopting supervisory decisions’. In the absence of an EU-wide administrative code, the fundamental rights are the most important legal rules that circumscribe the supervisory discretion exercised by European Banking Supervision.

The right to good administration is granted to all parties irrespective of their country of establishment even when European Banking Supervision applies national law. In line with Article 4(3) of the SSMR, this may happen when a directive is transposed into national law, for example Directive 2013/36/EU (the Capital Requirements Directive), and the ECB applies the respective national law.<sup>20</sup> Whenever the ECB applies national law in making a supervisory decision, it is the guarantees of the Charter, as reflected in the SSMR and SSMFR, which apply, and not the respective national law provisions. This ensures a harmonisation of the procedural rights for all supervised entities,<sup>21</sup> namely significant institutions, which are determined based on the criteria of Article 6 (4) of the SSMR, as well as less significant institutions, for common procedures under Articles 14 and 15 of the SSMR.

Finally, following the establishment of close cooperation between the ECB and Българска народна банка (Bulgarian National Bank or BNB) and Hrvatska narodna banka (Croatian National Bank or HNB), respectively, the ECB adopts instructions addressed to the BNB and the HNB and the latter adopt supervisory decisions addressed to the respective supervised entities.<sup>22</sup> This construction is necessary because

Article 139 of the Treaty on the Functioning of the European Union stipulates that the ECB has no powers in Member States which have not adopted the euro.<sup>23</sup> The supervisory decisions adopted by the BNB and HNB are, in principle, subject to national due process requirements. Nevertheless, the two Member States voluntarily harmonised the respective legal provisions to the extent possible in order to reflect those applicable to the ECB’s supervisory procedures.<sup>24</sup>

#### b. The right to be heard in general

Even before the Charter’s adoption, the Court of Justice recognised in its judgements that observance of the right to be heard was a fundamental principle of EU law, in all proceedings initiated against a person which were liable to culminate in a measure adversely affecting that person. It was essential that this principle be guaranteed, even in the absence of any rules governing the proceedings in question.<sup>25</sup>

The right to be heard is an essential part of the right of defence.<sup>26</sup> The party has the chance to put its own case forward and to make its views known on the relevant circumstances and, where relevant, on the documents taken into account by an EU institution.<sup>27</sup> More specifically, observance of the right to be heard in all proceedings in which sanctions, in particular fines or penalty payments, may be

<sup>19</sup> Regulation (EU) No 468/2014 of the ECB 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), OJ L 141, 14.5.2014, p. 1.

<sup>20</sup> 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 228; Lo Schiavo, Gianni ‘The ECB and its application of national law in the SSM’, in Lo Schiavo (Ed), *The European Banking Union and the Role of Law*, (Elgar, 2019), p. 177, 179.

<sup>21</sup> Sarmiento, Daniel, ‘Who’s afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe’ (2013) 50 Common Market Law Review, 1268.

<sup>22</sup> See Decision (EU) 2020/1015 of the European Central Bank of 24 June 2020 on the establishment of close cooperation between the European Central Bank and Българска народна банка (Bulgarian National Bank) (ECB/2020/30) (OJ L 224I, 13.7.2020, p. 1) and Decision (EU) 2020/1016 of the European Central Bank of 24 June 2020 on the establishment of close cooperation between the European Central Bank and Hrvatska Narodna Banka (ECB/2020/31) (OJ L 224I, 13.7.2020, p. 4). The agreement on the inclusion of the Bulgarian lev and the Croatian kuna in ERM II entered into force simultaneously.

<sup>23</sup> Maria Nieto and Dalvinder Singh, ‘Incentive compatible relationship between the ERMI II and close cooperation in the Banking Union: The cases of Bulgaria and Croatia’, Banco de Espana, Occasional Papers (2021), No 2117, p. 14; Dalvinder Singh, *European Cross Border Banking and Banking Supervision*, (Oxford University Press, 2020), p. 33.

<sup>24</sup> See Opinion of the ECB of 22 December 2020 on the interaction between the European Central Bank and the Bulgarian National Bank within the framework of close cooperation in the Single Supervisory Mechanism (CON/2020/36), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020AB0036&from=EN>; Opinion of the ECB of 25 March 2020 on close cooperation between the ECB and Hrvatska narodna banka (HNB) within the Single Supervisory Mechanism, and on the macroprudential mandate and tools of HNB (CON/2020/10), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020AB0010&rid=5>.

<sup>25</sup> Case 222/86, *UNECTEF v Heylens*, 15.10.1987, ECLI:EU:C:1987:44, para 15-16; Case C-32/95 P *Commission v Lisrestal* 24.10.1996, ECLI:EU:C:1996:402, para 21.

<sup>26</sup> Joined cases 46/87 and 227/88, *Hoechst AG v Commission*, 21.9.1989, ECLI:EU:C:1989:337, para 52; Case T-72/09 *Pilkington Group and Others v Commission*, 17.12. 2014, EU:T:2014:1094, para 232 refers only to Article 41(2) (a) of the Charter, which requires observance of the rights of the defence in all proceedings. Paul Craig, ‘Article 41 Right to good administration’ in S. Peers/T. Hervey/J. Kenner/A. Ward (Eds), *The EU Charter of Fundamental Rights*, 2<sup>nd</sup> edition (Hart Publishing 2021), 1072; Bucura C. Mihaescu Evans, *The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrated administrative system*, (Nomos 2015), 153-192.

<sup>27</sup> Case 269/90, *TU München v Hauptzollamt München-Mitte*, 21.11.1991, ECLI:EU:C:1991:438, para 25.





imposed constitutes a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings.<sup>28</sup> In order to respect the principle of the right to be heard, the party concerned must have been afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the administration to support its claim that there has been an infringement.<sup>29</sup>

Within this process, the administrative authority cannot rely on information covered by business confidentiality. If the party concerned was not afforded an opportunity to comment on such information, the administration may not use it in its decision.<sup>30</sup>

Further, the Court of Justice recognises that observance of the right to be heard requires that any party on which a penalty may be imposed must be placed in a position in which it can effectively make known its view of the matters which has led the administration to impose the penalty before the decision is adopted. Otherwise, the contested decision must be judged as invalid and annulled on the grounds of infringement of the applicant's right to be heard.<sup>31</sup>

If a person is not the addressee of a decision, the Court of Justice examines whether the person has a direct and individual claim, in order to answer the question of whether this party has a right to be heard. Thus, the Court considers that the beneficiaries of aid are directly and individually concerned by a decision that would reduce such assistance because they are named in that decision and their primary liability to return the sums results from EU law alone; as a result, these beneficiaries must be given the opportunity to be heard even when they are not the addressees of the measure, as per the construct of a composite procedure involving national and EU authorities.<sup>32</sup>

<sup>28</sup> Case 85/76, *Hoffmann-La Roche & Co AG v Commission*, 13.2.1979, ECLI:EU:C:1979:36, para 9: Raffaele D'Ambrosio, 'The Legal Review of SSM administrative sanctions', in Zilioli/Wojcik (Eds), *Judicial review in the Banking Union* (Elgar, 2021), p. 316; Georgios Zagouras, 'Verwaltungssanktionen der EZB: Bußgelder, Kompetenzen, Bemessungsmaßstäbe, WM 2017, p. 558, 560.

<sup>29</sup> Case 85/76, *Hoffmann-La Roche & Co AG v Commission*, 13.2.1979, ECLI:EU:C:1979:36, para 11.

<sup>30</sup> A Member State may also have the right to be heard, Case C 234/86, *Belgium v Commission*, 10.7.1986, ECLI:EU:C:1986:302, para 27–29.

<sup>31</sup> Case C-135/92, *Fiskano AB v Commission* 29.6.1994, ECLI:EU:C:1994:267, para 39, 44; Case 269/90, *TU München v Hauptzollamt München-Mitte*, 21.11.1991, ECLI:EU:C:1991:438, para 29; Jarass GrCh, 4. Aufl. 2021, EU-Grundrechte-Charta Art. 41, Rn 19.

<sup>32</sup> Case T-450/93, *Lisrestal and others v Commission*, 6.12.1994, ECLI:EU:T:1994:290, para 48–49; Christina Eckes and Raffaele D'Ambrosio, 'Composite administrative procedures in the European Union, ECB Legal Working Paper Series, (2020) No. 20, p. 37; Fil-

While the general rule has been to annul any decision in which a party's right to be heard has been infringed, the Court of Justice has adjudicated in a few cases that the administrative decision may not be declared void even though information was used on which the party had not had the chance to provide its views.

Accordingly, this possibility may exist first if the contested decision is sufficiently supported by the objective information referred to it of which the party was fully apprised and upon which it had been given the chance to provide its views, and second if, even without the information on which the party has not been able to comment, 'the decision would not have been substantially different'. In these circumstances, the mere fact that the administration has mentioned third-party comments in its decision without having afforded the party concerned an opportunity to comment upon them does not justify a declaration that the decision is void.<sup>33</sup>

### c. Consequences if the right to be heard is infringed

The absence of the right to be heard (and other fundamental rights) was the topic in two important cases.

In *Kadi v Council (Kadi I)*, the General Court recognised that the superior rules of international law fall within the ambit of jus cogens, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute 'intransgressible principles of international customary law'. However, the General Court dismissed the applicant's complaint that his right to be heard was infringed when the Council adopted a regulation freezing his assets because it upheld the arguments made relating to maintaining international peace and security and took into account that the Council had no other option but to implement the respective Security Council resolution requiring the Council to freeze the applicant's assets.<sup>34</sup>

On appeal, the Court of Justice proclaimed that there cannot be any derogation from the principles of liberty, democracy and respect for human rights and the fundamental freedoms enshrined in Article 6(1) of the TEU, as they constitute

Footnote 32 (continued)

ipe Brito Bastos, 'Judicial review of composite administrative procedures in the Single Supervisory Mechanism: Berlusconi' *Common Market Law Review* Vol. 56, Issue 5 (2019), p. 1355, 1360.

<sup>33</sup> A Member State may also have the right to be heard, Case C 234/86, *Belgium v Commission*, 10.7.1986, ECLI:EU:C:1986:302, para 30; Gianni Lo Schiavo, 'Conditions and Obligations in ECB supervisory Decisions as Ancillary Provisions under SSM Law' *ECFR* Vol. 14, Issue 1 (2017), p. 118.

<sup>34</sup> Case C-315/01, *Kadi v Council*, 21.9.2005, ECLI:EU:T:2005:332, para 231, 254, 274.



the foundations of the EU. A judicial review of the validity of any EU measure with respect to fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the Treaty as an autonomous legal system, which must not be prejudiced by an international agreement.

The Court of Justice declared the Council regulation to be void for the applicant because his right to be heard had been infringed. However, it maintained the regulation for a period not exceeding three months, which would permit the Council to remedy the infringements because an annulment with immediate effect would have prejudiced the final regulation in the event that the measures were found to be justified. This was a way to grant the individual a ‘sufficient measure of procedural justice’ and to ‘strike a balance between the combat of international terrorism and the protection of fundamental rights’.<sup>35</sup>

In *Kadi v Commission (Kadi II)*, the General Court referred explicitly to the case law of the ECHR and annulled a regulation adopted following a procedure during which the applicant was not given precise information to allow him to effectively exercise his right to be heard and provide exculpatory evidence.<sup>36</sup>

The above shows that a legal act that has been adopted in violation of the right to be heard can be declared void on the grounds of the infringement of this right, and exceptions to this rule, if any, need to be interpreted restrictively to remain valid under EU law.

#### d. The right to be heard in the context of banking supervision

Article 31 of the SSMFR establishes a formal dialogue between European Banking Supervision and the supervised banks.<sup>37</sup> The right to be heard is granted to parties adversely affected by a supervisory decision made by the ECB. The

parties are those defined in Article 26 of the SSMFR, namely those submitting an application and the addressees of a supervisory decision. Other persons that do not fall under this definition are referred to as third parties and are generally not granted the right to be heard.

The right to be heard applies whenever the ECB adopts a supervisory decision, which is a binding legal act, not of general application, as laid down in Articles 31 and 2(26) of the SSMFR. Consequently, the right to be heard does not apply if the supervised entity is addressed by means of a non-binding operational act.<sup>38</sup> Similarly, the right to be heard does not apply when European Banking Supervision carries out a failing or likely to fail assessment addressed to the Single Resolution Board (SRB) under Article 18(1)(a) of Regulation No 806/2014<sup>39</sup> (SRMR). This assessment does not have any binding legal effect that is capable of affecting the legal interests of the supervised entity ‘by bringing about a distinct change in its legal position’.<sup>40</sup>

The party is granted a period of two weeks in which it has the right to comment in writing on facts, objections and legal grounds relevant to the supervisory decision. The time period is reduced to three working days for supervisory decisions relating to the granting or withdrawal of licenses for credit institutions, as well as to acquisitions of qualifying holdings in credit institutions under Articles 14 and 15 of the SSMR.

The time period may also be shortened to three working days subject to particular circumstances. These particular circumstances may exist if the party has been heard before on the same decision. If an urgent supervisory decision appears necessary to prevent significant damage to the financial system, the right to be heard can be granted in writing after the adoption of the decision without undue delay (ex post). The right to be heard cannot be granted ex post in proceedings that lead to supervisory decisions which impose pecuniary penalties under Article 18 of the SSMR.

<sup>35</sup> Joined cases C-402/05 and C-415/05, *Kadi and Al Barakaat v Council* 3.9.2008, ECLI:EU:C:2008:461, para 303, 316, 344, 348, 376; Lenaerts Koen, ‘The Kadi saga and the rule of law in the EU’, 67 SMU L. Rev. (2014), 707, 712, regarding the role of the court as guarantor of the rule of law and ‘protector of those without a voice, those blacklisted.’

<sup>36</sup> Case T-85/09, *Kadi v Commission*, 30.9.2010, ECLI:EU:T:2010:418, para 176; In joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission v Kadi*, 18.7.2013, ECLI:EU:C:2013:518, para 162.

<sup>37</sup> ECB, *SSM Supervisory Manual*, (2018), pp. 21–22, available on the website of ECB Banking Supervision [www.bankingsupervision.europa.eu](http://www.bankingsupervision.europa.eu); Lackhoff, Klaus, ‘Procedural law requirements for conducting administrative procedures by the ECB and the SRB’, in Zilioli/Wojcik (Eds), *Judicial review in the Banking Union* (Elgar, 2021), p. 146; Moloney, Niamh, ‘Banking Union and the Charter of Fundamental Rights’, in Zilioli/Wojcik (Eds), *Judicial review in the Banking Union*, p. 209; IMF, *Detailed assessment of observance—Basel Core Principles for Effective Banking Supervision*, IMF Country

Footnote 37 (continued)

Report No. 18/233, (July 2018), p. 75, 79, 118; Petit, Christy Ann, ‘The SSM and the ECB decision-making governance’, in Lo Schiavo (Ed), *The European Banking Union and the Role of Law*, (Elgar, 2019), p. 108, 110.

<sup>38</sup> ECB, *Guide to onsite inspections and internal model investigations*, (2018), p. 15.

<sup>39</sup> 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.

<sup>40</sup> Joined Cases C-551/19 P and 552/19 P, *ABLV Bank AS and others v ECB*, 6.5.2021, ECLI:EU:C:2021:369, para 66.



#### e. Access to one's file in general

The right to access to one's file is one of the procedural guarantees that exists to protect the right of defence and to apply the principle of equality of arms.<sup>41</sup> Any party to an administrative proceeding may access its file—that is the documents on which the administration bases its decision—and in particular the exculpatory documents.<sup>42</sup> Access to one's file may be granted in parallel with a party exercising its right to be heard or it may occur independently from this right. As with other fundamental rights, access to one's file may be subject to certain limits.

Evidence that has no relevance to the allegations of fact and of law in the statement of objections can be excluded. Furthermore, the protection of confidential information covered by the obligation of professional secrecy must be guaranteed and implemented in such a way as to reconcile it with the right of defence. Confidential information is information that is not public and is likely to adversely affect the interests of the person who provided that information or those of third parties or the proper functioning of the supervisory system.<sup>43</sup>

The competent authority has to weigh up the interests of the person requiring access to the information in order to exercise his right of defence with the interests of maintaining confidentiality as covered by the obligation of professional secrecy, and it must strike a balance between these two competing interests.<sup>44</sup> Thus, access may be limited as a result of legitimate professional and business secrets of third parties.<sup>45</sup>

#### f. Consequences if the right to access the file is infringed

Access to one's file is considered a preparatory step within the procedure leading to a final decision. If the procedure is vitiated by any error of the hearing officer (or the

administrative authority) that refuses or restricts inadmissibly access to documents in the file, the party may lodge a complaint for annulment of the final decision.<sup>46</sup> The reason for this is that preparatory measures are not capable per se of producing legal effects on the rights and obligations of the party affected and thus are not actionable acts.<sup>47</sup> The Court of Justice should examine the observance of all fundamental rights during the entire procedure leading to the adoption of the contested final decision.<sup>48</sup> Infringement of the right to access the file is objective in nature and does not depend on the officials' good or bad faith.<sup>49</sup>

#### g. Access to the file in the context of banking supervision

The parties to supervisory proceedings<sup>50</sup> are entitled to access their file at any time after proceedings have begun in order to protect their right of defence. A supervisory procedure is deemed to have started when any activity has been undertaken in preparation for an ECB supervisory decision, as defined under Article 2(24) of the SSMFR.

In line with Article 22(2) of the SSMR and the case law mentioned above, this right shall not extend to confidential information; this is the only limitation. The ECB's internal documents or those of the national competent authorities (NCAs), correspondence between the ECB and NCAs or between NCAs, may qualify as confidential (Article 32(5) of the SSMFR). As mentioned above, the right to access the file is subject to the 'very special protection' granted for the legitimate business interests of third parties.<sup>51</sup>

<sup>41</sup> Case T-30/91, *Solvay v Commission*, 29.6.1995, ECLI:EU:T:1995:115, para 83.

<sup>42</sup> Case C-109/10 P, *Solvay SA v Commission*, 25.10.2011, ECLI:EU:C:2011:686, para 68–71; Case C-110/10 P, *Solvay SA v Commission*, 25.10.2011, ECLI:EU:C:2011:687, para 65; Case T-30/91 *Solvay v Commission*, 29.6.1995, ECLI:EU:T:1995:115, para 81–86.

<sup>43</sup> Case C-15/16, *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, 19.6.2018, EU:C:2018:464, para 35.

<sup>44</sup> Case C-358/16, *UBS and others v CSSF and others*, 13.9.2018, ECLI:EU:C:2019:715, para 70.

<sup>45</sup> Case C-62/86, *AKZO Chemie BV v Commission*, 3.7.1991, ECLI:EU:C:1991:286, para 24, 33; Case T-30/91 *Solvay v Commission*, 29.6.1995, ECLI:EU:T:1995:115, para 93–95, 98; Case C-7/89, *Hercules Chemicals NV v Commission*, 17.12.1991, ECLI:EU:T:1991:75, para 51–53, 56; Case T-353/94 R, *Postbank NV v Commission*, 18.9.1996, ECLI:EU:T:1996:119, para 68.

<sup>46</sup> Case T-219/01, *Commerzbank v Commission*, 9.7.2003, ECLI:EU:T:2003:20, para 25, 53, 58, 62; Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92, *Cimenteries CBR and others v Commission*, 18.12.1992, II-2668, p. 42; Jarass GrCh, 4. Aufl. 2021, EU-Grundrechte-Charta Art. 41, Rn 27.

<sup>47</sup> Case C-874/19 P, *Aeris Invest Sarl v SRB*, 21.12.2021, ECLI:EU:2021:1040, para 76; Case C-934/19 P, *Algebris (UK) Ltd and others v SRB*, 21.12.2021, ECLI:EU:2021:1042, para 86.

<sup>48</sup> Joined Cases C-551/19 P and 552/19 P, *ABLV Bank AS and others v ECB*, 6.5.2021, ECLI:EU:C:2021:369, para 66, 73; Lenaerts K., I. Maselis, K. Gutman, *EU Procedural Law*, (OUP, 2014), para 10.11; Case C-188/92 *TWD, Textilwerke Deggendorf GmbH v Federal Republic of Germany*, 9.3.1994, ECLI:EU:1994:90, para 17, 24; Bax, R. and A. Witte, 'The taxonomy of ECB instruments available for banking supervision', *ECB Economic Bulletin* (2019), Chapter 2.3.

<sup>49</sup> Case T-30/91, *Solvay v Commission*, 29.6.1995, ECLI:EU:T:1995:115, para 86.

<sup>50</sup> Carmen Hernandez Saseta, 'The interaction between the rule of professional secrecy and the rights of defence. Access to files in supervisory procedures,' in *ESCB Legal Conference 2020*, (2021), p. 258.

<sup>51</sup> Case T-353/94, *Postbank NV v Commission*, 18.9.1996, ECLI:EU:T:1996:119, para 87.





These definitions and modalities of access to the file during a supervisory procedure are aligned with those applicable during the review of supervisory decisions before the Administrative Board of Review (ABoR).<sup>52</sup> These definitions and modalities are inspired by those applicable to the European Commission's procedure under competition law, taking into account the distinctive features of supervisory procedures.<sup>53</sup>

The party's right to access its file in the context of a supervisory procedure is distinct from the general right of the public to access documents held by the ECB under Decision ECB/2004/9, which is subject to different criteria and exceptions and pursues a different purpose. Access to documents by the public reflects Article 42 of the Charter and is an expression of the principle of transparency and openness.

#### h. Statement of reasons in general

The purpose behind the obligation to state the reasons of an act is more pronounced<sup>54</sup> when the measure adversely affects a person and is twofold: first, to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the EU judiciary; and second, to enable that judiciary to review the legality of the act.<sup>55</sup>

The statement of reasons must identify the actual and specific reasons why the EU institution considers that the measure must be adopted in respect of the person concerned.<sup>56</sup> The statement of reasons depends on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure may have in obtaining explanations.

It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question as to whether the statement of reasons is sufficient must be assessed with

regard not only to its wording but also to its context and to all the legal rules governing the matter in question. The reasons are sufficient if the measure is adopted in a context which is known to the addressee. The general context of the measure adopted can be provided in the recitals to the preamble of a regulation, and this is sufficient for the addressee to be aware of because he is in a position to dispute the merits of an adverse measure.<sup>57</sup>

#### i. Consequences if the statement of reasons is infringed

The obligation of the administration to state reasons for its decisions stems from Article 296 of the TFEU is an 'essential procedural requirement' and is distinguished from the evidence provided and the substantive legality of an act.<sup>58</sup> This obligation to state reasons is a question of law, is reviewable by the Court, also on appeal,<sup>59</sup> and reflects the principle of respect for the right of defence.

#### j. Stating reasons (motivation) in the context of banking supervision

Article 41(2) and Article 296 of the TFEU are reflected in Article 33 of the SSMFR. The motivation encompasses material facts and legal reasons on which a supervised decision is based, but only those on which a party was given the opportunity to comment as part of its right to be heard. This provision reflects the Charter and the existing case law discussed above.

As described above, the requirement to state reasons must be assessed with reference to the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations.

It is not necessary for the reasoning to specify all the relevant facts and points of law, since the question as to whether the statement of reasons meets the requirements of Article 296 of the TFEU must be assessed with regard not only to its wording, but also to its context and to all the legal rules governing the matter in question.<sup>60</sup>

<sup>52</sup> Article 20 of Decision (EU) 2019/1378 of the European Central Bank of 9 August 2019 amending Decision ECB/2014/16 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2019/27), OJ L 224, 28.8.2019, p. 9.

<sup>53</sup> 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. 1–25; Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, 7–15, paragraph 7, 10.

<sup>54</sup> Jarass, *Charta der Grundrechte der EU*, 2021, Rn 34.

<sup>55</sup> Case C-521/09 P, *Elf Aquitaine v Commission* [2011] ECR I-8947, para 148.

<sup>56</sup> Case C-417/11 P, *Council v Nadiany Bamba*, 15.11.2012, ECLI:EU:C:2012:718, para 52.

<sup>57</sup> Case C-417/11 P, *Council v Nadiany Bamba*, 15.11.2012, ECLI:EU:C:2012:718, para 55, 59.

<sup>58</sup> Case C-974/19, *Carmen L. Reig v SRB*, 4.3.2019, ECLI:EU:2019:172, para 28; Case C-417/11 P, *Council v Nadiany Bamba*, 15.11.2012, ECLI:EU:C:2012:718, para 60; Case C-876/19 P, *PlasticsEurope AISBL v European Chemicals Agency*, 21.12.2021, ECLI:EU:2021:1047, para 51.

<sup>59</sup> Case C-417/11 P, *Council v Nadiany Bamba*, 15.11.2012, ECLI:EU:C:2012:718, para 41.

<sup>60</sup> C-247/14P, *Heidelberg Cement v Commission*, 10.3.2016, EU:C:2016:149, para 16.



The opinion of the ABoR supplements the motivation of an ECB supervisory decision.<sup>61</sup> The opinion is part of the context of the decision in question and can therefore be taken into account for the purpose of determining whether the decision contains a sufficient statement of reasons.

## The right to an effective remedy and to a fair trial

The principle that offences and penalties must be defined by law is one of the essential principles in criminal law and procedure. This principle was the main subject of philosopher and criminologist Cesare Beccaria in his book ‘On Crimes and Punishments’ published in the eighteenth century, which was based on Thomas Hobbes’s theory of society.<sup>62</sup>

Article 47(2) of the Charter reflects Article 6(1) of the Convention and both observe the fundamental principles of the rule of law and the separation of powers.<sup>63</sup> Everyone whose rights are violated has the right to an effective remedy before a tribunal and everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

The Court of Justice has enshrined the right to a fair trial as a general principle of EU law in its judgements.<sup>64</sup> Accordingly, while Article 6(1) of the Convention refers to civil law disputes or criminal charges, the wording of Article 47 is broader because it reflects the case law of the Court, such that the right to a fair trial extends to any type of dispute.<sup>65</sup>

- a. The exclusive jurisdiction of the Court of Justice of the EU to review the legality of ECB acts

The fundamental right to a fair trial is reflected in Article 263 of the TFEU. For the tasks conferred on the ECB under Articles 4 and 5(1) of the SSMR for which the ECB

is exclusively competent, the Court has exclusive jurisdiction to review the legality of ECB supervisory decisions.<sup>66</sup> The ECB has to assess the necessity of adopting a measure against the individual situation<sup>67</sup> of the applicant, and if this individual assessment has not taken place, the Court of Justice must annul the decision.

According to case law, procedural steps that are taken in preparation for the contested decision are not actionable, and the Court of Justice will review the legality of the entire administrative procedure during the judicial review of the final decision.<sup>68</sup> During the review of a final ECB supervisory decision, the Court of Justice of the EU determines whether preparatory national acts are vitiated by defects affecting the validity of the final ECB supervisory decision.<sup>69</sup> The exclusive jurisdiction of the Court of Justice of the EU to review the final ECB supervisory decision precludes national courts from reviewing such preparatory national acts under national law.<sup>70</sup>

As regards the admissibility, the applicant is the addressee or any other person that has a direct<sup>71</sup> and individual concern<sup>72</sup> in line with the existing case law of the Court. The two-prong test to establish whether direct concern exists involves checking if the contested measure: first, directly affects the legal situation of the applicant; and second, leaves no discretion to the person entrusted with the implementation, this implementation being purely automatic and resulting from EU rules alone. It should be noted that in the examination of direct effect, the Court of Justice disregards any economic effects suffered by a bank’s shareholders which

<sup>61</sup> Case C-450/17 *Landeskreditbank Baden-Württemberg Förderbank v ECB*, 8.5.2019, ECLI:EU:C:2019:372, para 95.

<sup>62</sup> Cesare Beccaria, *Dei delitti e delle pene*, (first published in Livorno, 1764), Part XI on the impact of punishment on crimes; Case C-42/17, Opinion of Advocate General Bot, 18.7.2017, para 74.

<sup>63</sup> Joined cases C-562/21 PPU and C-563/21 PPU, 22.2.2021, ECLI:EU:2022:100, para 56. See generally Gutman, Kathleen, “Article 47: the right to an effective remedy and a fair trial”, in Bobek/Adams-Prassl (Eds) *The EU Charter of Fundamental Rights in the EU States* (Hart Publishing 2020), Chapter 19.

<sup>64</sup> Case C-222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, 15.5.1986, ECLI:EU:C:1986:206, para 18; Case C-97/91, *Oleificio Borelli Spa v Commission of the European Communities*, 3.12.1992, ECLI:EU:C:1992:491, para 14; Case 222/86, *UNECTEF v Heylens*, 15.10.1987, ECLI:EU:C:1987:442, para 14.

<sup>65</sup> Case 294/83, *Parti écologiste “Les Verts” v European Parliament*, 23.4.1986, ECLI:EU:C:1986:166, para 23.

<sup>66</sup> Case C-219/17, *Berlusconi and Fininvest v Banca d’Italia*, 19.12.2018, ECLI:EU:C:2018:1023, para 44.

<sup>67</sup> Case T-143/18, *Societe Generale v ECB*, 9.9.2020, paragraph 72, ECLI:EU:T:2020:389.

<sup>68</sup> Case C-60/81, *IBM v Commission*, 11.11.1981, 24, ECLI:EU:1981:264, para 20–21.

<sup>69</sup> Case C-219/17, *Berlusconi and Fininvest v Banca d’Italia*, 19.12.2018, ECLI:EU:C:2018:1023, para 58; Lefterov, Asen, ‘Judicial review in a multi-level administrative framework—the case of the SSM’ in *ESCB Legal Conference 2020*, (2021) p. 298.

<sup>70</sup> Including decisions to initiate procedures, preparatory acts or non-binding proposals in the field of qualifying holding procedures.

<sup>71</sup> Case C-414/18, *ICCREA v Banca d’Italia*, 3.12.2019, ECLI:EU:2019:1036, para 67; C-622/16 P to C-624/16 P, *Scuola elementare Montessori v Commission, Commission v Scuola elementare Montessori, Commission v Ferracci*, 6.11.2018, EU:C:2018:873, para 42.

<sup>72</sup> Case 25-62, *Plaumann & Co v Commission*, 15.7.1963, ECLI:EU:C:1963:17, p. 107. In Case C-414/18, *ICCREA v Banca d’Italia*, 3.12.2019, ECLI:EU:2019:103, para 69, the individual concern existed because the applicant was specifically named in the annex to the contested decision; In Case C-135/16, *Georgsmarienhütte GmbH and Others v Bundesrepublik Deutschland*, ECLI:EU:C:2018:582, para 33, the individual concern was given for ‘parties that form part of a limited class of economic operators’, such as the beneficiaries of individual aid.



do not affect their legal rights and obligations,<sup>73</sup> as well as effects which do not result purely automatically from EU rules alone but occur as a result of national laws.

#### b. The standard of limited review by the EU judiciary

In the case of EU institutions which enjoy discretion and thus a wide power of assessment, as is the case with European Banking Supervision, respect for the rights guaranteed by the EU legal order in administrative procedures assumes even more fundamental significance for a very important reason.<sup>74</sup> For European Banking Supervision, the case law follows the standard which the Court of Justice of the EU has established in other areas of EU law.

In the case of complex assessments, where an EU institution enjoys broad discretion, the review by the EU judiciary will not lead it to substitute its own assessment for that of the ECB and ‘must be confined to verifying whether the rules on procedure and the statement of reasons have been complied with, whether the facts have been correctly stated and whether there has been any manifest error of assessment or a misuse of powers’ or whether it clearly exceeded the bounds of the ECB’s discretion, such as a violation of the principle of equal treatment.<sup>75</sup>

### Limiting fundamental rights for the stability of the financial system

Fundamental rights recognised by the Court of Justice ‘are not absolute but must be considered in relation to their social function’.<sup>76</sup> The protection of fundamental rights may be restricted in the EU provided that the conditions listed in Article 52(1) of the Charter are met. These conditions reflect the wording of the existing case law, according to which restrictions must correspond to objectives of general interest pursued by the EU and cannot constitute, ‘with regard to the

aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights’.<sup>77</sup>

Accordingly, the Charter lays down three conditions for limitations to fundamental rights and freedoms to be legitimate, namely that the limitations: (1) must be provided for by law; (2) must respect the essence of the rights; and (3) must be in compliance with the principle of proportionality, that is, they must be necessary and genuinely meet the objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.<sup>78</sup> A difficulty here is interpreting what constitutes an objective of general interest recognised by the EU.<sup>79</sup> The most conspicuous examples are the objectives of general interest recognised explicitly by the Treaties.<sup>80</sup>

Another example is the stability of the financial system, as stipulated in Article 1(1) of the SSM Regulation:

... the stability of the financial system within the Union and each Member State, with full regard and duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions...

This view has been corroborated by the existing case law, as follows. The stability of the banking system was acknowledged in *Ledra Finance v Commission and ECB* as an objective of general interest recognised by the EU, the pursuit of which may have led to legitimate restrictions of fundamental

<sup>73</sup> Joined cases C-663/17 P, C-665/17 P and C-669/17 P, *ECB and others v Trasta Kommerbanka and others*, 5.11.2019, ECLI:EU:2019:923, para 103, 109, 114.

<sup>74</sup> Case T-712/15, *Crédit Mutuel Arkéa v ECB*, 13.12.2017, 202, ECLI:EU:T: 2017:900, para 178-180; Case T-733/16, *Banque Postale v ECB*, 13.7.2018, ECLI:EU:T:2018:477, para 61-70.

<sup>75</sup> Case T-712/15, *Crédit Mutuel Arkéa v ECB*, 13.12.2017, ECLI:EU:T: 2017:900, para 178-180, 202; Case T-733/16, *Banque Postale v ECB*, 13.7.2018, ECLI:EU:T:2018:477, para 109-115.

<sup>76</sup> Case 5/88, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* 13.7.1989, ECLI:EU:C:1989:321, para 18. See Lenaerts, Koen, ‘Limits on Limitations: The Essence of Fundamental Rights in the EU’ 20 German Law Journal (2019), 779.

<sup>77</sup> Case C-292/97, *Karlsson and others*, 13.4.2000, ECLI:EU:C:2000:202, para 39, 45, 58; Case 5/88, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* 13.7.1989, ECLI:EU:C:1989:32, para 18.

<sup>78</sup> Joined cases C-245/19 and 246/19, *Etat luxembourgeois v B and others*, 6.10.2020, ECLI:EU:C:2020:795, para 51; Joined cases C-439/14 and C-488/14, *Star Storage and Others*, 15.9.2016, EU:C:2016:688, para 46 and 49.

<sup>79</sup> In recent case law, the pursuit of national security has been considered an objective of general interest recognized by Union law, see C- 623/17, *Privacy international v Secretary of State for Commonwealth and Foreign Affairs and Others*, 6.10.2020, ECLI:EU:C:2020:790, para 82. The stability of the financial markets and the continuity of the entity’s critical functions have been recognised as objectives of general interest that may limit the right to be heard for shareholders and creditors in a resolution procedure, see Case T-510/17, *Antonio del Valle Ruiz and others v European Commission and SRB*, 1.6.2022, ECLI:EU:T:2022:312, para 174 and Case T-570/17, *Algebris UK Ltd and Anchorage Capital Group LLC v European Commission*, 1.6.2022, ECLI:EU:T:2022:314, para 387, with references to *Camberrow MM5 AD v Bulgaria*, 1.4.2004, CE:ECHR:200401DEC005035799, para 6, *Mamatas and others v Greece*, 21.7.2016, CE:ECHR:2016:0721JUD006306614, para 88, 115 and Case C-41/15, *Dowling and others v Minister for Finance*, 8.11.2016, EU:C:2016:836, para 53.

<sup>80</sup> For instance, objectives laid down in Article 3 and interests protected under Articles 4(1) of the Treaty European Union (TEU), and Articles 35, 36 and 346 of the Treaty on the Functioning of the European Union (TFEU).



rights.<sup>81</sup> The other cases do not deal directly with limitations to due process requirements, but with limitations of other fundamental rights, such as the public's access to documents and the right to property. They are discussed here because they provide an indication of the conditions under which limitations may be permissible, which also apply in the context of supervisory procedures to protect the financial stability of the EU. In *Thesing and Bloomberg v ECB*<sup>82</sup>, the General Court adjudicated in a case concerning limitations to the fundamental right of public access to documents in the field of central banking.<sup>83</sup> The stability of the European financial markets in view of the economic and financial situation in a Member State was recognised as an objective of general interest, which was legitimately pursued when the fundamental right of public access to documents was limited.

Moreover, the fact that the requested document had been drafted more than seven months prior to the ECB's refusal to grant access to it was not relevant for the assessment as to whether the data referred to in this document were outdated. What was relevant was the perspective of the 'financial market participants',<sup>84</sup> which would not have regarded the released data in the document as outdated and would have been influenced in their judgement. The public's right to access ECB documents exists for both monetary policy and banking supervision alike. Thus, the arguments favouring a limitation to access monetary policy documents is relevant for limiting access to supervisory documents as well since the public's access to both types of documents is governed by the same ECB decision, ECB/2004/9.

Finally, in *Kotnik* the Court of Justice acknowledged that the objective of ensuring 'the stability of the financial system while avoiding excessive public spending and minimising distortions of competition' constitutes an overriding public interest. Furthermore, even if a clear public interest exists to ensure a strong and consistent protection of investors throughout the EU, that interest cannot be held to prevail in all circumstances over the 'public interest in ensuring the stability of the financial system'.

The context of this case was the condition of burden-sharing measures by shareholders and subordinated creditors as a prerequisite to the authorisation of state aid to banks faced with a capital shortfall in the exceptional context of a national economy being affected by a serious disturbance, in order to overcome a systemic financial crisis capable of

adversely affecting 'the national financial system as a whole and the financial stability of the European Union'.

The Court of Justice did not find any adverse restriction of the right to property under Article 17 of the Charter in the event that the shareholders' shares were reduced as a prerequisite for state aid, as opposed to an insolvency court order.<sup>85</sup> The argument is that each shareholder bears the risk of its investment in a bank and may lose its shares in the event of a bank insolvency. The shareholders who were part of a burden-sharing measure were not deemed to be worse off than they would have been in a bank insolvency. Further, the Court of Justice confirmed that the burden-sharing arrangements could not exceed what was necessary to overcome the capital shortfall of the bank concerned.<sup>86</sup> This language echoes the principle of proportionality, as developed in EU law by the Court of Justice.<sup>87</sup>

None of the above cases concerns limitations of the specific due process rights applicable in the context of ECB Banking Supervision. Nevertheless, they demonstrate that the stability of the financial system is an objective of general interest recognised by the EU which, under the strict conditions of Article 52 of the Charter, may limit fundamental rights, including those discussed in this paper. A manifestation of such a limitation can be found in Article 31(4) of the SSMFR according to which the right to be heard can be granted ex post for financial stability reasons.

## Conclusion

This paper discussed two fundamental rights that are stipulated in the Charter: the right to good administration and the right to a fair trial. Both are pivotal for all entities which are subject to European Banking Supervision, in particular whenever measures adversely affecting them are adopted. The fundamental rights apply in a harmonised way during all ECB supervisory proceedings—even when the ECB supervisory procedures lead to supervisory decisions adopted in accordance with national law.

The EU recognises that the stability of the financial system is an objective of general interest that may justify

<sup>81</sup> Joined cases C-8/15 P and C-10/15 P, *Ledra Advertising and others v Commission and ECB*, 20.9.2016, ECLI:EU:C:2016:701, para 67, 71 and 74.

<sup>82</sup> Case C-590/10, *Gabi Thesing and Bloomberg Finance LP v ECB*, ECLI:EU:T:2012:635, para 52.

<sup>83</sup> In line with Article 4(1)(a) of Decision 2004/258.

<sup>84</sup> Case C-590/10, *Gabi Thesing and Bloomberg Finance LP v ECB*, 29.11.2012, ECLI:EU:T:2012:635, para 56.

<sup>85</sup> Case 526/14, *Kotnik and others v Državni zbor Republike Slovenije and others*, 19.7.2016, ECLI:EU:C:2016:570, para 74–75.

<sup>86</sup> Case 526/14, *Kotnik and others v Državni zbor Republike Slovenije and others*, 19.7.2016, ECLI:EU:C:2016:570, para 90, 102.

<sup>87</sup> Case C-331/88, *The Queen v Fedesa and others*, 13.11.1990, ECLI:EU:C:1990:391, para 13: 'Measures of a Union institution should not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued'; Case T-203/18, *VQ v ECB*, 8.7.2020, ECLI:EU:2020:313, para 61.





limitations to fundamental rights if certain conditions are met. That being said, it is acknowledged that limitations to the due process requirements are possible solely if the strict conditions of Article 52 of the Charter are fulfilled, taking into account the principle of proportionality. This constitutes an additional safeguard for all supervised entities. Thus, in the absence of an EU administrative code, the fundamental rights of the Charter provide a powerful form of protection to all supervised entities and counter-balance the limited judicial review of ECB supervisory decisions.

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## Declarations

**Conflict of interest** The author states that there is no conflict of interest.

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