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Depicting the limits to the SSM's supervisory powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection (*)

Marco Lamandini[1]
David Ramos Muñoz[2]
Javier Solana Álvarez[3]

ABSTRACT

Given the complexity of the new supervisory architecture in the Euro zone, it seems necessary to provide a proper theoretical framework for the lawful exercise of both regulatory and supervisory tasks within the SSM. In this paper we endeavour to offer one such a framework. In particular, Section 2 provides an overview of the new institutional architecture of banking supervision within the SSM and a brief description of selected aspects of the SRM that directly interact with the SSM. Section 3 considers the limits to the SSM's powers directly stemming from the SSM Regulation. Section 4 and 5 address the constitutional limits to the ECB powers; in particular, Section 4 discusses the limits deriving from the horizontal and vertical distribution of regulatory and supervisory competences within the SSM whereas Section 5 explores the coexistence of prudential and monetary Treaty's mandates and its implications. Section 6 expands on fundamental right protection and its implications for the SSM. Section 7 concludes, showing that (a) the constitutional distribution of competences within the SSM is likely to be more ambiguous than necessary, (b) the relationship between prudential and monetary tasks described by the SSM Regulation seems to be quite questionable and (c) the SSM may raise important questions about the implications of the exercise of the supervisory tasks conferred upon the ECB and NCAs for the fundamental rights of the entities subject to supervision.

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1 University of Bologna.

2 Carlos III University of Madrid.

3 University of Oxford.

Data la complessità della nuova architettura di vigilanza nell'Eurozona, sembra necessario tentare di offrire un inquadramento teorico del corretto esercizio dei compiti regolatori e di vigilanza all'interno del MVU. In particolare il capitolo 2 presenta una panoramica della nuova architettura istituzionale di vigilanza nel quadro del MVU e offre altresì una breve descrizione di aspetti specifici del MRU che interagiscono direttamente con il MVU. Il capitolo 3 prende in esame i limiti dei poteri direttamente derivanti dal Regolamento MVU. I capitoli 4 e 5 affrontano il tema dei limiti costituzionali ai poteri della BCE; in particolare il capitolo 4 esamina i limiti derivanti dalla distribuzione orizzontale e verticale delle competenze regolamentari e di vigilanza all'interno del MVU e il capitolo 5 affronta la questione della coesistenza tra le funzioni prudenziali e di politica monetaria. Il capitolo 6 tratta diffusamente della protezione dei diritti fondamentali all'interno del MVU. Il capitolo 7 conclude, mostrando come (a) la ripartizione delle competenze all'interno del MVU risulti più ambigua del necessario; (b) la relazione tra funzioni prudenziali e di politica monetaria prevista dal Regolamento MVU appaia per certi aspetti discutibile e (c) il funzionamento in concreto del MVU, e in particolare l'esercizio dei compiti di vigilanza attribuiti alla BCE e alle Autorità nazionali competenti, ha rilevanti implicazioni per la tutela dei diritti fondamentali dei soggetti vigilati.

SUMMARY

Questo studio, per quanto modesto,
è in onore di Renzo Costi,
al quale è dedicato.

I. INTRODUCTION

The micro- and macro-prudential supervisory remits of competent authorities have been drastically re-arranged recently in Europe, in particular within the Euro area with the establishment of the SSM and the conferral of specific supervisory tasks to the ECB under Article 127(6) TFEU. This came along with an armoury of different supervisory powers and measures that fatally impacted on the conduct of business of participating Member States' credit institutions and groups and call into question a variety of constitutional and institutional limits to the exercise of power. By addressing these limits we will examine the ECB's and other national competent authorities' ("NCAs") role in regulating and supervising the field without depriving market participants of their fundamental rights and the role given to the judiciary to ensure full compliance by the SSM of the overarching principles enshrined in the Charter of Fundamental Rights and in the TFEU.

Our analysis shall encompass both regulatory and supervisory powers, because the distinction between regulation and supervision in banking, traditionally embedded in national preferences, is to some extent illusory. This is so although (a) regulatory measures, being of general application, are clearly different from supervisory measures in the way they impinge on the conduct of business of individual credit institutions and groups and (b) regulatory responsibilities for the implementation of Union law in the field of banking are given primarily to the Commission and the European Banking Authority. Indeed, according to Article 4(3), second paragraph, of Regulation (EU) No 1024/2013 (the "SSM Regulation") the ECB is "subject to binding regulatory and implementing technical standards developed by EBA and adopted by the Commission in accordance with Article 10 to 15 of Regulation (EU) No 1093/2010, to Article 16 of that Regulation and to the provisions of that Regulation on the European supervisory handbook developed by EBA in accordance with that Regulation". In turn, the ECB is expressly granted by the SSM Regulation regulatory powers (i) to organise or specify the arrangements for the carrying out of its tasks (Article 4(3), second paragraph, last period and Article 6(7) of the SSM Regulation) and (ii) to provide general instructions to NCAs according to which the tasks defined in Article 4(1) and delegated to them under Article 6(4) are performed and NCAs' supervisory decisions are adopted. Yet, we argue that, despite the SSM Regulation is ambiguous on this point and a contrary view is also well represented in the literature, the ECB has been also granted regulatory powers *to the extent necessary to complete the "Single Rule Book" where Union Law is incomplete and in particular where "competent authority" options and discretions are still granted by the CRD IV/CRR compact.* If this holds true, ECB regulatory powers may be wider than purely organizational and the constitutional and institutional limits to their exercise would deserve even greater attention, also to test the interplay of such regulatory competences with the principle of effective judicial protection enshrined in the Charter of Fundamental Rights. In any event, then, the unsettled interpretation of the SSM Regulation on the breadth of regulatory powers conferred upon the ECB would likely feature an unchartered territory to test the ECB and national allocation of competences from a judicial perspective.

From an institutional perspective, then, lacking a CJEU final say on this point, experience shows that this kind of differences is often conducive to political compromise and light touch, cooperative, solutions rather than heavy handed unilateral action. A pragmatic response might be the use of ECB guidelines and recommendations to national competent authorities, that Article 4(3) of the SSM Regulation empowers the ECB to adopt to the effect of carrying out the tasks conferred on it by the SSM Regulation and with the objective of ensuring high standards of supervision this in turn, makes it relevant to explore how they would interact with the fundamental principle of effective judicial protection.

On the other hand, the ECB is granted a wide array of micro-prudential supervisory tasks, listed in Article 4 of the SSM Regulation and additional ("*add on*") macro-prudential tasks and tools listed in Article 5. The exercise of these tasks authorises the use by the ECB of the powers listed in letters a)-m) of Article 16 and the application, where relevant, of administrative (*but quasi criminal*) penalties and sanctions as set out in Article 18. This sanctioning power is complemented by some NCAs' competences as also specified in Article 18. Moreover, to the effect of the exercise of the supervisory tasks related to recovery plans and early intervention, the ECB and NCAs are granted the special powers set out in Directive 2014/59/EU (the "BRRD") – in particular those listed in Article 6(6) - and are called to coordinate with the resolution authorities, in particular with the SRB established by Regulation (EU) No 806/2014 ("The SRM Regulation"), also to the effect of the exercise of the powers to address or remove impediments to resolvability granted to the resolution authorities. All of *these supervisory (administrative and sanctioning) powers* exert significant influence over the decisions of credit institutions and groups as private undertakings. They must be carefully considered, thus, in order to dispel all express and implied limits in their exercise stemming (i) from the specific provisions of the SSM Regulation establishing supervisory competences, (ii) from overarching general principles that distribute those competences, and (iii) from fundamental rights' protection, including those curtailing the exercise of discretion by supervisory authorities (data protection, fair trial) and their relations with the judiciary (*ne bis in idem*, presumption of innocence).

Thus, given the complexity of the current arrangements, it is certainly necessary to provide a proper theoretical framework for the lawful exercise of *regulatory and supervisory* tasks within the SSM. In this paper we endeavour to offer one such a framework. In particular, Section 2 provides an overview of the new institutional architecture of banking supervision within the SSM and a brief description of selected aspects of the SRM that directly interact with the SSM. Section 3 considers the limits to the SSM's powers directly stemming from the SSM Regulation. Section 4 and 5 address the constitutional limits to the ECB powers; in particular, Section 4 discusses the limits deriving from the horizontal and vertical distribution of competences within the SSM whereas Section 5 explores the coexistence of prudential and monetary Treaty's mandates and its implications. Section 6 expands on fundamental right protection and its implications for the SSM. Section 7 concludes.

II. THE NEW INSTITUTIONAL ARCHITECTURE OF BANKING SUPERVISION: A BRIEF DESCRIPTION

In the summer of 2007 instability in the subprime mortgage market in the U.S. triggered a confidence crisis that spread through the money markets in the U.S. affecting participating financial institutions. The confidence crisis worsened throughout 2008, eventually taking with it two large investment banks: Bear Sterns and Lehman Brothers. The demise of Lehman Brothers aggravated the crisis of confidence in the money markets, eventually leading to runs in the money market. European banks were not immune from these events. Some of them had U.S. mortgage-backed securities in their balance sheets the value of which decreased as confidence and liquidity dried up in the U.S. markets. Some of the ailing banks held considerable amounts of sovereign debt from their government as well as other governments within the E.U. In the years that followed, many E.U. Member States had to fight the problems that had arisen in their highly interconnected banks using national policy tools. Moreover, the deep interdependencies resulting from the single currency hindered the capacity of Member States to respond rapidly and effectively. Eventually, some Member States ended up requesting financial assistance from outside sources, which put additional pressure on the public finances and boosted public debt to unprecedented levels.

As the U.S. crisis spread to European credit institutions and morphed into a sovereign debt crisis for Euro zone Member States, the fragmented response to the events surfaced structural vulnerabilities of the E.U. institutional framework to provide a coordinated response to a problem of interconnection. Voices raised within the European Union institutions calling for the need to build a framework to manage cross-border banking crises.[4] If the European Union wanted to weather another financial crisis in the future, it would need to have an adequate institutional framework in place. This would mean, at least, having a supervisor that would monitor all the credit institutions within the Eurozone as well as a European authority that would be able to put large banks into resolution if needed.

On 26th June 2012, a joint report by the Presidents of the European Council, the European Commission, the Eurogroup and the European Central Bank, presented a series of proposals "towards a stronger EMU architecture, based on integrated frameworks for the financial sector, for budgetary matters and for economic policy."[5] One of the four building blocks was the need to put in place "[a]n integrated financial framework to ensure financial stability in particular in the euro area and minimise the cost of bank failures to European citizens."[6] An integrated financial framework would build upon a single rulebook applicable

4 See e.g. European Parliament resolution of 7 July 2010 with recommendations to the European Commission on Cross-Border Crisis Management in the Banking Sector (2010/2006(INI)).

5 Herman Van Rompuy, 'Towards a Genuine Economic Monetary Union' (2012) EUCO 120/12 1.

6 ibid 5. The three other building blocks were: an integrated budgetary framework, an integrated economic policy framework, and the need to ensure the necessary legitimacy and accountability of decision-making within the E.U.

to all Member States and it would have two central elements: a single European banking supervision and a common deposit insurance and resolution framework.[7]

A few days later, these proposals were backed in the Euro Area Summit. The European Commission was asked to present a Proposal for a single supervisory mechanism ("SSM") on the basis of Article 127(6) of the Treaty on the Functioning of the European Union ("TFEU") and the Council was asked to consider those proposals "as a matter of urgency" before the end of 2012.[8]

On 12th September 2012 the European Commission issued a set of proposals as the first step towards an integrated "banking union". There were three proposals: one regulation giving supervisory powers to the ECB and national supervisory authorities, i.e. the creation of a SSM;[9] one regulation introducing limited changes to the regulation that had set up the European Banking Authority (EBA) to ensure a balance in its decision making structures in the face of the new SSM;[10] and a communication presenting a roadmap for the implementation of the banking union, covering the single rulebook, common deposit protection and a single bank resolution mechanism ("SRM").[11]

The European Council acknowledged the European Commission's proposals and urged co-legislators to take action.[12] In October 2013, the European Union formally adopted the creation of a SSM by promulgating two Regulations: one in which the Council agreed to confer specific supervisory tasks to the ECB,[13] and a joint Regulation of the European Parliament and the Council amending the previous Regulation that had established the EBA.[14]

In July 2014, the European Parliament and the Council adopted Regulation (EU) No. 806/2014 establishing the Single Resolution Mechanism ("SRM") and a Single Resolution Fund ("SRF").[15] The SRM will apply to banks covered by the SSM. In the event of a bank failure, the SRM Regulation requires that the

7 See ibid 4–5.

8 See European Council, 'Euro Area Summit Statement' <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131359.pdf>.

9 COM(2012) 511 final.

10 COM(2012) 512 final.

11 COM(2012) 510 final.

12 See European Council, 'Conclusion of the European Council' (2012) EUCO 205/12.

13 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 (hereinafter, "SSM Regulation").

14 Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013 (hereinafter, "EBA Regulation").

15 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 (hereinafter, "SRM Regulation").

resolution be managed through a Single Resolution Board ("SRB") in conjunction with national resolution authorities,[16] and a SRF.[17]

Both the SSM and the SRM are underpinned by the single rulebook, which comprises a set of common rules for banks in all 28 Member States. Among other things, the single rulebook regulates the amount of capital that banks are required to hold,[18] it provides a common framework to manage the process of resolving a bank if necessary,[19] and it describes the guarantees in place to protect consumers should banks get into difficulty.[20]

The Conclusions of the December 2012 European Council intentionally left the door open to further reforms towards a more resilient banking union.[21] Some commentators have identified specific areas that will need further integration, particularly with regards to a single deposit guarantee scheme, an issue recently considered a priority for European action by the Five Presidents' Report.[22] Whether that will be the case, only time will tell.

A. The SSM: an overview

The Council Regulation (EU) No. 1024/2013 of 15 October 2013 (the "SSM Regulation") confers upon the ECB specific tasks concerning prudential supervision of credit institutions with the purpose of "contributing to the safety

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16 See Article 7 of the SRM Regulation.

17 See Articles 67 *et seq* of the SRM Regulation.

18 See the 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 (hereinafter "CRD IV") and the Regulation (EU) No 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (hereinafter "CRR"), known together as the "CR Compact".

19 See 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 (hereinafter, "BRRD"). In addition, the European Stability Mechanism ("ESM") instrument adopted on 8 December 2014 gave the ESM the power to directly recapitalise euro area financial institutions under specific circumstances (e.g. only if private investors have been bailed-in in accordance with the BRRD) as a last resort measure (hereinafter, "DRI"). The DRI aims to contribute to breaking the link between governments and banks that caused major instability for some euro area countries in recent years. See European Stability Mechanism, 'ESM Direct Bank Recapitalisation Instrument Adopted' <http://www.esm.europa.eu/press/releases/esm-direct-bank-recapitalisation-instrument-adopted.htm>.

20 See e.g. Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (hereinafter "DGS Directive").

21 See Nicolás Verón and Guntram B Wolff, 'From Supervision to Resolution. Next Steps on the Road to European Banking Union' (2013) No. 2013/04 5–6.

22 Accessible at http://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report_it.pdf. The European Commission is expected to review the DGS Directive in 2019 to assess whether a single deposit guarantee scheme should be put in place to develop the banking union further. For an analysis of possible areas for further integration within the banking union, see Jean Pisani-Ferry and others, 'What Kind of European Banking Union?' (Bruegel Policy Contribution 2012) 2012/12.

and soundness of credit institutions and the stability of the financial system within the Union and each Member State."[23] The SSM is the system of prudential financial supervision of credit institutions in the E.U. composed of the ECB and the NCAs of participating Member States.[24] Under the SSM Regulation, "participating Member States" shall mean all Member States whose currency is the euro or any other Member States who establish a close cooperation with the SSM in accordance with Article 7 of the SSM Regulation.[25]

Articles 4 and 5 of the SSM Regulation provide for the specific competences to be attributed to the ECB in relation to micro- and macro-prudential supervision, respectively. In particular, Article 4.1 expressly refers to the following micro-prudential tasks:

- "[T]o authorise credit institutions and to withdraw authorisations of credit institutions subject to Article 14;"[26]
- For supervised institutions that want to establish a branch or provide cross-border services in a non-participating Member State, to undertake the tasks of the competent authority in the home Member State;[27] to undertake the supervisory tasks of NCAs when a credit institution established in a non-participating Member State establishes a branch or provides cross-border services in a participating Member State;[28]
- "[T]o assess notifications of the acquisition and disposal of qualifying holdings in credit institutions, except in the case of a bank resolution, and subject to Article 15;"[29]

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23 Article 1 of the SSM Regulation. In the context of the banking union project, some commentators have argued that its new supervisory powers will not allow the ECB to provide effective protection to the stability of the E.U. financial system unless they also covered insurance companies. See Hans Geeroms and Pawel Karbownik, 'A Banking Union for an Unfinished EMU' (Wilfred Martens Centre for European Studies 2014) Policy Brief 5 <http://www.martenscentre.eu/publications/banking-union-unfinished-emu> accessed 22 June 2015. That, however, would require a change of the Treaties. See Article 127(6) of the TFEU and Article 25(2) of the Statute.

24 See Article 2(9) of the SSM Regulation. Like the EFSF or the SRM, the SSM has no legal personality. It is rather a network of national and EU supervisory authorities. See Raffaele D'Ambrosio, 'The ECB and NCA Liability within the Single Supervisory Mechanism' (2015) *Quaderni di Ricerca Giuridica* 59.

25 See Article 2(1) of the SSM Regulation.

26 Article 4(1)(a) of the SSM Regulation. Article 14 of the SSM Regulation provides that any application for authorization to take up the business of a credit institution shall be submitted to the relevant NCA. The NCA will submit a draft decision to the ECB, who will be able to adopt it or modify it depending on the circumstances. The article also regulates the process for withdrawing an authorization. For general requirements for access to the activity of credit institutions, see Articles 8 to 21 of the CRD IV.

27 See Article 4(1)(b) of the SSM Regulation.

28 See Article 4(2) of the SSM Regulation.

29 Article 4(1)(c) of the SSM Regulation. Pursuant to Article 15, any such notifications will be introduced with the NCAs of the Member State where the credit institution is established in accordance with the requirements set out in relevant national law. Such notification and a proposal for a decision will be submitted to the ECB, who may oppose the acquisition on the basis of the assessment set out in the relevant Union law. Moreover, Articles 22 to 27 of the CRD IV also contain specific provisions about qualifying holdings in a credit institution.

- To ensure that supervised credit institutions comply with the ECB's acts referred to in Article 4(3), which impose prudential requirements on a series of areas;[30]
- To carry out supervisory reviews, stress test and their possible publication, and to impose any additional measures hat are considered necessary to ensure a sound management and coverage of the risks of the relevant supervised institutions;
- To carry out supervision on a consolidated basis over credit institutions' parents, including in colleges of supervisors when parents are established in a non-participating Member State;
- To participate in supplementary supervision of a financial conglomerate in relation to the credit institutions included therein;
- To supervise recovery plans and early intervention where a credit institution or a supervised group may be likely to breach any applicable requirements, and to supervise any structural changes where expressly stipulated by Union law, excluding any resolution powers.

Article 6 of the SSM Regulation further specifies the framework within which these micro-prudential competences shall be distributed between the ECB and the relevant NCAs. We will explore these competences in greater detail in Section IV below.

Article 5 of the SSM Regulation deals with macro-prudential tasks and tools. National competent or designated authorities will continue to be vested with macro-prudential powers and tools that are not the object of any relevant Union law. Although both national authorities and the ECB may apply the macro-prudential tools provided for under the Capital Compact in relation to all credit institutions, regardless of their significance, the initiative is taken by the national authorities.[31] Nevertheless, the ECB may require the relevant credit institutions to apply higher stricter measures than those stipulated by the national authorities.[32]

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30 Such areas include: "own funds requirements, securitisation, large exposure limits, liquidity, leverage, and reporting and public disclosure of information on those matters […]" Article 4(1)(d) of the SSM Regulation. They also include those acts that impose requirements on credit institutions to "have in place robust governance arrangements, including the fit and proper requirements for the persons responsible for the management of credit institutions, risk management processes, internal control mechanisms, remuneration policies and practices and effective internal capital adequacy assessment processes, including Internal Ratings Based models […]" Article 4(1)(e) of the SSM Regulation.

31 See Article 5(1) of the SSM Regulation. Macro-prudential tools include, among others, the imposition of own funds requirements (see Article 4.1(d) of the SSM Regulation), of capital buffers, countercyclical buffer rates and any other measures aimed at addressing systemic or macro-prudential risks as provided for, and subject to the procedures set out in the Capital Compact. See e.g. Articles 128 to 142 of the CRD IV.

32 See Article 5(2) of the SSM Regulation. Pursuant to Article 5(3) of the SSM Regulation, national authorities may require the ECB to act in accordance with Article 5(2) "to address the specific situation of the financial system and the economy in its Member State."

We will explore the specific details of the distribution of competences between the ECB and the relevant national authorities in Section IV below.

The ECB is intended to carry out its micro- and macro-prudential supervisory tasks separately from its monetary policy mandate.[33] For that purpose, the SSM Regulation establishes a Supervisory Board within the ECB that will undertake the planning and the execution of tasks conferred to the ECB under that Regulation.[34] The Supervisory Board will be composed of its Chair, a Vice-Chair, four representatives of the ECB and one representative of the NCA in each participating Member State.[35] The Supervisory Board will take its decisions by a simple majority unless otherwise stated in the SSM Regulation.[36] The Supervisory Board will submit its draft decisions to the Governing Council of the ECB[37] to be adopted by the latter.[38] The decision will be adopted unless the Governing Council objects by stating its reasons in writing.[39] The Governing Council shall adopt internal rules setting to govern its relationship with the Supervisory Board.

Article 4(3) of the SSM Regulation confers specific regulatory powers to the ECB for the purpose of ensuring high standards of supervision. To that effect, the ECB shall adopt guidelines and recommendations, and take decisions that are in compliance with the relevant Union law. The ECB may also adopt regulations[40] "only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred on it by this Regulation"[41] and after having

33 See Article 25 of the SSM Regulation.

34 The Supervisory Board shall establish a steering committee from among its members to support the Board's activities; however, it shall have no decision-making powers. See Article 26(10) of the SSM Regulation.

35 See Article 26(1) of the SSM Regulation. Paragraphs (2) to (5) of Article 26 provide specific details about the appointment and removal of members of the Supervisory Board.

36 See Article 26(6) of the SSM Regulation.

37 "In accordance with Article 283(1) of the Treaty on the Functioning of the European Union, the Governing Council shall comprise the members of the Executive Board of the ECB and the governors of the national central banks of the Member States whose currency is the euro." Article 10(1) of the Statute of the European System of Central Banks and of the European Central Bank (the "Statute").

38 Article 7(8) of the SSM Regulation foresees a specific procedure for a participating Member State whose currency is not the euro to inform the governing Council of a reasoned disagreement with a draft decision prepared by the Supervisory Board.

39 See Article 26(8) of the SSM Regulation. Article 7(7) provides specific procedures for the communication of the disagreement of a participant Member State whose currency is not the euro with a particular objection of the Governing Council. Such participating Member State may decide not to be bound by the amended draft decision, in which case the ECB shall consider the possible suspension or termination of the close cooperation.

40 Articles 25(2) and 34(1) of the Statute confers the power upon the ECB to make regulations to the extent necessary to implement tasks of prudential supervision of credit institutions and other financial institutions conferred upon the ECB in accordance with any Regulation of the Council under Article 127(6) TFEU. See The SSM Regulation is one such Regulation.

41 Article 4(3)(2) of the SSM Regulation. See also article 6(5)(a) of the SSM Regulation. Some commentators have interpreted that the ECB's power to issue regulations cannot directly impose obligations vis-à-vis credit institutions. In other words: the ECB may not issue substantive EU banking rules directly. See D'Ambrosio (note 24) 101–105.

conducted open public consultations and carried a cost-benefit analysis.[42] The Supervisory Board shall adopt these regulations on the basis of a qualified majority of its members pursuant to Article 26(7) of the SSM Regulation.[43] In the case of breach of any requirement imposed under any acts referred to under Article 4(3) or under relevant directly applicable acts of Union law, the ECB may impose administrative pecuniary penalties in accordance with Article 18 of the SSM Regulation.[44]

Article 22 of the SSM Regulation specifies that before taking any supervisory decisions the ECB shall give the persons subject to the proceedings the right of being heard.[45] This provision, however, may not apply "if urgent action is needed in order to prevent significant damage to the financial system."[46] In any rate, the rights of defence of the relevant persons shall be fully respected throughout the proceedings.[47]

The ECB shall establish an Administrative Board of Review to carry out internal administrative reviews of the decisions taken by the ECB in the exercise of its powers.[48] In addition, the acts and omission of the ECB shall be open to review or interpretation by the Court of Justice of the European Union ("CJEU") under the conditions laid down in the Treaty on the Functioning of the European Union ("TFEU").[49] The ECB shall also be subject to the liability regime provided for in Article 340 TFEU, while national central banks shall be liable to their respective national laws.[50]

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42 Such consultations and analyses will not be necessary in cases where they are considered to be disproportionate in relation to the scope and impact of the relevant regulations or in relation to the particular urgency of the matter, which the ECB shall justify. See Article 4(3)3 of the SSM Regulation.

43 Notwithstanding Article 26(7), qualified majority coting and simple majority voting shall be applied together for the adoption of regulations referred to in Article 4(3) until 31 December 2015. See Article 33(6) of the SSM Regulation.

44 See also Articles 120 to 137 of the 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 (ECB/2014/17), (the "SSM Framework Regulation"). Moreover, see Articles 64 to 72 of the CRD IV.

45 For details about the general provisions relating to due process for adopting ECB supervisory decisions, see Articles 25 to 38 of the SSM Framework Regulation.

46 In that case, Article 22(a) of the SSM Regulation provides that "the ECB may adopt a provisional decision and shall give the persons concerned the opportunity to be heard as soon as possible after taking its decision."

47 See Article 22(2) of the SSM Regulation.

48 See Article 24 of the Regulation of the SSM.

49 See Article 35(1) of the Statute and Article 271(d) of the TFEU.

50 See Article 35(3) of the Statute. Recital (61) of the SSM Regulation continues to subject the ECB to the liability regime laid under article 340 TFEU for its the supervisory authority conferred under the SSM Regulation. D'Ambrosio, however, affirms that the absence of any limitation of the ECB's liability is unjustified in light of the 2012 Basel Core Principles for Effective Banking Supervision and is also inconsistent with a single and unitary SSM. Moreover, he argues that the absence of any limitation on the ECB's liability could lead it to over-rely on NCAs as they enjoy a greater degree of legal protection and that this could "de facto" distort the allocation of supervisory powers and responsibilities within the SSM as well as the allocation of accountability obligations towards the EU or national parliaments. See D'Ambrosio (note 24) 11–70.

B. The SRM: an overview

The main focus of this research is the Single Supervisory Mechanism (SSM), but the picture would not be complete if no mention were made of the Single Resolution Mechanism (SRM), where the ECB retains a role in some of the most important "initial" decisions that have to be adopted within its framework. It is, thus, necessary to at least provide a brief overview of the SRM in order to later address the context where the two frameworks may intersect.

The SRM was subject to an even more heated discussion than the SSM, due to the deeper political implications of the mutualization of losses, which had to be a part of the final arrangement,[51] and the need to respect the coexistence between a more centralized system for euro-area Member States (the SRM), with a coordinated but de-centralized one for the other States (the one envisaged in the BRRD).[52]

The SRM was also problematic due to the fact that, for its enactment, EU institutions could not rely on the modification of the Treaties that introduced article 127(6) TFEU, which expressly provides for the possibility of expanding the powers of the ECB for purposes of "prudential supervision", but says nothing about the "resolution" of financial institutions.[53] Nor was it considered a good idea that the ECB, which was already being made subject to a dramatic expansion of supervisory competences, were also entrusted with the resolution of institutions, due to the potential for overload, and conflict of interest.[54]

These original problems resulted in a peculiar institutional arrangement based upon Article 114 TFEU, which balances the needs for procedural efficiency, respect of Member States sovereignty, and heeds to both technical

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51 See, e.g. Niamh Moloney 'European Banking Union: Assessing its Risks and Resilience' *Common Market Law Review* Vol. 51 (2014) 1625.

52 Directive 2014/59/EU 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.

53 As said above in the text, the SRM is based on article 114 TFEU, or the "internal market" competence: see on this legal basis the recent Case C-270/12 *United Kingdom v European Parliament and Council (ESMA Short Selling)* Judgment of 22 January 2014.

54 Article 3(3) of the BRRD provides that: *"Resolution authorities may be national central banks, competent ministries or other public administrative authorities or authorities entrusted with public administrative powers. Member States may exceptionally provide for the resolution authority to be the competent authorities for supervision for the purposes of Regulation (EU) No 575/2013 and Directive 2013/36/EU. Adequate structural arrangements shall be in place to ensure operational independence and avoid conflicts of interest between the functions of supervision pursuant to Regulation (EU) No 575/2013 and Directive 2013/36/EU or the other functions of the relevant authority and the functions of resolution authorities pursuant to this Directive, without prejudice to the exchange of information and cooperation obligations as required by paragraph 4. In particular, Member States shall ensure that, within the competent authorities, national central banks, competent ministries or other authorities there is operational independence between the resolution function and the supervisory or other functions of the relevant authority."* If would be a bit contradictory to consider the accumulation of supervisory and resolution functions "exceptional" and subject to safeguards within the BRRD system, and then turn the exception into the rule in the SRM.

and political considerations. Its peculiarities are present in the relevant bodies, and the decision-making process. The SRM is based on a specific regulation (the SRM Regulation),[55] which, in many respects, is mirroring the BRRD and "implementing" it within the EU area,[56] but also relies on the establishment of a single resolution fund, which must be set up through an intergovernmental agreement.[57]

At to the institutional architecture, it is worth noting that, unlike the SSM, where for all specific micro-prudential tasks listed in the SSM Regulation is exclusively competent the ECB, although part of these tasks are then legislatively allocated to NCAs concurrent responsibility under the control of the ECB for less significant credit institutions, the SRM Regulation adopts a different division of tasks. The SRM Regulation established indeed a Single Resolution Board (SRB) responsible for resolution: (i) of significant entities in accordance with Article 6(4) of the SSM Regulation; (ii) of entities in relation to which the ECB has decided to exercise directly the relevant powers under Article 6(5)(b) of the SSM Regulation and (iii) other cross border groups. In relation to all other entities resolution competences and powers are vested in the national resolution authorities (NRAs). Nonetheless, the SRB retains a complementary, and quite significant, competence to ensure consistency and, to this effect, is granted the powers listed in Article 31 of the SRM Regulation.

The SRB is a Union "agency"[58] – like the three European Financial Supervisory Authorities established by Regulations (EU) No 1093, 1094 and 1095/2010 also based on Article 114 TFEU and, unlike the "colleges" of national resolution authorities (as in the BRRD[59]), it has legal personality and decision-making capacity[60] - but it is not a Union institution, like the ECB.[61] Furthermore, it is composed by a Chair and five full-time members[62] (which shows the need for expediency in decision-making), but also (c) *a member appointed by each*

55 Regulation (EU) No 806/2014 of 15 July 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.

56 Examples of the coordination can be found in the identical language between article 19(1) SRM Regulation and 32 (1) BRRD ((triggers for the resolution procedure) and article 27 (1) – (2) SRM Regulation and Article 43 (2) – (3) of the BRRD (bail-in).

57 Article 1 SRM Regulation provides that: "The SRM shall be supported by a single resolution fund ('the Fund'). The use of the Fund shall be contingent upon the entry into force of an agreement among the participating Member States ('the Agreement') on transferring the funds raised at national level towards the Fund as well as on a progressive merger of the different funds raised at national level to be allocated to national compartments of the Fund". The Intergovernmental Agreement (IGA) was signed in May 2014 by all Member States, except for Sweden and the UK (Council document 8457/14). It needs to be ratified by the Member States.

58 Article 42(1) SRM Regulation.

59 See Article 88 BRRD. A resolution college is not decision-making body, "but a platform facilitating decision-making by national authorities" (see recital (98) BRRD).

60 Article 42(1) *in fine*, and 50, 53-54 SRM Resolution.

61 See Article 13 of the TEU.

62 Article 43(1) (a) – (b) SRM Regulation.

participating Member State, representing their national resolution authorities[63] all with a vote (which shows the need for deference to national sovereignty)[64] and a two representatives designated, respectively, by the Commission and the ECB, as permanent observers, but without vote.[65]

The decision-making process also reflects this delicate balance. The SRB is entrusted with critical decisions, which include adopting "resolution plans",[66] determining the minimum requirement for own funds and eligible liabilities for entities and groups,[67] adopting all decisions concerning the resolution procedure, ensuring the fair valuation of assets and liabilities,[68] deciding on the write-down and debt conversion of capital instruments,[69] and adopting a resolution scheme, making use of options such as the sale of business, bridge institution, bridge institution, asset separation or bail-in.[70]

Some of the most critical decisions, such as the decision to adopt a resolution scheme are adopted by the executive session,[71] which is formed by the chair and the five full-time members.[72] However, a member of the plenary session can request that the decision on a resolution scheme be adopted by the plenary session.[73] Then, National Resolution Authorities (NRAs) also have important competences for the adoption of specific measures,[74] and the rules contemplate the participation of the national resolution authorities (NRAs) of the states where the credit institution or group is establishedin the decisions of the executive session.[75] The ECB forms part of the process, and is, at a minimum, consulted for many of the relevant decisions.[76]

Then, what is arguably the most important decision, i.e. the adoption of a resolution scheme, is also subject to the most complex balance. The decision is subject to criteria enshrined in the rules to enhance certainty, namely, that (a) the entity is failing or is likely to fail; (b) there is no reasonable prospect that any alternative private sector measures; and (c) a resolution action is necessary

63 Article 43(1)(c) SRM Regulation.

64 Article 43(2) SRM Regulation.

65 Article 43(3) SRM Regulation.

66 Articles 8-11 SRM Regulation.

67 Article 12 SRM Regulation.

68 Article 20 SRM Regulation.

69 Article 21 SRM Regulation.

70 Articles 22-27 SRM Regulation.

71 Articles 18(1), and 21(1) SRM regulation.

72 Article 53(1) SRM Regulation.

73 Article 50(2) para. 2 SRM regulation states that: "the resolution scheme prepared by the executive session is deemed to be adopted unless, within three hours from the submission of the draft by the executive session to the plenary session, at least one member of the plenary session has called a meeting of the plenary session. In the latter case, a decision on the resolution scheme shall be taken by the plenary session."

74 Article 7(3) SRM Regulation.

75 See article 53 (3) – (4) SRM Regulation.

76 The ECB is consulted in the drafting of resolution plans (Article 8(2), (13) SRM Regulation), the assessment of resolvability of groups and institutions (Article 10), or the determination of minimum requirement for own funds and eligible liabilities (Article 12).

in the public interest,[77]which are supplemented by criteria established in other rules.[78] But, while the assessment of these criteria is made by the SRM (normally in executive session, as explained above), the decision must be transmitted "immediately" to the Commission, which has 24 hours to endorse it or object to it with regard to its discretionary aspects, and, if the objections are related to the "public interest" element, its objection must include a proposal that must be adopted by the Council.[79]

Most important for our purposes, however, and an important issue that needs analysis, is that, while the decision to adopt a resolution scheme is taken by the SRM, the assessment of the two first conditions, i.e. whether the entity is failing or is likely to fail, and whether there is a private sector alternative, correspond *primarily* to the ECB (in the latter case the SRB and the ECB acting in strict cooperation under Article 18(1) of the SRM Regulation).[80] This makes the competences of the ECB and of the SRB to partially blur and overlap and justifies that we devote some attention to this topic in the following analysis.

III. LIMITS TO THE SSM'S POWERS (I): LEGALITY AND VALIDITY UNDER THE SSM REGULATION

One evident limit to the proper exercise of SSM's regulatory and supervisory powers lies in the SSM Regulation itself. All relevant acts must be valid under the SSM Regulation. Pursuant to Article 263(1) TFEU, the CJEU "shall review the legality of legislative acts, [and] of acts […] of the European Central Bank, other than recommendations and opinions". Additionally, pursuant to Article 267, the CJEU "shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union".

An evident, yet significant source of concern for the legality of any act adopted by the ECB or the NCAs is thus the compliance with any formal requirement specified under the SSM Regulation and, due to the referral of Article 4(3) of the SSM Regulation to "national laws transposing those Directive" where "Union law is composed of Directives", the relevant national laws. The SSM Regulation contains several examples of such formalities that the ECB and the NCAs will have to comply with in the exercise of their supervisory powers. For example, the ECB will have to apply for the necessary judicial authority before carrying on an on-site inspection in accordance with Articles 12 and 13 of the SSM Regulation. Similarly, any decision to be adopted by the Supervisory Board regarding the

77 Article 18(1) SRM Regulation.

78 See Article 18(4) for a specification of the criteria to be taken into account when assessing whether an entity is failing or is likely to fail, and (5) for the elements to determine the "public interest" criterion.

79 Article 18(7) SRM Regulation.

80 Article 18(1) paras. 2-4 SRM Regulation.

supervisory tasks conferred upon the ECB must comply with certain procedural requirements.[81]

The possibility of supervised credit institutions resorting to the courts to challenge the validity of a decision adopted by the supervisors will be of particular relevance in situations where the ECB exercised the *discretionary* powers conferred upon it under the SSM Regulation. In principle the ECB enjoys a wide margin of technical discretion also in micro- and macro-prudential matters. However, such discretion is often subject to the concurrence of certain circumstances. In those cases, the ECB must provide sufficient justification that those circumstances concur. For example, any regulation adopted by the ECB in accordance with Article 4(3) of the SSM Regulation must be preceded by public consultations and a cost-benefit analysis, "unless such consultations and analyses are disproportionate in relation to the scope and impact of the regulations concerned or in relation to the particular urgency of the matter, in which case the ECB shall justify that urgency." Therefore, the legality of an ECB regulation that did not carry the said consultations and analyses could be challenged if, in the opinion of the credit institution concerned, such regulation was not justified on sufficiently urgent grounds or the ECB failed to justify that urgency.[82]

It should be also considered that the Grand Chamber of the CJEU, in its recent decision of 16 June 2015, *Peter Gauweiler and Others v Deutscher Bundestag* (Case C-62/14 expressly stated (at paragraph 69) that "where an EU institution enjoys broad discretion" (as it was found to be the case, in the exercise of monetary functions, in the adoption of a program of open market transactions), "a review of compliance with certain procedural guarantees is of fundamental importance. Those guarantees include the obligation to examine carefully and impartially all relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions". The SSM Regulation expressly sets out a parallel requirement under Article 22(2), where it posits that "the decisions of the ECB shall state the reasons on which they are based". In the same vein, Article 22 also expressly ensures due process guarantees, such as the right to be heard and the rights of defence, before the adoption by the ECB of supervisory decisions.

Finally, any act of the ECB in the exercise of its powers should comply with the general principles laid under the SSM Regulation such as proportionality and independence. For example, affected parties could challenge the validity of a penalty imposed by the ECB in accordance with Article 18 on the grounds

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81 See Article 26 of the SSM Regulation.

82 Article 6(5)(b) of the SSM Regulation provides another interesting example. The ECB may decide "to exercise directly itself all the relevant powers for one or more credit institutions referred to in paragraph 4, including in the case where financial assistance has been requested or received indirectly from the EFSF or the ESM", provided that such joint exercise is "necessary to ensure consistent application of high supervisory standards." In this case, the failure of the ECB to provide sufficient justification for such joint exercise could give supervised credit institutions sufficient grounds to challenge the validity of the relevant ECB's decisions.

that it is not proportional to the alleged breach.[83] Moreover, an affected party could challenge the validity of an ECB's supervisory act on the suspicion that the act had been adopted under the influence of the government of a Member State or any other public or private body.[84] This might be of considerable relevance in cases where supervised financial institutions have received support from public institutions, either at the national or at the EU level. If the supervised credit institution is teetering on the brink of insolvency, these creditors will have incentives to pressure the ECB to adopt any of the measures specified under Article 16.2 of the SSM Regulation.[85]

In cases of conformity with procedural aspects of the decisions adopted by the Supervisory Board in the ECB's exercise of its powers, the affected party may initiate an internal administrative review process.[86] In any other case, the affected party may challenge the legality and validity[87] of the relevant act before the relevant courts: in principle, the CJEU if the decision had been adopted by the ECB,[88] or the relevant national courts if the decision had been adopted by a NCA.[89] In this latter case, the CJEU may decide on the validity of the relevant act

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83 See Article 18(3) of the SSM Regulation. See also Articles 123 to 131 of the SSM Framework Regulation. More generally, "according to the settled case-law of the CJEU, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives (see, to that effect, judgment in *Association Kokopelli*, C-59/11, EU:C:2012:447, paragraph 38 and the case-law cited)." *Peter Gauweiler and Others v Deutscher Bundestag* (Case C-62/14) (hereinafter, the "Gauweiler case"), para. 67. In the *Gauweiler case*, the CJEU recognised the ESCB's broad discretion to prepare and implement an open market operations programme. See Gauweiler case, para. 68. However, as mentioned above in the text, the CJEU also expressly mentioned that such broad discretion should be subject to "a review of compliance with certain procedural guarantees […] of fundamental importance", including the principle of proportionality in accordance with Article 5(4) of the Treaty on the European Union. See *Gauweiler case*, para. 69.

84 See Article 19 of the SSM Regulation. See also Article 130 of the TFEU.

85 Examples of these measures include: the raise of capital requirements (letter (a)), the application of specific provisioning policies (letter (d)), to limit the business, operations or network of institutions or to request the divestment of risky activities (letter (e)), or the limitation of managers' variable remuneration (letter (g)).

86 Article 24 of the SSM Regulation requires the ECB to establish an Administrative Board of Review for the purposed of carrying out an internal administrative review of the decisions taken by the ECB in the exercise the supervisory powers conferred under the Regulation. The fifth indent describes the procedure to request such an administrative review. However, any opinion by the Administrative Board of Review will not bind the Governing Council. See Article 16.5 of the 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).

87 See by analogy, cases referred to in Raffaele D'Ambrosio, *cit.*, note 377.

88 See Article 263 of the TFEU, fourth paragraph. Pursuant to Article 263 of the TFEU, sixth paragraph, any proceeding as provided under that Article must be instituted "within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be." Nevertheless, notwithstanding the expiry of such period, Article 277 of the TFEU provides that "any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act."

89 D'Ambrosio provides a thorough analysis of the allocation of liabilities between the ECB and the NCAs. D'Ambrosio (note 24) 73. It is also worth noting that this allocation of judicial competences is well established within the network of antitrust authorities and relies on the very fact that, although such national

in a preliminary ruling where the relevant national court or tribunal considers that CJEU's decision would be necessary to enable it to give judgement.[90]

At this point, it is important to note that Recital 61 of the SSM Regulation subjects the ECB in its capacity as banking supervisor to the common liability regime provided for all EU Institutions under Article 340 TFEU.[91] Some commentators have argued that in spite of Recital 61 the ECB's liability under Article 340 TFEU should be limited. It has been argued, for example, that such limitation can be inferred from the 2012 Basel Core Principles for Effective Banking Supervision and from the "sufficiently serious violation" criterion referred to in the CJEU case law on the liability of EU institutions and Member States.[92] If the ECB's liability under Article 340 TFEU were not limited, it is suggested that unintended effects may destabilise the current supervisory structure of the SSM: for example, the ECB may have an incentive to over-rely

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authorities apply EU law, they are still national authorities, and issue administrative acts subject to review by domestic courts. In the SSM context, the lack of European legal personality for the mechanism as such could be used as an argument to support a similar conclusion. On the other hand, it could be argued that all supervisory tasks listed in Article 4 are conferred *exclusively* to the ECB (as it is clearly stated in Article 4(1)) and then only made subject by Article 6(4) to a legislative re-allocation of *concurring* responsibility for some (but not all) of these tasks to NCAs with respect to less significant banks. Such view would operate a sort of "EU upgrade" for domestic measures, recognizing their European nature albeit without giving them the formal status of ECB measures. However, it is unlikely that such was the intention of the EU legislature. First of all, in light of the principle of subsidiarity it could be argued that a coordinated EU supervision mechanism without separate European personality does not require domestic institutions to be co-opted at the European level to the effect of subjecting their acts to the CJEU review without a Treaty amendment enlarging the scope of the latter. Second, the fact that Article 4(1) provides that the ECB should apply domestic law, whenever the Directives grant Member States some level of choice suggests that the EU legislature intends to respect a division of competences between the EU and national levels, not the opposite. In third place, this would create quite intractable problems of delimitation when trying to distinguish to the effect of their judicial review, acts adopted by NCAs which should be considered "European", and acts adopted by the NCAs as domestic authorities enforcing purely national legislation (in exercise of competences not subject to the SSM). In fourth place and above all, this would put the CJEU in the extremely uncomfortable position of having to review acts of NCAs, "as if" they were acts of the ECB without a clear legal basis to do so in the Treaty. This would also raise uncomfortable questions about the level of review operated by EU courts, a level of review that has been found admissible pursuant to fair trial rights by the ECHR only because it operates at an EU level (i.e. on a domestic level the ECHR has tended to be less forgiving, see *infra* VI.C.2.a-b). In such scenario, it would not make sense to talk about NCAs as separate entities, like the SSM Framework does. In short, even if the NCAs and ECB are part of the same institutional and procedural framework, what seems consistent with the legislative intent is to conclude that the separate acts of the NCAs and the ECB must be respectively imputed to one or the other and are subject to a separate judicial review, national and European respectively. A different question, of course, is what happens in cases where NCAs and ECB participate in the same decision (for example, through provisional and definitive decisions). Such borderline questions, however, are impossible to avoid, but can be circumscribed as issues pertaining to the imputation of the act and its reviewability. See *infra* VI.C.2.a-b.

90 See Article 277 of the TFEU. See also Order of the Court, 29 April 2015, *Sven A. von Storch and Others v European Central Bank (ECB)* (Case C-64/14 P), para. 51.

91 The same rule applies to the ECB for actions in relation to monetary policy. See Article 35(3) of the Statute. Recital (61) maintained the ECB's liability under Article 340 TFEU despite the latter's plead in an opinion for the limitation of its liability in the performance of its supervisory tasks to some form of qualified unlawfulness. See ECB's opinion of 27 November 2012 on the draft Regulation on the SSM (CON/2012/96), para. 1(7). For an analysis of the possible reasons behind the final wording of Recital (61), see Eddy Wymeersch, 'The Single Supervisory Mechanism or "SSM", Part One of the Banking Union' (University of Gent 2014) *Financial Law Institute Working Paper* No. 2014-01 61–62.

92 For a thorough analysis of this issue, see D'Ambrosio (note 24) 11–70.

on NCAs, which could be and are often made immune from liability actions in relation to banking supervision,.[93]

The debate about the actual scope of liability of the ECB in its new role as banking supervisor under Article 340 TFEU remains an open question, particularly in the absence of any CJEU decisions on the matter.[94].

IV. LIMITS TO THE SSM's REGULATORY AND SUPERVISORY POWERS (II): DISTRIBUTIONAL COMPETENCES

The SSM Regulation describes the competences of the SSM and distributes them between the ECB and the NCAs that comprise the SSM ("vertical distribution"). The SSM Regulation also delineates the contours of the SSM competences vis-à-vis other European authorities ("horizontal distribution"), namely the European Banking Authority ("EBA"), which is the European authority in charge of banking supervision and the European Single Resolution Board ("SRB"). The language used in the SSM Regulation to distribute competences vertically and horizontally has been criticised in the literature for being unclear and leaving room for misinterpretations.[95] The coexistence of additional pieces of Union law and "pure" national law[96] that confer specific supervisory competences upon the NCAs and other European authorities adds several layers of complexity to the distribution.[97]

This Section aims to provide a systematic classification of the different competences conferred upon the relevant banking supervisory authorities within the E.U. In particular, it will describe the distribution of competences (a) at the vertical level as well as (b) the horizontal level in accordance with the relevant Union law. The complexity of the distribution of competences between the different banking supervisors could lead to sensitive situations where none or various supervisors consider themselves competent. In those situations, supervised credit institutions and other potentially affected third parties could challenge the relevant acts or decisions on the grounds of ultra vires intervention.

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93 See ibid 65–68.

94 In the case of *Sven A. von Storch and Others v European Central Bank (ECB)* (Case C-64/14 P), the applicants sought a compensation for damages ex Article 340 TFEU against the ECB in relation to its decisions concerning the ECB's OMT program and collateral guidelines publicised in two decisions dated as of 6 September 2012. The CJEU, however, dismissed the claim on jurisdictional grounds and did not examine the substantive claim.

95 See e.g. D'Ambrosio (2015), 73 et seq.

96 The term "pure" national laws describes those legal instruments adopted at the national level that are not driven by the need to implement applicable Union law. See e.g. D'Ambrosio (note 24) 72. Some pure national laws may still confer banking supervisory competences on the relevant NCAs that are not covered by the SSM Regulation. See e.g. Article 9(1)(3) of the SSM Regulation. See also Article 1(2) of the SSM Framework Regulation.

97 Examples of Union law that contain provisions conferring supervisory powers upon the ECB and NCAs: CRD IV/CRR, BRRD, SSM Framework. Texts that distribute competences for the EBA: the new EBA Regulation.

A. Vertical distribution of supervisory competences within the SSM

The SSM Regulation confers supervisory competences upon the ECB over credit institutions in euro Member States.

Non-euro area Member States may choose to be subject to the ECB's supervisory powers under a close cooperation regime pursuant to Article 7 of the SSM Regulation. In particular, Article 7 of the SSM Regulation requires that the ECB adopts a decision by which it will establish a close cooperation with the relevant NCA. Article 7(1) specifies that the ECB will carry out the tasks referred to in Articles 4(1), 4(2) and 5, unless otherwise provided under Article 7. To that end, the ECB may address instructions to the relevant national authorities specifying a relevant timeframe.[98] Article 7 further grants the right upon the ECB to warn the relevant national authority where the latter fails to comply with the ECB's instructions.[99] The SSM Framework Regulation provides additional guidance as to the regulation of the close cooperation procedures.[100]

Article 6 establishes the cooperation mechanisms between the ECB and the NCAs that compose the SSM.[101] Although the ECB is the sole responsible and accountable for the tasks conferred on it by the SSM Regulation,[102] NCAs shall be responsible for assisting the ECB in some of its tasks under Article 4.[103] Article 6(4) delineates the scope of the tasks directly exercised by the ECB and of those, whose direct exercise is legislatively allocated under the responsibility of the NCAs under the ultimate control of the ECB according to the SSM Regulation: the NCAs' tasks will cover those credit institutions considered to be "less significant" except for authorizations and notifications of the acquisition and disposal of qualifying holdings in credit institutions (together: "the Exceptions") [104], while the ECB's direct exercise of the supervisory tasks will cover those institutions that shall not be regarded as "less significant".[105] Nevertheless, the

98 See Articles 7(1)(2) and 7(4) of the SSM Regulation.

99 See Article 7(5) of the SSM Regulation.

100 See Articles 106 to 119 of the SSM Framework Regulation.

101 See also Articles 19 to 24 of the SSM Framework Regulation.

102 See Article 6(1) of the SSM Regulation.

103 See Article 6(3) of the SSM Regulation.

104 See Article 6(5)(a) of the SSM Regulation.

105 Article 6(4) provides a definition of the institutions that *shall not* be considered "less significant". Those credit institution or financial holding company or mixed financial holding company, that either: (i) have a total value of assets above €30bn, (ii) the ratio of its total assets over the GDP of the Member State of establishment exceeds 20%, unless such total value is below €5bn, or (iii) the NCA considers an institution of significant relevance for the domestic economy and the ECB confirms the decision. See also Articles 50 to 58 of the SSM Framework Regulation. Pursuant to Article 6(4)(3), an institution that has received financial assistance from the EFSF or the ESM shall note b considered as a "less significant" institution either. See also Articles 61 to 64 of the SSM Framework Regulation. Finally, pursuant to Article 6(4)(2), the ECB may also decide, on its own initiative, to consider an institution to be of significant importance when it has established subsidiaries in more than one participating Member State and its cross-border assets or liabilities represent a significant part of its total assets or liabilities subject to certain conditions. See Articles 59 and 60 of the SSM Framework Regulation. For general provisions relating to the classification of credit institutions as significant or less significant, see Articles 39 to 49 of the SSM Framework Regulation. For specific provisions governing the structures for the supervision of significant and less significant supervised

tasks of the ECB will also extend to the three most significant institutions in each participating Member State unless justified by particular circumstances.[106]

Pursuant to Article 6(5), the ECB shall issue regulations, guidelines or general instructions to NCAs to perform the tasks enumerated in Article 4(1) above and legislatively delegated to NCAs by Article 6(4) Moreover, when "necessary to ensure consistent application of high supervisory standards", the ECB may decide to exercise itself all the relevant powers for one or more credit institutions, including cases of indirect support from the EFSF or ESM.[107] The ECB shall also oversee the functioning of the SSM and it may also request information from NCAs on the performance of their tasks carried out by them pursuant to Article 6.[108] Finally, the ECB may at any time make use of the investigatory powers vested upon it in the SSM Regulation:[109] the request of information from certain legal or natural persons,[110] the conduct of all necessary investigations of any such persons,[111] and the conduct of on-site investigations subject to prior notification to the relevant NCA and subject to the possible requirement of a judicial authorisation under the relevant national rules.[112]

Article 6(6) of the SSM Regulation provides that NCAs will carry out and be responsible for the tasks enumerated in Article 4(1) apart from the Exceptions and the coordinating tasks specifically attributed to the ECB under Article 4(1)(h).[113] They shall be able to adopt all relevant supervisory decisions and to maintain the investigatory powers necessary to conduct their supervisory tasks, without prejudice to the same powers conferred upon the ECB. NCAs shall report to the ECB on a regular basis on the performance of their obligations under this Article. The co-ordination between the ECB and the NCAs for the implementation of the tasks described in Article 6 are organised under a specific framework regulation prepared by the ECB in accordance with Article 6(7) of

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entities, see Articles 3 to 7 of the SSM Framework Regulation. For specific details about the procedures for the supervision of significant and less significant entities, see Articles 89 to 100 of the SSM Framework Regulation.

106 See Article 6(4)(4) of the SSM Regulation. See also Article 65 and 66 of the SSM Framework Regulation.

107 See Article 6(5)(b) of the SSM Regulation. See also Articles 67 to 69 of the SSM Framework Regulation.

108 See Articles 6(5)(c) and (e) of the SSM Regulation.

109 See Article 6(5)(d) of the SSM Regulation.

110 See Article 10 of the SSM Regulation. For details about the cooperation between the ECB and the NCAs in respect of requests for information, see Articles 139 to 141 of the SSM Framework Regulation.

111 See Article 11 of the SSM Regulation. For details about the cooperation between the ECB and the NCAs with regard to general investigations, see Article 142 of the SSM Framework Regulation.

112 See Articles 12 and 13 of the SSM Regulation. For specific details about the establishment and composition of on-site inspection teams, as well as the procedure, notification and conduct of on-site inspections, see Articles 143 to 146 of the SSM Framework Regulation.

113 Article 4(1)(h) confers upon the ECB the exclusive competence "to participate in supplementary supervision of a financial conglomerate in relation to the credit institutions included in it and to assume the tasks of a coordinator where the ECB is appointed as the coordinator for a financial conglomerate in accordance with the criteria set out in relevant Union law [...]" See also Article 18 of the SSM Framework Regulation.

the SSM Regulation,[114] in the exercise of its capacity to issue regulations "to organise or specify the arrangements for the carrying out of the tasks conferred on it by the SSM Regulation".

When a supervised institution does not meet the requirements set out in the acts referred to in Article 4(3), when the ECB has evidence that such breach may occur within next 12 months, or when "the arrangements, strategies, processes and mechanisms implemented by the credit institution and the own funds and liquidity held by it do not ensure a sound management and coverage of its risks", the ECB shall have the powers to take the necessary measures at an early stage to address the relevant problems. Such specific supervisory powers include:[115]

- To require institutions to raise its own funds above the mandatory capital requirements;
- "[T]o require the reinforcement of the arrangements, processes, mechanisms and strategies;"
- To present a specific plan to restore compliance with the relevant supervisory requirements breached;
- "[T]o require institutions to apply a specific provisioning policy or treatment of assets in terms of own funds requirements;"
- "[T]o restrict or limit the business, operations or network of institutions or to request the divestment of activities that pose excessive risks to the soundness of an institution;"
- "[T]o require the reduction of the risk inherent in the activities, products and systems of institutions;
- To require institutions to limit variable remuneration;
- "[T]o require institutions to use net profits to strengthen own funds;"
- "[T]o restrict or prohibit distributions by the institution to shareholders, members or holders of Additional Tier 1 instruments where the prohibition does not constitute an event of default of the institution;"
- "[T]o impose additional or more frequent reporting requirements, including reporting on capital and liquidity positions;"

114 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 (ECB/2014/17), (the "SSM Framework Regulation"). We will explore this Regulation in further detail in Section III.B below.

115 See Article 16 of the SSM Regulation. Besides the measures specified therein, pursuant to Articles 13 SRMR and 2(1), point 21 of the BRRD, the ECB may also adopt the early intervention measures specified under Articles 27(1), 28 and 29 of the BRRD. Moreover, pursuant to Article 18(1)(2) of the BRRD, the ECB is vested with the power to evaluate whether a credit institution is failing or is likely to fail, regardless of its significance. See D'Ambrosio, 85; Moloney, 1640. See also Article 104 of the CRD IV.

- "[T]o impose specific liquidity requirements, including restrictions on maturity mismatches between assets and liabilities;"
- "[T]o require additional disclosures;"
- To remove members of management that do not fulfil the requirements set out in the acts referred to in Article 4(3).

When carrying out the functions conferred upon the NCAs and the ECB, both, as well as the latter's internal bodies, shall act independently.[116] The ECB shall be accountable to the European Parliament and the European Council for its implementation of the SSM Regulation. The ECB will present an annual report and the Chair of the Supervisory Board may be called upon by the European Parliament or the Eurogroup to explain the execution of the ECB's supervisory tasks.[117] The Chairman shall also participate in a hearing before the European Parliament upon the latter's request, and it shall also respond to questions put to it by the European Parliament and the Eurogroup.[118] Some control will be exerted also at the relevant national parliaments, e.g. by requesting that the ECB responds to questions putt o it in writing or by inviting the Chair of the Supervisory Board "to participate in an exchange of views in relation to the super vision of credit institutions in that Member State".[119] The European Court of Auditors[120] will take into account the ECB's supervisory tasks when evaluating its operational efficiency.[121]

In relation to macro-prudential requirements, the ECB will be responsible for the supervision of compliance by significant credit institutions while the NCAs will be responsible for the supervision of compliance by less significant ones.[122] If the ECB decides to apply stricter macro-prudential requirements than those mandated by the national authorities in accordance with Article 5(2) of the SSM Regulation, it shall cooperate closely with the latter and, in particular, notify them of its intention.[123] The ECB shall duly consider the relevant authorities' objections before proceeding with a decision,[124] and it shall "take into account the specific situation of the financial system, economic situation and the economic cycle in individual Member States or parts thereof."[125]

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116 See Article 19 of the SSM Regulation.

117 See Articles 20(2) to (4) of the SSM Regulation.

118 See Articles 20(5) and (6) of the SSM Regulation.

119 See Article 21 of the SSM Regulation.

120 On the role of the European Court of Auditors on the control of financial supervisors, see European Court of Auditors 'European banking supervision taking shape – EBA and its changing context' (2014).

121 See Article 20(7) of the SSM Regulation.

122 The same criterion will apply for the adoption of any corrective measures other than those specified in Articles 5 and 16(2) of the SSM Regulation.

123 For details about the cooperation between the ECB and the relevant national authorities, see Articles 101 to 105 of the SSM Framework Regulation.

124 See Article 5(4) of the SSM Regulation.

125 Article 5(5) of the SSM Regulation.

B. Vertical distribution of regulatory competences within the SSM

The actual scope of the ECB's regulatory powers has been debated in the academic literature in relation to the vertical distribution of competences.[126] There seem to be room for two approaches: a more restrictive one, that adopts a literal interpretation of Article 4(3) of the SSM Regulation, which restricts the ECB's regulatory powers to the aim of specifying the organisational arrangements for the carrying out of the tasks conferred under the SSM Regulation;[127] and a broader one, based on a functional approach, which relies on the inseparability of supervisory and regulatory powers[128] and a joint reading of Articles 132, 127(6) and recital (34) of the SSM Regulation.[129] Since this has significant implications for the proper delimitation of ECB powers, it is worth considering it in some detail.

The question essentially lies on whether a *regulatory role* is vested in the ECB in the exercise of national options granted by the CRDIV/CRR compact to the competent authorities of participating Member States. Such question arises because the SSM Regulation is quite ambiguous on this point and such ambiguity is fatally also reflected in the current interpretation of the SSM Regulation.

A first line of reasoning points out that Article 4(3) expressly reserves to the ECB the possibility of adopting regulations "*only to the extent* necessary to organize or specify the arrangements for the carrying out of the tasks conferred on it by this Regulation". This provision is read as confining the regulatory role of ECB only to the specific subject-matters for which the power to make regulations is expressly granted by the SSM Regulation and these matters are strictly interpreted as purely organizational. In this vein, it has been suggested that this would prevent the ECB from making use by way of an ECB regulation of options and discretions granted to national competent authorities.[130] The arguments used to support this conclusion are two-fold.

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126 See e.g. D'Ambrosio (note 24) 101–107.

127 See Guido Ferrarini and Fabio Recine, 'The Single Rulebook and the Single Supervisory Mechanism: should the ECB have more say in prudential rule-making?' *European Banking Union* edited by Guido Ferrarini and Danny Busch, 23 of the draft, cited in D'Ambrosio, note 300.

128 Under Article 132 TFEU, the ECB "shall make *regulations* to the extent necessary to implement", among others, the tasks defined in Article 25(2) of the Statute. Article 25(2) of the Statute relates to the prudential competences under Article 127(6) TFEU and provides that "the ECB may perform specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions". In this light, some commentators have interpreted that the notion of "policies" under the latter provision "could no doubt include some rule-making powers in the areas of prudential supervision that the Council could very well specify in its mandate to the ECB grounding the SSM." Ferrarini and Recine, *cit.*, 23 of the draft. See also Concetta Brescia Morra, 'From the Single Supervisory Mechanism to the Banking Union' *Working Paper Luiss Guido Carli* 2/2014, 15-16.

129 One commentator has raised a concern about the probability of the EBA being "gradually marginalized" due to the "vast scope of the ECB's supervisory authority". Mandana Niknejad 'European Union Towards the Banking Union, Single Supervisory Mechanism and Challenges on the Road Ahead' (2014) 7(1) *EJLS* 92, in the Conclusion.

130 D'Ambrosio (note 24) p. 105-107.

From a formal perspective, under Article 9(1), second subparagraph, the ECB may enjoy the powers granted to national competent authorities "unless otherwise provided for by this Regulation". If one assumes that: (a) Article 4(3) is strictly confining the ECB power to adopt regulations only to the subject matter referred to in such Article; (b) such subject matter must be construed restrictively as limited to "those aimed at organizing and specifying the modalities according to which it intends to perform its supervisory tasks"[131] and (c) additional regulatory powers can be considered as conferred upon the ECB only where expressly provided for by the Regulation (as it is the case under Article 6, which in turn is strictly interpreted as "confined to the modalities according to which NCA's supervisory powers can be performed"), this would also mean that on *regulatory supervision* the Regulation would in fact derogate from the general principle of automatic conferral to the ECB of all the powers and obligations which NCAs have got under relevant Union law. In other words, it would be the Regulation itself to "provide otherwise" - to the effect of Article 9(1) - as to the powers of regulatory supervision granted to the ECB, and it would stipulate in particular that the ECB could not regulate in fields where such regulatory power is not expressly granted to it by the Regulation.

From a substantive perspective, if the ECB were empowered to exercise NCAs' options, this would be done for significant credit institutions only and "this would jeopardize the level playing field" in each Member State. This argument goes on by saying[132] that: (a) "if the ECB and the NCA exercised the options and discretions differently for significant and less significant credit institutions, the own funds requirements of these institutions would be different"; (b) the ECB does not have "the power to instruct NCAs on how to exercise their options and discretions vis-à-vis less significant credit institutions" because "the instructions that the ECB may give under Article 6(5)(a) are confined to the issues addressed by Article 6(7), which does not deal with the exercise of national options and discretions".

A second, and opposite, line of reasoning is, however, also documented[133]. According to this second line of reasoning the competent authority options are now vested in the SSM. This interpretation is based on Article 9(3) of the SSM

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131 D'Ambrosio (note 24) p. 101 and 104; Elke Gurlitt, 'The ECB's relationship to the EBA' (2014) *EuZW-Beilage*, 17; Eddy Wymeersch, 'The Single Supervisory Mechanism or SSM, Part One of the Banking Union' (2014) *Financial Law Institute Working Paper Series, WP* 2014-01, Universiteit Gent, 13.

132 D'Ambrosio (note 24) p. 106.

133 Brescia Morra (note 128) 15, Andrea Enria 'Challenges for the future of EU banking' 4, stating that: (i) the issue of national discretions and options (e.g. deductions from common equity like goodwill, deferred tax assets, prudential filters on AFS gains and losses) "can have a sizeable, and often unnoticed, impact on capital levels and their comparability. The issue – he continued - emerged with great clarity in the conduct of the 2014 EU-wide stress test. The ECB immediately realized that as they are taking up supervisory responsibility they cannot rely on such a diverse implementation of common rules"; (ii) "as a number of the national discretions are in the remit of competent authorities, *the ECB will now be in a position to iron them out*"; Anna Gardella, 'Ruolo dell'EBA e della BCE nella regolamentazione bancaria europe', Banca d'Italia, Perugia, 16 May 2014, 14 of the presentation, where, however, the ECB competence

Regulation and Article 34(1) of the ECB Statute, which confers regulatory powers to the ECB also for the exercise of the prudential tasks referred to in Article 25(2) of the Statute (and Article 127(6) TFEU). It is noted, in particular: (a) that Recital (32) of SSM Regulation, whilst (quite naturally) confirming that the ECB should not replace EBA and the Commission in their (joint) role of rule setters of secondary Union law, clarifies that the ECB "should therefore *exercise powers to adopt regulations in accordance with Article 132 TFEU* and in compliance with Union acts adopted by the Commission on the basis of drafts developed by EBA and subject to Article 16 of Regulation (EU) No 1093/2010". (b) Under Article 132 TFEU the ECB "shall make *regulations* to the extent necessary to implement", among others, also the tasks defined in Article 25(2) of the ECB Statute; (c) Article 25(2) of the ECB Statute relates to Article 127(6) prudential competences and provides that "the ECB may perform specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions"; (d) Article 34 of the ECB Statute replicates the provision of Article 132 TFEU, stipulating that the ECB shall make regulations to the extent necessary to implement, among others, also the tasks defined in Article 25(2) "*and* in cases which shall be laid down in acts of the Council referred to in Article 42" (complementary legislation in fields different, however, from prudential regulation: Article 42 does not refer indeed to Article 25(2).

According to this second view: (a) The SSM Regulation is not depriving the ECB of the general regulatory powers granted to it by the Treaty; (a) Article 4(3), where it specifies that "the ECB may also adopt regulations *only to the extent* necessary to organize or specify the arrangements for the carrying out of the tasks conferred on it by this Regulation" is essentially meant to prevent the ECB from generating undesired regulatory overlaps by competing with the Commission and EBA in the exercise of regulatory powers granted by Union law to the Commission and by adding an additional layer of regulation applicable only to banks supervised by the SSM and established in the participating Member States that could jeopardize the goal of a single rule book for all European banks; (c) Where Union law grants national options, the adoption of ECB regulations for the exercise of competent authority options would in no way generate such overlaps and, thus, the ECB should not be considered to have been deprived by the Regulation of the exercise of such general regulatory power.

We are inclined to embrace this second line of reasoning and to believe that the ECB is granted also a prudential *regulatory* role which is (i) hierarchical subject to primary and secondary Union law (herein included national *legislation* implementing it also through *legislative* exercise of national options granted by the CRD IV/CRR compact) but (ii) wider than the one that a plain reading of Article 4(3) and 6 of SSM Regulation (EU) would perhaps suggest. This derives from the following converging arguments.

to the direct exercise of competent authority discretions within the SSM is considered straightforward for significant bank and doubtful for less significant banks.

Article 132 TFEU and Article 34 and 25(2) of the ECB Statute must be read in conjunction with the SSM Regulation. The former expressly stipulate that the ECB is granted a *general* power "to make regulations *to the extent necessary to implement its tasks*". Both Treaty and Statute enabling provisions, albeit adopted once the ECB was vested only with monetary policy functions and primarily set out with a view to the monetary functions conferred upon the ECB, are also made applicable to the prudential tasks that could be extended to the ECB under Article 127(6) TFEU, as made clear by Article 25(2) of the ECB Statute. It is worth noting, moreover, that both Article 132 TFEU and Article 34 of the Statute provide that, to the extent necessary to implement the tasks conferred on it, "the ECB shall make regulations". In this way both provisions could even suggest that the attribution of implementing regulatory powers could be an automatic effect of the conferral of the specific prudential tasks conferred to the ECB without the need of any complementary specification by the Council regulation conferring them under Article 127(6) TFEU. This would militate against any reading of SSM Regulation conducive to an excessive limitation of the ECB implementing regulatory powers, and in particular against a restrictive interpretation of Article 4(3) suggesting a strict reading of that provision.

One could object, though, that, whilst Article 132 TFEU and Article 25 of the ECB Statute make reference to these regulatory powers as part of the ECB "constitutional" endowment in the matters deferred to it, Article 127(6) specifies that "the Council *may* confer specific tasks" and therefore that the Council, in its political discretion, could also decide to confer prudential tasks strictly confined to supervision with express exclusion of regulatory powers in respect to the same matters. In the same vein, the first period of Article 25(2) of the ECB Statute could be interpreted so as to emphasize that the conferral of the specific tasks is in any event "in accordance with any decision of the Council under Article 127(6)". However, it could also be argued to the contrary, that, in principle the Treaty is willing to confer on the ECB regulatory powers aligned with the specific supervisory tasks attributed to it under Article 127(6) due to the "to some extent illusory"[134] distinction between these two functions. Whatever the preference for the constitutional argument based on the Treaty, one should be careful, therefore, in construing the SSM Regulation in a way that would deprive the ECB of its general power to make regulations "*to the extent necessary to implement* the tasks defined in Article 25(2)". To be sure, the ECB cannot make any use of its regulatory powers beyond the scope of these specific supervisory tasks and the aim of implementing them nor can do a use of the same contravening primary and secondary Union law, herein included the broad regulatory role conferred upon the Commission and EBA.

To reconcile therefore a literal reading of Article 4(3) with a more systematic interpretation, the period "the ECB may also adopt regulations only to the extent

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134 Ignazio Angeloni, 'Rethinking banking supervision and the SSM perspective', speech delivered at the conference on "The new financial architecture in the Eurozone", European University Institute, Fiesole, 23 April 2015, accessibile at www.bankingsupervisio.europa.eu/press/speeches.

necessary to organize or specify the arrangements for the carrying out of the tasks conferred on it by this Regulation" could be read as limiting the scope of ECB regulation where Union law (herein included national *legislations* exercising Member States options) is already a complete body of primary and secondary rules which needs only to be enforced and supervised (and here the ECB regulatory scope shall be mainly organizational, in a broad sense of the expression, though). The ECB regulatory power under Article 132 TFEU and 34 of the Statute could remain, on the contrary, unaffected, *within the limits of the tasks conferred on it* and with the functional scope of implementing them ("*to the extent necessary to it*"), where Union law is incomplete and, in particular, defers regulatory choices to competent authorities.

This reading could be supported, on one count, by a better consideration of the relationship existing between Article 4(3), paragraph 1, and Article 4(3), paragraph 2. It is quite apparent, indeed, that these two paragraphs are strictly related (the *incipit* of paragraph 2 makes explicit reference "to the effect" of paragraph 1) and that they cover only situations (that are the vast majority) that are already *fully regulated* by Union law (herein included national legislation implementing Directives and exercising national discretions). In this context, Article 4(3) is aimed at preventing the ECB from adding additional regulatory requirements. This is true in principle, although the expression "organize or specify arrangements for the carrying out of the tasks" leaves some leeway for intervention. However, these two paragraphs do not consider in any way how the ECB could exercise its specific tasks where Union law is incomplete and in particular where Union law simply defers a regulatory role to competent authority in order to complete the regulatory framework for supervisory purposes. In this domain, it is our understanding that the ECB can make regulations to the extent necessary to implement the specific tasks conferred on it.

This seems confirmed by the wording of recitals (32), (34) and (45) of the Regulation itself. Indeed these recitals would likely be inconsistent with a restrictive reading of the Regulation, whilst they seem to be fully aligned with the idea that the rule making power under Article 132 TFEU is still available to the ECB (recital 32), that competent authority options within the SSM shall be exercised by the ECB, making use of its general regulatory empowerment (recital 34) and that the powers that "Union law on the prudential supervision of credit supervision confers on competent authorities" should be conferred on the ECB "to the extent that those powers fall within the scope of the supervisory tasks conferred on the ECB", because "for participating Member States the ECB should be considered the competent authority and should have the powers conferred on competent authorities by Union law" (recital 45). It is good interpretative practice to interpret directives and regulations in light of their recitals and to read legislative statements (albeit inserted solely within the reasoning of the legislative act) in such a way that they make sense in their context rather than in ways difficult to reconcile with the text. Indeed, the fifth period of recital (34) seems to address specifically the issue of the national options and discretions granted by the CRD IV/CRR compact and stipulates that "(CRDIV/CRR) *options should be construed* *as excluding options available only to competent or designated authorities*". This wording seems to suggest that, since after the entry into force of the SSM the ECB has taken over the role of competent authority in the participating Member States, the ECB also replaced the national competent authorities as sole entity within the Euro area vested with the power to exercise such competent authority options. In other terms, recital (34) seems to suggest that in its supervisory action the ECB, whilst still subject to national legislative options, should not encounter (nor pay any deference to) national discretions embedded in the CRD IV/CRR compact and qualified herein as national competent authorities options. This is so because such options relate to prudential tasks conferred to the ECB by the SSM Regulation and for such tasks the ECB is the competent authority.

Legislative history, in turn, offers some useful insights. The original wording of Article 4(3) in the 2012 Commission proposal (COM(2012) 511 final was as follows: "Subject to and in compliance with any relevant Union law rule and in particular any legislative and non-legislative act, the ECB may adopt *regulations* and recommendations and take decisions to implement or apply Union law, *to the extent necessary to carry out the tasks conferred upon it by this Regulation*". Current recital (34) was not present in the original proposal whereas current recital (32) was already contemplated as recital (26) and current recital (45) was already contemplated as recital (30). The explanatory report confirmed, at paragraph 4.1.3, the ECB regulatory competences under Article 132 TFEU. The EP Committee on Constitutional Affairs opinion of 27 November 2012 (2012/0242-CNS) proposed an amendment to Article 4(3) and namely that the ECB may adopt regulations to the extent necessary to carry out the tasks conferred upon it by the Regulation "*and only where those Union acts do not deal with certain aspects necessary for the proper exercise of the ECB's tasks or do not deal with them in sufficient detail*". This proposal was adopted by the Thyssen Report tabling the amendments to the Commission proposal on behalf of the EP Committee on Economic and Monetary Affairs of 3 December 2012 (A7-0392/2012). It was only with the second round of EP amendments adopted on 22 May 2013 that the original Article 4(3) was modified and adopted in its current text and, at the same time, was inserted a new recital (26b), expressly providing that options provided for in Union law "should be construed as excluding options available only to competent or designated authorities" (as currently set out in recital 34). The intention of the drafters might have well been, thus, to state that Article 4(3) could limit the extent of the powers to make regulations conferred to the ECB because this limitation was confined to situations where Union law was complete and recital (34) clarified that, where this was not the case, as it was precisely where Union law granted competent authority options, the ECB would have exercised such options (to that end making full use of its regulatory powers).

Also a functional interpretation could support this conclusion. Competent authority options and discretions granted by the CRD IV/CRR compact are given to the supervisory authority because of its special position and in particular taking into account the informational advantages associated with supervisory activity. This special position, within the SSM, has been transferred, at least in respect to significant banks, to the ECB and, consistently, also the power to exercise competent authority options should follow the same principle of attribution of competence.

If one accepts this conclusion, a final question arises on whether the ECB empowerment to exercise competent authority options and discretions for participating Member States is general or confined to prudential options for significant banks only. In the latter case - that is to say, if NCAs would retain the power to exercise national options and discretions in respect to non significant banks – the allocation of rule making within the SSM for the exercise of competent authorities options and discretions would be conducive, as already suggested in the literature[135] to a disparity of requirements for significant and less significant banks, with a uniform exercise of the options limited to significant banks. This is something that, functionally, is widely believed quite undesirable. We note, however, that Article 4(1) stipulates that "within the framework of Article 6, the ECB shall, in accordance with paragraph 3 of this Article, be *exclusively competent* to carry out, *for prudential supervisory purposes*, the following tasks in relation to all credit institutions established in the participating Member States (…)". This suggests that the attribution of competence to the ECB, whilst limited to the special tasks granted for prudential supervisory purposes, is *exclusive* and extends to *all* banks. The ECB could thus qualify as "competent authority" for the purposes of the exercise of competent authority options and discretions also for less significant banks. The basic principle of ECB exclusive responsibility for the tasks conferred on it was a cornerstone of the Commission proposal and was considered as such throughout the legislative process, although, as a compromise solution in the distribution of tasks within the SSM, the Regulation provides under Article 6(4) that responsibility for the direct exercise of some of the tasks conferred on the ECB are attributed to NCAs in the spirit of the subsidiarity principle. But also within this peculiar legislative allocation of (certain) responsibilities the ECB retains, in substance, a right of final say over the prudential tasks conferred on it by SSM Regulation also for less significant banks, as shown by the possibility granted to it to "issue regulations, guidelines or general instructions to NCAs" (Article 6(5)(a) of the SSM Regulation) and to "exercise directly itself all the relevant powers" for one or more less significant credit institutions "when necessary to ensure consistent application of high supervisory standards" (Article 6(5)(b) of the SSM Regulation). In other terms, it is certainly true that the attribution of exclusive competence set out in Article 4(1) must be read in conjunction with the provisions of Article 6, that stipulates that both NCAs and the ECB exercise competences with regard to less significant institutions. We note, nonetheless, that the cooperation framework set out by Article 6 was basically tailored as a *legislative* attribution to the NCAs of the direct exercise of (most *but not all*) prudential supervisory responsibilities of the ECB with regard to less significant banks. In this way, national supervisors are *also* made competent authorities to some effects, without depriving however the

135 D'Ambrosio (note 24) 106.

ECB of the role of *primary* competent authority also for less significant banks (as witnessed by Article 6(5) of the SSM Regulation). In conclusion, if one accepts that the exercise of competent authority options and discretions granted by the CRDIV/CRR compact (a) is essential for the performance of the prudential tasks conferred upon the ECB by Article 4(1) and strictly related thereto, (b) is expression of *regulatory* supervision consistent with the ECB rule making empowerment set out in Article 132 TFEU and (c) falls therefore within the ECB remit as competent authority for directly supervised significant bank in compliance with Article 9, expressly extending to the ECB "all the powers (…) which the competent authorities shall have under the relevant Union law, unless otherwise provided for by this Regulation", this could also support the conclusion that the same holds true also for less significant banks, because the ECB is also their *primary* competent authority. In this way the functional argument militating against the balkanization of the exercise of competent authority options and discretions for significant and less significant banks would fade away. In turn, this would make the best of the wording of recital (34) of the Regulation, because it would confirm that within the SSM competent authority options and discretion are no longer the remit of national supervisors.

Despite our preferences, these conclusions are however still provisional and need to be validated by the CJEU.

Lacking one such a final say of the CJEU, it seems safe to say that the unsettled interpretation of the SSM Regulation on this point reflects a constitutional ambiguity that fatally features a *de facto* limitation on the smooth exercise of regulatory powers within the SSM with at least two likely implications relevant for the purposes of our inquiry.

First, this opens an unchartered territory to private litigation to test both the ECB v. national allocation of regulatory competences from a constitutional point of view and the principle of effective judicial protection enshrined in the Charter of Fundamental Rights. Supervised credit institutions could potentially use conflicts over vertical distribution of competences under the SSM Regulation to defend themselves from intrusive acts from the SSM supervisors.[136] One such situation will evidently arise where the ECB exercises a competence that it does not hold, or where the exercise of a recognised competence goes beyond its legal scope (i.e. the ECB acts *ultra vires*).

Second, we expect that, from an institutional perspective, this could lead to political compromise and light touch, cooperative, solutions rather than heavy

136 In the event of a conflict over the vertical distribution of competences within the SSM, any action initiated by the affected credit institution would not exclude the initiation of other court proceedings. For example, if the ECB were to adopt an act under a competence thought to fall under the scope of a NCA's powers, the latter could request the relevant Member State to institute proceedings against the ECB before the CJEU pursuant to Article 263 of the TFEU, first and second paragraphs, to seek annulment of the relevant act. If a NCA were to adopt an act under a competence thought to fall under the scope of the ECB's powers, the latter could institute proceedings against the former before the relevant national courts to seek the annulment of the relevant act.

handed unilateral action or judicial claims of conflict of attributions. In the face of the uncertainties surrounding the allocation of the competent authorities options and discretions, a pragmatic and reasonable response (proportionate but still not completely safe, for it could be considered somehow elusive of the problem) could be indeed the use of ECB guidelines and recommendations to national competent authorities under Article 4(3) for the exercise of such options and discretions. This, in turn, makes it relevant to explore how fundamental rights protection would react to such a course of action. We will discuss this below in the following sections.

C. Horizontal distribution of regulatory competences

The SSM Regulation establishes a horizontal distribution of competences between the ECB and other institutions and authorities of the European Union in the realm of the exercise of regulatory powers.

For example, pursuant to Article 4(3) of the SSM Regulation, the ECB shall adopt guidelines, recommendations and decisions "subject to and in compliance with the relevant Union law and in particular any legislative and non-legislative act, including those referred to in Articles 290 and 291 TFEU." Article 4(3) goes on to clarify that the ECB shall, in particular, "be subject to binding regulatory and implementing technical standards developed by EBA and adopted by the Commission in accordance with Article 10 to 15 of Regulation (EU) No1093/2010, to Article 16 of that Regulation, and to the provisions of that Regulation on the European supervisory handbook developed by EBA in accordance with that Regulation." Finally, Article 4(3) adds that the ECB may also adopt regulations "only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred on it by this Regulation."

In essence, Article 4(3) of the SSM Regulation recognises the ECB's regulatory powers in the realm of banking prudential supervision. Yet, it also introduces express limits to the ECB's exercise of such regulatory powers. Recital (32) of the SSM Regulation confirms this approach as it reiterates the ECB's need to comply with the relevant Union law and, in particular, with the "draft technical standards ["DTS"] and guidelines and recommendations ensuring supervisory convergence and consistency of supervisory outcomes within the Union" prepared by the EBA, as well as with "Union acts adopted by the Commission on the basis of drafts developed by EBA and subject to Article 16 of Regulation (EU) No 1093/2010." Recital (32) puts it even more bluntly: "The ECB should not replace the exercise of those tasks by EBA, and should therefore exercise powers to adopt regulations in accordance with Article 132 of the [TFEU] in compliance with Union acts adopted by the Commission on the basis of drafts developed by EBA".[137]

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137 Article 3(3) of the SSM Regulation makes a similar claim: "The ECB shall carry out its tasks in accordance with this Regulation and without prejudice to the competence and the tasks of EBA, ESMA, EIOPA and the ESRB." Moreover, the Regulation (EU) No 1022/2013 of the European Parliament and of the

The SSM regulation provides for several coordination mechanisms between the ECB on one hand, and the EBA and the European Commission on the other, to avoid regulatory overlaps. Article 3(1) of the SSM Regulation establishes that the ECB "shall cooperate closely with EBA, ESMA, EIOPA and the European Systemic Risk Board (ESRB), and the other authorities which form part of the ESFS, which ensure an adequate level of regulation and supervision in the Union." Moreover, Article 3(2) provides that "[f]or the purposes of this Regulation, the ECB shall participate in the Board of Supervisors of EBA under the conditions set out in Article 40 of Regulation (EU) No 1093/2010." In turn, the Supervisory Board of the ECB may invite a representative of the European Commission to participate in the Board's meetings in accordance with Article 26(11) of the SSM Regulation. Arguably, such an invitation could also be extended to a representative of the EBA.[138]

These coordination mechanisms will become of considerable importance in those situations where the ECB and the EBA will carry out similar exercises, e.g. supervisory reviews and stress tests and impose specific additional requirements to ensure a sound management and coverage of the institutions' risks.[139] The ECB shall also contribute to the development of DTS or implementing technical standards by the EBA, or it shall draw its attention to a potential need to submit to the Commission DTS.[140]

In sum, regardless of the actual scope of the ECB's regulatory powers under the Treaties and the SSM Regulation, the latter refers to specific regulatory competences of other E.U. institutions and authorities as express limits to the regulatory powers conferred upon the ECB under the SSM Regulation. In particular: binding regulatory and implementing technical standards developed by EBA and adopted by the Commission in accordance with Articles 10 to 15 of the EBA Regulation, Article 16 of the EBA Regulation, and the provisions of that Regulation on the single supervisory handbook elaborated by EBA.[141] The SSM Regulation provides for several mechanisms of cooperation between the ECB and the EBA and the European Commission to ensure full coordination between them.

Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013 (hereinafter, the "amended EBA Regulation") reiterates that position. See e.g. Recital (4) of the amended EBA Regulation.

138 Although Article 26(11) of the SSM Regulation does not provide for the possibility of the Supervisory Board inviting a representative of the EBA to attend the Board's meetings as an observer, "[i]n order to ensure full coordination with the activities of EBA and with the prudential policies of the Union," Recital (70) of the SSM Regulation does provide that "the Supervisory Board should be able to invite EBA and the Commission as observers."

139 See e.g. Article 4(1)(f) of the SSM Regulation.

140 See Article 4(3)(4) of the SSM Regulation.

141 See e.g. Article 4(3)(3) of the SSM Regulation.

D. Horizontal distribution of supervisory competences in the realm of recovery and resolution

We already noted that, in the recovery and resolution context, there are important areas where, in the initial stage of resolution, the ECB and SRB competences partially overlap and blur. Indeed, while the decision to adopt a resolution scheme is taken by the SRM, the assessment of the two first conditions, i.e. whether the entity is failing or is likely to fail, and whether there is a private sector alternative, correspond primarily to the ECB or, in the latter case, is adopted in strict cooperation by both.[142] The SRB can also step in and make such an assessment but "only after informing the ECB of its intention and only if the ECB, within three calendar days of receipt of such information, does not make such an assessment". This must be put together with the ECB's ample supervisory powers in cases of breach of prudential rules,[143] which are connected with "early intervention" measures, also adopted by the ECB (when it is the competent supervisory authority).[144] This, together with the information and consultation requirements envisaged under the SRM regulation for both the SRB and the ECB makes the straightforward question "who pulls the resolution trigger?" difficult to answer.

Another difficult challenge for our purposes lies in the competence for the adoption of another of the most critical decisions under the SRM framework, such as the exercise of the write-down of capital instruments. The decision to convert or write-down capital instruments nominally corresponds to the SRB,[145] but the assessment that the entity is failing or likely to fail and that of viability that gives rise to the decision are made by, or in strict cooperation with the ECB.[146] Here again, the SRB can also step in and make such an assessment but "only after informing the ECB of its intention and only if the ECB, within three calendar days of receipt of such information, does not make such an assessment". This raises the question of how many "decisions" of different bodies are part of the "composite" resolution decision and which body is adopting the decision either in substance or in form, and, equally important, to which body will the decision be legally imputed, and determine the channels for challenging the decision.

The interpretation of the distribution of tasks in the context of these two momentous decisions cannot contradict the letter of the law. Thus, pursuant to SRM rules, the decision to adopt a resolution scheme corresponds to the SRB.[147] A different matter is whether the SRB retains any residual discretion after the ECB exercises its competence. Arguably, such discretion is ample if the ECB omits its assessment, in which case the SRB will adopt the decision all on its own, but such instances should be rare. The real question is whether the SRB

142 Article 18(1) paras. 2-4 SRM Regulation.

143 See, e.g. Article 16 SSM Regulation, and Article 13 SRM Regulation.

144 See Article 27 BRRD.

145 Article 21(1) SRM Regulation.

146 Article 21(2) SRM Regulation.

147 Article 18 and 21 SRM Regulation.

could refuse to adopt a resolution scheme once the ECB has made an assessment that an entity is failing or is likely to fail. Nominally it could, but the margin is thin. If it refused on grounds of lack of public interest, the decision would be challenged by the Commission, and overturned by the Council.[148] The SRB could still rely on its own assessment about the likelihood of a private sector solution, or regulatory intervention,[149] and refuse on those grounds, but the SRM Regulation does not give the SRB the power to instruct the ECB and NCAs to adopt specific supervisory measures with the aim to avoid the adoption of a resolution scheme. Another matter altogether are the channels of judicial review, a matter where, where, arguably, financial institutions should have the possibility of challenging both the SRB's decision to adopt a resolution scheme, and the ECB's assessment that the entity has failed or is likely to fail.

Regarding the write-down of capital instruments the confusion comes, partly, from the slight contradiction between articles 18 and 21 of SRM Regulation. Article 21 indicates that the SRB will only decide on the write down if, among other things, (a) the conditions for resolution under article 18 are met; and (b) the entity will not be viable in the absence of a write-down or conversion. Article 18, for its part, requires that the entity must not be viable even in the case of write down.[150]

Thus, the question is whether write-down or conversion is a measure that can be adopted (a) as part of a resolution scheme, in cases where the entity cannot, in any way, be made viable; (b) as part of a resolution scheme, in cases where the entity can be made viable via the write-down; (c) before adopting a resolution scheme, in cases where the entity can be made viable via the write-down; or (d) all of the above.

Oddly, a reading of article 18 (1) suggests solution (c) (i.e. before adopting a resolution scheme it must be assessed whether the entity could be made viable by less drastic measures, including private sector solutions, supervisory solutions, and debt write-downs); a reading of article 21 (1) (a) suggests solution (a) (i.e. after a conclusion is reached that the conditions of article 18 are fulfilled, including the lack of viability through private solutions or write-downs, the write-down is adopted as part of the resolution scheme); and a reading of article 21 (1) (b), suggests solution (b) (i.e. a write-down is part of the resolution scheme, but may be used to make the entity viable[151]).

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148 Article 18(7) SRM Regulation.

149 Article 18(1) para. 4 states: "An assessment of the condition referred to in point (b) of the first subparagraph shall be made by the Board, in its executive session, or, where applicable, by the national resolution authorities, in close cooperation with the ECB. The ECB may also inform the Board or the national resolution authorities concerned that it considers the condition laid down in that point to be met."

150 Article 18(1)(b) SRM Regulation states that, to adopt a resolution scheme, an assessment must be made that "there is no reasonable prospect that any alternative private sector measures, including measures by an IPS, or supervisory action, including early intervention measures or the write-down or conversion of relevant capital instruments in accordance with Article 21, taken in respect of the entity, would prevent its failure within a reasonable timeframe".

151 Since Article 18(1)(b) SRM Regulation states that it needs to be ascertained that "the entity will no longer be viable unless the relevant capital instruments are written down or converted into equity;" this

Adding to the confusion is the fact that, whereas in solutions (a) and (b) the decision would correspond to the SRB (as in both cases the decision would be adopted within the framework of a resolution scheme), it is perhaps arguable who would have the competence under solution (c), i.e. if the write-down/conversion is adopted as a prior step to avoid a resolution scheme. If such possibility were to exist, the competence should in theory correspond to the ECB, consulting the SRB. It would indeed be logical to include such tool within the ECB toolkit to solve cases where the decision to place an entity within a "resolution scheme" could create irreversible damage, which might annul the effect of the write-down or conversion. The problem is that recourse to write-down or conversion is not expressly included within the supervisory powers under prudential rules,[152] the SSM Regulation,[153] or early intervention powers under the BRRD. [154] In the absence of such references, it is necessary to be cautious, and, absent other references, assume that write-down and conversion decisions are adopted by the SRB, *and* there is no room for them to be adopted directly by the ECB.

V. LIMITS TO THE SSM'S SUPERVISORY POWERS (III): TREATIES' MANDATES TO THE ECB

A. The prevalence of monetary policy over prudential supervision

One important limit to the ECB's supervisory powers conferred under the SSM Regulation is the adoption of legal acts *ultra vires*. In Sections III and IV we have explored the possible means by which credit institutions may challenge the legality and validity of the ECB's exercise of its supervisory powers. In this Section, we will explore the limits to the exercise of such powers that may arise from their coexistence with other tasks conferred upon the ECB under the Treaties and its Statute.

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directly entails that write-down or conversion can be used to make the entity viable. However, this is still subject to Article 18(81) first para. Which states that the SRB shall adopt the write-down or conversion "acting under the procedure laid down in Article 18".

152 See Article 104 Directive 2013/36/EU. Prudential rules seem to presume that the write-down or conversion can only be decided by the resolution authority. Article 28(2), which deals with the definition of capital instruments, states that: "The conditions laid down in point (i) of paragraph 1 shall be deemed to be met notwithstanding a write down on a permanent basis of the principal amount of Additional Tier 1 or Tier 2 instruments. The condition laid down in point (f) of paragraph 1 shall be deemed to be met notwithstanding the reduction of the principal amount of the capital instrument within a resolution procedure or as a consequence of a write down of capital instruments required by the resolution authority responsible for the institution. The condition laid down in point (g) of paragraph 1 shall be deemed to be met notwithstanding the provisions governing the capital instrument indicating expressly or implicitly that the principal amount of the instrument would or might be reduced within a resolution procedure or as a consequence of a write down of capital instruments required by the resolution authority responsible for the institution".

153 Article 16 SSM Regulation.

154 Articles 27-29 BRRD.

Article 127(2) of the TFEU enumerates the basic tasks to be carried out through the European System of Central Banks (ESCB):[155] (i) to define and implement the monetary policy of the Union, (ii) to conduct foreign-exchange operations consistent with the provisions of Article 219, (iii) to hold and manage the official foreign reserves of the Member States, and (iv) to promote the smooth operation of payment systems. Additionally, Article 127(6) of the TFEU provides that, in accordance with a special legislative procedure, the Council may confer upon the ECB specific tasks relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings by means of regulations. The SSM Regulation is one such regulation. There is therefore a quite distinct separation between monetary and prudential tasks in the TFEU, that is fatally reflected in the SSM Regulation.

In order to understand the relationship between these different tasks, we need to explore the existence of any possible priority amongst them. If the ECB were confronted with the need to give priority to any of its tasks, which one would it be? In principle, we cannot infer any priority from the list of basic tasks included in Article 127(2) of the TFEU. Similarly, nothing in the wording of Article 127(6) of the TFEU would lead us to believe that any prudential supervisory powers conferred to the ECB under the SSM Regulation would be subject to any of the tasks enumerated in the second indent of Article 127.

The conclusion that the ECB's supervisory powers rank equally with the basic tasks enumerated in Article 127(2) of the TFEU seems to be supported by Article 25 of the SSM Regulation. In particular, Article 25(2) provides that the supervisory tasks conferred upon the ECB under the SSM Regulation shall not interfere with any other tasks of the ECB. However, it also specifies that such supervisory powers "shall neither interfere with, *nor be determined by*, its tasks relating to monetary policy." (Emphasis added.) The wording in this last excerpt would seem that the SSM Regulation is expressly trying to equate monetary policy and prudential supervision. However, we contend that this is not the case.

Firstly, according to Article 127(1) of the TFEU, the "primary objective of the [ESCB] shall be to maintain price stability". Specifically, Articles 119(2) of the TFEU and Article 2 of the Statute affirm that price stability shall be a primary objective of "a single monetary policy and exchange-rate policy". Prudential supervision, however, aims at "ensuring […] the stability of the financial system of the Union as well as of individual participating Member States and the unity and integrity of the internal market."[156] The Treaties do not recognise financial stability as a "primary objective" of the ESCB[157]. If price stability is a "guiding

155 The ESCB is composed of the ECB and the national central banks of all EU Member States. It must not be confused with the Eurosystem, which comprises the ECB and the national central Banks of those EU Member States that have adopted the euro. See Article 1 of the Statute.

156 Recital (30) of the SSM Regulation. See also Article 1 of the SSM Regulation.

157 When the ECB was created, at the beginning of the 1990s, the economic theory and empirical evidence that prevailed when the ECB was created, at the begining of the 1990s, supported an independent central bank oriented towards price stability. See Rosa M Lastra and Charles AE Goodhart, 'Interaction

principle”[158] that should inform all economic and monetary policy activities, then monetary policy and exchange-rate policy do rank higher in priority than other tasks of the ECB, including prudential supervision, that aim at secondary objectives.[159]

Secondly, it is important to note that Article 25 of the SSM Regulation seems to be mainly concerned with operational coordination within the bodies composing the ECB, and in particular between the Governing Council and the Supervisory Board.[160] That supervisory tasks conferred upon the ECB “should not interfere with” any other tasks of the ECB should thus be interpreted in terms of independence, not priority. In other words: operational independence does not exclude the need to resolve clashes between different policy objectives.

Moreover, the creation of a Supervisory Board pursuant to Article 26 of the SSM Regulation will not prevent the prevalence of monetary policy in the event of a clash. Article 26 of the SSM Regulation vests the Supervisory Board with “*de facto*” powers in the exercise of prudential supervision.[161] It is responsible for the planning of the ECB’s supervisory tasks and for submitting complete draft supervisory decisions to the Governing Council for its approval under a “negative decision-making technique”.[162] However, the ultimate decision lays with the Governing Council.[163] This has led some commentators to cast doubt on the effectiveness of the operational independence provisions contained in Article 25 of the SSM Regulation.[164] Some have also questioned whether the administrative role of the Executive Board, who is responsible for the internal

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between Monetary Policy and Bank Regulation’ (2015) European Parliament’s Committee on Economic and Monetary Affairs IP/A/ECON/2015-07 7. After the 2008 financial crisis, legislators in the U.S. and the U.K. have revised central bank laws to reinforce the dual mandate of their respective central Banks to protect financial stability as well as price stability. A similar revision is yet to be implemented in the EU legislation. See ibid.

158 See Article 119(3) of the TFEU.

159 The TFEU predates the banking crisis that surged in the euro area after the 2008 financial debacle in the U.S. and the European sovereign debt crisis that ensued. Today, financial stability is almost regarded as a necessary precondition for reaching the central bank’s macroeconomic objective of price stability. For example, in the recent *Gauweiler case*, the CJEU’s considered that a situation of instability in relation the risk *premia* of sovereign bonds of certain euro area Member States trading in the secondary markets threatened to disrupt the monetary policy transmission mechanism. See *Gauweiler case* (C-62/14), para. 50.

160 Indeed, Article 25(1) of the SSM Regulation provides that “[w]hen carrying out the tasks conferred on it by this Regulation, the ECB shall pursue only the objectives set by this Regulation.” Moreover, the second paragraph under Article 25(2) requires that “[t]he staff involved in carrying out the tasks conferred on the ECB by this Regulation shall be organisationally separated from, and subject to, separate reporting lines from the staff involved in carrying out other tasks conferred on the ECB.”

161 See D’Ambrosio (note 24) 125.

162 See ibid 118. See also Wymeersch (note 91) 68.

163 See Article 26.8 of the SSM Regulation. In support of this interpretation, see D’Ambrosio (note 24) 58; Lastra and Goodhart (note 157) 16. On the contrary Wymeersch has argued that in spite of the Governing Council having the last Word, the ten-day period in which the Governing Council may oppose the draft decision presented by the Supervisory Board is too short and would thus render any opposition ineffective. See Wymeersch (note 91) 69.

164 See e.g. Geeroms and Karbownik (note 23) 5.

organisation and staff of the ECB, would be compatible with a separation of the monetary policy and supervisory functions.[165]

In addition, the wording of Article 26(8) of the SSM Regulation, which regulates the process by which the ECB will adopt decisions in the exercise of its supervisory powers also seems to cast doubt on the effective separation between the two functions. In particular, it provides that "[i]f the Governing Council objects to a draft decision [presented by the supervisory Board], it shall state the reasons for doing so in writing, *in particular stating monetary policy concerns*." (Emphasis added.) This provision would seem to suggest that the monetary policy function could indeed prevail over that of prudential supervision.

The arguments presented above would lead us to conclude that, in the absence of a reform in the Treaties, the prevalence of price stability as a "primary objective" over financial stability will make the monetary policy functions of the ECB prevail over its prudential supervisory functions in the event of a clash between the two[166]. This conclusion, however, is not definitive. To this date, the CJEU has not explored the relationship between the ECB mandates of price stability and financial stability, nor has it explored the relationship between the ECB's monetary policy and prudential supervisory functions. [167] The question thus remains open and subject to interpretation. The following sub-section will explore how this may affect the relationship between the supervised credit institutions and the ECB in the latter's exercise of its supervisory powers.

B. Implications for supervised credit institutions

If the interpretation that price stability and monetary policy should prevail over financial stability and prudential supervision were correct, then the affirmation in Article 25(2) that the ECB's supervisory powers "shall [not] be *determined by*

165 According to D'Ambrosio, Articles 3(2) and (3) of the ECB decision of 17 September 2014 on the implementation of separation between the monetary policy and supervisory functions would seem to take the view that the Executive Board's roles is compatible with the separation of functions. However, he also finds evidence that would suggest a contrary position in other relevant provisions. For example, he points at Articles 6(1) and (2) of the said decision, where "only the Executive Board is vested with the power to authorize the exchange of confidential information between the two functions." Furthermore, he points at Article 13m(2) of the ECB's Rules of Procedure, according to which the Supervisory Board maintains, in agreement with the Executive Board, the only limited power to "establish and dissolve substructures of a temporary nature, such as working groups or task forces". See D'Ambrosio (note 24) 130.

166 The question on how to reconcile monetary policy objectives and prudential supervision has a long constitutional tradition in several Member States: compare, for instance, on Article 47 of the Italian Constitution, Fabio Merusi 'I rapporti economici' *Commentario della costituzione* (1980) 165. Compare also Renzo Costi 'L'ordinamento bancario' (2012), 250 ff. (rightly advocating, in any event, the application of the principle of legality as to banking regulation).

167 The CJEU, however, has explored the actual scope of the ECB's objective of price stability. In so doing, the CJEU has regarded financial stability almost as a necessary precondition for reaching the central bank's macroeconomic objective of price stability. For example, in the recent *Gauweiler case*, the CJEU considered that a situation of instability in relation the risk *premia* of sovereign bonds of certain euro area Member States trading in the secondary markets threatened to disrupt the monetary policy transmission mechanism. See *Gauweiler case* (C-62/14), para. 50.

[…] its tasks relating to monetary policy" (emphasis added) will not be consistent with EU primary law. This would have important implications. It could arguably put the independence of the Supervisory Board from the Governing Council as purported in Article 25 of the SSM Regulation in jeopardy. Moreover, it could give the Governing Council a legal justification to put prudential supervision at the service of monetary policy. But paradoxically, and perhaps more importantly for the purposes of this paper, it could also put monetary policy at the service of prudential supervision. Let us take a few examples.

As part of its price stability mandate, the ECB can engage in open market operations such as outright sales of collateral, repos and securities ending transactions.[168] It may also engage in credit operations by lending to credit institutions and other financial institutions against adequate collateral.[169] Given that the ECB's supervisory powers fall on some of the most significant credit institutions in the EU, it will not be uncommon for these institutions to be counterparties of the ECB in its open market and credit operations, as well as supervised credit institutions under the SSM.

The relationship between monetary policy and prudential supervision has been explored extensively in the literature. The majority seems to favour that both functions should be kept separate.[170] Some commentators suggest that "Chinese walls" should be erected to guarantee the operational independence of both functions where these are conferred upon the same institution. However, the recent financial crisis in the U.S. and the E.U. has evidenced the intricate interrelation between financial stability and price stability. In this light, other commentators have suggested that these walls will be ineffective and that they may even be counterproductive in times of financial crises.[171]

In any event, the separation of the two functions remains, at least, unclear under Union law.[172] If the ECB were to interpret the relationship between monetary policy and prudential supervision as one where the former would prevail over the latter, this could give rise to acts the legality of which would be arguable.

168 See Article 18(1) of the Statute. Provide a brief definition of each of these instruments.

169 See Article 18(1) of the Statute.

170 For an overview of the main beneficial and detrimental implications of such compatibility, see e.g. Charles Goodhart and Dirk Schoenmaker, 'Should the Functions of Monetary Policy and Banking Supervision Be Separated?' (1995) 47 Oxford Economic Papers 539; Charles AE Goodhart, 'The Organizational Structure of Banking Supervision' (2002) 31 Economic Notes 1. For an analysis of institutional design in the context of the euro area, see Martin Hellwig, 'Financial Stability, Monetary Policy, Banking Supervision, and Central Banking' (2014) No. 2014/9.

171 See e.g. Thorsten Beck and Daniel Gros, 'Monetary Policy and Banking Supervision: Coordination Instead of Separation' (European Parliament 2012) Policy Note IP/A/ECO/NT/2012-06 <http://www.europarl.europa.eu/document/activities/cont/201212/20121210ATT57790/20121210ATT57790EN.pdf> accessed 25 June 2015.

172 In order to equate price stability and financial stability as "primary objectives" of the ESCB, Article 127 of the TFEU would need to be reformed. In support of this opinion, see e.g. Geeroms and Karbownik (note 23) 9. More generally, on the desirability to introduce financial stability as an express concern in the legal mandates of central Banks, see Hellwig (note 170) 18–19.

In this regard, it is possible to think of examples where the ECB lets its mandate of price stability determine its supervisory practices. One example could be the introduction of more stringent measures regarding the financial institutions' liquidity ratio, as a measure to reduce inflation (if it is high), rather than ensure the institutions' soundness, from a prudential perspective, which seems to be the aim of prudential rules.[173] Conversely, the ECB could soften its stance on supervisory measures regarding solvency and liquidity requirements, as a means to boost credit-creation, if there is a risk of deflation and conventional measures, such as lowering interest rates, have not worked. Or it could soften its stance on financial entities which are relevant counterparties in open market operations. In an opposite sense, the ECB could let its monetary policy be determined by its views on regulatory/supervisory policy. For example, if the ECB has detected an unusual concentration of a type of assets (e.g. bonds from a specific country, or asset-backed securities) in the balance sheet of a specific subset of financial institutions with systemic importance, it could expand the range of assets, even at the price of undertaking more operations than necessary to maintain inflation low, to make sure that the assets remain liquid, and that the institutions are not subject to contagion.

It is unclear to what extent the ECB could be scrutinized in such cases, however. In cases where the ECB puts regulatory/supervisory policy at the service of a contractionary monetary policy, the measures of prudential supervision would enhance solvency/liquidity requirements, which, from a micro-prudential perspective, would make the entities more solvent and liquid. The problem would be that, from a macro-prudential perspective, the policy could render the system more fragile, but this is not a type of policy decision that could be challenged in the courts, for courts do not dictate economic policy, and prudential rules do not seem to imply a mandate for courts to check for ulterior motives, as long as the spirit of the rules (to render individual entities safer) is respected.

In cases where regulatory/supervisory policy is put at the service of an expansionary monetary policy, however, the ECB's action could be open to challenge, if it implies not upholding the mandate of prudential supervision rules. In this regard, the finalistic mandate to ensure "high supervisory standards"[174] seems to justify stricter standards than those that would result from a direct application of the rules, but not more laxity, as much as inflation levels may seem to justify it.

A different matter, of course, would be to prove that the ECB is willingly undermining regulatory/supervisory standards due to monetary reasons. Furthermore, albeit it is easy to think about affected constituencies, such as

173 See e.g. Articles 412 *et seq* Regulation 575/2013.

174 Articles 4(3) and 6(5)(b) SSM Regulation.

depositors,[175] creditors,[176] shareholders and other E.U. credit institutions,[177] standing (or lack thereof) would prove an issue in annulment proceedings, due to the restrictive view of the CJEU,[178] and interested parties would have to rely on proceedings seeking damages, or on preliminary references to the CJEU in the context of domestic proceedings, with uncertain prospects.

If, on the other hand, monetary policy were to be put at the service of regulatory/supervisory goals, it is, again, very difficult that the ECB acts could be challenged. The exercise of monetary policy is an area subject to much discretion, and, after the *Gauweiler* decision by the CJEU, the view seems to be that the decision will be respected as long as it can be justified on monetary grounds (even if it has other effects),[179] provided that its exercise is proportional to the ends sought.[180]

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175 In the *Peter Paul case*, a group of depositors at a bankrupt German bank had sought compensation in relation to their deposits lost above the amounts protected under the applicable deposit guarantee scheme on the grounds of defective supervision. The supervisor's liability for damages on negligent breach of official duty was limited under German law. However, the applicant depositors challenged that statutory immunity on the grounds that it contravened three banking Directives of Union law. The European Court of Justice ruled that the said Directives did not confer any rights upon depositors in spite of their ultimate objective being the protection of their deposits. See *Peter Paul and Others v. Bundesrepublik Deutschland* (Case C-222/02). The House of Lords took a similar decision at the beginning of the early 2000s in the BCCI case. See D'Ambrosio (note 24) 49. Both decisions were criticised in the literature. D'Ambrosio provides a useful overview of the main arguments in favour of the recognition of rights to individuals such as depositors "when the content of those rights is identifiable on the basis of the legislation itself" in light of the the *Francovich-Dillenkofer* standards. See ibid 53. See also CJEU, Joined Cases C-6 and C-9/90, *Francovich v. Italian Republic*, 1991 and Joined Cases C- 178, C-179, C-188-90/94, *Dillenkofer and Others v. Federal Republic of Germany*, 1996. D'Ambrosio evens seems to suggest that similar rights could be recognised upon individual investors on the basis that substantive EU legislation on financial markets is intended to protect them. See ibid.

176 For example, bond holders in the application by analogy of the argument for depositors raised by D'Ambrosio. See note 24 above.

177 See *Gauweiler and Others v Deutsche Bundestag* (Case C-62/14) and *Sven A. von Storch and Others v ECB* (Case C-64/14 P) for precedents of third party claims against ECB decisions on the basis of their wide-ranging effects.

178 An institution subject to regulatory/suoervisory forbearance would have little incentive to challenge the measures, and competitors of the entities subject to forbearance would have an extremely hard task in showing that they are directly affected by the measure. See *infra* VI.C.2.a-b.

179 E.g. in *Gauweiler* the fact that the OMT program by the ECB had effects in the field of economic policy was not an obstacle to its justification as a "monetary policy", understood as preserving "price stability", due to the fact that it tried to restore the "monetary policy transmission mechanism". According to the CJEU, *"The ability of the ESCB to influence price developments by means of its monetary policy decisions in fact depends, to a great extent, on the transmission of the "impulses" which the ESCB sends out across the money market to the various sectors of the economy. Consequently, if the monetary policy transmission mechanism is disrupted, that is likely to render the ESCB's decisions ineffective in a part of the euro area and, accordingly, to undermine the singleness of monetary policy. Moreover, since disruption of the transmission mechanism undermines the effectiveness of the measures adopted by the ESCB, that necessarily affects the ESCB's ability to guarantee price stability. Accordingly, measures that are intended to preserve that transmission mechanism may be regarded as pertaining to the primary objective laid down in Article 127(1) TFEU."* Case C-62/14 *Peter Gauweiler and others v Deutsche Bundestag*, Judgment of 16 June 2015, at 50.

180 *Ibid* at 66 *et seq*.

VI. LIMITS TO THE SSM'S SUPERVISORY POWERS (IV): FUNDAMENTAL RIGHTS (SUBSTANTIVE AND PROCEDURAL) OF REGULATED/SUPERVISED ENTITIES

A major overhaul of the EU banking supervisory system was certainly necessary, but it raises important questions about the implications of the exercise of those supervisory powers for the rights of the entities subject to supervision and their constituencies, and the extent to which those rights can pose limits to the exercise of those competences. First, we will analyse the broader issue of the applicability of fundamental rights in an EU context (A). In second place, we will analyse the substantive implications of specific fundamental rights protection with regard to the exercise of supervisory competences (B). Finally, we will extend the analysis to the different issue of "patrimonial" protection arising from domestic company and insolvency law (C).

A. Scope and reach of fundamental rights: applicability of fundamental rights texts in an EU context, overlapping of rights, applicability to legal persons

In addressing the more specific issues concerning the limits in the exercise of powers by the ECB and NCAs (or NRAs) the same questions of general nature keep arising time and again: are fundamental rights texts applicable, how do they apply, and to whom they apply. This is why it makes sense to address such general questions before one proceeds to the more specific ones.

1. *The applicability of the EU Charter and the ECHR in a composite situation*

The first question that needs to be addressed is whether fundamental rights texts apply to EU or national authorities when they exercise their functions within the SSM or SRM. This is especially pressing, since both SSM and SRM envisage a combination of regulatory and supervisory actions from both EU institutions (the ECB) and national institutions (NCAs and NRAs).

Addressing first the question in relation with the EU Charter, Article 51 states that:

> *The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States* ***only when they are implementing Union law****.*

The answer seems quite clear with regard to the ECB, which is an EU institution. But are NCA to be considered part of an institution of the Union when they are legislatively delegated under Article 6(4) of the SSM Regulation some responsibilities in the performance of micro-prudential tasks on less significant credit institutions? In turn, are Member States considered to be "implementing Union law" when the distribution of legislative competences envisaged in the CRD IV/CRR Compact contemplates the possibility of Member States exercising choices in the determination of certain prudential measures (e.g. liquidity ratio)? Case law by the CJEU is ambiguous in this regard. In *McB* it held that the assessment of the compatibility with the Charter had to be made exclusively in relation with EU provisions (in the case, Regulation 2201/2003, on the recognition and enforcement of foreign judgments in matrimonial matters and matters of parental responsibility), not the national provisions (in the case, the Irish law, which, according to the EU rules, was the one regulating the acquisition of custody rights), thus rejecting the possibility that, in determining custody rights, national law was "implementing EU law".[181] Similarly, in *Magatte Gueye* the CJEU required a substantive connection between national law and EU Law (the case concerned the relationship of Spanish substantive law on domestic violence, and EU decisions on the standing of victims in such context).[182]

However, the CJEU has given an ample scope to the language of article 51 in cases where the subject matter was closer to the subject matter of this work (i.e. the relationship of EU and national regulatory provisions between themselves, and with enforcement provisions), and where the different provisions are more closely connected by a similar purpose (and the national interests at stake are less obvious). In Fransson, it considered sufficient the connection between proceedings for the imposition of administrative penalties and criminal sanctions, and the breach of (EU-regulated) VAT, plus the broad obligation of Member States *to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion*, to conclude that, when pursuing domestic proceedings based on domestic law to impose penalties, State authorities were "implementing EU law".[183]

The contrary opinion of the Advocate General Villalón,[184] which was not followed by the Court, has stirred up controversy,[185] but so far the Court's case law supports the understanding that States are subject to the Charter *when they*

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181 The mother removed the children from Ireland to Britain after Mr McB had initiated proceedings before the Irish courts to obtain an order securing custody rights, but before the process was completed. Article 2(11)(a) of regulation 2201/2003 stipulated that rights of custody were to be acquired (and, thus, subject to recognition and enforcement) "by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention". The CJEU held that Article 2(11)(a) could not be considered incompatible with the Charter or the ECHR (the case law of the ECtHR on Article 8 of the ECHR was used to integrate the meaning of Article 7 of the Charter on private and family life). See Case C-400/10 PPU *McB* (2010) ECR I-8965.

182 In this case the compatibility of a mandatory stay away injunction set forth in Spanish law against offenders in crimes of violence within the family was examined in light of Council Framework decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. The Court held that this was a matter of domestic law, and that the Council Decision did not intend to harmonize the substantive laws in respect of the forms and levels of criminal penalties. See Joined cases C-483/09 and C-1/10 *Magatte Gueye* (2011) ECR I-8263.

183 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* Judgment of 26 February 2013, at 25-27.

184 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* AG Opinion.

185 See e.g. the decision of the German Federal Constitutional Court 1 BvR 1215/07, Judgment of 24 April 2013, where the Court, deciding on a case about the compatibility of German counter-terrorism database with German Basic Law, stated that this was a purely internal matter, and that the distribution of competences between EU and domestic authorities had not been altered by the *Fransson* ruling. See also

apply domestic law that has the purpose to enforce EU provisions. The connection is even closer in the case of the SSM and SRM, where the provisions in the EU rules make reference to the recourse by domestic authorities to inspections and sanctions. The case is even stronger when NCAs apply domestic rules in exercise of discretions granted by EU law (e.g. under the CRD IV/CRR Compact). In *NS v Secretary of State for the Home Department* the CJEU clearly stated that, in such instances, State authorities are subject to the Charter.[186]

An interesting situation could arise if the SSM and SRM mechanism happens to operate under the aegis of the European Stability Mechanism. In *Pringle* the CJEU held that the Charter was considered inapplicable when Member States take collaborative action outside the EU legal order.[187] The question could arise if, say, a specific supervisory action (or an action with the content of intervention and resolution) is initiated as part of the package of measures indicated by the ESM (e.g. if the bailout is limited to a State's banking sector). In that case, the Charter would be applicable to the ECB actions. There would also be a strong argument to apply the Charter if, in executing the Memorandum of Understanding, the NCA concerned makes use of the collaborative structures envisaged in the SSM and SRM (e.g. the "close collaboration" with non-euro States).[188] However, this is a bit of uncharted territory. The CJEU was probably more concerned about the side effects that a full-blown application of EU law to the more flexible structure created with the ESM would have, but surely *Pringle* is not (nor should it be) the last word on the applicability of the EU Charter to collaborative structures outside, yet closely connected, to EU law.

Having addressed the question with respect to the EU Charter, it is necessary to do the same with the ECHR, which poses challenges of its own. The ECHR is not formally part of EU law, though specific references are made in article 52(3) of the EU Charter, and article 6(2) and (3) TEU. Articles 6(3) and 52(3) indicate the relevance of the ECHR for the purpose of EU law, while article 6(2) contemplates the accession of the EU to the ECHR. A draft accession treaty was negotiated in 2013,[189] but, then, the CJEU held, in 2014, that such treaty (and parts of the ECHR) was incompatible with EU law,[190] mainly because the new powers of the ECtHR would impinge upon the powers of the CJEU.[191]

UK House of Commons European Scrutiny Committee *The application of the EU Charter of Fundamental Rights in the UK: a state of confusion* Forty-third Report of Session 2013–14, 43-49.

186 Joined cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department* Judgment of 21 December 2011.

187 Case C-370/12 *Thomas Pringle v Government of Ireland* Judgment of 27 November 2012.

188 *Supra* IV.1.2.

189 <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf>

190 Opinion 2/13 of the Court, 18 December 2014.

191 Some objections had to do with the incompatibility of Article 53 of the ECHR, which permits Member States to dispense a greater protection to fundamental rights than the ECHR does, whereas the CJEU had ruled in *Melloni* that Member States could not do that if EU law had fully harmonized the matter, and also with the absence in the draft agreement of the "mutual trust" clause in justice and home affairs, which applies in EU law. But most objections were related to the new powers the ECtHR would gain, such

Therefore, up to this point the ECHR does not apply, nor can the ECtHR decide, on actions by EU institutions (including the ECB). However, the ECHR applies to actions by Member States, and, in the past, the ECtHR has held that its jurisdiction to decide on a violation of Convention rights cannot be excluded solely because a State was, simply, giving effect to EU law.[192] Having said that, in most cases where the ECtHR had to decide on the violation of the ECHR by a State giving effect to EU law, the complaint was manifestly unfounded,[193] or Member States had been granted a wide margin of appreciation in implementing EU measures (which means that the action could be easily attributed to the State, and not the EU).[194]. This could likely be the case of national legislative options and discretions granted by the CRDIV/CRR compact.

Finally, in cases where the State had little margin of discretion, so that the potential violation of the ECHR was (if such violation existed) a direct consequence of the implementation of EU law, the ECtHR was willing to grant an unprecedented breathing space to EU law and EU institutions, by *presuming* that the EU grants an equivalent level of protection to that under the Convention.[195]

In its decision of *Bosphorus Airways v Ireland* the ECtHR for the first time examined the merits of a case where domestic authorities were implementing EU law without exercising discretion.[196] The ECtHR was ready to assume that the fact that the State interfered with the property (an aircraft) to comply with its obligations under EU law constituted, in itself, a legitimate interest.[197] It then established that the system of protection of fundamental rights within the EU, albeit providing for limited access to individuals, created a presumption of Convention compliance for acts by a State that gave effect to EU measures.[198] Finally the ECtHR held that the presumption had not been rebutted in the case

as the applicability of Protocol 16, which permits Member States' courts to send questions to the ECtHR, which could rule on matters of EU law (thereby circumventing the preliminary reference procedure), the implicit possibility that the ECtHR could rule on inter-State disputes (which, by article 344 TFEU are reserved to the CJEU); and the co-respondent system, where both the EU and a Member State could be sued in proceedings before the ECtHR (as, the CJEU held, the ECtHR should not have the power to allocate responsibility between them). See Opinion 2/13 of the Court, 18 December 2014.

192 Commission Decision Application 11123/84 *Tete v France* Decision of 9 December 1987; Application 17862/91 *Cantoni v France*, Decision of 11 November 1996; Application no. 45036/98 *Bosphorus Airways v Ireland* Decision of 20 June 2005.

193 E.g. Commission Decision Application 11123/84 *Tete v France* Decision of 9 December 1987.

194 E.g. in Application 17862/91 *Cantoni v France*, Judgment of 11 November 1996. The ECtHR has reviewed the States' exercise of discretion when giving effect to EU law in light of Convention rights in numerous occasions. See *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, Series A no. 288; *Procola v. Luxembourg*, judgment of 28 September 1995, Series A no. 326; *Cantoni and Hornsby*, both cited above; *Pafitis and Others v. Greece*, judgment of 26 February 1998, Reports 1998-I; *Matthews*, cited above; *S.A. Dangeville v. France*, no. 36677/97, ECHR 2002-III; and *Société Colas Est and Others v. France*, no. 37971/97, ECHR 2002-III.

195 Commission Decision Application no. 13258/87 *M & Co. v. Federal Republic of Germany* Decision of 9 January 1990.

196 Application no. 45036/98 *Bosphorus Airways v Ireland* Decision of 20 June 2015, 143-148.

197 *Ibid* at 150.

198 *Ibid* 159-165.

at hand.[199] One can only emphasize that the ECtHR even failed to undertake the proportionality assessment, which it normally does, even when the interference with property rights (or fundamental rights in general) is based on a legitimate interest.

This is the current context. However, it is a context in flux. If the EU accession to the ECHR is delayed, or even frustrated, the ECtHR could find that its patience has been tested too far, and adopt a less accommodating stance towards the EU.

2. *The applicability of "principles" and the applicability to legal persons*

The second question is whether, within the Charter, with regard to the regulatory and supervisory action of the ECB, domestic legislatures or NCAs, there are rights which are "more equal than others", especially since the same article 51 referred to above continues saying "They [EU institutions and bodies and States implementing EU law] shall therefore *respect* the rights, *observe* the principles and *promote* the application thereof in accordance with their respective powers". In this vein, the SSM Regulation stipulates, in recital (58), that "in its action the ECB should comply with the principles of due process and transparency" (a matter further regulated under Article 22 of the SSM Regulation); in recital (63) that "the ECB should respect the fundamental rights and observe the principles recognized by the Charter of Fundamental Rights of the European Union, in particular the right to an effective remedy and to a fair trial" and in recital (86) that "the Regulation respects the fundamental rights and observes the principles recognized in the Charter of Fundamental Rights of the European Union, in particular the right to the protection of personal data, the freedom to conduct a business, the right to an effective remedy and to a fair trial, and has to be implemented in accordance with those rights and principles". To that aim, the Framework Regulation warrants specific guarantees, in particular in Part III, title 3 and, as to the field of sanctions, in part X, title 2.

This fine distinction between the type of action required is susceptible to create some controversy due to the different understanding of the word "principle", a term normally put in opposition to the term "rule", and in relation with terms such as "policies" or "values". A traditional view distinguishes principles from rules according to their level of generality, and need of interpretation in order to be applicable.[200] This seems to be the view adopted in the Charter: partly as a result of British concerns about the possibility of broad social policies colonizing their country via judicial activism, they introduced the distinction.[201]

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199 *Ibid* at 166.

200 Joseph Raz 'Legal Principles and the Limits of the Law' (1972) *The Yale Law Journal* Vol. 81 838.

201 UK House of Commons European Scrutiny Committee 'The application of the EU Charter of Fundamental Rights in the UK: a state of confusion' *Forty-third Report of Session 2013–14* 33-34.

However, this distinction is quite slippery. The very act of applying a rule, even the most concrete one, requires some kind of interpretation.[202] Furthermore, rules can have a certain degree of generality, while principles can have quite concrete consequences that bind public authorities (think about the non-discrimination principle), which means that the distinction is blurred, and can become useless for enforcement needs.[203] Robert Alexy defines principles as "mandates of optimization", meaning that they are norms that order that something be realized in the greatest possible degree, given the legal and factual possibilities.[204] This opens the gate for principles to be "balanced" or "weighed" against each other. This view, while helping to distinguish principles from "rules", however, does not clearly differentiate between "specific principles", which define individual rights that are subject to direct court enforcement, and "broader principles", which are more general mandates to the legislator, and which are not susceptible of court enforcement (which was the intention of the drafters of the Charter). Dworkin has, possibly, the more neat distinction. He first characterizing "principles" in a general sense as legal propositions which, unlike rules, do not apply in an all-or-nothing fashion, but have a dimension of weight and importance (and can thus be balanced with each other).[205] But, then, within this category of principles in the general sense, he distinguishes between "principles" (in a restricted sense) which define rights, which can be exercised before the courts, and whose interpretation is the domain of the courts, and "policies" which define broader "goals" (i.e. ends) and whose realization is the domain of the legislature.[206]

In light of the confusion that the term can generate, "policies", or, at least, "principles of statutory configuration" would be probably a preferable term for regulatory purposes. The characterization as "principles" was put to a test in the *AMS* case, where the right of collective representation in the company was relied upon by a workers' association: the Court held that article 27 of the Charter, "to be fully effective, it must be given more specific expression in European Union or national law."[207] It is interesting to note that, despite relying on the implicit distinction between "rules" and "principles" for its judgment, the Court held that:

the facts of the case may be distinguished from those which gave rise to Kücükdeveci in so far as the ***principle of nondiscrimination*** *on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.*[208]

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202 Judge Scalia, of the US Supreme Court, hardly an advocate of judicial activism, as said as much. See Antonin Scalia 'A Matter of Interpretation' (1997) *Princeton University Press*.

203 Robert Alexy 'Teoría de los derechos fundamentales' (2014) 2ª edición (Transl. Carlos Bernal Pulido) Madrid: Centro de Estudios Políticos y Constitucionales 64-67.

204 *Ibid* p. 67.

205 Ronald Dworkin 'Taking Rights Seriously' (1977) Duckworth ,22.

206 Robert Alexy 'Teoría de los derechos fundamentals' (2014) (transl. Carlos Bernal Pulido) 2ª edición Madrid: Centro de estudios políticos y constitucionales 67.

207 Case C-176/12 *Association de médiation sociale (AMT) v Union locale des syndicats CGT*, Judgment of 15 January 2014, at 45.

208 *Ibid* at 47.

For present purposes, the rights that are more relevant in relation with supervisory functions (right of ownership, right to a fair trial, right to privacy, legality principle) will normally have a well-established status as susceptible of direct enforcement, but some caution will be necessary with those rights typically subject to legislative determination (e.g. rights of privacy and secrecy of communication, or some aspects of the right to a fair trial).

A related question, as it has to do with how fundamental rights are applied, is whether, and, if so, to what extent, could a supervisor rely on the waiver of fundamental rights by one of the supervised entities. The courts have been suspicious of such waivers in cases where they do not take place between private parties, but between private parties and public authorities, and have required that such waivers be made in an *unequivocal* manner.[209] In *Deweer v Belgium* the owner of a shop in breach of price regulations was ordered to provisionally close his shop, then offered a friendly settlement by paying a relatively low fine. The Court held that the settlement was tainted by constraint because the person concluded it under threat of closure of his shop.[210] The existence of a written settlement was considered only partial evidence of a waiver. This may be an important factor in cases where the ECB or NCAs accept to forgo specific enforcement proceedings if the financial firm in question accepts to implement certain measures. The settlement reached may be open to challenge in courts. Though, arguably, the element of constraint is less persuasive in case of a large, sophisticated, financial institution, aided by counsel, especially if the proceedings are not purely sanctioning in nature, the high reputational cost of an enforcement action could also weigh heavily in a court's decision to annul the settlement

The third question is the "who" is protected by fundamental rights. Given that the subjects of supervision action will, more often than not, be legal persons, whether this has any implications in the degree of protection of their rights vis-à-vis the rights of physical persons. The German Fundamental Norm includes a specific reference to the issue, though it refers to the nature of the right in order to determine the scope of protection.[211] The ECHR expressly refers to the possibility of applications being presented by "*any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation*" (article 34), but this means that a non-physical person can have standing, and, implicitly, suffer a violation of fundamental rights, it does not specify which are the rights a legal person can have. An express reference to legal persons is only included in the ECHR in relation with the protection of property[212] (the EU Charter introduces the specific reference to "every natural and legal person" solely in relation with

209 *Colozza v Italy* 9024/80 12 February 1985; *Barberá, Messegué and Jabardo v Spain* 10590/83 6 December 1988.

210 *Deweer v Belgium* 6903/75 27 February 1980.

211 Article 19(3) of German Basic Law states that "The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits."

212 Article 1 Protocol 1 states: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions."

the right of access to documents, right to refer to the European Ombudsman, and right to petition).[213]

This lack of systematic approach towards the distinction between physical and legal persons[214] cannot be palliated by interpreting all-encompassing formulae, such as "everyone" or "no one", as including legal persons, because they are not only used in case of rights typically relied upon by legal persons (privacy and protection of personal data, property, equality, or right to an effective remedy and to a fair trial[215]) but also rights that are the exclusive domain of physical persons (life, physical integrity, etc).[216] In terms of our immediate focus of analysis, case law (mostly by the ECtHR, though the approach is shared by the two courts) has determined that legal persons can be the subject of violations of due process rights,[217] property rights,[218] non-discrimination rights,[219] and privacy rights,[220] but also of freedom of association[221] and freedom of expression.[222] It remains to be seen whether, in respect to some fundamental rights (mainly those of procedural content), the conditions of whose effective exercise might in theory be different for natural and legal person taking into account their diverse organizational and economic status, it shall be possible, as we would be inclined to believe, to finely tune the mode of exercise of such rights depending on such circumstances (e.g. granting proportionate but shorter terms for defense to well structured legal entities or making it automatic the publication of the sanctions also in respect of legal entities).

Finally, given that property rights can clearly be held by companies, this creates a relevant issue with the standing of shareholders to sue on behalf of the company for interference with its property. In principle, this "procedural veil piercing" should be exceptional, and, at least the ECtHR will not admit

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213 Articles 43-45 EU Charter.

214 This can also be seen in the fact that, in Article 16 of the EU Charter, the freedom to conduct a business, typically exercised by legal persons, is formulated in impersonal terms, stating that: "The freedom to conduct a business in accordance with Union law and national laws and practices is recognised".

215 Articles 8 ECHR, and 7-8 of the Charter (property), Article 17 of the Charter (property; the ECHR expressly distinguishes "legal persons" rather than using the "everyone" formula); Article 14 ECHR and Article 20 of the Charter (equality; Protocol 12 of the ECHR (also on non-discrimination) makes a reference to "all persons" in its Preamble); Article 6 of the ECHR, and 47 of the Charter (fair trial rights). The other provisions on rights related to the administration of justice (presumption of innocence, right of defense, legality principle, or *non bis in idem*) of Articles 48-50 also include references to "everyone" or "no one". The "everyone" formula is also used with rights that may be relied upon in certain cases, such as freedom of expression and association, (Articles 10-11 of the ECHR, articles 11-12 of the Charter), and principles, such as the right to liberty and security (Article 5 of the ECHR, and Article 4 Protocol 4 of the ECHR; and Article 6 of the Charter).

216 Articles 2-4 ECHR, and Articles 1-5 of the Charter.

217 See e.g. *Stran Greek Refineries and stratis Andreadis v Greece* (1994) EHRR 29.

218 *Lithgow v United Kingdom* (1986) 8 EHRR 245.

219 *Pine Valley Development Ltd v Ireland* (1991) 14 EHRR 319.

220 *Societé Colas Est and others v France* 37971/1997, *Niemietz v. Germany*, 13710/88 16 December 1992.

221 *Sunday Times v United Kingdom (No 1)* 6538/74, 26 April 1979.

222 *Autronic v Switzerland* 12726/87, 22 May 1990.

shareholders' claims for the diminution in value of their shares resulting from an interference with the property of the company.[223]

The conclusion should be similar with regard to the EU Charter, though such conclusion is more tentative. In its judgment in DEB the CJEU confirmed that its scope was not necessarily limited to natural persons, and its provisions can be relied upon by legal persons, though the Court will regard the wording, scheme within the Charter and overarching purpose of the provision in order to determine that (in the specific case, due process rights were not excluded).[224]

B. Substantive limits to regulatory/supervisory action: fundamental rights and other substantive rights

1. *Substantive limits based on economic freedoms (property, freedom of enterprise and freedom of establishment and services)*

Having analysed the issues related to the more general framework of fundamental rights, this section deals with the issues pertaining to the domain of the specific rights. Although the situations involving fundamental rights in a supervisory context can be countless, the rights more usually engaged in case of regulatory, supervisory and sanctioning actions will be property rights and freedom of enterprise, privacy rights, and due process rights.

An analysis of existing case law on the right of property shows the reluctance of EU courts to treat it as a "normal" fundamental right. Despite its inclusion in the EU Charter (article 17), many decisions by the CJEU or the TGEU begin the analysis by stating the now-familiar coda that the "right of ownership cannot be understood as an absolute prerogative, but must be seen with reference to the function it plays in society".[225] Since it is difficult to find a fundamental right that is "absolute", it is difficult to draw a definite conclusion about whether this contrast (individual right – social function) impacts the construction of the

223 In A330-A (1995) *Agrotexim v. Greece* the ECtHR disagreed with the Commission on Human Rights, and rejected that shareholders could claim a diminution in the value of their shares resulting from the expropriation of the land of the company they were shareholders. The Court held that, in light of the frequent disagreements between board and shareholders, as well as between shareholders themselves, accepting this construction could cerate problems as to whom has the right to claim.

224 Case C-279/09 *DEB* (2010) ECR I-9199 at 38-40.

225 14 May 1974, *Nold KG / Commission* (4-73, Rec._p._00491); 11 July 1989, *Schräder / Hauptzollamt Gronau* (265/87, Rec._p._02237) (cf. al. 15-19); 3 July 1989, *Wachauf / Bundesamt für Ernährung und Forstwirtschaft* (5/88, Rec._p._02609) (cf. al. 18-19, 22); 30 July 1996, *Bosphorus / Minister for Transport, Energy and Communications e.a.* (C-84/95, Rec._p._I-3953) (cf. points 21-26); 10 July 2003, *Booker Aquaculture et Hydro Seafood* (C-20/00 et C-64/00, Rec._p._I-7411) (cf. points 68, 78-83, 84-86, 93, 95, disp. 1-3); 30 June 2005, *Alessandrini e.a. / Commission* (C-295/03 P, Rec._p._I-5673) (cf. points 86, 88-91); *Van den Bergh Foods / Commission* (T-65/98, Rec._p._II-4653) (cf. points 170-171); 12 July 2005, *Alliance for Natural Health e.a.* (C-154/04 et C-155/04, Rec._p._I-6451) (cf. points 126-129); 13 July 2011, *Schindler Holding e.a. / Commission* (T-138/07, Rec._p._II-4819) (cf. points 187-190); 28 May 2013, *Trabelsi e.a. / Conseil* (T-187/11) (cf. points 75, 78-81, 91, 93-96)

right itself (by operating a teleological reduction or expansion depending on the social function played by the specific type of property), or else the analysis about the proportionality of the measure undertaken by the courts (by granting a wider margin of appreciation to public authorities in their interpretation of the suitability, necessity and proportionality of the measure).

Be it as it may, case law by EU courts is not as developed with the right of property as it is with other rights, and it is generally tolerant to public intrusion on the right of property. Both the General Court and the CJEU tend to follow a script, where they contrast the right and its social function, they indicate that measures are admissible as long as they are not disproportionate, and do not affect the "essence" of the right, and, normally, they validate the public action, which, for these courts, consists normally on a restriction on the use of property, resulting from regulations,[226] or orders by national courts[227] or EU institutions (e.g. in abuse of dominant position cases);[228] or the diminution of value of a company's interests resulting from regulatory changes.[229]

Case law on freedom of enterprise does not offer better guidance,[230] other than to confirm that the EU Courts tend to uphold public interference by EU regulations and institutions with the right when such restrictions are related to public health,[231] broadcasting rights,[232] labour regulations,[233] or price caps on

226 See e.g. 12 July 2005, *Alliance for Natural Health e.a.* (C-154/04 et C-155/04, Rec._p._I-6451) (cf. points 126-129) (Directive 2002/46/EC, on food supplements); 30 June 2005, *Alessandrini e.a. / Commission* (C-295/03 P, Rec._p._I-5673) (cf. points 86, 88-91) (centralized system of tariff quotas); 10 December 2002, *British American Tobacco (Investments) et Imperial Tobacco* (C-491/01, Rec._p._I-11453) (cf. points 149-153) (Directive 2001/37/EC Tobacco Directive)

227 See e.g. 15 January 2013, *Križan e.a.* (C-416/10) (cf. point 116, disp. 4) (order by a national court in application of EU provisions on environmental protection)

228 See, e.g. 13 July 2011, *Schindler Holding e.a. / Commission* (T-138/07, Rec._p._II-4819) (cf. points 187-190)

229 See, e.g. 22 January 2013, *Sky Österreich* (C-283/11) (cf. points 34-35, 38-40) (request for additional compensation as a result of reduction in value of exclusive TV rights arising from the entry into force of Directive 2007/65/EC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

230 The well-known reference to the need to understand the right as not an absolute prerogative is widespread in cases predating the EU Charter 30 July 1996, *Bosphorus / Minister for Transport, Energy and Communications e.a.* (C-84/95, Rec._p._I-3953) (cf. points 21-26); 29 January 1998, *Edouard Dubois et Fils / Conseil et Commission* (T-113/96, Rec._p._II-125) (cf. points 74-75); 28 April 1998, *Metronome Musik / Music Point Hokamp* (C-200/96, Rec._p._I-1953) (cf. points 21, 23-26); 20 March 2001, *Bocchi Food Trade International / Commission* (T-30/99, Rec._p._II-943) (cf. points 80-81);

231 See 12 July 2012, *Association Kokopelli* (C-59/11) (cf. points 39-40, 43-44, 47-49, 60, 79), on the Directives 2002/55/EC and 2009/145/EC on the marketing of seeds; 6 September 2012, *Deutsches Weintor* (C-544/10) (cf. points 49-53, 55-56, 58, 60, disp. 2) (restriction for wine producer on the use of terms such as "digestive"); 16 September 2013, *ATC e.a. / Commission* (T-333/10) (cf. point 190) (restrictions on import of birds caught in the wild); 17 October 2013, *Schaible* (C-101/12) (cf. points 26, 28, 35, 42, 59, 75 et disp.) (electronic identification of sheep and goats); 14 December 2004, *Swedish Match* (C-210/03, Rec._p._I-11893) (cf. points 72, 74)(tobacco products)

232 22 January 2013, *Sky Österreich* (C-283/11) (cf. points 44-47, 66-68 et disp.)

233 9 September 2004, *Espagne et Finlande / Parlement et Conseil* (C-184/02 et C-223/02, Rec._p._I-7789) (cf. points 51-52, 56, 58)

roaming services.[234] *Only in Alemo-Herron* the CJEU held that the freedom of contract (in this case, the freedom of a transferee of a business to participate in the negotiation process to determine the rights of its employees) was impaired by the automatic subjection, by domestic provisions, to collective bargaining agreements he could not negotiate.[235] Thus, even if it is possible to see a review stricter with interferences arising from domestic provisions, than with interferences resulting from EU rules, precedents show that freedom to conduct a business, at least in the CJEU case law, hardly constitutes a limit to legislative or regulatory interventions.

Case law of the ECtHR in relation with the protection of property is more developed. The autonomously interpreted concept of "possessions" includes clientele[236] and the economic interests associated with the running of a business, especially in the context where a licence is revoked.[237] It also includes shares in a company.[238] However, the right to acquire property in the future is not protected. In other words: the expectation of future profits based on a specific regulatory status quo cannot be considered as "possessions".[239]

This is consistent with the scheme of protection envisaged by the ECtHR in relation with the provision, and formed by three limbs: one, general principle of free enjoyment of possessions, two, protection against expropriation, three, States' right to control the use of property.[240] Most cases involving the specific application of regulatory measures are treated under the third limb,[241] and, even though a proportionality test is applied, it is relatively benign with pubic interference. The ECtHR has reiterated that, in principle, due to the direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken; a "margin of appreciation" that is particularly wide when it involves general measures of social impact.[242] This also influences

234 Case C-58/08 *Vodafone Ltd et al*, 8 June 2010.

235 C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd*, 18 July 2013.

236 A101 (1986) *Van Marle v. the Netherlands*; *Iatridis v. Greece* 25 March 1999.

237 A159 (1989) *Traktörer Aktiebolag v. Sweden* .

238 *Tre Traktörer Aktiebolag v. Sweden* (Appl. No. 10873/84), judgment of 7 July 1989, *Ser.* A, No.159.

239 Application No. 8410/78, *X v. the Federal Republic of Germany* (1979).

240 *Sporrong and Lönnroth v. Sweden* A52 (1982).

241 Even in the case of *AGOSI v. the United Kingdom* A108 (1986), where gold coins were seized by British authorities, the ECtHR considered that the seizure of the coins were measures taken for the enforcement of an import prohibition. However, in *James v. the United Kingdom*, A98 (1986) the Leasehold Reform Act 1967, which gave long leaseholders (tenants) the right to buy the freehold (ownership) at less than market value, was considered from the prism of "deprivation" over property.

242 *James and Others v. the United Kingdom*, 21 February 1986, Series A no. 98; *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, para. 80.

the proportionality analysis, where the Court typically abstains from deciding whether public authorities could have found a "better" solution.[243]

The resolution of the *Grainger v UK* case (also known as the *Northern Rock*) case was consistent with this approach.[244] The circumstances that gave rise to the dispute were the financial support (using lender of last resort (LOLR) facilities) of Northern Rock by public authorities, and, in light of the inability to find a private solution, its nationalization.[245] The expert hired to determine the valuation was instructed to make the valuation under the assumption that Northern Rock was unable to continue as a going concern and was in administration[246] ; and, on that basis, decided that there would be no residual value in the company, and thus no compensation would be payable.[247] Investors in Northern Rock's shares appealed to courts in the UK pursuant to breaches of Article 1 Protocol 1, but the courts dismissed the claim; and the ECtHR upheld the UK courts' decision. The only measure that was discussed was the statutory instruction to the independent valuer to consider that Northern Rock could not continue as a going concern.

In addition to this, the ECtHR applied to this case the type of limited review (under which the measure in question has to be "without reasonable foundation" to be in breach of the Convention) normally reserved for complex social legislation (e.g. housing).[248] In doing so, it did not give much consideration to the argument of whether regulatory authorities were partly responsible of the Northern Rock debacle,[249] and accepted the public authorities' argument that the assumption of

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243 I.e. public authorities have a margin of appreciation to decide which may be that solution, within the range of options available. Clear examples of this are the cases where the ECtHR had to examine the validity of rent control legislation, which imposed restrictions on the property of landowners, in *Mellacher v. Austria*, A169 (1989), para. 48; or legislation giving a purchase option of long leaseholders, in *James v. the United Kingdom*, A98 (1986).

244 Application 3490/10 *Grainger and others v United Kingdom*, Judgment of 10 July 2012 (hereafter *Grainger v UK*).

245 The two private sector proposals presented involved continuing financial support from the government, and it was considered that the taxpayer would not receive good value. The power to nationalise Northern Rock was conferred on the Government by the Banking (Special Provisions) Act 2008 ("the 2008 Act"), which was passed into law on 21 February 2008. The nationalisation of the company was effected by the Northern Rock plc Transfer Order 2008. *Grainger v UK* at 13.

246 According to Article 36(5) of BRRD – not in place at the time of Northern Rock collapse - the valutation of the independent expert "shall be based on prudent assumptions, including as to rates of default and severity of losses. The valutation shall not assume any potential future provision of extraordinary public financial support or central bank liquidity assistance provided un non-standard collateralisation, tenor and interest rate terms to the institution or entity". An identical provision is set out in Article 20(6) of the SRM Regulation.

247 The assumptions to be made were stipulated in the Northern Rock plc Compensation Scheme Order 2008. *Grainger v UK* at 18.

248 E.g. *James and Others v. the United Kingdom*, 21 February 1986, Series A no. 98. In *Grainger v UK* the Court expressly stated that "a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy" *Grainger v UK* at 36 (the underlining is ours).

249 The Court held that: "The applicants have not established that the State authorities acted negligently in their dealings with Northern Rock or, more generally, in their handling of the financial turmoil of the Autumn of 2007. Nor have they established that Northern Rock's liquidity problems were caused by any act of the State authorities. Moreover, even assuming that the applicants could establish some fault on the part of the State, again the Court does not see that the terms of the Compensation Scheme would have prevented

the absence of public support was necessary to avoid moral hazard. The aim of the LOLR function is to protect the system, not to protect a specific bank, which is in line with the ECtHR's case law stating that Article 1 of Protocol 1 does not impose any general obligation on the Contracting States to cover the debts of private entities.[250]

Even if these arguments are reasonable, it is worth noting, first, that the ECtHR did not discuss the limb of the property protection test under which the measure should have been incardinated, i.e. whether it was an "expropriation", a "control of use", or "interference". Its brief discussion of compensation issues could suggest that it was treating the matter under the expropriation rule, but, given that, by the Court's own admission, lack of compensation is only permissible "in exceptional circumstances",[251] it seems as though the Court preferred to leave the matter open.[252] In second place, the decision did not discuss the whole intervention, including the compulsory transfer plus the valuation with instructions (everyone agreed that Northern Rock was not viable without public intervention). In light of the facts, it would not have made much difference, but it could have helped clarify the framework for other interventions made under less clear circumstances.

Finally, and most important, the Court left out an argument raised by the plaintiffs before domestic courts and the ECtHR, which is the difference in treatment between Northern Rock, and HBOS and Royal Bank of Scotland, nationalized barely a year after Northern Rock.[253] One can only speculate as to why, and the fact that the plaintiffs referred to the different treatment as grounds to illustrate the lack of proportionality made the argument easy to ignore, but the more interesting line of inquiry would have been opened if the plaintiffs had alleged discrimination.

The reading of the Convention's provision on non-discrimination is quite narrow, as it refers to discrimination on the "enjoyment of the rights and freedoms" protected by the Convention (article 14), but the inclusion within the article of the more dangerous grounds of discrimination (gender, race, origin, religion, political opinions…) of "property" has given rise to some case law on discrimination on grounds of property, between, for example, landlords of property on long and short term leases[254] (where the Court found the discrimination justified), and small

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the Valuer from taking the equitable approach they advocate if he had considered it appropriate". *Grainger v UK* at 41.

250 *Ibid* at 42, with reference to *Kotov v. Russia* [GC], no. 54522/00, para. 111, 3 April 2012.

251 *Grainger v* UK at 37, with reference to *Jahn and Others v. Germany* GC, nos. 46720/99, 72203/01 and 72552/01, para. 117, ECHR 2005-VI.

252 Getting into matters of classification could have created more problems. Given the existence of a compulsory transfer, it was hard to characterize the measures as "control" of use; and thus the only category available was "interference".

253 *Ibid* at 32.

254 *James and Others v. the United Kingdom*, 21 February 1986, Series A no. 98.

and large landowners (where it found the distinction unjustified).[255] Whether such cases are comparable to the difference between some banks and others is debatable, but if the plaintiffs had been able to prove that the circumstances of HBOS and Royal Bank of Scotland, and those of Northern Rock, were otherwise comparable, the Court would have been forced to choose between unpopular options: either (a) authorities have complete discretion over which entities they intervene, in which case the question is what is the limit; or (b) if a "policy of intervention" with a reasonable basis is needed, the Court would have had to clarify how far should the authorities go in substantiating their finding that, in the case at hand, the bank was or was not systemically important, and whether such distinction is relevant in tuning the anti-discrimination and property right protection under the Convention.

The problem with option number (b) is not whether the distinction has a reasonable basis (it has) but whether it is prudent to give express legitimacy under the non-discrimination provision to a measure that promotes a "too big to fail" policy of banks, especially now that the resolution tools provided for by the SRM Regulation and BRDD can ensure continuity of essential functions systemically relevant without preventing resolution action. Even if these issues were not behind the Court's failure to acknowledge the argument, their implications alone would have justified tiptoeing over it.

Even if one considers the field where case law is more favourable to economic freedoms, i.e. that of EU fundamental freedoms, establishment, provision of services, and circulation of capital, EU Courts seem to have left interventions resulting from financial services regulations from the more rigorous analysis typical of the Court in other fields.[256] In cases such as *Commission v Germany*,[257] *Parodi*[258] or *Alpine Investments*[259] the CJEU found that domestic provisions requiring permits for the marketing of specific financial services introduced restrictions (at a time where there was no single passport system), but that those restrictions were justifiable in light of reasons of public interest.[260] In this initial case law the Court seems to have placed a preponderant importance

255 In *Chassagnou v France* (1999) 29 EHRR 615 the Court held that a requirement that small, but not large landowners should join intermunicipality hunters' associations discriminated on grounds of property, without any objective and reasonable justification.

256 Most known in its taxation cases. See e.g. Case C-196/04 *Cadbury Schweppes pic, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* ECR (2006) I-8031; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* ECR [2007] I-2157.

257 Case 205/84 *Commission v Germany*, (1986) ECR 3755.

258 C-222/95 *Société Civile Immobilière Parodi and Banque H. Albert de Bary et Cie* (1997) ECR I-03899.

259 C-384/93 *Alpine Investments BV v Minister van Financiën* (1995) ECR I-1141.

260 David Ramos Muñoz 'The Law of Transnational Securitization' *OUP* (2010) 441-442. Further cases seem to have confirmed this view, and justified the restrictions in light of overriding reasons of public interest, in money laundering cases. See Case C-212/11 *Jyske Bank Gibraltar Ltd v Administración del Estado* 25 April 2013.

on the impact of financial services on consumer protection as a justification,[261] but it seems reasonable to presume that the same view would be adopted with regard to interventions with a prudential (i.e. not consumer protection) content.[262] In light of its case law in relation to other rights, it is reasonable to presume that, if regulatory or supervisory interventions are undertaken by EU institutions, the views will be even more sympathetic. This can lend support to the idea that, since institutional integration (such as through the Banking Union) is a further step towards integration, the CJEU is more prepared to redraw the boundaries of the instruments primarily used for previous stages of integration, such as EU freedoms.

2. *Other substantive limits: supervisory competences, company law and investment protection law*

In light of the above analysis, it is reasonable to conclude that courts will be reluctant to exercise their jurisdiction on fundamental rights to set up limits to the exercise of regulatory or supervisory competences by the ECB or NCAs. With this in mind, the question remains whether there are other kind of substantive limits. First, we will focus on the interplay of SSM and SRM provisions with company law, which will be analysed in general (a); and in the specific context of corporate groups (b); and, then, as a final consideration, on the relevance of investment protection provisions (c).

a) The most obvious limits are those arising from the action of domestic provisions of company law. The potential limits can arise as a result of company law rules applicable to the specific financial institution, and those applicable to the financial group as a whole.

Among the rules applicable to the specific financial institution the most notable are the rules that regulate pre-emption rights. Unlike the United States, where the right of existing shareholders to subscribe newly-issued shares is only upheld when it is specifically introduced in the company's bylaws, the default rule being the absence of such pre-emption rights, in the EU the consensus seems to be in favour of granting shareholders (especially minority shareholders) an anti-dilution protection. Such protection is enshrined in the Second Company Law Directive, where it is stipulated that "*Whenever the capital is increased by consideration in cash, the shares must be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares.*"[263]

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261 See e.g. C-222/95 *Société Civile Immobilière Parodi and Banque H. Albert de Bary et Cie* (1997) ECR I-03899 at 22, or C-384/93 *Alpine Investments BV v Minister van Financiën* (1995) ECR I-1141 at 42. In *Alpine Investment* the Court even suggested that the stability of the market was related to consumer confidence in the system (i.e. circumscribing the broader prudential argument also to consumer protection).

262 See, for example, the repeated references to "prudential" principles in the recitals of Regulation (EU) No 575/2013 (Capital Requirements Regulation).

263 Article 33 of the Directive 2012/30/EC (recast) on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within

According to the interpretation of the provisions by the CJEU the States (or the EU) do not have a great margin of discretion to reduce the protection dispensed by the provision, or even to extend it to other constituencies. In the case *Commission v Spain* the Court held that it was contrary to the Directive to provide a pre-emption right to the holders of convertible bonds.[264] This is relevant if new hybrid instruments, such as CoCos, are used to enhance the capital cushion of financial institutions.

More important for our purposes, according to the Court, in its cases on the Greek company restructurings, *the Second Directive provides clearly, precisely and unconditionally that the shares must be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares*, which means that even if a restructuring of the company is undertaken by State authorities shareholders' pre-emption right has to be respected.[265]

Actually, in case the company's capital needs to be increased, the hypothesis under which pre-emption rights is supposed to operate (i.e. pre-existing shareholders' interest to subscribe capital) should not be bad. The problem may exist if shareholders merely insist on their pre-emption rights merely as a means to be able to sell those rights in the market, or otherwise stall the process in order to extort some benefit from the company in exchange for their waiving those rights (this seemed to be the case in the above cases decided by the CJEU). It is important to bear in mind that, according to the CJEU, national courts can decide that a certain right (including the pre-emption right) is being exercised in an abusive manner.[266] The Court, however, stated that the possibility to decide the existence of abuse was restricted in case this would limit the effective scope of protection of the provision (i.e. domestic courts could not "abuse the abuse").[267]

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the meaning of the second paragraph of Article 54 of the TFEU, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

264 Case C-338/06 Commission v Spain (2008) *ECR* I–10139.

265 See Joined Cases C-19/90 and C-20/90 *Karelia* and *Karelins* (1991) ECR I-2691; and C-381/89 *Syndesmos Melon tis Eleftheras Evangelikis Ekklisias and Others* (1992) ECR I-2111. In *Evengelikis* the Greek Organization for the Restructuring of Undertakings (OAE) was created as a public sector body in the form of a public limited company acting in the public interest, and under control of the State, and with the power of take over administration and day-to-day operation of undertakings undergoing nationalization or rationalization. In case of a company undergoing serious financial difficulties, the OAE could decide *to increase its capital, by way of derogation from the provisions in force concerning public limited liability companies,* through the approval of the competent minister, whereas former shareholders would retain their pre-emptive rights, but had to exercise them within a time-limit laid down in the decision granting ministerial approval. The company EPAS was subject to such restructuring, and former shareholders were given a month to exercise their rights, which they failed to do, and, as a result of the OAE's subscription of shares, it became the majority shareholders. It also negotiated with creditors, and approved a debt-to-capital conversion program to keep the company afloat. Once this had been done, one of the former shareholders sought to annul these decisions. The Court held that then-article 29 of the Second Directive applied to the company, and could not be derogated from by special provisions.

266 Case C-441/93 *Panagis Pafitis and Others and Trapeza Kentrikis Ellados AE and Others* (1996) ECR I-1363, at 67-68.

267 I.e. if, for example, the domestic court held that there was an abusive exercise of right merely because the plaintiff was *a minority shareholder of a company subject to reorganization measures or had*

With that in mind, it is interesting to analyze not just the specific pronouncements, but also the context and content of these decisions. In terms of context, at the time when they were decided there was a clear division between company law measures providing shareholder protection, and national law measures, regulating the restructuring of companies. As a background, there was an issue of establishing the primacy of EU law, as a means to guarantee its *effet utile*, which called for a restrictive approach towards national measures establishing exceptions to the minimum standard of protection set forth in EU law.[268] But what if the exceptional measures were established in EU law as well? In such case, it could well be argued that the EU legislator is itself drawing the balance between the need for shareholder protection, and the need for a quick restructuring, subject to legal certainty, not one that can be re-opened by former shareholders.

This argument is also supported by the subsequent evolution of the CJEU's views on abuse of rights. From an initial standpoint, where it viewed the doctrine of abuse as a means of States to modulate the exercise of rights (and thus was a matter for national courts, provided there was no suspicion of use to limit the scope of a right conferred by *EU* legislation) subsequent decisions have dealt with the abuse of rights when a right is exercised in a way that is contrary to the purpose of the *EU* legislation creating it.[269] It would not be unreasonable to presume that, if such teleological interpretation has been adopted as the main test for abuse by the CJEU, the exercise of pre-emption rights in a way that may defeat the purpose of an intervention could be considered abusive.

Still, if this argument were to be rejected by the Court, the content of the decision leaves some possibilities open. It is, first, important to note that the safeguards of the Directive apply "*as long as the company continues to exist within its own structures*", that is,

"Whilst the directive does not preclude the taking of execution measures and, in particular, liquidation measure placing the company under compulsory liquidation in the interests of

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benefited from the reorganization of the company Case C-441/93 *Panagis Pafitis and Others and Trapeza Kentrikis Ellados AE and Others* (1996) ECR I-1363, at 70.

268 This is clear in the Court's statement that the objective of establishing a minimum standard of shareholder protection "would be seriously compromised if the Member States were allowed to derogate from the provisions of the directive by maintaining in force rules — even rules categorized as special or exceptional — which make it possible to decide, by administrative measure, outside any decision of the general meeting of shareholders, to effect an increase in the company's capital without guaranteeing them pre-emptive rights in respect of the shares to be issued." C-381/89 *Syndesmos Melon tis Eleftheras Evangelikis Ekklisias and Others* (1992) ECR I-2111 at 33.

269 The landmark case is Case C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd, v Commissioners of Customs & Excise* (2006) ECR I-1655, where the CJEU, following the previous opinion of AG Poiares Maduro, held that, in the context of VAT, there would be an abuse of rights if "the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions."

safeguarding creditors' rights, it nevertheless continues to apply as long as the company's shareholders and normal bodies have not been divested of their powers".[270]

If pre-emption rights are present as long as the company continues to exist within its own structures, and its normal bodies have not been divested of their powers the question is when that change of status takes place. In the cases above the CJEU held that pre-emption rights continued to exist despite the fact that the public organism had taken administrative control, which leaves open the question of whether the conclusion would be the same in case of measures adopted by competent authorities or resolution authorities. We believe that a clear case of change of status occurs, and the exclusion of pre-emption rights is substantially in line with the CJEU case-law, when the resolution is triggered by the determination either by the resolution authority or by the competent authority that "the institution is failing or likely to fail". Indeed, at this point in time the company is bound to leave its status as a going concern, unless the appropriate resolution action is taken in the public interest for the achievement of the resolution objectives listed in Article 31(2) BRRD and 14(2) of the SRM Regulation. It should be noted, however, that resolution measures, including those implying the exclusion of pre-emption rights, are adopted only once "having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures (herein included an increase in capital subscribed by existing shareholders) "would prevent the failure of the institution within a reasonable timeframe". Such a condition provides, albeit indirectly, a sufficient protection of the property rights of existing shareholders, and namely of their pre-emption rights, because it provides in practice a reasonable time frame for them to table and adopt an increase of capital before the resolution conditions are met or the resolution measures adopted. A similar conclusion can be reached with regard to the power to write down and convert capital instruments granted to the resolution authority by Article 59 of the BRRD and Article 21 of the SRM Regulation. Although the write down and conversion tool can be adopted "independently of resolution action", it is subject to a determination by the resolution authority that either the conditions for resolution have been met or the entit "will no longer be viable" unless the power is exercised. Both the BRRD and the SRM Regulation rightly clarify, however, that an entity is deemed to be "no longer viable only if both the following conditions are met: (a) the institution or the entity or the group is failing or likely to fail; (b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures (herein included an increase in capital subscribed by existing shareholders) "would prevent the failure of the institution within a reasonable timeframe".

In turn at the stage where the financial institution is put in a "special management" situation,[271] normal bodies are divested of their role and in such

270 *Ibid* at 27.

271 Article 35(2) of Directive 2014/59/EU states that: "The special manager shall have all the powers of the shareholders and the management body of the institution."

cases the decision (and the control of the special manager) is exercised by the resolution authorities, not competent supervisory authorities.[272] In contrast, the situation seems to be less clear-cut in the "early intervention" stage, when competent supervisory authorities, including the ECB, may decide to appoint a temporary administrator.[273] Such an appointment is limited, and, although the appointment can result in the replacement of the functions of the institution's "management body", corporate bodies, such as the board of directors or the shareholders' meeting (to which a specific reference is made) are not replaced,[274] and the appointment must be compliant with company law.[275] Thus, in principle every decision should be adopted subject to pre-emption protection.

Naturally, competent authorities can still rely on the Second Directive's provisions, which allow the company to exclude pre-emption rights via a resolution of the shareholders' meeting, in which case the "*administrative or management body shall be required to present to such a meeting a written report indicating the reasons for restriction or withdrawal of the right of preemption, and justifying the proposed issue price*."[276] In a context of financial stress, obviously, it should not be difficult to justify the cancellation or restriction of the pre-emption as a means to speed-up the process, and a price that makes the offering attractive in a way that guarantees the entity's future, which is in its best interest.

This opens a more general question about what the "company interest" is. In most countries company directors can be sued in case they act against the company's interests,[277] and, in some countries, a company decision (even one adopted by the shareholders' meeting) can be annulled if it is shown to be against that interest.[278] It is interesting to note that some countries have introduced, as an additional requirement to issue shares without pre-emption rights, that the "company interest" requires it (or a similar test based on open-ended concepts),

272 See Article 35(1) and (2) of Directive 2014/59/EU.

273 Articles 28-29 Directive 2014/59/EU.

274 Article 29(5) of Directive 2014/59/EU states that: "the temporary administrator may exercise the power to convene a general meeting of the shareholders of the institution and to set the agenda of such a meeting only with the prior consent of the competent authority", whereas para. (7) of the same provision states that: "The appointment of a temporary administrator shall not last more than one year. That period may be exceptionally renewed if the conditions for appointing the temporary administrator continue to be met. The competent authority shall be responsible for determining whether conditions are appropriate to maintain a temporary administrator and justifying any such decision to shareholders".

275 Article 29(2) of the Directive 2014/59/EU stipulates that: "The competent authority shall specify the powers of the temporary administrator at the time of the appointment of the temporary administrator based on what is proportionate in the circumstances. Such powers may include some or all of the powers of the management body of the institution under the statutes of the institution and under national law, including the power to exercise some or all of the administrative functions of the management body of the institution. The powers of the temporary administrator in relation to the institution shall comply with the applicable company law". Para. (8) of the same provision reiterates that: "Subject to this Article the appointment of a temporary administrator shall not prejudice the rights of the shareholders in accordance with Union or national company law."

276 Article 33(4) Directive 2012/30/EC (recast).

277 See e.g. Sections 172 and 175 in relation with 260 *et seq* UK Companies Act 2006.

278 See e.g. Article 204 of the Spanish Capital Companies Act.

an enhanced protection that the CJEU has found to be compatible with the Second Directive.[279] But the concept has broader implications, and could subject to challenge decisions adopted as a result of instructions or acts of competent authorities which do not entail share issuances or capital increases.

Without the need to open the more general debate as to whether the "shareholder value" model is the most appropriate in general, it is certainly true that in the banking sector – and particularly in the wake of the BRRD and of the SRM regulation - corporate governance is somehow different, also creditors (and especially holders of bail-inable liabilities) run part of the risk and there might be, especially in the "twilight zone" when the viability of the institution or the group becomes doubtful, controversial decisions to be taken where the best interest of creditors, or even the public interest might prevail over the interest of the shareholders. The swiftness of interventions by competent authorities should not obscure the fact that they are normally adopted with the aim of protecting constituencies such as depositors, clients, or the system as a whole.[280]

Comparative case law on company law, however, is not very sympathetic to this broader view. In the United States there was an initial pronouncement in the *Credit Lyonnais* case, where the court exempted a director who had made decisions that were arguably against the interest of shareholders, but in the interest of creditors in a situation of financial distress, on the basis of a broader community of interest,[281] but such pronouncement was later dismissed by other courts.[282] In other countries, the law contemplates the need to take into consideration the company interests as a whole, including different constituencies[283], but it is unclear to what extent such pronouncements are actionable (i.e. whether it creates a liability exemption in case an action is adopted in the interest of a particular constituency, e.g. depositors).

This can subject authority-appointed managers, or temporary administrators, and the competent authorities that appointed them, to an extremely difficult tension in their choices, which is why EU rules exclude temporary administrators from the characterization as "shadow directors" or de facto directors.[284] But that still provides no guidance as to how they, are supposed to act. Supposedly those acts have to be in compliance with company law, and protect the interests of shareholders, and yet the *role and functions of the temporary administrator shall be specified by competent authority at the time of appointment and may include*

279 Case C-43/95 *Siemens AG and Henry Nold* (1996) ECR I-6028.

280 See, e.g. Article 31 of Directive 2014/59/EU on "resolution objectives".

281 *Credit Lyonnais Bank Netherland, N. V. v Pathe Communications Co.,* 1991 Del. Ch. (Dec. 30, 1991).

282 See *Production Resources Group, L.L.C. v. NCT.Group, Inc.*, 863 A.2d 772 (Del. Ch. 2004), and *North American Catholic Educational Programming Foundation Inc. v. Gheewalla,* 2007 Del. LEXIS 227 (Del. Supr. May 18, 2007), which can be considered an overruling of even the milder view in *Credit Lyonnais*.

283 Section 172 UK Companies Act 2006.

284 Article 29(10) Directive 2014/59/EU.

ascertaining the financial position of the institution, managing the business or part of the business of the institution with a view to preserving or restoring the financial position of the institution and taking measures to restore the sound and prudent management of the business of the institution,[285] which may, or may not, be in the company's interest (if that is defined as the maximization of profits). The question is even more pressing when competent authorities require the removal of the senior management or management body of the institution, since the new managers are not, in principle, subject to instructions by the authorities, nor shielded from liability. They might as well be subject to removal by shareholders in the jurisdictions where company laws so provide.

In practice, given the precarious situation of a financial entity which is subject to intervention measures the ECB and NCAs may find shareholders keen to cooperate with any decision that guarantees the future of the company, and it is unlikely that courts will find that certain measures adopted by the authority-appointed managers or administrator were against the interest of the financial institution, when not doing so would have precipitated the entity's financial collapse. However, this view underestimates the probability that, in a situation of financial distress, a significant stake of the firm is acquired by hedge funds, or similar entities, specialized in using litigation as a means of pressure to maximize the value of their holdings. The fact that precedents such as Northern Rock (see supra) paint a more optimistic picture for public authorities than private shareholders should not lead to complacency. The Northern Rock case was decided on the basis of the fundamental right of ownership, which does not protect a specific status quo, and accepts public interference subject to proportionality. It is not possible to draw the same conclusion if the rights involved are those arising from the less compromising rules of company law, at least not without a note of caution. In this vein, we consider very likely that the CJEU shall be confronted with the question on how to align with the fundamental rights of shareholders (property right and freedom of enterprise) the provision set out in the BRRD under Article 47(1) and in the SRM Regulation under Article 17 requiring, in the implementation of the bail-in tool and write down and conversion instruments, that "the conversion shall be conducted at a rate of conversion that severely dilutes existing holdings of shares or other instruments of ownership". This cautions against a punitive implementation of these provisions by competent authorities[286].

b) The second limb of our analysis of regulatory and supervisory action by the ECB and NCAs concentrates on the law of corporate groups. Corporate groups are now so widespread that it is practically impossible to find a single listed entity, large in size that does not form part of a group structure (as parent or subsidiary). Thus, one cannot limit the analysis to the implications of company law for regulatory/supervisory action under the narrow assumption that the supervised entity will be a stand-alone company. Rather, the supervised entities will form

285 Article 29(3) Directive 2014/59/EU.

286 See Eba 'Draft guidelines on the rate of conversion of debt to equity in bail-in' *Consultation paper* EBA/CP/2014/39 11 November 2014.

part of a group, which, more often than not, will act in a concerted manner, following the dictations of the parent company, or through the coordination of its different parts.

The discussion of the implications of the action of competent authorities is made even more difficult by the fact that the approaches towards corporate groups are very variable across the different jurisdictions. Even though most countries have some kind of definition of "group" (if only because they are subject to International Financial reporting Standards, which require consolidated accounting)[287] most (traditionally Germany or Portugal, more recently also Italy being the main exception)[288] do not contemplate specific rules to resolve the situation of conflict of interest between the different entities belonging to a group.

In countries like Germany the so-called "group interest" justifies the giving of directions from one company to another, even when detrimental to the subsidiary.[289] Such directions, however, are only possible if there is a "control agreement", in the absence of which any detrimental act has to be compensated within the fiscal year.[290] Even in the presence of a control agreement, the legal representatives of the controlling enterprise are subject to liability for their acts.[291] This theory of compensatory advantage has also been recognized in countries like Italy initially by case law,[292] and later by reformed statutory provisions,[293] while the courts also indicate that a director is not exempted from liability for the mere fact that the company belongs to a group and he acts in favour of the group.[294] In France, on the other hand, the issue has been subject only to court analysis. The doctrine in the case *Rozenblum* held that, to be exempt from criminal liability in a group context, the directors had to act for a common economic, social or financial interest, in the context of an elaborate policy for the whole group, which may not be exempt of consideration or breach the balance between the respective commitments of the companies involved, nor exceed the financial possibilities of the company that withstands the burden.[295] This constitutes the view in France, though, being a criminal case, it is difficult to conclude with certainty to what extent the third limb of the test (i.e. the need only that there is some consideration, and that the support does not exceed the financial possibilities) can be extrapolated to a case where the issue is the civil liability of the directors, or the validity of the decision adopted. According to some studies, all countries (France included), requires that the transaction be effected in fair conditions.[296] Exceptionally, in Spain courts

287 See IFRS no. 10.

288 See Sections 308 *et seq* Share Companies (*Aktiengesetz*) Act.

289 Section 308 Share Companies (*Aktiengesetz*) Act.

290 Section 311 Share Companies (*Aktiengesetz*) Act.

291 Section 309 Share Companies (*Aktiengesetz*) Act.

292 Cass. Civ. 11 March 1996, n. 2001 *Giur. comm.* (1996) N. 23.5 II 643.

293 Articles 2497 – 2497*septies* Italian Civil code.

294 Cass. Civ. 24 August 2004, n. 16707 *Fiorini c. Scotti finanziaria s.p.a.*.

295 Cour de cassation chambre criminelle 4 February 1985 No. Pourvoi 84-91581.

296 See 'Study on the feasibility of reducing obstacles to the transfer of assets within a cross border banking group during a financial crisis' (2009) Final Report ETD/2008/IM/H1/53 61-70.

have not expressly acknowledged the interest of the group, and some transactions have been held invalid by the courts (i.e. not just susceptible of compensation) for being against the subsidiary's interest.[297] In the European Model Company Act (EMCA), chapter 16 codifies, under section 9, the right of a parent company to give instructions to the management of a subsidiary and under section 16 the relevance of the interest of the group, stipulating that "if the management of the subsidiary, especially as a result of an instruction issued by the parent company, takes a decision which is contrary to the interests of its own company, it shall not be deemed to have acted in breach of their fiduciary duties if (a) the decision is in the interest of the group as a whole; (b) the management may reasonably assume that the loss/damage/disadvantage will, within a reasonable period, be balanced by benefit/gain/advantage and (c) the loss/damage/disadvantage does not include any which could place the continued existence of the company in jeopardy". The requirement of letter (b) does not apply where the subsidiary is wholly-owned.

A quite similar special regime has been set forth for banking groups in the context of intra-group financial assistance with chapter III of the BRRD. EU rules introduce the matter in a way that looks unobjectionable, i.e. through a prior contracts determining mutual financial assistance, to be concluded between parties under arm's length conditions, and where consideration and profit are considered in the calculation of the contract conditions by the different entities, "taking account of any direct or any indirect benefit that may accrue to a party as a result of provision of the financial support".[298] It is difficult, however, to gauge in advance, based upon the case law mentioned above, the impact that company law shall have on the enforcement of such statutory regime. The difficulty, of course, is that indicating what the group entities must do does not necessarily turn it into a reality, since the courts will be expected to appraise the extent to which the conditions stipulated in the Directive were fulfilled at both the time of the conclusion of the contract and of the provision of group financial support. Quite critical issues, in this respect, shall be both the determination of the consideration to be paid for the provision of the group financial support and the determination whether the conditions for such support (herein included that requiring a reasonable prospect that the support redresses the situation and the loan will be reimbursed) are really met in the circumstances.

c) Since substantive rules (fundamental rights or company law rights) do not entail a visible limit to regulatory/supervisory action in the context of SSM and SRM the question is whether such limits could stem from a source as improbable as investment protection treaties. True, standards of investment protection have traditionally evolved along the lines of cases of expropriation (blatant or in disguise). But investor activism (and good representation) and a relatively pro-investor stance in arbitral tribunals has led to consequences that were probably not expected by the States that ratified Bilateral Investment Treaties (BITs) or Multilateral Investment Treaties (MITs), including broad clauses, such as "Most

297 Supreme Court Decisions of 12 April 2007, RJ 2007/2410; and 17 January 2012, RJ 2012/4981.

298 Article 19 (6) – (7) Directive 2014/59/EU.

Favoured Nation" (MFN), "Fair and Equitable Treatment", or "Full Protection and Security".[299]

It is not possible to undertake here a full analysis that takes account of the rich body of law developed by investment tribunals, but a few remarks will suffice to illustrate our point that investment protection law can also be relevant in the present context.

First, the protection against "expropriation" envisaged in the Treaties is no longer restricted to direct expropriations, but also extends to indirect expropriations effected through regulatory action. Normally, a distinction is drawn between regulatory measures, which the investor has to endure, and expropriation measures, which carry with them the obligation of compensation, a distinction based (a) on the severity (economic impact) of the measure[300] (which can include the appointment of a manager if that manager interferes with the property involved);[301] and (b) on the existence of a purpose or intention to expropriate (though this is not essential, and it is not necessary to prove it).[302]

Second, in interpreting the "Fair and Equitable" treatment standard, arbitral tribunals have been prepared to go further, and hold that such standard protects the "legitimate expectations" of the investor,[303] which include the legal environment at the moment when the investment was made, to the extent that the investor relied on such legal environment at the moment when the investment was made.[304]

Naturally, the "fair and equitable" standard does not imply that States completely lose their ability to pass new regulation, so that the regulatory system becomes ossified. However, it would be equally wrong to associate investment protection with egregious abuses in faraway countries. Breaches of investment protection standards have been found in situations other than classical expropriation, involving changes in regulation or licensing, which violated the "legitimate expectations" of investors, and arbitral tribunals do not write a blank check to the States in "crisis" cases.[305]

Finally, no one should find comfort in the fact that the vast majority of precedents concern investments in energy, construction and infrastructure, not

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299 For criticism of the unpredictability that this causes, see Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham L. Rev.* 1521, 1558 et sqq..

300 See, e.g. *Metalclad Corp. v United Mexican States,* Award 30 August 2000, 5 ICSID Reports 225; *CME v Czech Republic* Partial Award, 13 September 2001.

301 *Tippets, Abbet, McCartthy, Stratton v TAMS-AFFA Consulting Engineers of Iran*, Iran-US Claims Tribunal, 22 June 1984, 6 Iran-US CTR 219.

302 *Metalclad Corp. v United Mexican States,* Award 30 August 2000, 5 ICSID Reports 225 at 101.

303 See, e.g. *Metalclad Corp. v United Mexican States,* Award 30 August 2000, 5 ICSID Reports 225.

304 *BG Group plc v Republic of Argentina*, Final Award, 24 December 2007. See also *National Grid v Argentina*, Award 3 November 2008.

305 Argentina has been the main defendant in past years (due to the measures adopted during its financial crisis), and Spain is now (due to the derogation of the subsidies to the renewable energies sector after the crisis).

finance. In *Saluka Investments v Czech Republic* an arbitral tribunal considered the conduct of the respondent state in light of the standards of the BIT with The Netherlands, and found it in compliance with the clause of protection against expropriation, but in breach of the "fair and equitable" standard.[306] The reason was that, in the context of a systemic bad debt problem, the State provided financial assistance to only three of the Big Four Banks, to the exclusion of the entity invested in by the claimants. In so doing, the tribunal rejected the respondent State arguments that the failures of the entity were due to reckless management (supported by inspections, but contested by the plaintiff's experts) but to a bad debt problem, chronic in the financial sector. It also held that there were no justifiable reasons to deny assistance to the entity, while providing it to the others, a conduct that was only aggravated by regulatory changes.[307]

The case's surrounding circumstances recommend caution before extrapolating results. In *Saluka* the banks that received assistance were partly owned by the State, whereas the one that was left to fail was the only one that had been entirely privatized. Still, the fact that, somehow, the tribunal implied that the provision of financial assistance to some entities, and the absence of such assistance to others in a comparable situation amounts to a breach of the fair and equitable standard sits in contrast with the ECtHR's view in *Grainger v UK*,[308] where the non-discrimination argument was raised by the plaintiff, and simply ignored by the Court. From a more critical perspective, one that bears in mind the purposes of the implementation of the SSM, and, especially, the SRM, it fails to acknowledge the argument of "moral hazard". If somehow the provision of financial assistance creates some kind of "binding precedent", or, at least, a presumption of it, entities in trouble can only expect that the same treatment will be dispensed to them, which creates an incentive for a race-to-the-top in recklessness. The best way to avoid the moral hazard problem is, precisely, to make the legal environment in terms of financial assistance, and regulatory relief, unpredictable. Arguably, whereas the courts have tiptoed around the tension between these two principles in the past, at some point they will have to confront it.

The applicability of investment protection law in this context would have to face a great obstacle, such as the lack of jurisdiction of arbitral tribunals over acts committed by an institution such as the ECB. So far, there has been no precedent in this regard, and it is unlikely that investment arbitration tribunals would be so bold as to draw the implication that the acts of the ECB can be attributed to the State that ratified the investment treaty, as long as the act has legal consequences within its jurisdiction (a step the ECtHR has taken, only to give an "equivalence" blessing to the EU legal order as a whole[309]), and, least of all, that it will find a

306 *Saluka Investments BV v The Czech Republic*, Arbitration under UNCITRAL Arbitration Rules, PCA, 17 March 2006.

307 There were changes in the rules for provisioning of loan losses. Furthermore, the tribunal considered that this was a consequence of a lack of adequate protection of creditors, regarding the enforcement of security interests, which was not improved by the Czech Republic.

308 *Supra* VI.B.1.

309 *Supra* VI.A.1.

breach of the treaty by the ECB. However, an arbitral tribunal could well find that an act adopted by an NCA, even if following partially the instructions of the ECB, is in breach of an investment treaty. In light of existing precedents, and the greater willingness of investment arbitration tribunals (as opposed to the CJEU or the ECtHR) to delve into the details of the regulatory/supervisory intervention, this possibility cannot be ruled out.

C. Procedural limits to the exercise of regulatory/supervisory competences: fundamental rights of due process and sound administration

In light of the above, it seems that the ECB and NCAs can feel quite at ease about potential substantive limits to the exercise of their competences: a sound proportionality analysis is likely to be favourable to supervisors. This leaves procedural guarantees as the main safeguard for particulars and financial institutions against excessive intrusion, and as the main limit for regulatory/supervisory intervention. Defence rights, especially, have been highlighted by the CJEU as a mechanism of protection long before the EU Charter was adopted.[310] In the following paragraphs we will distinguish between the rights to a good administration (1); and the rights more related to judicial due process (though we will also include the specific rights applicable in case of the imposition of penalties) (2).

1. *Rights applicable in administrative procedures: privacy rights and defence rigths*

a) The first difficulty arises with respect to the exercise of supervisory action executed through inspections[311]. EU Courts have categorically held that fundamental rights need to be respected not only in procedures leading to sanctions, but also in preliminary inquiry procedures.[312] The question, however, is what is the degree of intrusion into the affairs of the entities subject to supervision that can be tolerable pursuant to fundamental rights. The question is only made more difficult by the fact that entities are legal persons, which does not entirely fit within the references in fundamental rights' texts to the respect of privacy of "home" (e.g. article 8 ECHR). The ECtHR, however, has considered that a company has a right to the respect of its "home", according to article 8 of the ECHR.[313]

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310 See e.g. Case 322/81 *Michelin v Commission* (1983) ECR 3461, para. 7.

311 Under Article 13 of the SSM Regulation the inspection is subject to prior judicial approval only if applicable national rules so require. For a thorough discussion of this point, partly departing from ECtHR case law, D'Ambrosio (note 24), 52

312 According to the CJEU, it is necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures including, in particular, investigations which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable. Joined Cases 46/87 and 227/88 *Hoechst AG v Commission* (1989) ECR 2919, at 15.

313 *Societé Colas Est and others v France*, para. 41; *Buck v Germany* 28 July 2005; *Kent Pharmaceuticals Limited and others v UK*, 11 October 2005.

The CJEU, on the other hand, established in its early decisions that some privacy rights, such as the inviolability of domicile, were typically rights of natural persons, but did not protect legal persons; legal persons only had a protection against "arbitrary or disproportionate intervention".[314] In *Hoechst*, however, the CJEU tried to establish a balance between the finality of an effective investigation, and the existence of safeguards (arising from all domestic legal systems) which introduce an element of certainty and proportionality similar to the privacy protection.[315]

In its further case law, such as *Roquette Freres* the CJEU made a systematic assessment of its early case law, and expanded its prior reasoning, using also a finalistic interpretation of the legal texts regulating the Commission's inspection powers in competition cases, to provide a roadmap of the protection against arbitrary or disproportionate intervention.[316]

This included the requirement that a court verifies that the coercive measures sought in pursuance of a request by the authority (Commission in this case) are not arbitrary or disproportionate to the subject-matter of the investigation ordered. The review has, on the one hand, to determine whether the measure is arbitrary,[317] and, on the other hand, whether it is proportionate to the subject-matter of the investigation (whether the measures are appropriate to ensure that the investigation can be carried out, and whether the measures constitute, in relation to the aim pursued by the investigation in question, a disproportionate

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314 "Although the existence of such a right must be recognized in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities". Case 85/87 *Dow Benelux et al v Commission* ECR (1989) 3150, at 28; and Joined Cases 97-99/87 *Dow Chemical Iberica* ECR [1989] 3181 at 14. The Court also made reference to Article 8 of ECHR, which refers to "private and family life".

315 In *Hoechst*, the CJEU combined a finalistic assessment of the public authority's competences (i.e. the powers must serve the purpose of complying with the competences entrusted by the Treaty) with certain requirements for certainty (e.g. the need to specify the subject-matter and purpose of the investigation). See Joined Cases 46/87 and 227/88 *Hoechst AG v Commission* (1989) ECR 2919, at 19 *et seq*. Specifically, after stating that Article 8 ECHR was not applicable to legal persons, the Court held that "None the less, in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognized as a general principle of Community law. In that regard, it should be pointed out that the Court has held that it has the power to determine whether measures of investigation taken by the Commission under the ECSC Treaty are excessive" *Ibid* at 19.

316 C-94/00 *Roquete Frères SA* ECR (2002) I-9039.

317 In other words, that there are reasonable grounds to suppose that there is an infringement of the rules that give rise to the investigation. Thus, the Commission is required to provide that court with explanations showing, in a properly substantiated manner, that the Commission is in possession of information and evidence providing reasonable grounds for suspecting infringement of the competition rules by the undertaking concerned. C-94/00 *Roquete Frères SA* ECR (2002) I-9039 at 61. The court cannot, however, request the information on the files on which the suspicions are based, nor substitute its own criterion about the necessity for the investigation.

and intolerable interference),[318] which means that that EU authority must inform the court of the essential features of the activity that gives rise to the action. In doing their review the courts are expected to take into consideration the finality of the investigatory powers involved (the uniform application of the specific rules across the EU), and the specific powers vested in the institution.[319]

In that case law the courts stated that the Commission was required to state reasons for the decision ordering an investigation by specifying its subject-matter and purpose, and to state in that decision, as precisely as possible, what it is looking for and the matters to which the investigation must relate (to protect the rights of defense of the undertakings concerned). If courts were to annul the investigation EU authorities could not use the information in bringing a further enforcement action.[320]

These standards have been reiterated in subsequent case law, such as *Minoan Lines v Commission*.[321] In *Strinzis v Commission* the CFI validated an inspection that extended to a company different than that originally inspected,[322] and held that there was no excessive interference in spite of the absence of a warrant or police order, because there was no definitive opposition by the company's employees, and the company did not bring an action afterwards.[323]

A related issue are a company's communications. According to the ECtHR they can be considered "correspondence" in the sense of article 8 ECHR.[324] It seems that the CJEU's procedural guidance resulting from the finalistic interpretation of supervisory provisions should cover a company's correspondence as well; while other case law has also developed an independent standard for communications

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318 *Ibid* at 71, 76. In particular, "it must be open to the competent national court to refuse to grant the coercive measures applied for where the suspected impairment of competition is so minimal, the extent of the likely involvement of the undertaking concerned so limited, or the evidence sought so peripheral, that the intervention in the sphere of the private activities of a legal person which a search using law-enforcement authorities entails necessarily appears manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation". *Ibid* at 80.

319 The latter, for example, results in the exclusion of non-business documents from the inquiry. See case C-94/00 *Roquete Frères SA* ECR (2002) I-9039 at 45

320 *Ibid* at 49.

321 See e.g. T-66/99 *Minoan Lines v Commission* 11 December 2003 II-5523.

322 ETA was the agent of the company originally inspected (Minoan), but part of the business of Minoan was undertaken from its agent premises. Despite the Commission agents insisted in inspecting the premises after being told that these belonged to ETA, this was found valid by the CFI, which granted the Commission some leeway in deciding where the information could actually be found. In para. 76 of the judgment the CFI stated: "It should be borne in mind in this connection that the Court has held that the right to enter any premises, land and means of transport of undertakings is of particular importance inasmuch as it is intended to permit the Commission to obtain evidence of infringements of the competition rules in the places in which such evidence is normally to be found, that is to say, on the 'business premises of undertakings' (the judgment in Hoechst v Commission, cited above, paragraph 26). In the exercise of its investigatory powers, therefore, the Commission was entitled to take into account in its reasoning the fact that its chances of finding proof of the supposed infringement would be higher if it were to investigate the premises from which the target company in fact conducted its business as a matter of practice." *T-65/99 Strinzis Line Shipping SA v Commission* [2003] II-5440.

323 *Ibid* at 81-83.

324 *Association for European Integration and Human Rights v Bulgaria*, 30 January 2008, para. 60.

between the company subject to regulatory or supervisory action and lawyers, which are subject to privilege, though the rule excludes communications with in-house lawyers.[325]

These rights have crystalized in the CJEU's case law, and form a critical part of the parties' right of defence (see below). However, the SSM Regulation and Framework Regulation exclude investigative powers from the applicability of the right of defence, which is only applicable to the "supervisory procedure" and to "supervisory decisions".[326] This is not unlike competition procedure, where hearings and rights of defence apply before a decision on infringement or penalties is adopted.[327] However, the construction is different: competition rules choose a positive formulation, and indicate that the right to be heard (and the associated rights of defence) apply *before* decisions on infringement or penalties are taken, which leaves open the possibility that certain procedural protections apply in the investigative stage, especially if these are necessary to properly protect the right to be heard in the posterior, decision-making, stage. Banking rules, on the other hand, choose a negative wording, which excludes the right to be heard from investigative stage.[328] This is a riskier path, as it may create some equivocation as to whether the typical procedural safeguards (associated to the right against disproportionate intervention) still apply during the investigative stage, as a matter of principle (as part of the broader right to a good administration) or are also excluded, and apply only to the extent recognised in the specific procedural rules.

This may look like mere semantics, but it is not, at least in our view. SSM and Framework Regulations include some procedural safeguards for the investigative stage, such as (a) in relation to requests for information, the duty to "specify the information concerned", and to give a reasonable time limit to comply,[329] (b) with regard to general investigations, the duty to indicate in the decision opening

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325 Communications are protected by attorney-client privilege *only* if (a) the exchange with the lawyer is related to the client's right of defence; and (b) the exchange emanates from independent lawyers, i.e. lawyers who are not bound by a relationship of employment. See Case 155/79 *AM & S Europe* v *Commission* (1982) ECR 1575, at 21. Thus, in-house lawyers are excluded from such protection, without this difference in treatment constituting frounds for discrimination. See Case C-550/07 *P Akzo Nobel Chemicals Ltd v European Commission* ECR (2010) I-8360, at 42-51 (no subjection to confidentiality) and 54-61 (no violation of equality principle).

326 Article 22(1) SSM Regulation, Article 31(1) Framework Regulation.

327 Article 27(1) of Regulation 1/2003 states that: "Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection."

328 E.g. Article 31 of the Framework Regulation (right to be heard) states that "Section 1 of Chapter III of the SSM Regulation shall not be subject to the provisions of this Article."

329 Article 139 Framework Regulation. Article 141, with regard to information at recurring intervals, provides that "Subject to the conditions set out in relevant Union law, the ECB may specify in particular the categories of information that should be reported as well as the processes, formats, frequencies and time limits for provision of the information concerned", the word "may" raising doubts as to whether the ECB is bound by the duty in this regard.

the investigation, the legal basis of the decision,[330] and (c) in relation to on-site inspections, the need to include the subject matter and the purpose of the on-site inspection in the decision,[331] and to notify it to the legal person subject to it,[332] as well as (d) guidelines for judicial control of the requests for on-site inspection (in line with competition procedures).[333]

However, the language chosen by the SSM and Framework Regulation does, in some respects, fall short of safeguards in competition procedures, which, for example, require to specify the subject matter *and* purpose also in requests of information.[334] Such differences, plus the open nature of some provisions, and the differences in the formulation of defense rights could be constructed in a way that gives rise to diverging supervisory practices, which begs the question of whether procedural safeguards during the investigative stage are a matter to be determined by the legislature, or strictly limited by fundamental rights. The ECB could choose the safest path, by reading the exclusion of defense rights in the investigatory stage as referring only to the right to be heard, and to access the file (see below), and adjust its practice to the well-known parameters of other regulatory authorities; or choose a riskier path, by reading the exclusion as referring to procedural safeguards in general, unless they are expressly included in its specific rules. In such scenario, the gambit could play well, if the ECB finds an accommodating Court of Justice, which tolerates divergences in the investigatory stage as long as the right to a hearing and to access the files remain robust; but it could also turn sour, if the Court finds that either the legislature is trying to derogate from the essential content of the fundamental right to a good administration, or else the ECB is misinterpreting the specific statutory provisions (either way, it could lead to the annulment of the decisions).

A final consideration involves the rights of the entities subject to inspection to protect their reputation. Although EU courts were reluctant to imply the right of inviolability for companies as part of EU law, they have followed ECtHR case law in finding that companies are entitled to certain privacy rights pursuant to article 8 ECHR. These rights are less relevant in the context of inspections, than in the context of the publication of a decision (or its disclosure to parties who so request) that can cause harm to the entity (including, in certain cases, of specific documents), e.g. a decision imposing penalties[335]. However, EU courts,

330 Article 142 Framework Regulation.

331 Article 143 Framework Regulation.

332 Article 145 Framework Regulation.

333 Article 13 SSM Regulation provides that "If an on-site inspection provided for in Article 12(1) and (2) or the assistance provided for in Article 12(5) requires authorisation by a judicial authority according to national rules, such authorisation shall be applied for." The same article, in its no. (2) regulates the test for the control of the request of an on-site inspection by the domestic court in a way in line with Article 20(8) of Regulation 1/2003, and case law by EU courts.

334 Article 18(2) and (3) and 20(3) of Regulation (EU) No 1/2003.

335 Compare D'Ambrosio (note 24), p. 66, where the correct finding that in case of penalty applied by national competent authorities to natural persons, "the publication cannot be an automatic effect (...); otherwise it would be illegal under the rules and the case law on the protection of personal data" and this begs the question whether or not the same principles should be extended to legal persons; in the affirmative,

following the ECHR, have also established that article 8 ECHR cannot be used to prevent publication of decisions causing harm to privacy and reputation when this harm stems from the acts of the entities themselves (i.e. because the acts performed were illegal).[336]

In relation to this (though the courts have not explicitly made the connection) it has also been held that companies are also granted protection of confidential information, which requires that (a) the information is known only to a limited number of persons, (b) whose disclosure is liable to cause serious harm to the person who has provided it or to third parties, and (c) that the interests liable to be harmed by disclosure must, objectively, be worthy of protection.[337] This protection has been seen as an exception by the GC, which has tended to give certain discretion to EU authorities,[338] though the CJEU seems to adopt a more protective stance towards business secrets (also to incentivize cooperation by entities subject to supervision), and to rely more on a general presumption that sensitive information is not subject to disclosure, and that it is the disclosure of specific documents that needs to be justified (on the basis of their non-confidential nature, or an overriding public interest), not the other way around.[339]

The nature of the financial sector, however, should give some pause for thought. Given their dependence on trust (which is closely connected to liquidity access) there is an argument for restricting the publication of decisions with regard to specific institutions if this can cause harm to the prospects of those institutions. These concerns are reflected in the Framework Regulation which provides for the publication in anonymous form of decisions imposing administrative penalties when these can jeopardize the stability of financial markets, an ongoing criminal investigation, or cause disproportionate harm to the entity.[340] The obligation to publish is also established for resolution orders,[341] but, significantly, such publication can be done through a simple notice summarising the effects of the resolution action and must be done "as soon as reasonably practicable" whereas, under Article 81(3) of the BRRD, the decisions adopted either by the competent authority or by the resolution authority determining the occurrence of the resolution trigger are only to be notified to other authorities under an appropriate level of confidentiality and "without delay". Little is said about other, less drastic, decisions. The absence of any provisions suggests

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the wording of Article 18(6) of the SSM Regulation taht seems to suggest an automatic publication should be constructed in light of these overarching principles.

336 Case T-341/12 *Evonik Degussa GmbH v Commission* 28 January 2015, at 125, with reference to Applications 55480/00 et 59330/00 *Sidabras & Džiautas v Lituania* Decision of 27 October 2004 para. 49, *Recueil des arrêts et décisions,* 2004VIII, p. 367, Applications no. 39627/05 and 39631/05 *Taliadorou & Stylianou v. Cyprus* Decision of 16 October 2008, para. 56, Application n° 41723/06 *Gillberg c. Suède* Decision of 3 April 2012, para. 67.

337 Case T-198/03 *Bank Austria Creditanstalt AG v Commission*, (2006) ECR II-1439, at 71.

338 *Ibid*. See also Case T-341/12 *Evonik Degussa GmbH v Commission* (2015).

339 Case C-404/10 *Commission v Éditions Odile Jacob SAS* Judgment (2012) 103-127.

340 Article 132 Framework Regulation. See also Article 112 Resolution Directive.

341 Article 83(4) Resolution Directive.

that the ECB has discretion about this. However, some general guidance would have been pertinent, in light of the fact that, in the financial sector, even the publication of some interim decision about non-compliance by an entity or group with prudential requirements (even if non-definitive, or even groundless) can condemn the entity in the eyes of the public, and turn such non-compliance into a self-fulfilling prophecy. Conversely, it gives the ECB and NCAs a sizeable lever for obtaining cooperation from the entities, under threat that information will be disclosed. In such context, courts could revise their stance, in light of the more sensitive nature of the sector, making a finalistic interpretation of the provisions on publication of information, in order to extend the protection to cases not expressly contemplated in the rules.[342]

b) For entities being the subject of supervisory action the opposite perspective of privacy rights is given by their defence rights, which also arise during the course of inspections and other administrative procedures. One determines the degree to which supervisory authorities can intrude upon the activities of the entities subject to supervision, the other the rights of these entities to take part in the procedure and access its documents. These rights are encompassed within the broader concept of a "right to good administration", under article 41 of the EU Charter. This very same right encompasses also the right – that appears to be quite significant in the context of the complex co-administration established by the SSM Regulation and in the face of the relevant matters referred to it and of the often difficult interplay of NCAs and ECB's concurring procedures - to the expedite conduct of the supervisory process and in particular to a reasonable duration of the same, albeit always respectful of the rights of defence.

Article 41 (2) (a) of the Charter enshrines the "right to be heard", which was acknowledged by the CJEU in its early case law,[343] and applies beyond procedures leading to sanctions, i.e. it applies in cases where the procedures were initiated against the claimant, or, even more broadly, whenever the procedures had an adverse impact on that claimant.[344] This right is duly included within the due process rights of the SSM Regulation,[345] and Framework Regulation,[346] in a way that closely resembles the formula used for competition procedures by

342 The argument could be made as follows: the absence of express restrictions in the publication of information in cases other than the imposition of penalties or resolution orders cannot be interpreted as an absence of such restrictions, but as a consequence of the fact that publication is only required for this type of decisions. If it becomes supervisory practice to publish other types of decisions, it is logical that the same safeguards, as reflective of principles of general application, apply with regard to them.

343 Case 17/78 *Transocean Marine Paint v Commission* (1974) ECR 1063 at 15.

344 Case C-49/88 *Al-Jubail Fertilizer c Council* (1991) ECR I-3187 at 15 (investigative proceedings prior to the adoption of the anti-dumping duty).

345 Article 22(1) of the SSM Regulation provides that "Before taking supervisory decisions in accordance with Article 4 and Section 2 of Chapter III, the ECB shall give the persons who are the subject of the proceedings the opportunity of being heard. The ECB shall base its decisions only on objections on which the parties concerned have been able to comment."

346 Article 31 of the Framework Regulation.

the Commission.[347] Thus, in principle, there should be little room for conflict.[348] However, there are several challenges for the application of this right within the current supervisory system, some obvious ones, and some perhaps a bit less evident.

Among the more obvious we include the scope of the exceptions to the right to be heard, and the content of the right. As to the exceptions, the right is only excluded *if urgent action is needed in order to prevent significant damage to the financial system*.[349] The reference to the significant damage "to the financial system", in principle means that even entities individually close to collapse must be heard. The problem is that, at least based upon this wording and in some very urgent and critical circumstances, systemically important entities may be left out of the process, as their meltdown could mean that of the financial system. The problem is even more acute, since the reference to "system" creates the illusion that there is consensus about what that means. In practice, it may be a source of problems, and even more so insomuch as the banking industry is going to gain a truly European dimension, whenever supervisory activity is undertaken with regard to a large entity with activities primarily restricted to one or two domestic markets.

In these and other complex situations the courts can use the references to the "provisional" nature of the measure, and the fact that an opportunity to be heard will be granted "as soon as possible" after the ECB takes its decision to balance the requirements of market integrity and procedural integrity, but it should not be surprising if the courts understood their function as going beyond that, and scrutinized the provisional decision itself, and annul it if it is adopted with insufficient grounds. Admittedly, such scenario seems improbable, but, with the right to be heard being a fundamental right, it cannot be restricted by the specific content of procedural regulations, even with regard to provisional measures.

The second, obvious, challenge, is the content of the right itself. The specific SSM rules provide that the ECB "may", "if it considers it appropriate", give the opportunity to be heard "in a meeting"[350] (i.e. orally), but otherwise the comments and objections will be filed in writing, within variable deadlines,[351] which seems in line with the general view of the right (which does not per se, entail a right to an

347 The resemblance with Article 27 (1) of Regulation (EU) No 1/2003 is easily noticeable.

348 Article 31 of the Framework Regulation adopts the formula of precedents by EU courts, i.e. "Before the ECB may adopt an ECB supervisory decision addressed to a party which would adversely affect the rights of such party" (the underlining is ours).

349 Article 22 (1) para. 2. In that case, "the ECB may adopt a provisional decision and shall give the persons concerned the opportunity to be heard as soon as possible after taking its decision."

350 Article 31(1) Framework Regulation.

351 Documents will have to be filed within a deadline of two weeks after the party is notified of the decision (which can be extended on application of the party, but also shortened to three working days "in particular circumstances"). Article 31(3) Framework Regulation. The notification shall contain "the material content of the intended ECB supervisory decision and the material facts, objections and legal grounds on which the ECB intends to base its decision". Article 31(1) Framework Regulation

oral hearing[352]), though it remains to be seen the use that supervisory authorities, and the ECB in particular, make of the discretionary powers to decide on oral hearings and deadlines.

Among the less obvious challenges we include the applicability of the right to be heard in the context of acts of general application, and in the context of procedures undertaken between the ECB and NCAs. Regarding the former, there is a great contrast in EU courts' views over norms of administrative, and legislative content. Whereas the courts have been willing to imply a right to be heard in purely administrative procedures specifically affecting one party as a result of a fundamental right, even if such right was not contemplated in the specific procedure, they have traditionally resisted attempts to imply a similar right in procedures that should give rise to norms of general application.[353]

This distinction makes sense to prevent the legislative process from being bogged down by endless consultation with every party affected by the measure (which also multiplies the opportunities for lobbying). However, the distinction can be problematic in the context of the SSM, where the ECB is empowered to adopt both specific and general acts, both on supervisory grounds. The test elaborated by EU courts to distinguish between different types of measures is substantive in nature but scant in detail.[354] This can create problems in an environment where systemically important players are not that numerous, and certain regulations can be perceived by the market as having "name and surname".

A clear example of this difficulty is in the use of macro-prudential tools, which are separately regulated in the SSM Regulation[355] and Framework Regulation,[356] and include increases in capital buffers, liquidity requirements and "other measures" aimed at addressing systemic of macroprudential risks.[357] These are measures susceptible of having an adverse impact on the entities affected, but, seen as "macro" prudential, there is an argument to be made that they are general, not individual, measures. There is however, much room for manoeuver in the definition of the scope of the measures, since there is little specification as to the

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352 Paul Craig 'Commentary to Article 41' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward *The EU Charter of Fundamental Rights. A Commentary* Oxford: Hart (2014), 1081.

353 Case C-221/09 *AJD Tuna Ltd v Direttur tal-Agrikoltura u s-Sajd, Avukat Generali* (2011) ECR I-1710, at 47-52 (on emergency measures for the conservation of living aquatic resources as a result of fishing).

354 In *AJD Tuna* the CJEU stated that "The criterion for distinguishing between a regulation and a decision must be sought in the general application or otherwise of the act in question (see, inter alia, the order of 12 July 1993 in Case C-168/93 Gibraltar and Gibraltar Development v Council (1993) ECR I-4009, paragraph 11). A measure is of general application if it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged in general and in the abstract (see, inter alia, Case 307/81 Alusuisse Italia v Council and Commission (1982) ECR 3463, paragraph 9)." See C-221/09 *AJD Tuna Ltd v Direttur tal-Agrikoltura u s-Sajd, Avukat Generali* (2011) ECR I-1710, at 51.

355 Article 5 SSM Regulation.

356 Article 101 Framework Regulation.

357 See Article 101 Framework Regulation, as well as Articles 130-142 of CRD IV (Directive 2013/36/EU), and Article 458 of CRR (Regulation 575/2013).

level of generality that they need to have to be considered macro-prudential, and thus can be quite specific, even entity-specific.[358]

This does not prevent the Framework Regulation from excluding these measures from consideration as "supervisory procedures", though defence rights are granted in case of individual decisions:

The macro-prudential procedures referred to in Articles 5(1) and (2) of the SSM Regulation shall not constitute ECB or NCA supervisory procedures within the meaning of this Regulation, without prejudice to Article 22 of the SSM Regulation in relation to decisions addressed to individual supervised entities.[359]

It remains to be seen how supervisory practice evolves. The ECB and NCAs may prefer to be on the safe side, and rely on the final coda (i.e. the reference to article 22 SSM, which contains procedural guarantees) and, in case of doubt, implement policies via entity-specific decisions where there is notification and hearing, and thus reserve the non-application of defence rights to actual situations of general market turmoil (where the right to be heard might also be excluded by the exception for urgent situations analysed above). They might, however, use the exclusion of macro-prudential measures de facto carve-out, and thus pool together decisions addressed to specific institutions to make them pass as "general measures" or measures addressed to a "subset" of financial institutions, further testing the courts' resolve.

It should also be noted that, as recently confirmed by GCEU decision of 4 march 2015, in case T-496/11, *United Kingdom and Ireland v ECB* this challenge could also concern acts apparently without binding character, "whatever their nature or form, [if, in substance they] are intended to have legal effects[360]. Indeed, "that case-law is intended specifically to prevent the form or designation given to an act by its author from resulting in its escaping assessment of its legality in an action for annulment, even though it in fact has legal effects". The General Court made also clear that "In the light of case-law, in order to determine whether an act is capable of having legal effects and, therefore, whether an action […] can be brought against it, it is necessary to examine its wording and context. If the act is perceived as only proposing a course of conduct and, therefore, as being similar to a mere recommendation within the meaning of Article 288 TFEU or, in the case of the ECB, Article 132(1) TFEU, it should be concluded that the act does not have legal effects that are such as to render an action for annulment brought against it inadmissible. On the other hand, that examination may reveal

358 Article 130 of the CRD IV, for example, regulates an institution-specific countercyclical capital buffer, and systemic risk buffers (Article 133 CRD IV, and 458 CRR) can be introduced for a "subset of entities", without specifying whether this can also include 1-2 of them.

359 Article 101(2) Framework Regulation.

360 See, to this effect, judgments of 31 March 1971 in *Commission* v *Council*, 22/70, ECR, EU:C:1971:32, para. 39, and of 17 July 2008 in *Athinaïki Techniki* v *Commission*, C-521/06 P, ECR, EU:C:2008:422, paras. 43 and 45.

that the parties concerned will perceive the contested act as an act which they must comply with, despite the form or designation favored by its author".

The other non-obvious challenge concerns the contents of the right to be heard in administrative proceedings, which involve the concurring action of NCAs and the ECB.[361] The rules make an explicit reference to this context, in case of, for example, NCAs' role in submitting to the ECB "draft supervisory decisions" with regard to significant supervised entities,[362] or notifying changes that can affect the suitability of members of management bodies,[363] or the opening by NCAs of proceedings for the imposition of penalties at the request of the ECB (in cases not covered by the regular penalties).[364] But this is only the general framework for all the possibilities of composite proceedings in practice, where both NCAs and the ECB make assessments that can adversely impact the rights of the supervised entities. In practice EU courts have guaranteed the right to be heard when it was not contemplated in one of the stages of the procedure,[365] and, from the initial stages, where such right was granted before national authorities,[366] it was later considered to be applicable before EU authorities (usually the Commission)[367] when it was the entity that determined the content of the act to be applied. The SSM rules stipulate that "*the ECB shall give the persons who are the subject of the proceedings the opportunity of being heard*",[368] i.e. it indicates the responsibility over the right to be heard, but not the forum where it can be exercised. Normally, in supervisory actions where the ECB retains the residual discretion, it is only logical that the right to be heard is granted before the ECB itself (as the specific rules regulate).[369] The problem could arise in the instances where NCAs retain discretion over the decision (in which case *the ECB* must grant a right to be heard *before the NCA)*, or in cases where the decision by the NCA pre-determines in part the decision of the ECB, in which case the doubt is whether there is a right to be heard both before the NCA and the ECB.

An additional question in this respect is whether the right to be heard must be granted before the unit, either at the ECB or the NCA, instructing the file or before the ECB supervisory board preparing the draft decision or the ECB Governing Council adopting the final decision by the no objection procedure. In principle the ESA's Board of Appeal held in its decision *Standard Rating/ESMA*

361 In general, see Christina Eckes, Joana Mendes 'The Right to Be Heard in Composite Administrative Procedures: Lost in between Protection?' (2011) *European Law Review* Vol. 36 651 *et seq*.

362 Articles 90-91 Framework Regulation.

363 Article 94 Framework Regulation.

364 Article 18(5) of SSM Regulation, and Article 134 of the Framework Regulation. The ECB's power to impose penalties is regulated in Article 18 (1) SSM Regulation.

365 See Case T-450/93 *Lisrestal v Commission* (1994) ECR II-1177; Case C-32/95 P *Commission v Lisrestal* (1996) ECR I-5373.

366 Case T-346/94, *France Aviation v Commission* (1995) ECR II-284 at 30*et seq*.

367 Case T-42/96, *Eyckeler & Malt AG v Commission* (1998) ECR II-401, paras. 84-86; Case T-50/96, *Primex Produkte Import-Export GmbH & Co and others v Commission* (1998) ECR II-377, paras. 65-67. See Christina Eckes, Joana Mendes *op. cit.*

368 Article 22 SSM Regulation.

369 Article 31 Framework Regulation.

of 10 January 2014 (paragraph 49) and in line with the CJEU precedent in *Buchler & Co v. Commission* (c-44/69), that fairness of the procedure was ensured where the members of ESMA supervisory board adopted their final decision without hearing the parties since they had "complete and detailed information regarding the essential points of the case and had access to the entire file". The issue is however likely to be questioned again in this context.

The necessary complement to the right to be heard is the right of access to the information in the file, which is granted in clear terms to the supervised entities,[370] again in a way that resembles the formula used for competition procedures.[371] The fact that banking rules have been drafted after a long evolution of court practice created an opportunity to sidestep some past doubts, such as whether the right of access includes, as a general rule, the whole file.[372] However, the language chosen by the specific rules still leaves the matter open.[373] This could create a problem if, in the presence of vast amounts of documentation, e.g. resulting from cross-border supervisory activity affecting numerous entities, the ECB decides to restrict access only to the documents that have an "objective link" to its decision: such restriction is acceptable under EU courts' standards,[374] but not included under the supervisory rules. Though it is arguably a common sense restriction, lawmakers could have taken the opportunity to make the distinction more carefully.

The express restrictions on which the ECB may rely upon are (a) "*the legitimate interest of legal and natural persons other than the relevant party, in the protection of their business secrets*"; and (b) the restriction in cases of "confidential information".[375] Such restrictions are in line with EU case law,[376] but, again, the most difficult exercise is not to accept these limits in the abstract, but to assess whether the supervisory authorities overreached in a specific case.

In *Hoechst*, for example, the GC held that the Commission breached the right of access: the Commission could not rely on confidentiality as a sort of blank check (i.e. by failing to "balance" confidentiality with the right of access), and also should have provided *a non-confidential version of the documents in*

370 Article 22 SSM Regulation stipulates that "The rights of defence of the persons concerned shall be fully respected in the proceedings. They shall be entitled to have access to the ECB'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".

371 See the parallel with Article 27(2) of Regulation (EU) No 1/2003.

372 See e.g. the contrast between cases 43, 63/82 *VBVB and VBBB v Commission* (1985) ECR 19 (the right of access did not include the whole file) and Case T-7/89 *SA Hercules Chemicals NV v Commission* (1991) ECR II-1711 (access included the whole file except for confidential information). But see C-204 205/00 *Aalborg Portand and others v Commission* (2004) ECR I-404 at 108 *et seq*.

373 Article 32 of the Framework Regulation stipulates that: *"the parties shall be entitled to have access to the ECB's file,"*

374 C-204 205/00 *Aalborg Portand and others v Commission* (2004) ECR I-404 at 108 *et seq* (there must be an "objective link" between the documents not disclosed and the decision against the specific entity, for a violation of the right of access to exist).

375 Article 22 SSM Regulation; Article 32(1) Framework Regulation.

376 See C-204 205/00 *Aalborg Portand and others v Commission* (2004) ECR I-404.

issue or, where appropriate, if that proved difficult, to have prepared a list of the documents concerned and a sufficiently precise non-confidential summary of their content.[377] Furthermore, the confidentiality exception cannot operate with the same level of intensity with regard to parties protected by the right of access to documents as part of their right of defense, than with regard to the right of access of the public in general: information protected by confidentiality from the public may need to be facilitated to parties in a specific procedure as part of their defense rights.[378] It will be, as with many other things, a matter of proportionality, and of the craft with which the ECB restricts access to the file, and the reasons it uses to do so.

The duty to give reasons completes the scope of defense rights during the supervisory proceedings, because this gives the person subject to those proceedings to decide whether to seek judicial review.[379] It is expressly contemplated in SSM rules, in a way in line with traditional case law.[380] Since such case law has been a result of article 296 TFEU, which contemplates the duty to give reasons for *all* EU acts, its conclusions with respect to acts of general application cannot be extrapolated to individual acts of specific application.[381] Other than that, it is difficult to identify in advance an area where this particular right can be an issue in the exercise of supervisory competences by the ECB and NCAs.

b) Aside from the more specific protections analyzed above the general clause of article 41 of the EU Charter states that "*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union*"[382]. The administration has a duty to carefully examine the factual and legal aspects of a case: in *Technische Universitat München*, for example, the Court found the Commission in breach of this principle, for having relied on experts who did not possess the requisite technical knowledge in the area.[383] In competition law or state aid, however, EU courts have held that the Commission, for example, is under no obligation to undertake an investigation of every reported infraction, nor of engaging with the

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377 Case T-410/03 *Hoechst GmbH v Commission* (2008) ECR II-881 at 154. See *ibid* 150-155.

378 Case T-341/12 *Evonik Degussa GmbH v Commission* (2015), at 95.

379 Case C-367/95 P *Sytraval* (1998) ECR I-1752.

380 Article 22(2) para. 2 states that: "The decisions of the ECB shall state the reasons on which they are based." Article 33 of the Framework Regulation contemplates the right in more detail, by stating that: "1. Subject to paragraph 2, an ECB supervisory decision shall be accompanied by a statement of the reasons for that decision. 2. The statement of reasons shall contain the material facts and legal reasons on which the ECB supervisory decision is based. 3. Subject to Article 31(4), the ECB shall base an ECB supervisory decision only on facts and objections on which a party has been able to comment".

381 Compare cases C-122/94 *Commission v Council* (1996) ECR I-881 (general) with Case 24/62 *Commission v Germany* (1963) ECR 63, 69.

382 This provision was held applicable in the context of financial supervision by the ESA's Board of Appeal , 14 July 2014, SV Capital II

383 Case C-269/90 *Hauptzollamt Munchen-Mitte v Technische Universitat Munchen* (1991) ECR I-5469.

applicant in an exchange of views about the reasons for not adopting a certain act.[384]

With regard to the requirement of impartiality, the courts have held that particulars' right to have their affairs handled impartially encompasses "*subjective impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice, and, on the other hand, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned*".[385] However, the fact that units entrusted with different tasks belong to the same organizational structure cannot, "*of itself, call into question that institution's objective impartiality, since those departments necessarily form part of the structure, to which they belong*",[386] nor imply, in general, that an administrative institution (such as the Commission) can be treated as a "tribunal", for these purposes.[387] Fair trial rights (including the right to an independent tribunal), thus, are appraised in relation with the mechanisms of judicial review to challenge the acts by the administration (different degrees of independence, depending on the context),[388]not by the decision-making organs of the administrative organ itself.

c) In an earlier section we have made reference to the possibility that the lack of substantive limits to the exercise of competences by regulatory/supervisory authorities from the perspective of fundamental rights can give render operational the limits contained in investment protection treaties, which, despite being vaguer in nature, have been constructed with a pro-investor stance that, in some cases, makes them more protective in practice than standards enshrined in fundamental rights texts.

Such protection is not merely substantive. Standards such as "fair and equitable treatment" have been constructed not only as protecting "legitimate expectations" regarding the substance of the business and regulatory environment, but also the fairness of the treatment received by the investor from a procedural perspective.[389] Such procedural perspective encompasses the right to administrative due process, or the bundle of safeguards otherwise grouped under the concept of the "right to a good administration".[390]

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384 Case T-432/05 *EMC Development AB v Commission* (2010) ECR II-1629 (competition law); C-367/95 P *Commission v Sytraval and Brink's France* (1998) ECR I-1719.

385 Case C-439/11 P *Ziegler SA v Commission* Judgment of 11 July 2013.

386 *Ibid* at 158. See also Case C-199/11 *Otis and Others* (2012) ECR, at 64.

387 See Case T-372/10 *Bolloré v Commission* Judgment of 27 June 2012, at 57; Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* (1980) ECR 3125, at 81; Case T-384/94 *Enso Española* v *Commission* (1998) ECR II-1875, at 56.

388 Case C-439/11 P *Ziegler SA v Commission* Judgment of 11 July 2013 at 159. See also *infra* VI.C.2.a-b.

389 See e.g. *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004.

390 See, e.g. *International Thunderbird Gaming Corporation v. The United Mexican States*, Arbitral Award of 26 January 2006, at 200.

Breaches of such standards, however, were found in cases of blatant denial of rights (i.e. lack of evidence supporting the decision,[391] or an overbearing exercise of administrative functions[392]). Thus, contrary to the case of substantive limits (where arguably investment treaties could offer a more enhanced protection than fundamental rights) it is unlikely that the normal exercise of supervisory competences under the SSM and SRM would result in a breach of investment treaties. If so, there seems to be no difference in principle between the limits imposed by fundamental rights, and investment treaties. And, in that event, an arbitral tribunal would only have jurisdiction to decide on breaches by the State that ratified the Treaty, not by a supervisory institution, such as the ECB, which is not national in nature. Still, the fact that the "global standards" enshrined in the law of investment protection have, at least, caught up with the local standards applicable in a regionally integrated structure, such as the EU, where there is greater consensus on matters such as the rule of law, should give one pause for thought.

2. *Judicial review and due process rights, and specific rights in procedures for the imposition of penalties*

In the following paragraphs we will distinguish between the judicial review of acts adopted in the context of the SSM (a), and its implications for fundamental due process rights (such as access to court, and the right to an effective remedy) (b), and, then, will focus on more specific protections in the context of the imposition of penalties, such as legality, presumption of innocence, ne bis in idem and proportionality (c).

a) In earlier sections we have established the complexities associated to the new Banking Union, both from the perspective of institutional design, and from the perspective of the individual fundamental rights of the financial institutions subject to this system. The limits imposed by these provisions would be ineffective if they were not accompanied by a proper system of judicial review. Yet the SSM provisions, often detailed and elaborate with regard to procedural guarantees, become mute when it comes to the mechanisms through which SSM decisions can be challenged. Indeed, for legislative provisions that so closely mirror those applicable in competition and other administrative procedures it is simply striking that the SSM and Framework Regulations do not include any reference to a review process by the courts, in contrast with competition rules.[393]. It is worth recalling, in this respect, that the CJEU found that, in competition

391 In *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, for example, the refusal of a licence was based on the opposition of the local population to the project, not on the application of construction law.

392 *Pope & Talbot, Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 of 10 April 2001.

393 Article 31 of Regulation (EU) No 1/2003. See also Article 261 of the TFEU (unlimited jurisdiction), and Article 263 (control of legality) of the same text.

cases, the "review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, satisfies the requirements of the principle of effective judicial protection in Article 47 of the Charter of Fundamental Rights of the European Union"[394]. However, it should also be considered that in that field, fines are the major way entities are economically affected in their fundamental rights, whereas in this context many supervisory measures are highly afflictive (and possess a "coloration penale" according to the standards of the ECtHR) and are therefore similar in their effect on the recipients to fines in the antitrust sector, thereby requiring that an effective judicial protection be duly warranted.

Resolution measures, in turn, expressly provide for some involvement by national courts, but this only validates existing practice of review by domestic courts of bankruptcy-like arrangements,[395] which is only logical in a system that is highly de-centralized (courts would be controlling decisions of national authorities). Nothing is said, however, about the review of the decisions taken by the ECB, or the decisions where the ECB is involved. This can be a source of conflict in light of the complexity of the supervisory architecture, which involves, at least, acts adopted by the ECB, acts adopted by NCAs following instructions by the ECB or related to tasks exclusively conferred upon the ECB but legislatively delegated in part to NCAs as to less significant institutions, and acts adopted by the ECB in application of EU soft law measures, and national legislation.[396]

The first type of acts, which are adopted by the ECB in application of EU law include its specific supervisory powers (through which the ECB may ask a supervised entity to take the necessary measures at an early stage to address relevant problems),[397] or the imposition of penalties.[398] In such cases the decisions will be subject to the review of legality by EU courts, pursuant to article 263 TFEU, and the financial institution directly targeted by the measure can challenge it.[399]

More difficult will be the instances where the ECB issues instructions to NCAs, and these adopt an administrative act (as it occurs with specific supervisory instructions with regard to a significant supervised entity, general supervisory instructions (typically, but not limited to, the supervision of less

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394 Koen Lenaerts, Ignace Maselis, Kathleen Gutman, 'EU Procedural Law',(2014) OUP 394 and ECJ, case C-272/09 *P KME Germany* and case C-199/11 *Otis.*

395 Article 85 Directive 2014/59/EU.

396 See e.g. Andreas Witte 'The Application of National Banking Supervision Law by the ECB: three Parallel modes of executing EU law?' (2014) *Maastricht Journal* Vol. 1 89-109.

397 Article 16 SSM Regulation.

398 Article 18 SSM Regulation. On Article 18, compare, i. a., Raffaele D'Ambrosio, 'Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings' (2013) *Quaderni della Ricerca giuridica della Consulenza Legale* No 74; Antonio Luca Riso, 'The power of the ECB to impose sanctions in the context of the SSM', (2014) *Bancni vestnik*, 63, 32-35; Sven Schneider, 'Santioning by the ecB and national authorities within the SSM' (2014) *EuZW-Beilage* 18.

399 Article 263 para. 4 of the TFEU states: "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person".

significant entities), or in cases where the ECB has a supervisory task, but no related power),[400] as well as those where NCAs undertake a specific act, but, then, the ECB adopts the definitive act (as in cases of authorisations, assessment of qualified holdings).[401]

In such cases the act by the ECB will be subject to the legality control of the annulment decisions (again, pursuant to article 263) but, unlike decisions directly addressed by the ECB to a financial entity, the standing of the latter to challenge the act is problematic, because the act needs to be "of direct and individual concern" to the person, or, in case of a regulatory act, "of direct concern", and "does not entail implementing measures".[402]

These provisions have been subject to a quite narrow interpretation by EU courts: ever since the *Plauman* decision[403] the courts have granted standing to private parties only if, (a) the measure affects the applicant's legal position directly and leaves no discretion to the addressees of the measure who are entrusted with its implementation, i.e. if there is a direct link between the challenged measure and the loss or damage (direct concern[404]); and, (b) the measure "*affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed*".[405] These criteria (especially the second) have resulted in the exclusion of standing of private parties in cases of EU acts not directly addressed to them in almost all cases, and has been criticized by scholars.[406] In *Inuit Tapiriit Kanatami* the CJEU also provided a restrictive interpretation for the case of annulment of regulatory acts (where only "direct", but no "individual" concern is required).[407]

In practice, this poses a challenge similar to the right to be heard by the administrative body in composite procedures,[408] only this time EU Courts seem

400 Articles 6(3) (power to issue instructions in relation to the tasks of Article 4), (5) (general instructions for the exercise of supervisory tasks with regard to less significant banking institutions) 7(1), (3) (close cooperation with non-euro States regime), and 9(1) para. 3 (supervisory task but no related power) SSM Regulation; Articles 6 (joint supervisory teams, or JSTs), 22 (Right of the ECB to instruct NCAs or NDAs to make use of their powers and to take action if the ECB has a supervisory task but no related power), or 90 (assistance of NCAs in the supervision of significant banking groups) Framework Regulation.

401 Articles 14-15 SSM Regulation.

402 Article 263 TFEU para. 4.

403 Case 5/62 *Plaumann v. Commission* (1963) ECR-95.

404 See e.g. Cases 41-44/70, *International Fruit Company BV v. Commission* (1971) ECR 411 (standing was denied on the basis that the approval of a merger by the Commission would not be a direct cause of the loss of jobs in the merged company).

405 Case 5/62 *Plaumann v. Commission* (1963) ECR-95 at 107.

406 See e.g. Albors-Llorens 'The Standing of private parties to challenge Community Measures: Has the European Court Missed the Boat?' (2003) *Cambridge Law Journal* Vol. 62(1) 72-92.

407 Case C-583/11 P *Inuit Tapiriit Kanatami and others v European Parliament and Council*, Judgment of 3 October 2013. The General Court has also made a similar interpretation. See Case T-96/10 *Rütgers Germany GmbH v ECHA,* Judgment of 7 March 2013.

408 *Supra* VI.c.1.b.

more concerned about procedural expediency and the risk of EU courts being flooded with complaints, than about the protection of due process rights. In practice this will mean that general instructions addressed to NCAs by the ECB (typically, for the supervision of less significant entities) cannot be challenged unless the supervised entity can show that it is differently affected than the other potential addressees of the measure;[409] while, even in case of specific supervisory measures, the addressee would have to demonstrate that the instructions leave no discretion to the NCA. Even if the ECB is a bulwark of integrity, the combination of this doctrine with the SSM is a breeding ground for concern: if the ECB were to tailor its instructions, by giving them a formal degree of generality, or giving the NCA formal discretion with regard to implementation, it could well avoid the scrutiny of the CJEU pursuant to the annulment procedure. Challenges based on a purportedly unequal exercise of supervisory powers (e.g. the failure to issue similar instructions with regard to entities in a similar position) would be almost impossible in practice.[410]

Once the decision is subject to implementation by NCAs, it will be subject to challenge before national courts, which can be expected to be quite deferential in respect of national decisions simply implementing ECB directions. If within the procedure the matter of the legality of the previous instructions by the ECB arises, domestic courts could stay the proceedings, and make a preliminary reference to the CJEU, and later decide on the basis of the CJEU decision about the legality of the ECB measure.[411] This would be clearly highly episodical and, in practice, the only viable, but exceptional, avenue to challenge the legality of instructions by the ECB to NCAs.

The third possibility arises from the text of article 4 (4) SSM Regulation, which states that:

For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options.

The question, in this case, is what is the avenue for challenging an act adopted by the ECB in application of national law which exercises the option granted to it by the EU Directive it otherwise transposes (e.g. a specific calculation of a liquidity ratio under CRD IV). The problem could be complicated even more

409 E.g. if the entity has a business model peculiar to it. See Andreas Witte 'The Application of National Banking Supervision Law by the ECB: three Parallel modes of executing EU law?' *op. cit.* pp. 102-103.

410 See e.g. Andreas Witte *op. cit.*, 102, with reference to Case T-95/98 *Gestevisión Telecinco S.A. v. Commission* (1998) ECR II-3407, para. 58, which holds that procedures for failure to act are subject to the *Plaumann* test.

411 See Andreas Witte *op. cit.,* 101, with reference to Case 314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost* (1987) ECR 4199.

if we assumed that, contrary to what discussed in Section 4 above, competent authority options and discretions granted by CRD IV were exercised by NCAs, and in particular if the ECB issues a supervisory instruction to an NCA, which leaves formal discretion to the NCA, and applies the domestic law of the country of the NCA, which exercises the option granted by the Directive. Arguably, the financial institution affected by the measure could not challenge the ECB measure directly because it has not a direct impact (i.e. it grant some discretion to the NCA), but then, if it challenges the NCA measure before the national courts, it could only do so with respect to the exercise of discretion by the NCA (which, as indicated in the example, is very little). If the problem concerns the rules that give rise to the final decision, the national court could not annul the ECB supervisory instruction, and would have to make a preliminary reference, but, then, the CJEU does not have the competence to rule on national law. Which is the competent authority, then, to issue an authoritative interpretation of the national legislative rule establishing a liquidity ratio?

One possibility would be to read the provisions as meaning that national law remains national law, and that the ECB only applies it as a result of a specific mandate.[412] In that case, at least in theory, the national court could issue an authoritative interpretation of the national rule exercising the options granted by the EU Directive, or even annul the national rule. It could not, however, annul the ECB acts in application of that national law, for which it would have to make a preliminary reference. The CJEU would have to validate the decision by the national court. In so doing, however, it would have to review that the annulment of the rule or the corrective interpretation issued by the national court does not step over the boundaries of the specific choice granted by the Directive to Member States, and that it does not invade the ECB's supervisory competences, an act for which a determination of the application of national law would be a necessary step.

Another possibility would be to read the provisions as meaning that, through the application of the ECB, national law becomes EU law.[413] In such case the CJEU would be entitled to make the authoritative interpretation, and could well answer the preliminary reference without having to make the balancing act of all the superimposed layers of competences. However, this would not only go against the express language of the provisions, which talk about "national law"; it would also put the CJEU in the extremely uncomfortable position of having to determine the authoritative interpretation of domestic law, something that the Court is extremely unlikely to do.

Thus, the first possibility seems more likely, and only its mind-boggling complexity makes it desirable that either the CJEU, by relaxing its *Plaumann* test in the context of banking rules, or the ECB, by relying on acts specifically directed to financial entities (or directed to NCAs, but with a content specifically

412 Andreas Witte *op. cit.*, 108.

413 *Ibid*, 107.

addressed to a financial entity, and leaving no discretion) provide a channel for a direct review of legality.[414] Though more cumbersome at the initial stage, it would help provide a sounder footing for ECB action, and assess the potential impact of fundamental rights of due process.

In the absence of a relaxation of the standard for standing in proceedings for the review of legality, the existence of an enhanced review for acts imposing sanctions could be the open door for a deeper involvement by the courts, as in the area of competition cases. However, we are again confronted by the lack of references to judicial review in the SSM texts.[415] One has to rely on Council Regulation 2532/98,[416] which before the SSM was the only text that regulated the ECB competences to impose sanctions (which the ECB used in fields such as monetary policy, payment systems, and statistical information)[417], and whose article 5 introduced full CJEU jurisdiction for sanctions (in conformity with Article 261 TFEU).[418]

However, SSM rules' references to the 2532/98 Regulation are equivocal. In case of penalties imposed for breach of directly applicable Union law, sanctions shall be imposed with respect to the 2532/98 Regulation's "procedure", and "as appropriate".[419] Only in case of sanctions imposed for a breach of ECB regulations and decisions, sanctions *may be* imposed "in accordance with Regulation 2532/98", and SSM rules will be complementary.[420]

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414 In such cases, the only difficulty would be that the legality of the ECB measure would have to be evaluated in the context of the national rules that exercise the option granted by the Directives. However, the CJEU could limit itself to gather the opinions of the courts and experts to assess the actual state of national law, and evaluate the ECB action in its light, rather than making an authoritative interpretation of that domestic law.

415 The word "court" does not figure in the text of SSM Regulation (except to refer to the Court of Auditors), while the Framework regulation takes the review for granted, rather than stipulate it. Article 130(4) Framework Regulation states: "The limitation period for imposing administrative penalties shall be suspended for any period during which the decision of the ECB's Governing Council is subject to review proceedings before the Administrative Board of Review or appeal proceedings before the Court of Justice." See, in a similar sense, article 131(4)(b) Framework Regulation.

416 Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions.

417 Recital (2) of the ECB Proposal for amending Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions, OJ C 144/6 15 April 2014.

418 Article 5 of Regulation (EC) No 2532/98 states: "The Court of Justice of the European Communities shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty over the review of final decisions whereby a sanction is imposed."

419 Article 18(4) SSM Regulation provides that: "The ECB shall apply this Article in accordance with the acts referred to in the first subparagraph of Article 4(3) of this Regulation, including the procedures contained in Regulation (EC) No 2532/98, as appropriate." Article 121 (1) of the Framework Regulation, for its part, states: ""1. For the purposes of the procedures provided for in Article 18(1) of the SSM Regulation, the procedural rules contained in this Regulation shall apply, in accordance with Article 18(4) of the SSM Regulation" (i.e. it does not even mention Regulation 2532/98).

420 Article 18(7) SSM Regulation states that: "Without prejudice to paragraphs 1 to 6, for the purposes of carrying out the tasks conferred on it by this Regulation, in case of a breach of ECB regulations or decisions, the ECB may impose sanctions in accordance with Regulation (EC) No 2532/98". Article 121 (2) of the Framework Regulation states that. "For the purposes of the procedures provided for in Article 18(7) of the SSM Regulation, the procedural rules contained in this Regulation shall complement those laid down

Fortunately, in the assessment made by the ECB itself of the conflicts between SSM rules and Regulation 2532/98 Regulation (where the latter should be amended, if it has not been overridden) judicial review does not figure among them.[421] But even if a reasonable interpretation of the text leads to the conclusion that full jurisdiction shall be exercised by EU courts in the field of sanctions (including sanctions for breaches of directly applicable Union law) it is difficult not to imply a subtle "courts unwelcome" sign in the SSM framework. In light of this, it is doubtful whether the courts will use the combination of full jurisdiction for sanctions, and annulment proceedings for the rest to effect a robust review of SSM acts, or whether the lack of access to annulment proceedings will, in practice, fail to be palliated by an enhanced review of sanctions.

b) Failing to guarantee a better access to judicial review is problematic. As discussed above, the requirement of independence and impartiality in the context of administrative proceedings, even if it does not seem to require according to the current state of the ECtHR case law, that the administrative body imposing the penalties be independent from the one undertaking the investigation and prosecution[422], this is so under the condition that the person concerned has *an opportunity to challenge any decision made against him or her before a tribunal which offers the guarantees of Article* 6.[423] Furthermore, the review body needs to have "full jurisdiction".[424] This is what may constitute the greatest problem, in light of ECtHR case law.

In *Menarini* the ECtHR held that the court review of enforcement decisions imposed by competition authorities, while limited, complied with these requirements, since (a) the administrative courts could decide whether the authority had made a proper use of its powers, and examine the grounds for the decision, and its proportionality, as well as its technical evaluations; (b) and also review the proportionality of the fine, and, in a given case, replace it.[425] The ECtHR even opened the possibility for due process rights to be calibrated in the context of an administrative procedure with independent authorities.[426]

in Regulation (EC) No 2532/98 and shall be applied in accordance with Articles 25 and 26 of the SSM Regulation."

421 Areas of conflict include, on the other hand, the publication of the decision to impose penalties by the ECB, the upper limits of fines, the ability to impose periodic penalties as a coercive measure to compel compliance, or the separation of tasks. See ECB Proposal for amending Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions, OJ C 144/6 15 April 2014.

422 Compare D'Ambrosio (note 24), p. 64, where, however, the right finding that "the Regulation on CRA and the Regulation of OTC derivatives, central counterparties and trade repositories apply the principle of separation between investigative and decision-making powers (...)irrespective of its qualification as an administrative measure or as an administrative penalty". Also Regulation (EU) 2015/159 amending Regulation (EC) No 2532/98 follows the principle, without mentioning it (art. 4b).

423 Application no. 18640/10 *Grande Stevens v Italy* 4 March 2014 at 138, with reference to *Kadubec v. Slovakia,* 2 September 1998, para. 57, *Reports* 1998-VI; *Čanády v. Slovakia*, no. 53371/99, para. 31, 16 November 2004; Application no. *43509/08 Menarini Diagnostics v Italy* 27 September 2011.

424 See Application no. *43509/08 Menarini Diagnostics v Italy* 27 September 2011, at 59.

425 *Ibid* at 63-67. The ECtHR emphasized that the *Consiglio* had gone beyond an "external" review of the consistency of the decision on penalties, and examined the elements resulting in the final determination.

426 *Ibid* at 62.

However, it seems that the Court was mostly persuaded, and rightly so, by the *actual* understanding that the courts had of their scope of review, and their use to effectively control the grounds of the decision (with less emphasis on the denomination as legality jurisdiction or full jurisdiction).

The ECtHR used the same approach, with a less accommodating consequence in the *Grande Stevens* case.[427] The decision was adopted in the context of insider trading proceedings,[428] with penalties being imposed by the CONSOB (Italian Securities Commission), and reviewed by the Turin Court of Appeal. While the ECtHR found that the Turin Court of Appeal was a "body with full jurisdiction" (its impartiality and independence had not been questioned by the parties, it reviewed whether the offence had been committed, and was authorised to set aside the CONSOB decision, and assessed the proportionality of the penalties (which it reduced), but it could not be concluded that the hearings were "public" (the public hearings before the *Corte di Cassazione* were not enough, as the court did not have full jurisdiction) and that there was an effective parity of the armies between the public and private parties and the Court held that there was a breach of article 6.[429]

This, more recent, decision, by the ECtHR, can be supplemented by other case law,[430] where the Court found violations of article 6 when the applicant was prevented "in a practical manner" from bringing the claim to the courts,[431] or where it required schemes of judicial review to be "sufficiently coherent and clear" to afford "a practical, effective right of access" to the courts' jurisdiction, finding a breach of article 6 when the review rules were of "such complexity" to create "legal uncertainty",[432]and even in cases where the restrictions were the result of an "unreasonable construction of a procedural requirement" by a court.[433]

In light of these precedents the review system envisaged for acts adopted in the context of the SSM (and even the SRM) could fall short of the requirements considered necessary under article 6 ECHR. If a decision directly addressed to a financial entity is adopted by the ECB, national courts cannot review the decision, and EU courts only review, in principle, its *legality*, pursuant to article 263

427 Application no. 18640/10 *Grande Stevens v Italy* 4 March 2014.

428 In that case the CONSOB initiated procedure for insider trading against the Mr Grande Stevens, who had been negotiating an amendment to an equity swap agreement, in favor of the Agnelli family (the controlling shareholders in Fiat), in the context of a conversion of debt for equity for a banking syndicate (which had lent money to Fiat), so that the Agnelli family could remain as the dominant shareholder (i.e. with more shares than the banks) while avoiding the duty to launch a takeover bid (triggered at 30% of voting shares). According to the Insider Trading division of CONSOB, the press releases announcing the debt conversion initiative with the banks should also have included information on the equity swap agreement.

429 Application no. 18640/10 *Grande Stevens v Italy* 4 March 2014 at 153-155.

430 See Laurent Pech, Angela Ward, *cit.,* 1245.

431 Application no. 28945/95 *TP and KM v United Kingdom* Judgment of 10 May 2001, at 100.

432 See See Laurent Pech, Angela Ward, *cit.,* 1245, with reference to Application no. 12964/87 *Geouffre de la Pradelle v France* 16 December 1992, at 33.

433 Application no. 23436/03 *Melnyk v Ukraine* Judgment of 28 June 2001, at 23. See See Laurent Pech, Angela Ward, *cit.,* 1245.

TFEU, but do not have full jurisdiction. If the decision is adopted in the context of a composite procedure, where both the ECB and NCAs adopt certain acts, the picture is even more somber, as the financial entity is only granted for sure the action to seek annulment of the decision by the NCA, whereas the action to annul the act by the ECB is subject to the extremely restrictive *Plauman* standard. A similar, though even more complex, scenario arises in case the ECB applies national law. It is difficult to see these guarantees as meeting the requirement under article 6 ECtHR and 47 of the Charter.

As to the latter, according to article 52 (3) of the EU Charter,

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Thus, the Charter does not allow to dispense a less extensive protection if the right under the Charter corresponds to a right guaranteed by the ECHR; and, in the case of fair trial rights, the Explanations of article 53 include article 47 (2) (fair trial rights) as one where the *meaning* of Charter provisions is the same as that of the corresponding ECHR article (article 6), but the scope is *wider* (i.e. it covers more situations),[434] a view confirmed by the CJEU in *DEB*.[435] Thus, the protection granted under article 47 should be equivalent to that granted under article 6 ECHR, which, if one compares the ECtHR case law with the CJEU's views, is not (at least there are strong arguments to support a lack of equivalence).

A different matter is whether the ECtHR would in practice scrutinize decisions by domestic authorities that directly implement ECB decisions. The ECtHR does not have jurisdiction to decide a complaint against EU bodies.[436] Theoretically, it could find that a Member State breached article 6 by giving effect to a measure dictated by the ECB. However, the ECtHR's has taken a permissive stance when it comes to Member State acts which are a direct consequence of EU acts, and, in practice, granted a "broad-brushstroke equivalence" to EU acts (one that presumes, rather than examine, the equivalence between EU and ECHR acts). Thus, in principle one can presume that the ECtHR would not find a violation of due process rights despite the difficult access to judicial review mechanisms for the combined acts of the ECB and NCAs. This conclusion is tentative, and it depends on broader issues (i.e. (a) whether the EU eventually accedes the ECHR; or (b) whether, if the accession is delayed, or the EU does not accede, the ECtHR's stance towards the EU and the CJEU sours as a consequence). It also depends on the specific circumstances of the case. If the lack of judicial review is

434 "Article 47(2) and (3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation," See Explanations Relating to the Charter of Fundamental Rights OJ 2007/C 303/02, 14.02.2007.

435 Case C-279/09 *DEB* (2010) ECR I-13849.

436 Commission Decision Application no. 8030/77 *Confederation française Democratique du Travail v European Communities* Commission Decision of 10 July 1978 (admissibility).

too blatant it will be hard even for the ECtHR to find that the "limited access" to annulment procedures suffices as a guarantee of article 6 ECHR rights, and may evaluate the implementation of EU acts in a way more consistent with its case law on national acts.

Still, the above tentative conclusion that the current mechanism of review of SSM acts would fall short of article 6 ECHR if the ECtHR were scrutinizing national acts, but that it does not matter much anyway because the ECtHR is ready to be lenient with EU acts, is far from satisfactory. The ECB and NCAs should probably aspire to act consistently with the spirit of the Charter and the ECHR, not rely on a loophole. The most desirable would be for EU courts to show that, even relying on limited provisions, they can still develop via case law an acceptably robust review of administrative decisions, as some could argue they have done in the field of competition law.[437] However, in developing their standard of review EU courts have been able to rely on statutory texts that provide for the involvement of courts during the process,[438] and provide for judicial review in unambiguous terms,[439]something that cannot be said of SSM rules.[440]

It is hard to fathom the EU legislature's ultimate goal in failing to include clearer references about the role of courts, but it hardly does the ECB any favors. The risk of an overturned (or amended) decision seems a small price to pay in exchange for having clear guidance on the red lines that a supervisory institution is not supposed to cross, and the full backing of the CJEU's legal (and moral) authority in cases where it has remained within the lines. This is all the more striking in light of the fact that the ECB itself proposed the text of Regulation 2532/98 which included full jurisdiction review for sanctions,[441] (which somehow shows its interest in a review framework). Since the ECB submitted a proposal for an amendment to Regulation 2532/98 with regard to conflicting aspects,[442] it could be an opportunity to re-evaluate the need for a more express reference to judicial review by EU courts.

c) Having reviewed the rights pertaining to the administration, it is necessary to briefly mention the applicability of the specific guarantees that normally belong to the procedures for the imposition of penalties: a very complex issue

437 There are arguments to suggest that the standard of the review of the CJEU has evolved over time (the *Remia* decision is often said to have marked a turning point Case 42/84 *Remia BV v Commission* [1985] ECR I-2566) and that EU courts have grown bolder and more willing to elaborate the criteria of manifest error and excess of power, to grant themselves a sufficient leeway for effective and robust judicial control.

438 See Articles 6, 15 Regulation 1/2003.

439 See Articles 20(4) and (8) and 21(2) and (3) (annulment), and Article 31 (full jurisdiction for sanctions) Regulation (EU) No 1/2003.

440 See *supra* VI.C.2.a.

441 See Recommendation of the European Central Bank for a Council Regulation (EC) concerning the powers of the European Central Bank to impose sanctions. Submitted by the European Central Bank on 7 July 1998. OJ C 246/9 6.8.98. Article 5 of the recommendation was adopted as Article 5 of Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions.

442 ECB Proposal for amending Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions, OJ C 144/6 15 April 2014.

that would deserve a specific study of its own Thus we do not attempt to make a full analysis (as the focus of this article is on other limitations to the powers of ECB and NCAs and NRAs under the SSM and SRM) but to address some of the most important points.

The first point is the extent to which safeguards that normally belong to criminal proceedings can apply in the context of proceedings where the penalties are administrative in nature. In their case law, both the ECtHR and the CJEU have made an autonomous interpretation of the term "criminal", which considers (a) the legal classification of the offence under national law, (b) the very nature of the offence, and (c) the degree of severity of the penalty that the person concerned is liable to incur.[443]

The ECtHR, for example, has found that fines in cases of enforcement of competition rules and financial market rules were "criminal" in nature.[444] In doing so, it gave lesser relevance to the classification under domestic law, and analyzed more carefully the nature of the offence, using the severity of the penalty as the tie-breaker. In the *Grande Stevens* case, for example, the ECtHR attached much importance to (i) the fact that insider trading provisions were intended to guarantee the integrity of the financial markets and to maintain public confidence in the security of transactions, and that the CONSOB was entrusted with the task of protecting investors and ensuring the effectiveness, transparency and development of the stock markets, which are *all general interests of society, usually protected by criminal law*;[445] (ii) the fact that the penalties had the intention to punish, and have a deterrent effect, not to compensate investors;[446] (iii) and the severity of the penalties that *could be* imposed (i.e. the responsibility to which the persons were *ex ante* exposed)[447]

The assessment of the concept of "criminal" in *Grande Stevens* was not particularly broad because it was made to determine the admissibility of the claim (not the applicability of guarantees specific of criminal procedures), because the elements of the so-called *Engel* test,[448] are well-established by the ECtHR, and have been applied in more specific cases.[449] The test is also followed by the

443 For the CJEU, see Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson* 26 February 2013, at 35; Case C-489/10 *Bonda* (2012) ECR, at 37. For the ECtHR, see *Engel and Others v. the Netherlands*, 8 June 1976, para. 82, Series A no. 22; *Öztürk v. Germany*, 21 February 1984, para. 52, Series A no. 73.

444 Application no. 58188/00 *Didier v. France*, 27 August 2002 (financial markets); Application no. 25041/07 *Messier v. France* 19 May 2009 (financial markets); Application no. 5242/04 *Dubus S.A. v. France*, 11 June 2009 (banking rules); Application no. 53892/00 *Lilly France S.A. v. France* 3 December 2002 (competition rules).

445 Application no. 18640/10 *Grande Stevens v Italy* 4 March 2014 at 96.

446 *Ibid.*

447 *Ibid* at 97-98.

448 *Engel and Others v The Netherlands* (1976) Series A no. 22 at 80-82.

449 Application no. 14939/03 *Sergey Zolutukhin v Russia*, Judgment of 10 February 2009; Application no. 73053/01 *Jussila v Finland* Judgment of 23 November 2006; *Öztürk v Germany* (1984) ECHR Series A no. 73.

CJEU, which has held it to apply in competition cases,[450] despite article 23 (5) of Regulation 1/2003 expressly states that the fines are not criminal in nature. Thus, an equivalent conclusion should be drawn for penalties in the context of the SSM and SRM, where a similar language is used.[451]

Another issue would be to decide whether other supervisory actions, not even considered "sanctions" under the specific rules, could be considered "criminal" in nature, under this perspective. We are referring to acts that can have drastic consequences for the business, such as the withdrawal of authorization, followed by resolution[452] or the refusal to grant the suitability qualification to bank directors or key managers because they were previously sanctioned. In principle, there could be arguments to consider them as "penalties" under a broader reading of ECtHR case law, such as their severity,[453] and the fact that the measures have the intention of protecting public interests. Against them would be the fact that measures are not even considered penalties under the relevant rules (a factor of secondary importance, but present in the test, nonetheless) and, more important, the difficulty to justify that their intention is to punish and deter, rather than, simply, ensure the protection of clients and the system. In this regard, the treatment could perhaps differ if, in the former case, the context is one where the withdrawal of license is part of the resolution of the entity/group, with the purpose of maximizing the return for investors/savers, or part of a broader "sanctions package", which also includes fines and, in the latter case, the suitability test is used to as part of a broader "sanction package" whereby, at the end of the sanctioning process, the addressee is not only fined but also declared ceased from office because of the loss of the fit and proper qualifications (something that, once characterized as a criminal sanction, could also be questioned in light of the presumption of innocence, so far as the loss of the suitability qualification is attached to administrative or criminal sanctions that are still *sub judice* and are not yet definitive) However, the prospect that a single set of measures can receive different treatments, and be subject to different guarantees, depending on the use of it that is intended used by administrative authorities (and whether it is possible to prove such intention) is a bit disquieting.

The second factor is the extent to which the *ne bis in idem* principle applies in the context of administrative action, where great differences can arise. On the one hand, the applicability of the principle in an EU context, unlike its application in the context of the ECHR, implies the prohibition of duplication of trials or

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450 Case C-204 205/00 *Aalborg Portand and others v Commission* (2004) ECR I-404 at 338-340; case C-17/10 *Toshiba and others v Commission* Judgment of 14 February 2012.

451 See, e.g. Article 18 SSM Regulation, and Article 110 SRM Regulation, which both refer to "administrative" penalties.

452 Article 14(5) SSM Regulation; Articles 80-84 Framework Regulation; Article 34 (2) (a) SRM Regulation.

453 In *Grande Stevens*, one of the penalties considered "criminal" was the withdrawal of licenses. However, the Court assessed the severity by considering all the statutory consequences *as a whole* (and they also included monetary fines). See Application no. 18640/10 *Grande Stevens v Italy* 4 March 2014 at 97-98.

punishments in two or more jurisdictions (which enhances the territorial scope of the principle in the context of the Charter).[454]

On the other hand, the EU courts have been lenient with regulatory authorities in applying the principle, permitting the resumption of enforcement proceedings regarding the same conduct in breach of regulatory rules when the first decision adopted by the authorities had been annulled due to procedural reasons (i.e. there had been no decision on the merits);[455] and applying a restrictive test that requires (1) identity of facts, unity of the offender, and (3) unity of the legal interests protected, which, for example, has validated the existence of parallel competition proceedings (and sanctions) at an EU and national level, because the two view restrictions on competition from different angles.[456] This despite the ECtHR approach sees the *ne bis in idem* principle as prohibiting not only the trial of the "same offences", but also of different offences where the underlying facts are the identical, or materially the same.[457] It has only been held that, in case of parallel proceedings, natural justice requires that the latter penalty takes into account the former.[458]

Still, Banking Union authorities should be cautious, for the SSM and SRM try to ensure that the same interest is protected through the concerted action of the ECB, NCAs and NRAs. The attribution of decision-making competences to the ECB, the system of instructions to NCAs, and the possibility to instruct on the imposition of penalties in cases where the ECB lacks the competence make the overlapping of sanctions less plausible. The risk of falling within the *ne bis in idem* principle, however, can be further mitigated through the development not only of a coordinated investigatory practice, but also the coordinated imposition of penalties.

Another problem arises when the same conduct can give rise to both administrative and criminal penalties. Arguably, if NCAs and ECB are fully coordinated, this could be the greater source of overlap, if, for example, a single fine is imposed by the ECB or an NCA (or different fines associated to different facts) but, then, public prosecution authorities initiate an action against the same subjects. According to the CJEU the *ne bis in idem* principle leaves out the cases where a same conduct is punished twice by penalties that are truly administrative and criminal in nature, since the States are free to choose the applicable penalties (administrative, criminal, or a combination of the two).[459]

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454 Explanations Relating to the Charter of Fundamental Rights OJ 2007/C 303/02, 14. February2007.

455 Case T-24/07 *ThyssenKrupp Stainless AG v Commission* (2009) ECR II-2309; C-254/99 *Limburgse Vinyl Maatschappij and others v Commission* (*LVM)* (2002) ECR I-8375.

456 Case C-17/10 *Toshiba and others v Commission* Judgment of 14 February 2012 at 81.

457 Case C-17/10 *Toshiba and others v Commission* AG Kokott Opinion, 8 September 2011, at 121-123.

458 Case T-322/01 *Roquette Frères v Commission* (2006) ECR II-3137.

459 Case 68/88 *Commission* v *Greece* (1989) ECR 2965, paragraph 24; Case C-213/99 *de Andrade* (2000) ECR I-11083, at 19; Case C-91/02 *Hannl-Hofstetter* (2003) ECR I-12077, at 17.

However, in *Fransson*, although the Advocate General Cruz Villalón suggested that the CJEU should not consider the *ne bis in idem* principle in light of Article 4 of the seventh Protocol, since not all States had ratified it, and some had made reservations,[460] the CJEU confirmed its adherence to the approach by the ECtHR, and held that criminal and administrative penalties could be accumulated only provided administrative penalties were truly administrative (i.e. they did not disguise a criminal sanction) in nature, a matter that it left the national court to decide.[461]

A third issue, related to the *ne bis in idem* principle, is the interplay of the principles of certainty, legality, and proportionality of the penalties. Since a comprehensive study of these principles in the context of criminal and administrative law exceeds the scope of this study, we will focus on the issues that are more closely related with the subject-matter of the present study, which, essentially, have to do with the way the penalty is calculated and apportioned, among different entities involved in the commission of an offence.

In this regard, it is important to understand that the overwhelming majority of precedent is based on decisions in competition cases; where the basic facts are typically different from those in a case of infringement by financial entities of prudential or supervisory rules. In competition cases the two salient issues are the imputation of wrongful conduct, and calculation of fines both (a) horizontally, in cases where a concerted action is being punished; and (b) vertically, in cases where a subsidiary has acted upon the instructions of its parent.

In banking cases, however, whereas the issue of imputation and calculation in "vertical" situations will arise as often as in competition cases (if not more, as discussed below) the imputation and calculation in horizontal situations will lose relevance, as "concerted" action is not part of the scheme on which supervisory action is based. Therefore, the issues arising in competition cases should serve to open a discussion rather than to directly import the conclusions into the field of financial regulation. We analyse these considerations in this order.

(a) Starting with vertical cases, when parties have challenged the imposition of penalties to a parent company for acts committed, in principle, by one of its subsidiaries, they have relied on the principles of legality (*nulla poena sine lege*),[462] legal certainty, and presumption of innocence,[463] which, it has been argued, imply the principle of "personal liability".[464] EU Courts, however, while accepting the general premise, have held that separate legal personality is

460 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, AG Opinion 12 June 2012, at 83-85.

461 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* Judgment of 26 February 2013.

462 Article 7 of the ECHR and Article 49 of the EU Charter provide that: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed".

463 Case T-299/08 *Elf Aquitaine v Commission* (2011) ECR II-2159; and C-521/09 P *Elf Aquitaine v Commission*, Judgment of 29 September 2011.

464 Case C-97/08 P *Akzo Nobel and Others* v *Commission* (2009) ECR I-8237 at 77.

insufficient to exclude liability of the parent for acts of its subsidiary, and that, on the contrary, it is acceptable to impute the wrongful conduct to the parent when the subsidiary carried on its instructions.[465] On this basis, the Courts have upheld the relatively expansive imputation criteria for sanctions of the Commission in competition cases, accepting the presumption of direct and decisive influence by a parent on its subsidiaries when it held 100% of capital.[466] This has been done, however, in a context where a very thorough effort has been made by the Commission to provide evidence to prove the "direct and decisive" influence of the parent, which leads to joint and several liability.[467]

One difficulty in this context would be whether the same presumptions of competition law, where administrative action (including penalties) is based on the concept of "undertaking",[468] which has been interpreted as designating an economic unit even if in law that economic unit consists of several persons,[469] can apply in the SSM context, where the rules refer to "companies",[470] or to "entities",[471] or the SRM context, where rules use the term "undertaking" only as part of the concept of "parent undertaking" (i.e. an undertaking as a parent company, not as a group, formed by several companies).[472]

More problematic than this is the combination of rules in article 18 SSM Regulation. The calculation of fines can be made through two alternative methods: one, up to twice the amount of the profits gained or losses avoided because of the breach where those can be determined; two, up to 10 % of the total annual turnover. The problem is with the second method, because, on the one hand, article 18 (1) refers to the turnover, as defined in relevant Union law, of a *legal person* in the preceding business year.[473] On the other hand, the next section of the provision states that:

Where the legal person is a subsidiary of a parent undertaking, the relevant total annual turnover referred to in paragraph 1 shall be the total annual turnover resulting from the consolidated account of the ultimate parent undertaking in the preceding business year.[474]

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465 Case 48/69 *Imperial Chemical Industries* v *Commission* (1972) ECR 619; Case 107/82 *AEG-Telefunken* v *Commission* (1983) ECR 3151; Case C-294/98 P *Metsä-Serla and Others* v *Commission* (2000) ECR I-10065; Case C-97/08 P *Akzo Nobel and Others* v *Commission* (2009) ECR I-8237, para. 58; Case C-90/09 P *General Química and Others* v *Commission* (2011) ECR I-1, para. 37; Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* (2011) ECR I-2239, para. 96; and Case C-520/09 P *Arkema* v *Commission* (2011) ECR I-8901, para. 38.

466 Case 107/82 *AEG-Telefunken* v *Commission* (1983) ECR 3151 at 50.

467 See e.g. Case T-372/10 *Bolloré v Commission* Judgment of 27 June 2012, para. 45, for a reference to a number of cases where the General Court appraised the evidentiary process by the Commission in this respect.

468 See e.g. Article 7 Regulation 1/2003.

469 Case C-97/08 P *Akzo Nobel and Others* v *Commission* (2009) ECR I-8237 at 54-55.

470 Article 18(1) SSM Regulation.

471 Article 122 Framework Regulation.

472 See e.g. Article 2 (*definitions*) (6) SRM Directive.

473 Article 18(1) SSM Regulation.

474 Article 18(2) SSM Regulation.

The combination of the two provisions has at least three possible interpretations, two of which are problematic, and one that, in our view, is sounder, and the one that should be accepted. Under one interpretation the provision would imply that every time the legal person committing the offence is a subsidiary in a group, the imputation of the offence and the calculation of the fine should presume that the subsidiary acts under the direct influence of the parent. This would be contrary to the case law referred above, which is based on the EU courts' view that the approach of the Commission cannot in any way create a regime of strict liability, where the parent automatically responds for the acts of its subsidiary; for liability is personal, and, in group cases, based on the parent's own acts in directing and influencing the subsidiary.[475] Admittedly, in some cases the courts make such a strong presumption of direct influence when the parent has a 100% that the analysis of actual involvement is secondary;[476] but, as held by the CJEU and the ECtHR, presumptions of liability, even if strong, are compatible with fundamental rights, *as long* as they are rebuttable,[477] and, as it happens, there is hardly any case where the actual terms of the parent-subsidiary relationship are completely sidestepped and not discussed, not to mention the fact that article 18 (2) refers to "subsidiary" and "parent" in general, without qualifying it with the 100% (or similar) holding. If article 18 (2) has implications for the rules on the imputation of conduct, it must be interpreted in light of fundamental rights.

A second possibility would be to interpret that the provision is not trying to establish rules for the imputation of the offence, but merely for the calculation of fines, i.e. the rule does not predetermine the party that can be imputed with a breach of rules, but how the fines should be calculated with regard to the party imputed. However, this second interpretation would mean that, in case of breach, the mere fact that a party is a subsidiary entails that the fine imposed can amount to a 10% of the turnover of the consolidated group. This would clearly leave the provision open to challenge on grounds of lack of proportionality.[478]

A third, narrower, and, in our view, more sensible, interpretation of this provision, is that its aim is merely to set a higher limit for the fines in cases where the entity involved is part of a group, *provided the parent company participated in the offence*. In our view reading into the provision the last part of the sentence

475 Case C-97/08 P *Akzo Nobel and Others* v *Commission* (2009) ECR I-8237 at 71. See also C-294/98 P *Metsä-Serla and Others* v *Commission* (2000) ECR I-10065 at 34; or Case T-372/10 *Bolloré v Commission* Judgment of 27 June 2012, at 52; Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* (2000) ECR I-9925.

476 See, e.g. Case T-299/08 *Elf Aquitaine v Commission* (2011) ECR II-2159; and C-521/09 P *Elf Aquitaine v Commission*, Judgment of 29 September 2011.

477 See, e.g. Case C-45/08 *Spector Photo Group and Van Raemdonck* (2009) ECR I-12073, at 43-44; Application 34619/97 *Janocevic v Sweden* Judgment 23 July 2002. See also C-521/09 P *Elf Aquitaine v Commission*, Judgment of 29 September 2011 at 62.

478 See e.g. C-266/06 *Evonik Degussa GmbH v Commission* 22 May 2008; and, implicitly, Case C-289/04 P *Showa Denko* v *Commission* (2006) ECR I-5859 (discussion of criteria for calculation of fines, including the purpose to deter from the breach). See also Case T-279/02 *Degussa* v *Commission* (2006) ECR II-897; T-214/06 *Imperial Chemical Industries Ltdv Commission* Judgment of 5 June 2012; Case T-541/08 *Sasol and others v Commission* Judgment of 11 July 2014.

in italics is the only way to reach a result compatible with the limits on sanctions arising from fundamental rights. Thus, the ECB and NCAs need to have shown that the subsidiary was under the direct influence of the parent in order to, first, impute the offence to both, parent and subsidiary, and, then, calculate the fines accordingly.

Still, even this interpretation is not free from problems, as the provision refers to the turnover *resulting from the consolidated account of the ultimate parent undertaking*, which also seems to assume that *the whole group* is implicated in the offence. This sweeping statement can be a source of much trouble. Imagine a situation where a banking subsidiary forms part of a group controlled by an insurance company or by an holding company controlling also an insurance company: How can one take the view that this provision on calculation of fines confers, albeit indirectly, investigative and sanctioning powers on the ECB on that insurance companies that are outside its purview due to the limits of the legal basis of Article 127(6) TFEU?.

(b) Moving now to "horizontal" cases, in judicial precedent the problem has arisen whenever the administrative authority (almost invariably, the Commission in competition cases) seemed to calculate the fines in a manner that differed between the entities participating in the prohibited conduct. The difference in treatment was used by the entities concerned to challenge the decisions on grounds of a breach of equality (equivalent situations are treated differently) and proportionality (the calculation for other entities serving as the benchmark of proportion).[479] However, EU courts have tended to be quite generous in their appreciation, and have refused to bind administrative institutions with their own precedents.[480]

c) At this point one does not need to emphasize the differences between the regimes of fundamental rights and investment protection. The latter's content is more vague, but, precisely for that reason, has served arbitral tribunals to stretch the boundaries of concepts like "fair and equitable treatment" or "full protection and security" to encompass content that is not only substantive, but procedural,[481] and that covers not only the exercise of administrative functions, but also the imposition of penalties. The vagueness of such standards saves arbitral tribunals the trouble of analysing complex distinctions, such as whether a measure is a "penalty", or whether such penalty is "criminal in nature". All that matters is whether the standard (as constructed by the tribunal in light of existing precedent) was violated by the State.

479 See e.g. Case C-439/11 P *Ziegler v Commission* Judgment of 11 July 2013.

480 "The Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there is discrimination". See Case C-439/11 P *Ziegler v Commission* Judgment of 11 July 2013 at 134; Case C-167/04 P *JCB Service* v *Commission* (2006) ECR I-8935 at 205.

481 *Supra* VI.C.1.d.

And, in this regard, one can only conclude that investment protection law also covers cases that we would consider under the protection of judicial due process rights, in general, and rights associated with the criminal procedure, in particular. The availability of judicial review and judicial remedies is key to determine whether an investment protection standard has been violated.[482] In particular, a denial of justice exists if the courts refuse to entertain a suit, or subject it to undue delay, or refuse to grant the investor the right to be heard,[483] and a parallel has been drawn between the standards under investment treaties, and standards under the ECHR.[484] From the more specific perspective of measures that can be considered as "penalties", investment arbitration tribunals have repeatedly applied the requirement of proportionality (though in a broader context than that of penalties[485]). In *Genin*, for example, the arbitral tribunal examined the withdrawal of a banking licence to a foreign institution by Estonian authorities. Finding that, in principle, the application of regulatory rules by the authorities was excessively formalistic, the tribunal went into the details of the case, to see that the authorities had ample justification for making their decision.[486]

As said earlier, the effectiveness of investment protection standards as an actual limit to the regulatory/supervisory action within the SSM and SRM needs to overcome important procedural obstacles, especially if the acts are adopted by the ECB.[487] However, it would be ironic if, in a context where the States involved are part of a supranational organization with constitutional powers, and which has as part of its core two (overlapping) common human rights texts, and partially harmonized corporate laws, the greater challenge to SSM and SRM acts came from investment protection law, which was born to overcome, in a very specific terrain, the wide gap in the understanding of basic elements of the rule of law at a global level.

VII. CONCLUSIONS

In light of the foregoing, a couple of provisional conclusions can be attempted.

Our inquiry shows, first, that the constitutional distribution of competences within the SSM is likely to be more ambiguous than necessary. Despite the somehow clearer horizontal distribution of regulatory competences between

482 See, e.g. *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004, at 116.

483 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Final Award of 1 November 1999

484 *Mondev International Ltd. v. The United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October, 2002.

485 See, e.g. *Saluka Investments BV v The Czech Republic*, Arbitration under UNCITRAL Arbitration Rules, PCA, 17 March 2006.

486 *Genin, Eastern Credit Ltd., Inc. And AS Baltoil v Republic of Estonia*, Award 25 June 2001, 6 ICSID Reports 241.

487 *Supra* VI.B.2.c, and VI.C.1.d.

the EBA and the ECB, ECB supervisory powers are possibly extending beyond direct and indirect oversight to embrace also secondary regulation where Union law is conceived as incomplete and grants “competent authority” options and discretions. The interpretation of the SSM Regulation on this point is however unsettled, and for good reasons. There is indeed a constitutional ambiguity, that is fatally reflected in two conflicting readings of the SSM Regulation and features a *de facto* limitation on the smooth exercise of such regulatory powers within the SSM with two likely implications: to open up an unchartered territory to private litigation and to foster, failing a CJEU final say on this point, institutional “light touch” and cooperative solutions rather than heavy handed unilateral action, like the pragmatic use (proportionate but still not completely safe) of ECB guidelines and recommendations to national competent authorities under Article 4(3) for the exercise of such options and discretions. In turn the line between ECB and SRB competences is uncertain in some respects and this also materializes a risk of overlaps and conflicts of attributions.

At the same time the coexistence of national and EU law within the SSM is a matter of concern, mostly revolving around the ECB role of guidelines, recommendations or general instructions to NCAs, the ECB enforcement of national legislation implementing EU law and the distribution of sanctioning powers between the ECB and NCAs.

Also the relationship between prudential and monetary tasks described by the SSM Regulation seems to be quite questionable. Article 25(2) of the SSM Regulation stipulates that the ECB’s supervisory powers “shall [not] *be determined by* (…) its tasks relating to monetary policy” (emphasis added). We argue that, in the absence of a reform in the Treaties, the prevalence of price stability as a “primary objective” over financial stability will make the monetary policy functions of the ECB prevail over its prudential supervisory functions in the event of a clash between the two. This conclusion, however, is not definitive. To this date, the CJEU has not explored the relationship between the ECB mandates of price stability and financial stability, nor has it explored the relationship between the ECB’s monetary policy and prudential supervisory functions. The question thus remains open and subject to interpretation but if the suggested interpretation that price stability and monetary policy should prevail over financial stability and prudential supervision were correct, then the affirmation in Article 25(2) could prove not fully consistent with the Treaty.

Finally, the SSM raises important questions about the implications of the exercise of the supervisory tasks conferred upon the ECB and NCAs for the fundamental rights of the entities subject to supervision and their constituencies, and the extent to which those rights can pose limits to the exercise of those competences. After having explored the broader issues of the applicability of fundamental rights in an EU context, we find that the ECB and NCAs can feel quite at ease about potential substantive limits to the exercise of their competences: a sound proportionality analysis is likely to be favourable to supervisors. This leaves procedural guarantees as the main safeguard for particulars and financial institutions against excessive intrusion, and as the main limit for regulatory/supervisory intervention. The right to an effective judicial protection stands out, in our view, among the many fundamental rights of procedural nature as a central mechanism of protection. However, EU courts only review, in principle, *legality*, pursuant to article 263 TFEU, but do not have full jurisdiction except for what is expressly provided in application of Article 261 TFEU. If the decision is adopted by the NCAs in the context of a composite procedure, where both the ECB and NCAs adopt certain acts, the financial entity is only granted for sure the action to seek annulment of the decision by the NCA (according to differentiated national standards of review), whereas the action to annul the act by the ECB is subject to the extremely restrictive *Plauman* standard. A similar, though even more complex, scenario arises in case the ECB applies national law. It is difficult to see these guarantees as meeting the requirements under article 6 ECtHR and 47 of the Charter. In this regard, a parallel with competition cases is often instituted to show that in the antitrust field, full jurisdiction on the imposition of the fines coupled with legality control on the decision is considered sufficient to ensure effective judicial protection. However, we argue that it should also be considered that in that field, fines (that are subject to a full jurisdiction review) are the major way entities are economically affected in their fundamental rights, whereas in this context many supervisory measures other than fines are highly afflictive (and possess a "coloration penale" according to the standards of the ECtHR) and are therefore similar in their effect on the recipients to fines in the antitrust sector, thereby requiring that an effective judicial protection be duly warranted. We conclude therefore that the most desirable course of action would be for EU courts to show that, without the need to replace judicial second guessing to complex technical assessments, they can develop a case law of acceptably robust review of administrative decisions. There are arguments to suggest that the standard of the review of the CJEU has evolved over time (the *Remia* decision is often said to have marked a turning point) and that EU courts have grown bolder and more willing to elaborate the criteria of manifest error and excess of power, to grant themselves a sufficient leeway for effective and robust judicial control of all supervisory measures. They should go further in the same line. In the specific context of fines, moreover, it is desirable that full jurisdiction be clearly in place. The reference to Council Regulation 2532/98, whose article 5 introduced full CJEU jurisdiction for sanctions (in conformity with Article 261 TFEU), is currently somehow equivocal and should be clarified. The same full jurisdiction is due in the review of NCAs' sanctions under Article 6 EuCHR in the wake of the ECtHR *Franzo Grande Stevens* judgment.

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