



Dr. Paul Weismann
Selected Questions on Fundamental Rights Protection in EU Banking Law
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The empowerment of the European Central Bank (ECB) and the Single Resolution Board as the central EU actors in the Banking Union has significantly broadened the scope of EU administrative action vis-à-vis individuals/undertakings. The decisions these bodies take may directly impinge upon the situation of individual banks and their respective shareholders and creditors and, thus, may also affect their fundamental rights as protected, *inter alia*, in the Charter of Fundamental Rights (CFR). Two examples shall illustrate the intricate fundamental rights questions occurring in the field of EU banking supervision and resolution.

The first example relates to the resolution of banks. EU law allows for a bank which is ‘failing or likely to fail’ to be resolved, allowing for critical functions of the bank’s business to be continued. Part of this resolution may be a ‘bail-in’, i.e. the write-down or conversion of capital instruments (e.g. haircutting creditors). If the conditions for resolution are not met, the bank will be liquidated in the course of national insolvency proceedings. The No Creditor Worse Off (NCWO) Principle, as enshrined in EU secondary law on banking resolution, guarantees i.a. creditors of a bank which is subject to resolution that they will not suffer greater losses than they would have suffered under regular insolvency proceedings (possibility of compensation). The NCWO principle relates to the creditors’ fundamental right to property (Art. 17 CFR), but it is unclear, also from the case law of the Court of Justice of the European Union (CJEU), which effects (non-)compliance with this principle has on this right.

The second example relates to the exceptional application of national law by the ECB in its capacity as a banking supervisor. In an increasing number of cases the CJEU has stressed the importance of considering relevant national case law in this context, but the relevance of national fundamental rights law has not yet been addressed explicitly. This question is of particular importance where national law provides for a higher level of fundamental rights protection than the CFR (which is applicable, as well). According to Art. 53 CFR, the Charter does not stand in the way of higher fundamental rights standards under national law, but – as the CJEU has clarified – this applies only where ‘the primacy, unity and effectiveness of EU law’ are not compromised. Whether, in this specific context, the application of national (fundamental rights) law may have this effect remains an open question.



About the Speaker

Paul Weismann is Associate Professor at the Salzburg Centre of European Union Studies (SCEUS), University of Salzburg. He has engaged in teaching and research activities at various universities. His main research interests relate to institutional questions of EU law; Economic and Monetary Union; banking law.

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