



BANCA D'ITALIA  
EUROSISTEMA

## Quaderni di Ricerca Giuridica

della Consulenza Legale

Due process and safeguards of the persons subject to SSM  
supervisory and sanctioning proceedings

Raffaele D'Ambrosio

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ISSN: 0394-3097 (print)

ISSN: 2281-4779 (online)

*Printed by the Printing and Publishing Division of the Bank of Italy*

## FOREWORD

The aim of the paper is to ascertain which procedural rules apply to the different kinds of decisions within the Single Supervisory Mechanism (SSM) and what safeguards are granted to the addressees of these decisions.

The starting point is a previous analysis of the different meanings, under the relevant EU law, of “supervisory decisions”, “administrative measures” and “administrative penalties”.

A description of the various rules applicable to the decisions above will follow.

Since the SSM does not have legal personality, supervisory decisions cannot be ascribed to it and are therefore imputed to the ECB or to the NCAs according to the general rules on competence contained in Council Regulation 1024/2013 (known as the “SSM Regulation”). These rules are based on the distinction between significant credit institutions, directly supervised by the ECB, and the less significant ones, supervised by the NCAs within a common framework.

As regards the rules on due process and the rights of defence, one has to refer to either the Union law or the relevant national law, depending basically on the authority (the ECB or the NCA) vested with the power to adopt the final decision.

The rules of procedure and due process laid down by national laws may differ partially from those in place at Union level and so impinge on the equal treatment of credit institutions within the SSM.

A question accordingly arises as to whether the ECB, in its capacity as authority vested with the power to adopt the final decision and, in any case, in its role of authority responsible for the smooth functioning of the SSM as a whole, has the duty of monitoring the conduct of the NCAs and, as the case may be, of forcing them to apply, within any SSM supervisory or sanctioning proceeding, the same safeguards of the defence as laid down by Union law.

Aside from the case where the NCAs simply assist the ECB with the preparation of ECB’s decisions and so are compelled to follow its instructions, the role assigned to the ECB by the SSM Regulation does not go so far.

The adoption of the ECB legal framework under Articles 4(3) and 6(7) of the SSM Regulation will nonetheless represent a “benchmark” for the administrative procedures or phases of procedures which in accordance with the SSM Regulation fall under the national jurisdictions.



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## 1. Introduction: what this paper intends to demonstrate (\*)

The aim of this paper is to ascertain which procedural rules apply to the different kinds of decisions within the Single Supervisory Mechanism (SSM)<sup>1</sup> and what safeguards are granted to the addressees of these decisions.

The findings of this study should not be considered as conclusive, considering the novelty of the subject, the incomplete process of harmonisation and consolidation of the substantial EU banking law, and the still uncertain stance of the case law of the European Courts on some aspects of the due process principles and the rights of defence.

The starting point is a previous analysis of the different meanings, under the relevant EU law, of “supervisory decisions”, “administrative measures” and “administrative penalties”, including, among these latter, the “penalties having a *coloration pénale*”, as defined under the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).

A description of the various sets of rules contained in the SSM Regulation and applicable to the decisions above, from the rules on the allocation of competences between the European Central Bank (ECB) and the National Competent Authorities (NCAs) to those on due process and rights of defence, will follow.

Since the SSM does not have legal personality, supervisory decisions cannot be ascribed to it and are therefore imputed to the ECB or to the NCAs according to the general rules on competence, which are basically contained in Article 6 of Council Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institution (known as the “SSM Regulation”)<sup>2</sup>.

(\*) The author gratefully acknowledges comments from Jean-Christophe Cabotte.

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1 See in literature: LACKHOFF K., “How will the Single Supervisory Mechanism (SSM) Function? A Brief Overview”, draft text to be published in the *J.I.B.L.R.*, 2014; CAPOLINO, O., DONATO, L. and GRASSO, R., “Road map dell’unione bancaria europea. Il Single Supervisory Mechanism e le implicazioni per le banche”, *Banche e ciclo economico: redditività, stabilità e nuova vigilanza*, Edibank, 2013; FERRAN, E. and V. BABIS, “The European Single Supervisory Mechanism”, *Legal Studies Research Working Paper*, University of Cambridge, 2013; MANCINI, M., *Dalla vigilanza nazionale armonizzata alla Banking Union*, *Quaderni di Ricerca Giuridica*, Banca d’Italia, 73, 2013; VISCO, I., “Le banche italiane nella supervisione unica europea”, *XVIII Rapporto sul sistema finanziario italiano*, Fondazione Rosselli, 2013; VISCO, I., *The exit from the Euro Crisis: Opportunities and Challenges of The Banking Union*, Istituto Affari Internazionali and Council on Foreign Relations, 2013; WEISSMANN, “The Single Supervisory Mechanism (SSM): the Commission Proposal on reforming EU Banking Supervision”, *J.I.B.L.R.*, 2013; BECK, T., “Banking Union for Europe. Risks and Challenge”s, *CEPR*, 2012; ELLIOT, D. J., “Key issues on European Banking Union. Trade-offs and some recommendations”, *Global Economy and development Working Paper*, 2012; NAPOLETANO G., “La risposta europea alla crisi del debito sovrano: il rafforzamento dell’Unione economica e monetaria. Verso l’Unione bancaria”, *Banca, borsa e tit. cred.*, 2012, I, 747 ff.; SARCINELLI M., “L’Unione bancaria europea”, *Banca Impresa Società*, 2012, 3, 333 ff.; VÉRON, N., “Europe’s single supervisory mechanism and the long journey towards Banking Union”, *Econstor Working Paper*, 2012; WYMEERSCH, E., “The European banking Union, a first analysis”, *Financial Law Institute Working Paper*, 2012.

2 OJ, L 287, 29.10.2013, p. 63.

These general rules are based on the distinction between significant credit institutions, directly supervised by the ECB, and the less significant ones, directly supervised by the NCAs.

This distinction has a general application, since it is related to all the tasks specified in Article 4 of the SSM Regulation, including that of ensuring compliance with the rules on the prudential supervision of credit institutions by applying administrative measures and penalties.

Therefore, the above criterion on the allocation of competences applies not only to supervisory decisions under Article 16 of the SSM Regulation but to administrative measures and, although the wording of Article 18 of the SSM Regulation is not crystal clear, also to the administrative penalties that the supervisory authority may apply for unlawful behaviour.

Exceptions to this criterion only pertain to (i) macro-prudential decisions (Article 5 of the SSM Regulation), (ii) the granting (and withdrawal) of the banking licence and (iii) the assessment of the good repute of the holders of qualifying stakes (Articles 14 and 15 of the SSM Regulation).

As regards the rules on due process and the rights of defence, one has to refer to either the Union law or the relevant national law, depending basically on the authority (the ECB or the NCA) vested with the power to adopt the final decision.

Despite the convergence of the general principles of law applicable across EU countries, the specific administrative rules of procedure laid down by national law may differ partially from those in place at Union level and so impinge on the equal treatment of credit institutions within the SSM<sup>3</sup>.

The safeguards granted by Union law to the addressees of the ECB decisions gradually increase as we move from the general rules on due process for any supervisory decision adversely affecting the person concerned to the specific and more stringent rules aimed at the imposition of penalties having a *coloration pénale*.

The ECB is subject to Union law and must therefore abide by these rules when adopting its decisions. The same should be true for the NCAs of the participating Member States<sup>4</sup>. Some divergences may nonetheless occur in the application of Union law within the different national legal frameworks.

In this respect, compliance with the principle of separation between investigative and decision-making powers within the proceedings for the imposition of penalties having a *coloration pénale* may be regarded as the test of the application of the safeguards laid down under the EU law.

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<sup>3</sup> Under Article 1 of the SSM Regulation this latter “confers on ECB specific tasks concerning policies relating to prudential supervision on credit institutions... with full regard and duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions...”.

<sup>4</sup> Under Article 2 of the SSM Regulation “participating Member States” are the Euro area Member States and the Member States which have established a close cooperation with the ECB.

Whilst some participating Member States, such as France and Italy, apply the principle of separation as from the administrative procedure by the relevant NCA, other participating Member States tend not to apply it, where the decision on the application of penalties is subject to an unlimited judicial review.

Though these differences may not be extremely serious, divergences between national and EU rules of procedures within the SSM should nevertheless be avoided.

As a result of the primacy of Union law, any action taken by the NCAs within the scope of the SSM should comply with the Union requirements safeguarding fundamental rights. This need is still more imperative where the acts adopted by the NCAs are considered within the SSM Regulation as necessary steps within the procedure for the adoption of a Union decision, particularly where the relevant EU institution has only limited discretion with regard to this decision.

A question accordingly arises as to whether the ECB, in its capacity as authority vested with the power to adopt the final decision and, in any case, in its role of authority responsible for the smooth functioning of the SSM as a whole, has the duty of monitoring the conduct of the NCAs responsible for the relevant acts and to compel them to apply the same safeguards to all the supervisory and sanctioning proceedings within the SSM.

Aside from the case where the NCAs simply assist the ECB with the preparation of ECB's decisions and so are forced to follow its instructions, the role assigned to the ECB by the SSM Regulation does not go so far.

The adoption of the ECB legal framework under Articles 4(3) and 6(7) of the SSM Regulation will certainly represent a step forward in the harmonisation process and a "benchmark" for the administrative procedures or phases of procedures which in accordance with the SSM Regulation fall under the national jurisdictions.

The complete harmonisation of supervisory and sanction procedures within the SSM has therefore not yet been achieved.

## **2. The distinction between "Supervisory decisions", "Administrative measures", "Administrative penalties" and "Penalties having a *coloration pénale*": criteria**

### **2.1. The need for an autonomous interpretation of EU provisions which make no express reference to the law of the Member States**

In order to establish which rules and safeguards apply to the procedures specifically devoted to the adoption of the SSM decisions one must first determine what is meant by: "supervisory decisions", "administrative measures", "administrative penalties" and "penalties having a *coloration pénale*".

In the view of the CJEU, EU legal provisions that make no express reference to the law of the Member States, including therefore those contained in the SSM Regulation, have to be interpreted autonomously<sup>5</sup>.

Consequently, under the SSM Regulation, the notion of “supervisory powers” (and therefore that of “supervisory decisions” in which these powers materialise), mentioned in Article 16<sup>6</sup>, as well as those of “administrative measures” and “administrative penalties”, mentioned in Article 18, must be determined in the light of the *objectives* of the SSM Regulation and of its *context*, including the material banking legislation contained in the so-called CRD IV/CRR package: Directive 2013/36/EU (hereinafter: the CR Directive) and in Regulation (EU) 575/2013 (hereinafter: the CR Regulation) as well as in the light of the general definitions laid down in the case law of the EU courts.

On the contrary, the notions above cannot, for the sake of a harmonised application of the SSM Regulation, be determined according to the qualifications of each national law.

Even though the CR Directive is unbiased in respect of the distinction between “administrative measures” and “administrative penalties”, considering this distinction to be a matter of national law, the principle of an autonomous interpretation of the provisions contained in the SSM Regulation obliges the interpreter to find uniform definitions.

In doing so, the interpreter needs to take the following *caveats* into account.

(a). Under both the CR Directive (Article 102) and the SSM Regulation (Article 16(1)) some decisions in which the supervisory powers materialise are qualified as “measures at an early stage”. These decisions must not be confused with the “administrative measures” applied by the supervisory authority as a response to unlawful behaviour.

(b). Even though Article 18(5), second sub-paragraph, of the SSM Regulation only mentions the administrative measures addressed to the managers of the supervised entities and not also those addressed to the entities themselves, the criteria to identify the relevant notion of “administrative measures” are the same, since these measures do not change their features and their aim depending on the nature of their addressees as legal or natural persons. There is therefore a need to identify the “administrative measures” for the purposes of Article 18(5).

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5 See ECJ, C-66/08, *Kozłowski*, § 42: “it follows from the need for uniform application of Community law and from the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question”. See also Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-8817, § 24 Case 327/82 *Ekro* [1984], §§ 10 to 11, Case C-287/98 *Linster* [2000], §§ 41 to 44, Case C-170/03 *Feron* [2005], §§ 23 to 28.

6 Article 16 of the SSM Regulation is entitled “supervisory powers” and in paragraph 2 specifies a list of powers that the ECB may exercise towards the supervised entities. Each of these powers materialises in the relevant supervisory decision.

(c). Article 18(7) of the SSM Regulation employs the word “sanctions” instead of “penalties,” which is used in the other paragraphs of Article 18. The reason for this different wording is that Article 18(7) refers to Council Regulation 2532/98, which contains<sup>7</sup>, in turn, a definition of “sanction” and not a definition of “penalties”. In any case, in EU legislative acts the words “penalties” and “sanctions” are basically equivalent<sup>8</sup>.

(d). Since the CRD IV/CRR package does not help the interpreter to formulate general and distinct notions of “supervisory decisions”, “administrative measures” and “administrative penalties”, one may refer to the EU legislative acts pertaining to the contiguous field of the financial market. The recent EU Regulations on the Credit Rating Agencies (hereinafter CRA)<sup>9</sup> and on OTC derivatives, central counterparties and trade repositories<sup>10</sup> provide two different sets of tools to react to unlawful behaviour and expressly qualify them as measures and as fines.

(e) However, the language adopted by the EU legislator in the fields of banking (CRD IV/CRR package) and financial market (CRA/trade repositories regulations) is ambiguous. EU legislative acts sometimes employ different words to refer to the same kind of instrument. Identical or similar tools are, for example, included among “administrative measures” under the CRD IV/CRR package and among “supervisory measures” under the the CRA/trade repositories regulations. Moreover, these Union laws only give examples and stop short of providing general definitions.

(f) Here the case law of the CJEU may help the interpreter. Even though this case law refers to fields other than banking and financial supervision, it gives general and clear definitions of “administrative measures” and “administrative penalties”, based on their different aims: reparatory and punitive respectively.

(g) Furthermore, the case law of the ECtHR, which is followed by the CJEU, introduces, besides “administrative measures” and “administrative penalties”, the further category of “penalties having a *coloration pénale*”. Even though the EU legislative acts in the field of banking and financial supervision do not refer to “penalties having a *coloration pénale*”, a definition of these penalties is still useful, since, for the purposes of Article 6 of the European Convention on Human Rights (the Convention) and of Article 47 of the Charter of Fundamental Rights of the European Union (the Charter), specific safeguards shall apply to them.

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7 See Article 1.

8 Some scholars still employ the word “sanction” as an overall term to cover responses to an offence both of a reparatory and of a punitive nature but they are aware (a) that “Union law does not prefer the term ‘sanctions’ as an umbrella term for labelling the state’s responses to unlawful behaviour” and (b) that even though in the English version of Union legislative acts the term ‘penalty’ is more common, this term “is translated in several language versions by an equivalent of the word sanction”: see DE MOOR-VAN VUGT, A., “Administrative sanctions in EU law”, in *REAL*, vol. 5, 2012, p. 12.

9 Regulation 1060/2009 as amended by Regulation 513/2011 and by Regulation 462/2013.

10 Regulation 648/2012 of 4 July 2012.

## **2.2. The lack of any criterion for drawing this distinction under SSM Regulation**

Section 2 of Chapter III of the SSM Regulation is entitled “specific supervisory powers”. Besides the traditional supervisory decisions in which these powers materialise (Articles 14, 15 and 16)<sup>11</sup>, it deals with the administrative measures addressed to the management of the supervised entities and the administrative penalties addressed to both the natural and legal persons (Article 18).

This choice is in line with the 2012 Basel Core Principles for Effective Banking Supervision under which the supervisory authority needs to have a unique set of tools to address unsafe and unsound practices or activities that could pose risks to banks or to the banking system as a whole<sup>12</sup>.

It also reflects the practice of the supervisory authorities, which are prone to consider both the supervisory decisions and the administrative measures and penalties as means of enforcement.

Not surprisingly, the SSM Regulation establishes no criteria to distinguish between “supervisory decisions”, “administrative measures” and “administrative penalties”<sup>13</sup>.

## **2.3. The criterion to distinguish between supervisory decisions and administrative measures and penalties laid down under Article 65 of the CR Directive: previous violation**

The CR Directive confirms first of all, like the SSM Regulation, the inclusion within the field of prudential supervision of both supervisory powers and the power to impose administrative measures and administrative penalties<sup>14</sup>.

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11 These provisions pertain respectively to: the authorisation to take up the business of a credit institution and the withdrawal of the authorisation (Article 14); the assessment of acquisitions of qualifying holdings in a bank and the decision to oppose the acquisition (Article 15); some specific supervisory powers (Article 16).

12 See Principle 11 “Corrective and sanctioning powers of supervisors” under which “the supervisor acts at an early stage to address unsafe and unsound practices or activities that could pose risks to banks or to the banking system. The supervisor has at its disposal an adequate range of supervisory tools to bring about timely corrective actions. This includes the ability to revoke the banking licence or to recommend its revocation”.

13 The only element one may refer to is in recital 36, where it says that “penalties” should “ensure that supervisory rules and decisions are applied” by the supervised entities. But this is too less, since the goal of ensuring compliance with the supervisory rules and decisions is common to both the administrative penalties and measures and the supervisory decisions.

14 Title VII on “prudential supervision” includes section IV (Articles 64 and ff.) on “supervisory powers, powers to impose penalties and right of appeal”. Moreover, Article 64(2) of the CR Directive gives a general regime applicable to all the supervisory powers including those to impose penalties. It stipulates that “competent authorities shall exercise their supervisory powers and their powers to impose penalties in accordance with this Directive and with national law, in any of the following ways: (a) directly; (b) in collaboration with other authorities; (c) under their responsibility by delegation to such authorities; (d) by application to the competent judicial authorities”.

At the same time, and unlike the SSM Regulation, the CR Directive gives a criterion on the basis of which it is possible to distinguish between supervisory decisions<sup>15</sup> on the one hand and decisions to impose administrative measures or administrative penalties on the other hand.

Article 64(1) of the CR Directive stipulates that “competent authorities shall be given all supervisory powers to intervene in the activity of institutions that are necessary for the exercise of their function, including in particular the right to withdraw an authorisation in accordance with Article 18, the powers required in accordance with Article 102 and the powers set out in Articles 104 and 105”.

Article 65(1) clarifies, in turn, that “without prejudice to the supervisory powers of competent authorities referred to in Article 64 and the right of Member States to provide for and impose criminal penalties, Member States shall lay down rules on administrative penalties and other administrative measures in respect of breaches of national provisions transposing this Directive and of Regulation (EU) No 575/2013 and shall take all measures necessary to ensure that they are implemented. Where Member States decide not to lay down rules for administrative penalties for breaches which are subject to national criminal law they shall communicate to the Commission the relevant criminal law provisions. The administrative penalties and other administrative measures shall be effective, proportionate and dissuasive”<sup>16</sup>.

In the light of the above it is clear that both administrative measures and penalties may be distinguished from supervisory decisions and that: (i) they are applicable only in case of breaches of the CR Regulation and of national provisions transposing the CR Directive; (ii) they are not only effective and proportionate, like the supervisory decisions, but also dissuasive since they are intended to prevent further violations<sup>17</sup>.

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15 To be exact the CR Directive distinguishes supervisory powers from administrative measures and penalties, but the criterion can clearly also be used with regard the acts adopted in the exercise of the supervisory powers.

16 See also Recital 35, under which “in order to ensure compliance with the obligations deriving from this Directive and from Regulation... by institutions... Member States should be required to provide for administrative sanctions and measures which are effective, proportionate and dissuasive”.

17 See Recital 41 of the CR Directive: “this Directive should provide for administrative penalties and other administrative measures in order to ensure the greatest possible scope for action following a breach and to help prevent further infringements, irrespective of their qualification as an administrative penalty or other administrative measure under the relevant national law”. Both penalties and measures are therefore not only “effective” and “proportionate”, like any supervisory decision, but also “dissuasive”. Penalties and measures “can be considered effective when they are capable of ensuring compliance with EU law, proportionate when they adequately reflect the gravity of the violation and do not go beyond what is necessary for the objectives pursued, and dissuasive when they are sufficiently serious to deter the authors of violations from repeating the same offence, and other potential offenders from committing such violations”: Communication from the Commission of 8 December 2010 (Reinforcing sanctioning regimes in the financial services sector), paragraph 2.1.

## **2.4. The need to distinguish between administrative measures and administrative penalties**

### *2.4.1. The lack of any criterion under EU banking and financial law*

The above-mentioned features - the necessary link to a previous violation and the aim to prevent further ones – clearly differentiate both administrative measures and administrative penalties from supervisory decisions<sup>18</sup>, but they do not help the interpreter to distinguish between the administrative measures and the administrative penalties.

Furthermore, the CR Directive is unbiased towards this distinction. It refers to both administrative penalties and measures in order to cover all actions applied after a violation is committed, and which are intended to prevent further infringements, irrespective of their qualification as a sanction or as a measure under national law<sup>19</sup>.

In the absence of any criterion under the CR Directive for distinguishing between “administrative measures” and “administrative penalties” one may refer to the EU law in the contiguous field of the financial supervision, basically to the Regulations on CRA and on OTC, central counterparties and trade repositories.

However, these Regulations distinguish between “fines”, which are strictly “pecuniary penalties”, and “measures” but not between “penalties” in general (i.e. including non-pecuniary penalties) and “measures”<sup>20</sup>.

Thus they cannot be used to distinguish between administrative measures and administrative penalties.

Moreover, the wording used by these Regulations with regard to the measures is deceptive. In lieu of the expression “*administrative* measures” they use “*supervisory* measures,” which evokes the common prudential decisions of the CRDIV/CRR package<sup>21</sup>.

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18 Article 65 of the CR Directive clarifies that both penalties and measures are provided for and applied “without prejudice to the supervisory powers of competent authorities in accordance with Article 64 and the right of Member States to provide for and impose criminal sanctions”.

19 See Recital 41. This approach is also confirmed by the Communication from the Commission of 8 December 2010, where (in paragraph 2.1) it explains that “EU financial services rules often refer to both ‘administrative sanctions’ and ‘administrative measures’” and that “the distinction between measures and sanctions is not clear-cut”, since “some administrative actions - such as the withdrawal of authorisation - may be considered to be an administrative sanction in some Member States and an administrative measure in others”.

20 See Articles 23e (5), 24 and 36a of Regulation 1060/2009 as amended by Regulation 513/2011 and by Regulation 462/2013 on credit rating agencies as well as Articles 64 ff. of Regulation 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

21 Article 24 of the Regulation 1060/2009 is entitled “supervisory measures by ESMA”. Its first paragraph stipulates that: “where, in accordance with Article 23e(5), ESMA’s Board of Supervisors finds that a credit rating agency has committed one of the infringements listed in Annex III, it shall take one or more of the following decisions: (a) withdraw the registration of the credit rating agency; (b) temporarily prohibit the credit rating agency from issuing credit ratings with effect throughout the Union, until the infringement has been brought to an end; (c) suspend the use, for regulatory purposes, of the credit ratings

#### ***2.4.2. The criterion established by the case law of the CJEU: the aim of the decision***

Unlike the above-mentioned Regulations, Regulation 2988/95 on the protection of the European Communities' financial interests correctly distinguishes between "administrative penalties" and "administrative measures", assuming that only the latter have a reparatory nature, since they are limited to the withdrawal of a wrongly obtained advantage<sup>22</sup>.

This view is confirmed and better clarified by the CJEU in the *Kaserei Champignon Hofmeister* case<sup>23</sup> and, more clearly, in the *Bonda* case<sup>24</sup>.

Both the judgments refer to the rules contained under Regulation 2988/95 but establish a general criterion applicable to all administrative measures and penalties.

In the CJEU view, the character of "administrative measures" and that of "administrative penalties" shall be defined on the basis of their respective purposes: (i) the aim of administrative measures is to repair the interest harmed by the offender; (ii) the aim of administrative penalties is to punish the latter.

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issued by the credit rating agency with effect throughout the Union, until the infringement has been brought to an end; (d) require the credit rating agency to bring the infringement to an end; (e) issue public notices".

22 See Articles 4 and 5 of the Regulation. Article 4 provides: "1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage: – by an obligation to pay or repay the amounts due or wrongly received, – by the total or partial loss of the security provided in support of the request for an advantage granted or at the time of the receipt of an advance. 2. Application of the measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, where so provided for, interest which may be determined on a flat-rate basis. 3. Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal. 4. The measures provided for in this Article shall not be regarded as penalties". Article 5 (1) of the regulation reads as follows: "1. Intentional irregularities or those caused by negligence may lead to the following administrative penalties: (a) payment of an administrative fine; (b) payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate; this additional sum shall be determined in accordance with a percentage to be set in the specific rules, and may not exceed the level strictly necessary to constitute a deterrent; (c) total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage; (d) exclusion from, or withdrawal of, the advantage for a period subsequent to that of the irregularity; (e) temporary withdrawal of the approval or recognition necessary for participation in a Community aid scheme; (f) the loss of a security or deposit provided for the purpose of complying with the conditions laid down by rules or the replenishment of the amount of a security wrongly released; (g) other penalties of a purely economic type, equivalent in nature and scope, provided for in the sectorial rules adopted by the Council in the light of the specific requirements of the sectors concerned and in compliance with the implementing powers conferred on the Commission by the Council".

23 Case C-210/00, § 41: "in the context of a Community aid scheme, in which the granting of the aid is necessarily subject to the condition that the beneficiary offers all guarantees of probity and trustworthiness, the penalty imposed in the event of non-compliance with those requirements constitutes a specific administrative instrument forming an integral part of the scheme of aid and intended to ensure the sound financial management of Community public funds".

24 In the case C-489/10, *Bonda*, § 40, the ECJ found not punitive a penalty applied to economic operators who had recourse to the aid scheme set up by the Regulation 1973/2004, since its purpose was that of protecting the management of the EU funds by temporarily excluding a recipient who made incorrect statements in his application for aid.

Thus, where the instrument adopted by the competent authority goes further than the mere aim of restoring the interest protected by the law, it may be considered as having a punitive aim and therefore as a penalty<sup>25</sup>.

## 2.5. The uncertain nature of periodic penalty payments

Some EU regulations include within the category of “penalties”<sup>26</sup>, besides “fines”, also “periodic penalty payments”<sup>27</sup>.

The latter are of an uncertain nature.

They may be applied in order to punish a continued infringement. In this case they should be considered as penalties. This occurs under the provisions of Regulation 2532/98, where periodic penalty payments are defined as the amounts of money which, in the case of a continued infringement, an undertaking is obliged to pay as a sanction following the notification of a decision to initiate an infringement procedure<sup>28</sup>.

A different case arises where periodic penalty payments are applied in order to compel compliance with a decision, whose subject may also be the assessment of a violation<sup>29</sup>. In this case they are tantamount to the administrative “*astreintes*” well known in the French legal system<sup>30</sup>.

Whether “periodic penalty payments” are defined as “fines” or as “*astreintes*” carries somewhat different implications for the regime applicable.

Whilst both are subject to the full jurisdiction of the CJEU, the culpability principle applies to the fines but not to the *astreintes*; moreover, unlike fines, *astreintes* cannot be applied after the infringement has been terminated; both *astreintes* and fines can be applied to the same infringement without violating the *ne bis in idem* principle<sup>31</sup>.

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25 Even though the criterion adopted by the CJEU refers specifically to instruments having a pecuniary nature (like both administrative measures and penalties under the regulation above), it could easily be extended to the non-pecuniary ones.

26 Regulation 2532/98 refers to sanctions rather than penalties, but, as already mentioned, there is no difference between them.

27 See Regulation 1/2003, chapter VI, and Regulation 2532/1998, Article 1.

28 See Articles 1 and 6 of Regulation 2532/98.

29 See Article 24 of the Regulation 1/2003.

30 See Article L 612-39 of the COMOFI : « La commission des sanctions peut assortir la sanction d’une astreinte, dont elle fixe le montant et la date d’effet. Un décret en Conseil d’Etat fixe la procédure applicable, le montant journalier maximum de l’astreinte et les modalités selon lesquelles, en cas d’inexécution totale ou partielle ou de retard d’exécution, il est procédé à la liquidation de l’astreinte ».

31 For all these aspects, see SCHWARZE, J., *Droit administratif européen*, Bruxelles, 2009, p. 400: “conformément à leurs objets distincts, les astreintes et les amendes obéissent à des règles différentes. Alors qu’une astreinte ne peut plus être prononcée lorsque l’infraction a cessé ou qu’il n’existe pas de risque de récidive, une amende peut être infligée même lorsque l’infraction a pris fin. L’amende suppose une action coupable, tandis qu’il suffit pour l’astreinte d’une violation objective de droit. Toutefois, la culpabilité peut jouer un rôle dans la fixation du montant de l’astreinte. Il découle de leur différence de nature que les amendes et les astreintes peuvent être prononcées sans pour autant violer le principe *ne bis in idem* ».

## 2.6. The administrative penalties having a *coloration pénale* under the case law of the ECtHR and the CJEU

### 2.6.1. The Engel criteria

In the case law of the ECtHR and the CJEU, the concept of a “criminal charge” carries an “autonomous” meaning, independently of the categorisations employed by the legal systems of the Member States<sup>32</sup>, which are based essentially just on the qualification adopted by the national legislator<sup>33</sup>.

The starting point for the assessment of the applicability of the criminal aspect of Article 6 of the Human Rights Convention is based on the following criteria outlined in the *Engel* judgment<sup>34</sup>:

- (i) the domestic classification;
- (ii) the nature of the offence;
- (iii) the severity of the potential penalty.

The first criterion is of only relative importance and serves only as starting point. If the domestic law classifies an offence as criminal, then this will be

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32 ECtHR *Adolf v. Austria* (App. 8269/78), § 30.

33 Some scholars nonetheless take a different view based upon the nature of the interest harmed by the offender. In the light of the above, criminal offences are tantamount to limitations of constitutional rights (right to liberty and right to property) and therefore occur only where other constitutional rights are seriously harmed: see BRICOLA, F., “Teoria generale del reato”, *Novissimo Digesto Italiano*, XIX, Torino, 1977, p. 14 ff.. See also ROSENFELD E., VEIL, J., “Sanctions administratives, sanctions pénales”, *Pouvoirs* n°128 - La pénalisation, January, 2009, pp. 62-63: “Les sanctions administratives ne sont, dans leur principe même, ni un scandale ni même un sujet de débat. Leur existence a toujours été considérée comme légitime [*United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943)]. Seule se pose la question de la différence de nature et de régime entre les deux catégories de sanctions. Les Cours suprêmes se sont efforcées de tracer les lignes-frontières. L'exercice était indispensable pour déclencher ou dénier l'application, soit de la règle *non bis in idem* interdisant de punir deux fois à raison des mêmes faits, soit du corps de garanties propres à la matière pénale. Le droit français a adopté un critère organique: est une sanction administrative celle qui est prononcée par une autorité administrative. La jurisprudence américaine et la Cour européenne des droits de l'Homme (Cedh) penchent pour un critère matériel. Aux États-Unis, quel qu'en soit l'auteur, le juge se livre à un examen de la sanction, l'autorité sanctionnatrice ou la volonté du législateur n'étant que deux critères parmi d'autres, pour déterminer sa nature. La Cedh admet elle aussi que la matière pénale déborde de beaucoup les juridictions pénales. Cette analyse est plus réaliste mais le système français parvient néanmoins à un résultat comparable par l'intégration de la sanction administrative à la catégorie plus ample du droit répressif qui justifie alors, sans le détour de la requalification, l'application des principes communs de ce droit. Reste une différence: le formalisme du critère retenu par notre droit remet au législateur le soin de rendre les peines cumulables ou non: du seul fait qu'il qualifie une sanction administrative il en autorise le cumul avec une sanction pénale. Cette différence est cependant plus théorique que réelle puisque aux États-Unis les requalifications sont rares et que, d'autre part, le Conseil constitutionnel a édicté une règle de plafonnement global (voir *infra*). En définitive les critères d'identification de la sanction et de l'infraction administratives sont peu ou prou identiques partout. Les sanctions administratives se distinguent des fautes pénales par: la nature de la transgression qui ne requiert en général pas d'élément intentionnel alors qu'en matière pénale le juge doit, sauf exception, caractériser la mauvaise foi; la norme violée, qui peut être réglementaire et non législative (ce qui, en matière pénale, n'est vrai que des contraventions); l'exclusion des peines privatives de liberté que seul le juge judiciaire peut prononcer [Cons. const., n° 89-260 DC, 28 juillet 1989; *Rec.*, p. 71; *RJC*, p. I-370; *JO*, 1er août 1989, p. 9679] (de même au stade normatif que seul le législateur peut édicter)”.

34 ECtHR, *Engels and others v. the Netherlands* (App. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), § 82. See also ECtHR, *Zolotukhin v. Russia* (App. 14939/03), § 53 ff..

decisive; otherwise the Court will look behind the national classification and examine the substantive nature (administrative or criminal) of the procedure in question<sup>35</sup>.

In evaluating the second criterion, which is considered more important<sup>36</sup>, the following factors have to be taken into account by the ECtHR: (i) whether the legal rule in question is addressed exclusively to a specific group, or is of a generally binding character<sup>37</sup>; (ii) whether the proceedings are instituted by a public body with statutory powers of enforcement<sup>38</sup>; (iii) whether the purpose of the legal rule is punitive or deterrent<sup>39</sup>; (iv) whether the imposition of any penalty is dependent upon a finding of guilt<sup>40</sup>; (v) how comparable procedures are classified in other Contracting Member States<sup>41</sup>; (vi) the fact that an offence does not give rise to a criminal record may be relevant, but is not decisive<sup>42</sup>.

The third criterion is determined by reference to the maximum potential penalty that the relevant law provides for<sup>43</sup>.

The second and third criteria laid down in the *Engel* judgment are alternative and not necessarily cumulative.

For Article 6 of the Convention to be held applicable, it therefore suffices that the offence in question is, by its nature, to be regarded as “criminal” from that point of view, or that the offence makes the person liable to a sanction which, by its nature and degree of severity, belongs in general to the “criminal” sphere<sup>44</sup>.

However, a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear and definitive conclusion as to the existence of a criminal charge<sup>45</sup>.

### ***2.6.2. The convergence of ECtHR and CJEU case law***

The criteria above are laid down in the case law of the ECtHR.

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35 See ECtHR, *Engels and others v. the Netherlands*, § 82: “it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States”.

36 See ECtHR, *Jussila v. Finland* (App. 73053/01), § 38.

37 See, for example, *Bendenoun v. France* (App. 12547/86), § 47.

38 See ECtHR, *Benham v. the United Kingdom* (App. 19380/92), § 56.

39 See ECtHR, *Öztürk v. Germany*, cited above, § 53; *Bendenoun v. France*, cited above, § 47.

40 See ECtHR, *Benham v. the United Kingdom*, cited above, § 56.

41 See ECtHR, *Öztürk v. Germany*, cited above, § 53.

42 See, for example, ECtHR, *Ravnsborg v. Sweden* (App. 14220/88), §§ 31 ff..

43 See ECtHR, *Campbell and Fell v. the United Kingdom* (App. 7819/77), § 72; ECtHR, *Demicoli v. Malta* (App. 13057/87), § 34.

44 See ECtHR, *Öztürk v. Germany*, cited above, p. 21, § 54, and ECtHR, *Lutz v. Germany* (App. 9912/82), § 55.

45 See ECtHR, *Bendenoun v. France*, cited above, p. 20, § 47.

One may therefore conclude that they may be relevant with regard to the penalties applied by the NCAs but that they are meaningless for the purpose of ascertaining whether and to what extent the ECB pecuniary administrative penalties can be criminal in nature.

Since the respect of fundamental rights by the EU institutions and bodies is assessed by the CJEU, one should refer to the case law of this Court rather than to that of the ECtHR.

Nevertheless, although in the past the CJEU adopted its own approach in the interpretation of the human rights, this has changed in recent years.

Especially since the entry into force of the Charter, the case law of the CJEU has followed the interpretation of the ECtHR more closely.

Article 52(3) of the Charter stipulates that “in so far as this Charter contains human 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”.

The consequence of this Article would appear to be that the CJEU shall interpret the Charter rights in accordance with the Convention (ECHR)<sup>46</sup>.

Not surprisingly, the views of the two Courts are now converging, particularly in relation to the procedural guarantees.

In the *Spector*<sup>47</sup> and more clearly in the *Bonda* case<sup>48</sup> the CJEU took the same view as that taken by the ECtHR in the *Engel* case.

Even though the CJEU ruled that in this case the characteristics of the penalties examined in the specific case were not such as to allow them to be considered as having a “*coloration pénale*”, it accepted the general criteria laid down in the case law of the ECtHR.

In the light of the above one may therefore conclude that administrative penalties have a “*coloration pénale*” where they can be considered “penal in substance” or where they are “particularly severe”, considering the maximum potential penalty under the relevant law.

In accordance with these criteria, it will be assessed below<sup>49</sup> whether and to what extent the “pecuniary administrative penalties” provided for under Article 18(1) and the “sanctions” provided for under Article 18(7) of the SSM Regulation and Regulation 2532/98 may be considered as having a “*coloration pénale*”.

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46 See ECJ, *Roquette*, 22 October 2002, C-94/00, § 29.

47 See ECJ, *Spector Photo Group*, 23 December 2009, C-45/08, § 42.

48 See ECJ, *Bonda*, C-489/10, 5 June 2012, §§ 36 and ff.

49 See § 3.3.

### **3. The classification of decisions under the SSM as supervisory decisions, administrative measures, administrative penalties, or administrative penalties having a *coloration pénale***

#### **3.1. Supervisory decisions: micro- and macro-prudential decisions**

The ECB supervisory powers (and the supervisory decisions in which these powers materialise) are laid down in Article 16 of the SSM Regulation, which deals both with *measures at an early stage* (paragraph 1) and with *ordinary supervisory powers* (paragraph 2).

Nevertheless, the tools the ECB may use under both paragraphs 1 and 2 of Article 16 are identical. Under paragraph 1 the ECB may employ as measures at an early stage the same ordinary supervisory decisions laid down in paragraph 2<sup>50</sup>.

The tools under Article 16(2) basically reproduce those specified in Article 104 of the CR Directive, the only difference being that Article 16 gives the ECB the further power to “remove at any time members from the management body of credit institutions who do not fulfil the requirements set out in the acts referred to in the first subparagraph of Article 4(3)”<sup>51</sup>.

Even though they refer to the same decisions, some differences between measures at an early stage and ordinary supervisory decisions are worth noting.

The measures at an early stage may be applied only for micro-prudential tasks<sup>52</sup>, whilst the ordinary supervisory decisions may be applied for both micro- and macro-prudential tasks<sup>53</sup>.

This point needs to be better clarified.

The array of tools specifically devoted to macro-prudential purposes is confined to the capital buffers and to the measures referred to in Article 5(1) of the SSM Regulation, and therefore includes, besides the countercyclical buffer rates, only the other requirements for capital buffers and measures aimed at addressing systemic or macro-prudential risks expressly provided for under the CR Directive and the CR Regulation<sup>54</sup>.

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50 Under Article 16(1) of the SSM Regulation “for the purpose of carrying out its tasks referred to in Article 4(1) and without prejudice to other powers conferred on the ECB, the ECB shall have the powers set out in paragraph 2 of this Article...”.

51 See recital 46: “the ECB should have the supervisory power to remove a member of a management body in accordance with this Regulation”.

52 This emerges from the wording of the first line of Article 16(1) which refers to “the purpose of carrying out the tasks referred to in Article 4 (1)” and thus the micro-prudential tasks.

53 This emerges from the wording of the first line of paragraph 2 which refers to “the purposes of Article 9(1)”. This latter refers, in turn, both to Article 4 (1) (micro-prudential tasks) and Article 5(2) (macro-prudential tasks).

54 The requirements for capital buffers and the measures referred to in Article 5 SSM Regulation are basically provided for in Title VII, Chapter 4 of the CR Directive and are: (i) the capital conservation buffer, the countercyclical capital buffer rates and the Global and other systemically important institutions buffer;

Decisions under Article 16(2) of the SSM Regulation are not by themselves macro-prudential tools like those specifically referred to in Article 5 of the SSM Regulation, but may be adopted by the ECB also to ensure compliance with its macro-prudential decisions.

Measures at an early stage are adopted only “in... the following circumstances: (i) the credit institution does not meet the requirements of the acts referred to in the first paragraph of Article 4(3); (ii) the ECB has evidence that the credit institution is likely to breach the requirements of the acts referred to in the first subparagraph of Article 4(3) within the next 12 months; (iii) based on a determination, in the framework of a supervisory review in accordance with point (f) of Article 4(1), that the arrangements, strategies, processes and mechanisms implemented by the credit institutions and the own funds and liquidity held by it do not ensure the sound management and coverage of its risks”<sup>55</sup>. The ordinary supervisory powers are not subject to particular circumstances.

The addressees of the ECB powers under Article 16(1) are credit institutions, financial holding companies and mixed financial holding companies, whilst those of the ECB powers under Article 16(2) are “institutions” only.

It is not entirely clear which entities the term “institutions” refers to.

A first option would be that of interpreting the term “institutions” as referring to all the entities supervised by the ECB, including financial holding companies and mixed financial holding companies<sup>56</sup>.

A second and legally sounder option would be to interpret the term “institutions” in accordance with the EU banking law and thus referring to the definition in Article 3(1) point (3) of the CR Directive. Under this Article “institution” means “institution as defined in point (3) of Article 4(1) of Regulation (EU) No 575/2013” and therefore “a credit institution or an investment firm”<sup>57</sup>.

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(ii) the restriction on distributions and the capital conservation plan. Article 458 of the CR Regulation in turn provides for stricter national measures addressing specific macro-prudential or systemic risk concerns.

<sup>55</sup> The circumstances under (i) and (ii) reproduce those already provided for under Article 102 of the CR Directive; that under (iii) is provided for only by Article 16(1) of the SSM Regulation and not also by Article 102 of the Directive.

<sup>56</sup> This would interpret the word “institutions” independently from the relevant EU banking law; the interpretation is based on Article 2 of the SSM Regulation, which only mentions credit institutions, financial holding and mixed financial holding companies and “for the purposes of” the SSM Regulation refers to the specific definitions contained in the EU banking law. Since Article 2 above does not mention “institutions”, the interpreter is free to read this word independently from the CR Directive and the CR Regulation.

<sup>57</sup> The same reference to “institutions” is made in Articles 102 and 104 of the CR Directive, which basically (the only exception is the power of removal) specify the same supervisory powers mentioned in Article 16, first and second paragraph, of the SSM Regulation.

Excluding that ECB can make use of its Article 16(2) powers on investment firms<sup>58</sup>, a problem arises as to whether it may adopt similar supervisory decisions with respect to financial holding companies and mixed financial holding companies.

Article 9(1), second subparagraph, of the SSM Regulation stipulates that, for the purpose of carrying out its tasks, the “ECB... shall also have all the powers and obligations, which competent and designated authorities shall have under the relevant Union law”, hence including the CR Directive.

Nevertheless, it is unclear to what extent the relevant Union law allows the competent and designated authorities to use the supervisory powers provided for under Article 104 of the CR Directive<sup>59</sup> (which, as noted, are basically the same as those under Article 16 of the SSM Regulation) against the financial holding companies and the mixed financial holding companies.

### **3.2. The instruments singled out by Articles 66 and 67 of the CR Directive and their qualification as administrative penalties or administrative measures**

Whilst the “pecuniary administrative penalties” provided for in Articles 66 (2) and 67 (2) of the CR Directive<sup>60</sup> are obviously penalties, all the other instruments specified in the Articles above are of uncertain qualification.

These other instruments are:

- (i) the public statement<sup>61</sup>;
- (ii) the “cease and desist order”<sup>62</sup>;
- (iii) the withdrawal of an institution’s authorisation<sup>63</sup>;
- (iv) the temporary ban<sup>64</sup>;
- (v) the suspension of the voting rights<sup>65</sup>.

In the light of the criteria laid down in the case law of the CJEU, based on the different purposes of the penalties and the measures respectively<sup>66</sup>, one may try to qualify each of the instruments above as a penalty or as a measure.

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58 Investment firms are clearly excluded from the scope of the ECB supervisory powers: see Article 1 of the SSM Regulation.

59 Which basically correspond to those under Article 16(2) of the SSM Regulation, the only relevant exception being the removal.

60 Namely, the penalties applied: to legal persons, of up to 10% of the total annual turnover of the undertaking in the preceding business year (see Article 66 (2) (c) and Article 67 (2) (e)); to natural persons, of up to EUR 5.000.000 (see Article 66 (2) (d) and Article 67 (2) (f)); to both legal and natural persons, of up to twice the amount of the benefit derived from the breach where that benefit can be determined (see Article 66 (2) (e) and Article 67 (2) (g)).

61 See Article 66 (2) (a) and Article 67 (2) (a).

62 See Article 66 (2) (b) and Article 67 (2) (b).

63 See Article 67 (2) (c).

64 See Article 67 (2) (d).

65 See Article 66 (2) (f).

66 See 2.4.2 above.

### *Public statement*

The public statement, which indicates the natural or the legal person responsible and the nature of the breach, has basically, in the field of the prudential supervision of credit institutions<sup>67</sup>, a negative reputational effect on the offender.

It has therefore a punitive rather than a restoring aim and should be considered as a penalty.

### *Cease and desist order*

The order requiring natural or legal persons to cease their present conduct and to desist from repetition in the future seems to have the sole purpose of restoring the public interest harmed by the offender.

It should therefore be qualified as a measure.

### *Withdrawal of authorisation*

The withdrawal of the banking licence is a reaction to unlawful behaviour too severe to be considered as having only a reparatory aim.

It should therefore be considered as a penalty.

### *Temporary ban*

The temporary ban, against any member of the institution's management body or any other natural person who is held responsible, on the exercise of 'functions' for the period of time deemed adequate to restore governance arrangements and to prevent other violations from being committed is designed fundamentally to restore the interest violated by the offender.

Thus it should be considered as a measure.

### *Suspension of voting rights*

The suspension of the voting rights of banks' shareholders may have a reparatory or a punitive aim depending on the circumstances of the case.

Under Article 66(2), letter f), of the CR Directive, the suspension of voting rights is conceived as applicable to all the breaches referred to in Article 66(1). Nevertheless, it is reasonable to assume that it only applies to those under letters c) and d).

In fact, only these latter refer to the acquisition/increasing and to the disposal/reduction of qualifying holding.

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<sup>67</sup> In other fields, such as the markets in financial instruments, the public statement may also have a reparatory aim, since the publication of the breach of a transparency rule by itself restores the public interest harmed by the offender. The task in the field of markets in financial instruments is not expressly conferred on the ECB but remains nonetheless with the NCAs: see Recital 28 and Article 1 of the SSM Regulation.

In the first case (provided for under letter c) of Article 66(1)) the qualifying shareholder acquires/increases its stake without notifying in writing the competent authority during the assessment period or acquires/increases its stake against the opposition of this authority. The “suspension” here is only aimed at impeding the exercise of the voting rights by a shareholder that the supervisory authority had no the opportunity to scrutinise or that it considered as not fit and proper. Thus the purpose is that of restoring the public interest harmed by the offender. It should therefore be considered as a measure.

In the second case (provided for under letter d) of Article 66(1)) the qualifying shareholder disposes of/reduces its stake without notifying in writing the competent authority. In the event of a partial disposal not notified to the authority the suspension is only aimed at punishing the offender for non-compliance with the rules on notification. Thus it should be considered as a penalty.

### **3.3. Whether and to what extent the administrative pecuniary penalties under Article 18(1) and the sanctions under Article 18(7) of the SSM Regulation may be deemed as having a *coloration pénale***

Administrative pecuniary penalties under Article 18(1) of the SSM Regulation (applicable to the violation of a requirement provided for by the directly applicable Union law) are: (i) of up to twice the amount of the profit gained or losses avoided because of the breach, where these can be determined; or (ii) of up to 10% of the total annual turnover, as defined in relevant Union law (Article 305 of the CR Regulation), of a legal person in the preceding business year.

Sanctions under Article 18(7) of the SSM Regulation (applicable to violations of ECB regulations or decisions) are those provided for under Article 2 of Council Regulation 2532/98. According to this Article, the ECB may apply: (i) fines of up to the amount of €500,000; (ii) periodic penalty payments of up to €10,000 per day of infringement in respect of a maximum period of six months following the notification of the decision to initiate an infringement procedure.

It is worth remembering that the periodic penalty payments are considered by Council Regulation 2532/98 as sanctions<sup>68</sup>, since they may be applied only with the aim of punishing a continued infringement.

The problem arises here as to whether the level of these penalties and sanctions may be considered as relevant under the *Engel* criteria.

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<sup>68</sup> Article 1, paras. 5, 6, and 7: “5. ‘Fine’ shall mean a single amount of money which an undertaking is obliged to pay as a sanction; 6. ‘periodic penalty payments’ shall mean amounts of money which, in the case of a continued infringement, an undertaking is obliged to pay as a sanction, which shall be calculated for each day of continued infringement following the notification of the undertaking of a decision, in accordance with the second subparagraph of Article 3(1), requiring the termination of such an infringement; 7. ‘Sanctions’ shall mean fines and periodic penalty payments imposed as a consequence of an infringement”.

As already explained, the severity of the penalty which the person concerned risks incurring is determined by reference to the maximum amount provided for by the relevant law.

The potential administrative penalties under Article 18(1) of the SSM Regulation seem to be sufficiently severe to meet the *Engel* criteria. So they can be considered as having a *coloration pénale*.

Doubts may be raised with regard to the sanctions under Article 18(7) of the SSM Regulation and Article 2 of Council Regulation 2532/98<sup>69</sup>.

The maximum amount of €500,000 could be considered as not sufficiently severe to meet the *Engel* criteria, when compared to the total value of assets of a significant credit institutions.

As will be later clarified<sup>70</sup>, the fines provided for under Article 2 of Council Regulation 2532/1998 apply to the less significant credit institutions too. With respect to these latter the maximum amount of €500,000 can be considered as sufficiently severe when compared to the total value of their assets.

Doubts may also be raised on the nature (administrative or criminal) of the periodic penalty payments. The highest amount of the periodic penalty payments provided for under Article 2 of Council Regulation 2532/98 is €10,000 per day for a maximum period of six months. Again, the maximum amount here – more or less €1,800,000 - can be considered to be or not to be sufficiently severe and thus to meet the *Engel* criteria, depending on the nature, as significant or less significant, of the bank concerned.

#### **4. The allocation of competences to the ECB and the NCAs for the adoption of the decisions under the SSM Regulation**

##### **4.1. The allocation of competences for supervisory decisions**

Like the European System of Financial Supervision (ESFS)<sup>71</sup>, the Single Supervisory Mechanism (SSM) does not have legal personality.

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<sup>69</sup> Various doubts on the very nature of the sanctions under the Council Regulation 2532/98 have been raised by TEIXEIRA, P.G. and FERNANDEZ MARTIN, J.M.F., “The imposition of regulatory sanctions by the European Central bank”, *European Law Review*, 2000, p. 395: “Even though from the reference of the Treaty and ESCB Statute to ‘fines and periodic penalty payments’ one must conclude that Bank sanctions are punitive in character, it should be noted that the traditional aim of sanctions by central banks should in principle be not so much to punish or deter future conducts but rather to ensure the effectiveness of the systems under its control and generally to re-establish technical normality. This is mainly because the strict field of central banking does not involve choices about market organisation or behaviour, which need to be enforced vis-à-vis market participants. In this sense, the purpose of the sanctions imposed by the Bank will lean towards reparation of damages and prevention of unjust enrichment rather than punishment or deterrence, although this latter feature is certainly intrinsic to any sanction”.

<sup>70</sup> See § 4.3.3.

<sup>71</sup> See, for example, Article 2 of Regulation 1093/2010 establishing a European Supervisory Authority (European Banking Authority).

This is expressly conferred by the Treaties on the Union<sup>72</sup>, the ECB and the EIB<sup>73</sup> and by EU secondary law on some EU bodies, including the recently formed EU supervisory authorities (EBA, ESMA and EIOPA)<sup>74</sup>.

Under Article 2, point 9, of the SSM Regulation “‘Single supervisory mechanism’ (SSM) means the system of financial supervision composed by the ECB and national competent authorities of participating Member States as described in Article 6 of this Regulation”; this latter only stipulates, in turn, that “the ECB shall carry out its tasks within a single supervisory mechanism composed of the ECB and national competent authorities”.

Nor is legal personality mentioned in the Recitals of the SSM Regulation referring to the Single Supervisory Mechanism<sup>75</sup>.

The SSM is rather conceived, like the ESFS, as an integrated network of both national and Union supervisory authorities<sup>76</sup>.

The choice of not creating a separate body and conferring on the ECB some supervisory powers under Article 127(6) of the TFEU<sup>77</sup>, was also aimed at avoiding a delegation of powers to a new EU agency, subject to the strict limits of the *Meroni* doctrine<sup>78</sup>, and an unnecessary complication of the supervisory system<sup>79</sup>.

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72 See Article 47 of the TEU.

73 See Articles 282(3) and 308 of the TFEU.

74 See, for example, Article 5(1) of Regulation 1093/2010 which stipulates that “the Authority [EBA] shall be a Union body with legal personality”. See also Recital 14 according to which “in order to fulfil its objectives, the Authority should have legal personality as well as administrative and financial autonomy”.

75 See Recitals 10 and 12.

76 See Recital 9 of the Regulation establishing the EBA. In the literature see CAPOLINO, O., DONATO, L. and GRASSO, R., “Road map dell’unione bancaria europea. Il Single Supervisory Mechanism e le implicazioni per le banche”, p. 11: “Il SSM non ha soggettività giuridica, né la proposta di Regolamento sembra riconoscere a esso dignità di autonoma struttura organizzativa: la proposta distribuisce i compiti di vigilanza e le responsabilità fra la BCE e le Autorità nazionali competenti e individua i principi ai quali tali Autorità devono attenersi nello svolgimento delle rispettive attività senza attribuire alcuna autonomia al Meccanismo di Vigilanza Unico nel suo complesso. Sembra quindi ragionevole ritenere che l’espressione SSM si limiti a riassumere il complessivo assetto di poteri, responsabilità e flussi informativi fra le Autorità di vigilanza nel settore dell’Eurozona; che la formula prescelta, cioè, consenta unicamente di esprimere in maniera sintetica il complesso schema di relazioni intercorrenti tra le diverse Autorità interessate”.

77 Under Article 127(6) of the TFEU “the Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings”.

78 Under the *Meroni* doctrine a delegation involving “discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy” would imply an illegal transfer of responsibility by replacing the choices of the delegator with those of the delegate and by altering the balance of powers thus doing away with the guarantee granted by the Treaty to undertakings. See CJEU, judgments *Meroni*, C-9/56, *Romano*, C-98/80, *Alliance for Natural Health*, joined cases C-154/04 and C-155/04. The *Meroni* judgment was issued in the context of the European Coal and Steel Community (ECSC) Treaty (not in force any more) and concerned the validity of decisions of bodies established under Belgian private law adopted on the basis of a conferral of powers by the ECSC High Authority.

79 See WYMEERSCH, E., “The European Banking Union, a First analysis”, 2012, note 22.

Moreover, the conferral of specific supervisory powers based on a different Treaty source such as Article 114<sup>80</sup> of TFEU would have been uncertain<sup>81</sup>.

In the light of the above, the supervisory decisions cannot be ascribed to the SSM but have to be imputed to the ECB or to the NCAs according to the rules on the distribution of competences contained in the SSM Regulation.

As a consequence of the allocation of powers within the SSM:

- (i) the procedural rules may differ depending on the authority, the ECB or the relevant NCA, competent for the adoption of the decision;
- (ii) the extent of judicial scrutiny may also differ, particularly in the field of administrative penalties, where the review of ECB decisions by the CJEU seems to be exceptionally limited to mere legality, whilst the review of the NCAs' decisions by the national courts often extends to the merit;
- (iii) finally, liability regimes may diverge since, in contrast to most Member States' provisions on supervisors' liability, the ECB is subject to the general liability rule under Article 340 of the TFEU<sup>82</sup>.

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80 Under Article 114(1) of the TFEU "the European Parliament and the Council shall, acting in accordance with ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market".

81 See the Advocate General's Opinion of 12 September 2013 in Case C-270/12, *United Kingdom v. Council and Parliament*, § 54: "A centralised emergency decision-making process that replaces the decisions of the competent Member State's authority, without its consent, or which provides a substitution for the absence of one, cannot be considered to be encompassed by the concept of 'approximation of the provisions laid down by law, regulation or administration action in Member States' under Article 114 TFEU".

82 Recital 61 of the SSM Regulation clarifies that "In accordance with Article 340 TFEU, the ECB should, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties. This should be without prejudice to the liability of national competent authorities to make good any damage caused by them or by their servants in the performance of their duties in accordance with national legislation". Under Article 340 of the TFEU "the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties". Thus the liability of the ECB follows the same criteria laid down in the Treaty for the Union, which are reiterated in the relevant recent regulations for the ESAs, not only in the exercise of its monetary tasks but also in its capacity as supervisor. According to Article 67 of the EBA regulation (but identical rules are provided for in the ESMA and EIOPA regulations) "in the case of non-contractual liability, the Authority shall, in accordance with the general principles common to the laws of the Member States, make good any damages caused by it or by its staff in the performance of their duties". Differently from the common liability regimes provided for with regard to the ECB and the ESAs, there is a clear trend towards the limitation of supervisors' liability within the participating Member States (on limitations of supervisors' liability within Member States see: ATHANASSIOU, P., *Financial Sector Supervisors' Accountability: A European Perspective*, ECB Legal Working Paper series, 12, August 2011; D'AMBROSIO, R., "La responsabilità delle autorità di vigilanza: disciplina nazionale e analisi comparatistica", *Diritto delle banche e degli intermediari finanziari* edited by Galanti E., Padova, 2008, pp. 249 ff.; ANDENAS, M., "Depositor Protection, European Law and Compensation from Regulators", *Diritto bancario comunitario* edited by Alpa G. and Capriglione F., Turin, 2002, pp. 411 ff.; ANDENAS, M. and FAIRGRIEVE D., "Sufficiently serious? Judicial Restraint in Tortious Liability for Public Authorities", *English Public Law and the Common Law of Europe*, edited by Andenas M., London, 1998, 285 ff.). In Germany the supervisor enjoys total immunity vis-à-vis investors but not vis-à-vis the persons that are directly affected by an unlawful administrative act, such as banks and other financial intermediaries. In Ireland the supervisor is liable only in cases of bad faith. In France and Italy

Even though liability issues are not dealt with in this paper, it is worth noting that there should be cases where the allocation of liability between the ECB and NCAs is not clear-cut.

Under the case law of the CJEU, where Union law empowers the Commission to give mandatory instructions to a national authority and the national authority complies with the Commission's instructions, it is the Commission and not the national authority that is liable for damages.

This principle is laid down in the *Krohn* judgment<sup>83</sup> and confirmed in other cases<sup>84</sup>.

Thus a problem arises as to whether the ECB is empowered to give mandatory instructions to the NCAs.

Under Article 9(1) sub-paragraph 3 of the SSM Regulation, "to the extent necessary to carry out the tasks conferred on it by this Regulation, the ECB may require, by way of instructions, ... national authorities to make use of their powers, under and in accordance with the conditions set out in national law, where this Regulation does not confer such powers on the ECB".

Moreover, under Article 18(5) first sub-paragraph, "in the cases not covered by paragraph 1..., where necessary for the purpose of carrying out the tasks conferred upon it by this Regulation, the ECB may require national competent authorities to open proceedings with a view to taking action in order to ensure that appropriate sanctions are imposed in accordance with the acts referred to in the first subparagraph of Article 4(3) and any relevant national legislation which confers specific powers which are currently not required by Union Law".

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liability is confined to gross negligence (but the same is true in Belgium, Luxembourg and Netherlands). Only in Austria are supervisors liable also for simple negligence. Even though the ECB does not enjoy any limitation of liability, the application to EU administrative acts of the "sufficiently serious breach" rule (see CJEU, case C-352/98 P, *Laboratoires Pharmaceutiques Bergaderm SA*) may lead to the same outcomes. A sufficiently serious breach occurs when the supervisor manifestly and gravely disregards the limits of its discretionary powers. Against this background the circumstance that the rules embodied in the EU banking directives protect a multiplicity of interests could have an influence on the assessment of the "sufficiently serious breach" assessment: see TISON, M., "Who's Afraid of Peter Paul? The European Court of Justice to Rule on Banking Supervisory Liability", *The Financial Regulator*, vol. 9, No. 1 [2004], p. 62-71. Another way to limit the ECB liability is to consider the limitation of supervisory liability as a *general principle common to the laws of the Member States*. Against this background, the CJEU may refer to the recent convergent approaches in the House of Lords and the *Conseil d'Etat's* case law. The reckless indifference to the illegality of the act and to the consequences of it, requested by the House of Lords in the BCCI case as the mental element of the Bank of England's liability (see *Three River District Council and others v. Governor and Company of the Bank of England*, 2000, 2, *WLR*, 1220, and *Three River*, 2001, *UKHL*, 16) nears the strict requirement of *faute lourde* (gross negligence) as applied by the French *Conseil d'Etat* with regard to the liability of the *Commission Bancaire* (see *Conseil d'Etat* 24 January 1964, *Achard*, *Juris-Classeur Périodique*, 1965, *édition Générale*, II, 14416).

<sup>83</sup> See ECJ, case C-175/84 *Krohn&Co Import-Export GmbH & Co KG*, § 23.

<sup>84</sup> See, *inter alia*, ECJ, Case C-126/76 *Dietz*, § 5; ECJ, Joined Cases C-104/89 and C-37/90, *Mulder and Others*, § 9; CFI, Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others*, § 71; T-18/99 *Cordis*, § 26; and T-30/99 *Bocchi Food Trade International*, § 31.

Whilst under Article 9(1) the ECB seems to be entitled to oblige NCAs to use a certain specific power, under Article 18(5), the ECB may only refer the matter to the NCAs<sup>85</sup>, the latter remaining free to choose any action they deem appropriate.

Compliance with ECB instructions will not necessarily trigger ECB liability where the NCAs enjoy a certain discretion on how these instructions should be followed or implemented.

#### ***4.1.1. The allocation of competences for micro-prudential decisions under Article 6 of the SSM Regulation***

According to Article 4(1) of the SSM Regulation, “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”.

Three paramount ideas are contained in that sentence:

- (i) the ECB is competent to carry out supervisory tasks “in relation to all credit institutions established in participating Member States”;
- (ii) these tasks have to be performed “within the framework of Article 6” and;
- (iii) they have to be carried out “for prudential supervisory purposes”.

It follows that prudential supervision as defined by the CR Directive and the CR Regulation of all credit institutions is assigned to the ECB, but that some credit institutions will be directly supervised by the ECB, whereas others could continue to be directly supervised by the NCAs under the oversight of the ECB.

In this regard, Recital 16 of the SSM Regulation clearly states that “the safety and soundness of large credit institutions is essential to ensure the stability of the financial system. However, recent experience shows that smaller credit institutions can also pose a threat to financial stability. Therefore, the ECB should be able to exercise supervisory tasks in relation to all credit institutions authorised in, and branches established in, participating Member States.”

Article 6 therefore specifies the criteria according to which the ECB is competent to supervise credit institutions directly<sup>86</sup>.

The ECB will be competent to supervise the most significant credit institutions directly on the basis of three criteria: their size, their importance for the economy (of the EU or any participating Member State) and the significance of their cross-border activities. These three criteria are to be examined “on a

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<sup>85</sup> See Recital 36 of the SSM Regulation.

<sup>86</sup> For these aspects see LACKHOFF, K., “Which Credit Institutions will be Supervised by the Single Supervisory Mechanism?”, in *Journal of International Banking Law and Regulation*, 2013, 454 ff.

consolidated basis, at the highest level of consolidation within the participating Member States” and are alternatives.

Regarding size, the parameter chosen is total assets. The ECB will be competent for direct supervision of credit institutions or groups whose total assets are above 30 billion euro.

Regarding importance for the economy, two different possibilities arise: (i) the ratio of total assets to the GDP of the Member State of establishment must meet simultaneously two criteria - it is higher than 20% and the total value of the assets is above 5 billion euro; or (ii) the NCA notifies the ECB that it considers this credit institution as significant with regard to the domestic economy and the ECB, taking into account all relevant circumstances, including level-playing-field considerations<sup>87</sup>, decides to supervise this institution or group directly.

Regarding the criteria of the significance of cross-border activities, it is up to the ECB to decide whether a credit institution that has established banking subsidiaries in more than one participating Member State and whose cross-border assets or liabilities represent a significant part of its total assets or liabilities<sup>88</sup> has to be directly supervised.

A fourth criterion regarding the significance of a credit institution, at least with regard to domestic activity, specifies that the ECB will be the direct supervisor of the three most significant credit institutions in each of the participating Member States.

In addition to these criteria on the significance of the credit institution, there is another group of credit institutions that are supervised directly by the ECB: “those for which public financial assistance has been requested or received *directly* from the EFSF or the ESM”<sup>89</sup>. It is to be noted that direct supervision by the ECB is the necessary precondition for eligibility for direct recapitalisation of a bank<sup>90</sup>.

Beyond these criteria, the ECB may also decide to take over the direct supervision of credit institutions that are less significant in two circumstances: (i) “when necessary to ensure consistent application of high supervisory standards”; (ii) “in the case where financial assistance has been requested or received indirectly from the EFSF or the ESM”<sup>91</sup>.

Moreover, the ECB maintains the responsibility for the entire SSM. It exercises oversight on the functioning of the system, may make direct use of the

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87 Recital 41 SSM Regulation.

88 The ECB will publish a methodology to specify these criteria.

89 See Article 6(4) SSM Regulation.

90 The EU summit of 29 June 2012 stated: “We affirm that it is imperative to break the vicious circle between banks and sovereigns. (...) When an effective single supervisory mechanism is established, involving the ECB, for banks in the euro area the ESM could, following a regular decision, have the possibility to recapitalize banks directly”.

91 See Article 6(5)(b), SSM Regulation.

powers under Articles 10 to 13 of the SSM Regulation and may request, on *ad hoc* or continuous basis, information from the NCAs on the performance of the tasks assigned to them<sup>92</sup>.

The ECB carries out direct supervision of the credit institutions or groups mentioned above, involving almost all the supervisory tasks specified in the CR Directive and the CR Regulation.

The ECB is not competent to supervise the provision of investment services or payment services or the issuance of electronic money<sup>93</sup>.

According to Article 4(1) of the SSM Regulation, direct supervision<sup>94</sup> by the ECB will encompass: the tasks of the home authority, the supervision of the requirements on own funds, securitisation, large exposures, liquidity, leverage, internal governance including fit and proper requirements, risk management, internal control, remuneration policies, internal capital, the conduct of stress tests to assess the soundness of the management, supervision on a consolidated basis, supplementary supervision of financial conglomerates<sup>95</sup>, and supervisory tasks regarding recovery plans and early intervention.

#### ***4.1.2. The allocation of competences for macro-prudential decisions under Article 5 of the SSM Regulation***

A different criterion than the one laid down under Article 6 with regard to micro-prudential tasks is provided for under Article 5 of the SSM Regulation for the allocation of macro-prudential tools.

The macro-prudential supervisory tasks are therefore not influenced by the division indicated in Article 6 of the SSM Regulation.

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<sup>92</sup> See Article 6(5)(c) to (e), SSM Regulation.

<sup>93</sup> Article 1 of the SSM Regulation simply stipulates that “This Regulation is without prejudice to the responsibilities and related powers of the competent authorities of the participating Member States to carry out supervisory tasks not conferred on the ECB by this Regulation”. The more precise Recital 28 clarifies that “Supervisory tasks not conferred on the ECB should remain with national authorities. Those tasks should include the power to receive notifications from credit institutions in relation to the right of establishment and the free provision of services, to supervise bodies which are not covered by the definition of credit institutions under Union law but which are supervised as credit institutions under national law, to supervise credit institutions from third countries establishing a branch or providing cross-border services in the Union, to supervise payment services, to carry out day-to-day verifications of credit institutions, to carry out the function of competent authorities over credit institutions in relation to markets in financial instruments, the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and consumer protection”.

<sup>94</sup> “Direct supervision” will concern the Significant credit institutions and the credit institutions for which the ECB decides to perform the supervisory tasks directly.

<sup>95</sup> The ECB will become the coordinator of the supervision of a financial conglomerate when the parent undertaking is a significant credit institution. As recalled in Recital 26 of the SSM Regulation, “in addition to supervision of individual credit institutions, the ECB’s tasks should include supervision at the consolidated level, supplementary supervision, supervision of financial holding companies and supervision of mixed financial holding companies, excluding the supervision of insurance undertakings”.

First of all, the national competent or designated authorities shall continue to be vested with the powers to apply any macro-prudential tool which is not provided for under the relevant acts of Union law<sup>96</sup>.

Secondly, both the national authorities and the ECB may apply the macro-prudential tools provided for under the CR Directive and the CR Regulation in relation to all credit institutions and thus irrespective of their qualification as significant or not.

The initiative in applying the tools is taken by the national authorities. The ECB may nonetheless apply higher buffers or take stricter measures in place of the national authorities. Despite the less than perfectly clear wording of Article 5(2), the ECB should apply these tools even where the national authorities did not apply them at all.

This notwithstanding, compliance with macro-prudential instruments should be supervised by the relevant competent authority, the ECB for significant credit institutions and the NCAs for the less significant ones. The same should be true for the adoption of corrective measures other than those referred to in Article 5 of the SSM Regulation and mentioned in Article 16(2). These latter may in fact be applied also for macro-prudential purposes.

As is clarified by recital 24, the provisions of the SSM Regulation “on measures aimed at addressing systemic or macro-prudential risk are without prejudice to any coordination procedures provided for in other acts of Union law”. The recital seems to refer to the ESRB Regulation and to the multilateral coordination procedures therein for the adoption of macro-prudential tools, whilst coordination procedures under Article 5 of the SSM Regulation are on a bilateral basis between the national authority and the ECB.

#### ***4.1.3. The ECB competence to grant and withdraw banking licences and to assess the acquisition and disposal of qualifying holdings under Articles 14 and 15 of the SSM Regulation***

Two other exceptions to the allocation of supervisory powers laid down in Article 6 of the SSM Regulation are in Articles 14 and 15.

These Articles regulate the power to grant and to withdraw authorisations and the power to assess the acquisition and disposal of qualifying holdings.

For these purposes the ECB is the only competent authority within the SSM.

The rationale of these provisions seems to be that of preserving both the unity and the integrity of the internal banking market, expressly mentioned in Article 1(1) of the SSM Regulation. In the light of the above, then, there was

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<sup>96</sup> See Article 1(1), sixth sub-paragraph of the SSM Regulation: “This Regulation is without prejudice to the responsibilities and related powers of the competent or designated authorities of the participating Member States to apply macroprudential tools not provided for in relevant acts of Union law”.

a need to give to the same authority the powers to assess the requisites both for entering the banking market and for acquiring ownership stakes in credit institutions, irrespective of the institutions' qualification as significant or less significant.

This view is confirmed by Recital 20 of the SSM Regulation, according to which “prior authorisation for taking up the business of credit institutions is a key prudential technique to ensure that only operators with a sound economic basis, an organisation capable of dealing with the specific risks inherent to deposit taking and credit provision, and suitable directors carry out those activities. The ECB should therefore have the task of authorising credit institutions that are to be established in a participating Member State and should be responsible for the withdrawal of authorisations...”.

In turn Recital 22 states that “an assessment of the suitability of any new owner prior to the purchase of a significant stake in a credit institution is an indispensable tool for ensuring the continuous suitability and financial soundness of credit institutions' owners. The ECB as a Union institution is well placed to carry out such an assessment without imposing undue restrictions on the internal market”.

## **4.2. The allocation of competences for administrative measures**

### ***4.2.1. Whether Article 18 of the SSM Regulation only refers to the administrative penalties or also to the administrative measures and whether the limitations to the ECB's powers therein refer only to the former or also to the latter***

Article 18 of the SSM Regulation is entitled “administrative penalties” but its scope also includes the administrative measures addressed to natural persons, since they are mentioned in the second sub-paragraph of paragraph 5.

However, the Article is silent as to the administrative measures that under the relevant provisions of the CR Directive may be addressed to the legal persons subject to the ECB's supervisory powers.

In the light of the above one may interpret Article 18 as regulating (and limiting):

- (i) all the ECB's powers to react to a previous violation committed by an entity supervised by the ECB; or
- (ii) only the power to apply administrative penalties and administrative measures addressed to the members of the institution's management body or to any other natural person who is held responsible for the exercise of “functions” in an entity supervised by the ECB.

The first view is supported by the second sub-paragraph of paragraph 5, which refers to administrative penalties and to some measures.

The second view is supported by: (i) the title of Article 18 (“administrative penalties”); (ii) the wording of all the other paragraphs of Article 18, which refer only to administrative penalties (and to the sanctions under the Council Regulation 2532/98); (iii) an interpretation of Article 18 in accordance with the other provisions of the SSM Regulation.

This last point deserves further explanation. Since both the ECB and the NCAs have the power to enforce compliance with the material banking legislation within the framework under Article 6, and therefore according to the nature of the bank as significant or less significant, different criteria on the allocation of powers should be considered as exceptions and should be interpreted strictly.

Under this view, therefore, it would be consistent with the SSM Regulation’s objectives to vest the ECB and the NCAs, within the scope of their tasks, with all the instruments necessary for the purpose of ensuring compliance by the significant or less significant banks with the material banking legislation.

It follows that the exceptions to the ECB’s powers to directly react to a previous violation are solely those provided for under Article 18(5) of the SSM Regulation.

Thus ECB can only request NCAs to take action in order to apply one of the following:

- (i) the *public statement*, since it is a non-pecuniary penalty;
- (ii) the *temporary ban*, since it is an administrative measure addressed to the members of the institution’s management body or to any other natural person who is held responsible on exercising “functions” in an entity supervised by the ECB;
- (iii) the *cease and desist order* where it is addressed to the natural persons above;
- (iv) the *suspension of voting rights* where it is considered as a non-pecuniary administrative penalty<sup>97</sup> or where, even though it is considered as a measure, it is addressed to natural persons or to a legal person not supervised by the ECB<sup>98</sup>;

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97 See § 3.2.

98 See Recital 53 of the SSM Regulation, under which: “nothing in this Regulation should be understood as conferring on the ECB the power to impose penalties on natural or legal persons other than credit institutions, financial holding companies or mixed financial holding companies, without prejudice to the ECB’s power to require national competent authorities to act in order to ensure that appropriate penalties are imposed”.

On the contrary, the ECB may directly apply:

- (i) the *cease and desist order* where it is addressed to a legal entity supervised by the ECB;
- (ii) the *suspension of voting rights* to the extent that it is considered as an administrative measure and is addressed to an entity supervised by the ECB.

#### ***4.2.2. The decision to withdraw the banking licence for unlawful behaviour: an exclusive competence of the ECB?***

The *withdrawal of authorisation* deserves more careful analysis.

On the one hand, this may be considered as a non-pecuniary administrative penalty and be as such, under Article 18(5) of the SSM Regulation, applied only by the NCAs.

On the other hand, and in the light of Article 14(5) of the SSM Regulation, it may be applied by the ECB “in the cases set out in the relevant Union law”.

Under the first point of view, Article 18(5) prevails over Article 14(5). Thus, where the withdrawal of authorisation is adopted as a non-pecuniary sanction, the competence lies with the NCAs, at the request of the ECB for the significant banks and at their own initiative for the less significant ones.

Under the second point of view, Article 14(5) prevails over Article 18(5). Since “the cases set out in the relevant Union law” include the breaches referred to under Article 67(1) of the CR Directive, the ECB is entitled to withdraw the authorisation also for “sanctioning purposes”.

The rationale of the withdrawal supports this second view. As is clarified by Recital 20, the purpose of the ECB’s power to grant and to withdraw the banking licence is that of ensuring “that only operators with a sound economic basis, an organisation capable of dealing with the specific risks inherent to deposit taking and credit provisions, and suitable directors carry out those activities”.

In the light of the above, it seems that the ECB should be competent to withdraw the authorisation in all cases where the conditions established for granting it are not maintained. Since most of the violations under Article 67(1) of the CR Directive can be encompassed under these circumstances, it follows that the competence to withdraw the authorisation should be basically given to the ECB even for sanctioning purposes<sup>99</sup>.

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<sup>99</sup> There are nonetheless a few cases which seem to respond to a different aim. These cases are in fact not linked to a breach of a requirement provided for by the EU legislation for the banking licence to be granted and occur where: (i) “an institution has obtained the authorisation through false statements or any other irregular means” (Article 67(1) (a) of the CR Directive); (ii) an institution “is found liable for a serious

#### ***4.2.3. Whether, in the case that Article 18 only refers to the administrative penalties, the ECB is vested with the power to apply the administrative measures in its capacity as competent authority under Article 9(1) of the SSM Regulation***

The cease-and-desist order and the suspension of voting rights<sup>100</sup> have been considered as administrative measures<sup>101</sup>.

To the extent that they are addressed to legal entities supervised by the ECB, the problem arises of which provision of the SSM Regulation would empower the ECB to adopt such measures.

Since no specific provision of the SSM Regulation expressly entitles the ECB to apply the “cease-and-desist order” or the “suspension of voting rights”, one may refer to the general rule set forth in Article 9(1), second sub-paragraph, of the SSM Regulation.

Under this rule, “for the exclusive purpose of carrying out the tasks conferred upon it by Article 4(1), (2) and 5(2)”, which include that of ensuring compliance with rules under Article 4(3) (see Article 4(1) letters (c) and (f)), the ECB shall have not only the specific “powers listed in Sections 1 and 2 of” Chapter III (including those under Article 18), but also “all the powers and obligations, which competent and designated authorities shall have under the relevant union law, unless otherwise provided for by” the SSM Regulation<sup>102</sup>.

### **4.3. The allocation of the powers to impose administrative penalties**

#### ***4.3.1. The different possible interpretations of Article 18 of the SSM Regulation***

The allocation of the sanctioning powers under the SSM Regulation is not entirely clear. Article 18 is not expressly aligned with the general provisions contained in Article 6 on the allocation of supervisory powers and seems to follow different criteria.

Not surprisingly, Article 18 of the SSM Regulation has been interpreted in two different, opposing ways.

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breach of the national provision adopted pursuant to Directive 2005/60/EC” (Article 67(1), let. (o) of the CR Directive).

<sup>100</sup> The latter where it is taken in the event of the acquisition of a qualifying holding without informing the supervisory authority or in spite of the opposition of the authority.

<sup>101</sup> See § 3.2.

<sup>102</sup> An SSM Regulation rule *otherwise providing* is that contained in Article 18(5), which does not refer to the measures addressed to the legal entities supervised by the ECB.

According to one interpretation, the ECB has the exclusive competence to apply administrative pecuniary penalties and sanctions<sup>103</sup> to both the significant and the less significant credit institutions in the case of violations of requirements under the directly applicable Union law<sup>104</sup> and in the case of violation of ECB regulations or decisions<sup>105</sup>.

According to a second, opposite, interpretation, in the event of one of the above violations the ECB has exclusive competence only vis-à-vis the significant credit institutions, whilst the NCAs are exclusively competent vis-à-vis the less significant ones.

Under both of the interpretations: (i) ECB has the power to require NCAs to act in the case of violations of national laws transposing directives, the case of violations committed by natural persons and the case that non-pecuniary penalties should be applied<sup>106</sup>; and (ii) NCAs remain competent to employ their sanctioning powers in the case of violations of national law<sup>107</sup>.

Both interpretations are compliant with the 2012 Basel Core Principles 1 and 11 for effective banking supervision and with the link therein between sanctioning and supervisory powers<sup>108</sup>.

#### *4.3.1.1. The interpretation based on the nature both of the rule violated and of the addressee of the penalties*

The first interpretation (based on the nature of the rule violated and of the addressee of the penalties) seems more in line with the text and the aim of Article 18, when this is read in connection with Recital 36 and Article 4 of the SSM Regulation.

Despite its importance under Article 6, Article 18 makes no reference to the distinction between significant and less significant credit institutions<sup>109</sup>. Instead, it

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103 Administrative pecuniary penalties are those under Article 18(1), whilst administrative pecuniary sanctions are referred to under Article 18(7) of the SSM Regulation.

104 See Article 18 (1) of the SSM Regulation.

105 See Article 18 (7) of the SSM Regulation.

106 See Article 18 (5) of the SSM Regulation.

107 See Recital 36 of the SSM Regulation, under which “National authorities should remain able to apply sanctions in case of failure to comply with obligations stemming from national law transposing Union Directives. Where the ECB considers it appropriate for the fulfilment of its tasks that a sanction is applied for such breaches, it should be able to refer the matter to national authorities for those purposes”.

108 Under the first interpretation, the link between the ECB as sanctioning authority for less significant banks can also be considered as established by reference to the SSM as a whole and the ECB’s direct and indirect supervisory prerogatives. Under the second, this link is established insofar as the ECB would be the sanctioning authority for significant and the NCAs for less significant banks.

109 See MANCINI, M., *Dalla vigilanza nazionale armonizzata alla Banking Union*, p. 28: “Tanto per le competenze sanzionatorie riconosciute alla BCE quanto per quelle lasciate alle Autorità nazionali, la norma non sembra operare alcuna distinzione legata alla rilevanza o meno dei soggetti vigilati, limitandosi ad aggiungere che ‘laddove necessario allo svolgimento dei compiti attribuite dal presente regolamento, la BCE può chiedere alle Autorità nazionali competenti di avviare procedimenti volti a intervenire per assicurare che siano imposte sanzioni appropriate in virtù degli atti di cui all’articolo 4, paragrafo 3, primo comma, e di

implements a different distinction, contained also in Recital 36, between the legal and the natural persons as well as between the directly applicable Union law/ ECB regulations and decisions *versus* the national law transposing directives.

Moreover, the wording of the first line of Article 18(1) and Article 18(5) refers to the purpose of carrying out the tasks conferred upon the ECB by the SSM Regulation. For these tasks the ECB is exclusively competent under Article 4(1)<sup>110</sup>.

This interpretation ensures uniformity in the enforcement of directly applicable Union law (penalties for violations of this law are applied only by the ECB and are reviewed only by the CJEU) and coherent application of paragraphs 1 and 7 of Article 18 (which both refer to violations of directly applicable Union acts).

Nevertheless, under this interpretation the ECB probably cannot, itself, assess violations of directly applicable Union law by the less significant credit institutions, with the risk that no sanction will be inflicted.

#### *4.3.1.2. The interpretation based on the nature of the bank involved*

The second interpretation (based on the nature of the credit institution involved) seems more in line with a reading of Article 18 in connection with Articles 9 and 6 of the SSM Regulation.

Under these latter, sanctioning powers are assigned to the ECB for the purpose of carrying out the tasks conferred upon it by the Regulation. The ECB is exclusively competent for these tasks, but within the framework of Article 6 and thus only with regard to significant credit institutions.

It could therefore be argued that despite the lack in Article 18 of any reference to Article 6, this alternative interpretation makes Article 18 consistent with Article 6 and its allocation of direct supervisory powers between the ECB and the NCAs.

The application of penalties under this interpretation is more efficient and effective than under the interpretation based on the nature of both the rule and the offender, since the authority competent to supervise a credit institution is in the best position to ascertain whether it has committed a violation.

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qualsiasi pertinente disposizione legislativa nazionale che conferisca specifici poteri attualmente non previsti dal diritto dell'Unione' (art. 18, paragrafo 5, primo comma) e che questo vale, in particolare, per le ipotesi di violazione delle normative nazionali di recepimento di direttive dell'Unione Europea e per le 'misure e sanzioni amministrative' da imporre 'nei confronti dei membri dell'organo di amministrazione [...] o di 'ogni altro soggetto responsabile, ai sensi del diritto nazionale, di una violazione da parte di un ente creditizio, di una società di partecipazione finanziaria o di una società di partecipazione finanziaria mista'".

<sup>110</sup> This is also confirmed by the Recital 36 where it expressly cites the ECB "tasks relating to the enforcement of supervisory rules set out in directly applicable Union law".

Furthermore, ECB penalties must be effective, proportionate and dissuasive<sup>111</sup>. Whether penalties meet these requirements depends on a number of factors, including the “effective detection of the infringement”<sup>112</sup>, which is under the exclusive responsibility of the supervisory authority. Penalties are considered *proportionate* “when they adequately reflect the gravity of the violation and do not go beyond what is necessary for the objectives pursued”<sup>113</sup>. But the “gravity of the violation” and the consistence of the penalty with the “objective pursued” may be assessed only by the supervisory authority.

Nevertheless, in the text of Article 18 there is no direct or indirect reference to the allocation of powers under Article 6, which is a difference with Article 9 related to supervisory and investigative powers<sup>114</sup>.

Moreover, the SSM Regulation includes other provisions, like Article 14 on authorisations and withdrawals and Article 15 on qualifying holdings, which do not distinguish between significant and less significant banks and confer exclusive powers for both categories of credit institutions on the ECB<sup>115</sup>.

Furthermore, under this interpretation there is a risk to uniform application of penalties in case of violations of directly applicable Union law, which will be imposed by different supervisory authorities and will be reviewed by different judges with jurisdictions of different extent<sup>116</sup>.

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111 See paragraph 3 of Article 18 of the SSM Regulation.

112 See Communication from the Commission of 8 December 2010, “*Reinforcing sanctioning regimes in the financial services sector*”, § 2.1.

113 See Communication from the Commission of 8 December 2010, § 2.1.

114 It is worth noting that Article 9 refers to Article 4(1), which in turn refers expressly to action “within the framework of Article 6”.

115 The interpretation of Article 18 in connection with Article 6 of the SSM Regulation is criticised by MANCINI, M., *Dalla vigilanza nazionale armonizzata alla Banking Union*, p. 29-30. The author observes that: “La tesi rappresenta un lodevole tentativo di ovviare a un’infelice formulazione della norma, ma, a mio giudizio, pur essendo suggestiva, non vale a consentire il superamento del disposto letterale dell’art. 18 che, oltre a non contenere alcun richiamo espresso agli artt. 4 e 6 o ai criteri di riparto in essi riportati, non individua affatto nel solo affidamento di compiti di vigilanza diretta il presupposto indefettibile del conferimento del potere sanzionatorio. A fronte del chiaro tenore testuale della norma e in difetto di un’espressa affermazione della necessaria coincidenza fra la titolarità di compiti di vigilanza diretta e del potere sanzionatorio, l’incipit del primo paragrafo appare troppo generico per poterne ricavare una linea di confine netta, come quella che si vorrebbe tracciare, atteso che... il riparto dei compiti fra le Autorità che compongono lo SSM è tutt’altro che semplice e lineare, posto che anche nelle materie affidate alla competenza delle Autorità nazionali si rinvengono molteplici indici, che inducono a ipotizzare una responsabilità concorrente della BCE, il che non sembra incompatibile *ictu oculi* con il conferimento alla stessa di poteri sanzionatori. In ragione di ciò, considerato che in materia sanzionatoria è doverosa l’applicazione del canone ermeneutico della stretta interpretazione, mi sembra che il tenore letterale dell’art. 18 renda insidiosa ogni tesi interpretativa che se ne discosti apertamente e che sia, quindi, auspicabile una rivisitazione della norma, che riconnetta esplicitamente il conferimento del potere sanzionatorio all’esercizio della sola vigilanza diretta, evitando così ogni possibile equivoco interpretativo”.

116 Even though the CR Directive is intended to reduce differences in sanctioning regimes among Member States, there remains a risk of divergence in the application of these harmonised rules. General national laws under which sanctions in the specific field of bank are applied are not harmonised.

*4.3.1.3. The application of the criterion based on the nature of the bank adapted according to the nature of rule violated and the person involved*

The prevailing view seems to be that of applying the criterion based on the nature of the credit institution involved, but adapted according to the nature of the rule violated and of the addressee<sup>117</sup>.

Article 18, according to this new view, should be read in accordance with Article 6 and its allocation of supervisory powers but this reading should also consider the nature both of the rule violated and of the addressee.

As a consequence, the ECB may apply its sanctioning powers basically against the significant credit institutions, following the general rule contained in Article 6.

Moreover, the limitations to the ECB's sanctioning powers under Article 18 and Recital 36 also apply, since the ECB cannot impose penalties on natural persons or apply them for violations of national law.

Under this interpretation:

- (i) the allocation of sanctioning powers between the ECB and the NCAs depending on the qualification of the credit institution concerned as significant or as less significant applies to violations of requirements under directly applicable Union law;
- (ii) the ECB's power to require NCAs to open sanction proceedings in case of violations of national law transposing banking directives is intended to be limited to the significant credit institutions;
- (iii) sanctions for violations of ECB regulations and decisions are applied by the ECB not only to significant credit institutions but also to the less significant, to the extent that these regulations and decisions create obligations upon these latter.

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<sup>117</sup> See in the literature LOOSVELD, S., "The ECB's Investigatory and Sanctioning Powers under the Future Single Supervisory Mechanism", in *Journal of International banking Law and Regulation*, 2013, p. 423: "If an institution supervised by the ECB breaches, intentionally or negligently, a requirement under directly applicable EU law for which administrative sanctions are made available, then the ECB will, according to the proposed SSM Regulation, have the right to start a sanctioning procedure and impose administrative pecuniary sanctions. The same right will exist in case of breaches of regulations or decisions adopted by the ECB in the exercise of its supervisory tasks. In other cases – particularly breaches of national legislation that transposes EU directives – the ECB will only have the possibility to require the national supervisory authorities to open a sanctioning procedure with a view to taking action in order to ensure that appropriate sanctions are imposed by the national authorities. Such action by the national authorities instead of by the ECB will also be necessary when administrative sanctions or measures need to be imposed on natural persons, such as members of the management of credit institutions supervised by the ECB, or other individuals who under relevant national legislation are responsible for regulatory breaches. The reason is that, as is currently envisaged, the ECB will only be empowered to impose sanctions on legal persons and not on individuals".

#### *4.3.2. The imposition of the administrative penalties for breaches of requirements under directly applicable Union law*

Under Article 18(1) of the SSM Regulation the ECB is competent to apply administrative pecuniary penalties for violations of requirements provided for under the directly applicable Union law only with regard to the significant supervised entities.

This provision does not mean that the ECB may apply pecuniary administrative penalties for the breach of any requirement provided for by the CR Regulation.

Article 18(1) also requires that in relation to such a breach, administrative pecuniary penalties shall be “made available to competent authorities under the relevant Union law”.

Thus the power of the ECB to apply the penalties under Article 18(1) for violations of directly applicable Union law has the same scope as that allowed to NCAs under the relevant Union law.

Nevertheless, the expression “under the relevant Union law” needs to be better clarified.

According to the relevant provisions of the CR Directive, penalties under Article 67(2) apply “*at least*” in the circumstances laid down in Article 67(1). Thus Member States may provide for other cases warranting the application of administrative pecuniary penalties.

But in these latter cases Article 18(5) prevents the ECB for directly applying administrative penalties; it can only require NCAs to open procedures to ensure that appropriate penalties for violations of national law transposing directives are applied.

In the light of the above, as the ECB assumes the tasks conferred on it by the SSM Regulation<sup>118</sup>, it may apply the pecuniary administrative penalties provided for under Article 18(1) only where:

- (i) a violation of a requirement under the directly applicable Union law has been committed; and
- (ii) for this violation a penalty “*shall be made available*” to the NCAs under the Union law, either because it is provided for under the CR Regulation or because it is already mentioned under Article 67(2) of the CR Directive.

A further problem here arises, namely whether in order to apply the sanctioning powers under Article 67 of the CR Directive, the ECB must wait until the transposition of the Directive into the relevant national law.

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<sup>118</sup> See Article 33(2) and (3) of the SSM Regulation.

Two interpretations of Article 18(1) of the SSM Regulation are possible here.

By one, in order for the principle of legality to be respected the CR Directive needs to be transposed into the national law.

A directive cannot, by itself and independently of the national legislation for its implementation, have the effect of determining or increasing the criminal liability of the persons accused<sup>119</sup>.

This principle also applies to the imposition of administrative penalties and thus to Article 18(1).

Under the second interpretation, there is no need to wait for the implementation of the CR Directive. The rule that empowers the ECB to apply the penalties for the violation of requirements provided for under the directly applicable Union law is Article 18(1) itself.

The only condition established by Article 18(1) for the penalties to be applied is that the violations sanctioned be only those that are made available under the CR Directive, irrespective of its transposition into the relevant national law.

A different issue under Article 18(1) is that concerning the ECB's discretion in the exercise of its sanctioning powers.

Where a requirement provided for under the directly applicable Union law has been breached, the ECB "may" (not "shall") apply the administrative penalties under Article 18(1) of the SSM Regulation.

Thus, in keeping with the CJEU's position as regards the Commission's sanctioning powers<sup>120</sup> and in contrast to the express provisions of the EU

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119 In a 2011 judgment the ECJ held that the general principles of EU law, and in particular the principle of the legality of criminal offences and penalties, preclude national authorities from applying, to a customs offence, a penalty for which no express provision was made under the national legislation. See Case C-546/09, *Aurubis Bulgaria*, §§ 40 to 43: "40. By its third question, the national court is essentially asking whether EU law precludes national authorities from applying, for a customs offence, a penalty for which no express provision is made under the national legislation. 41. In that regard, it should be borne in mind that, as regards customs offences, the Court has pointed out that, in the absence of harmonisation of EU legislation in that field, the Member States are competent to choose the penalties which seem appropriate to them. They must, however, exercise that competence in accordance with EU law and its general principles (see Case C-213/99 *de Andrade* [2000] ECR I-11083, paragraph 20, and *Hannl-Hofstetter*, paragraph 18). 42. Those principles include the principle of the legality of criminal offences and penalties (see Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 46). That principle implies that legislation must define clearly offences and the penalties which they attract. That requirement is satisfied where the individual concerned is able, on the basis of the wording of the relevant provision and, if need be, with the help of the interpretative guidance given by the courts, to know which acts or omissions will make him criminally liable (see *Advocaten voor de Wereld*, paragraph 50, and judgment of 22 May 2008 in Case C-266/06 P *Evonik Degussa v Commission* [2008], not published in the ECR, paragraph 39). 43. In the light of the foregoing, the answer to the third question is that the general principles of EU law and, in particular, the principle of the legality of criminal offences and penalties preclude national authorities from applying, to a customs offence, a penalty for which no express provision is made under the national legislation".

120 See ECJ, Joined Cases C-189/02 P, C-202/02 P, C-205/02 to C-208/02 and C-213/02, § 172.

Regulations on CRA and on trade repositories with regard to the ESMA's sanctioning powers<sup>121</sup>, the ECB enjoys a certain margin of manoeuvre in the imposition of the foregoing penalties.

A limit to the ECB's discretion is constituted by the relevant Union law or, when this Union law consists of Directives, by the national law transposing these Directives.

Article 18(3) clarifies that "in determining whether to impose a penalty and in determining the appropriate penalty, the ECB shall act in accordance with Article 9(2)", which, in turn, refers to the acts mentioned in Article 4(3) and thus to both the Union law and the national law transposing it.

The criteria for determining the level of the pecuniary administrative penalties are those provided for under Article 70<sup>122</sup> of the CR Directive and under the national law transposing this Article.

#### ***4.3.3. The imposition of sanctions for violations of ECB regulations and decisions: the fines and the periodic penalty payments provided for under Council Regulation 2532/98***

Under Article 18(7) of the SSM Regulation the ECB may apply sanctions (the fines and the periodic penalty payments provided for by Council Regulation 2532/98) in the case of violation of ECB regulations or decisions.

Similarly, Recital 36 of the SSM Regulation stipulates that the ECB is "entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions", in accordance with Article 132(3) of the TFEU<sup>123</sup> and with Council Regulation 2532/98.

Even though Article 18(7) does not reproduce the wording of Recital 36<sup>124</sup>, there is no doubt that the ECB may apply a sanction only where a credit institution fails to comply with an obligation stemming from an ECB regulation or decision.

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121 The reason why the ESMA does not have a margin of manoeuvre in the imposition of penalties and measures lies in the Meroni doctrine, which prevents EU agencies from being vested with discretionary powers.

122 Under Article 70 of the CR Directive these criteria are the following: "(a) the gravity and the duration of the breach; (b) the degree of responsibility of the natural or legal person responsible for the breach; (c) the financial strength of the natural or legal person responsible for the breach, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person; (d) the importance of profits gained or losses avoided by the natural or legal person responsible for the breach, insofar as they can be determined; (e) the losses for third parties caused by the breach, insofar as they can be determined; (f) the level of cooperation of the natural or legal person responsible for the breach with the competent authority; (g) previous breaches by the natural or legal person responsible for the breach; (h) any potential systemic consequences of the breach".

123 Article 132(3) of the TFEU and Article 34(3) of the ESCB and ECB Statute both stipulate that "the ECB shall be entitled to impose fines or periodic penalty payments on undertakings for failure to comply with *obligation* under its regulations and decisions".

124 Under Article 18(7) ECB may impose sanctions "for breaches of ECB regulations and decisions".

Under the wording of Article 18(7), such sanctions may be applied to both the significant and the less significant supervised entities.

Since these latter are supervised by the NCAs and not by the ECB, the question arises whether the ECB has the power to issue regulations and decisions which may create obligations on the less significant credit institutions whose violation may be sanctioned under Article 18(7).

ECB regulations under Article 6(5)(a) of the SSM Regulation refer to the supervision of less significant credit institutions but they create obligations on the NCAs rather than on the less significant credit institutions<sup>125</sup>.

Nor may obligations upon the less significant credit institutions arise from the ECB regulations under Article 4(3), since these regulations can be issued “only to the extent necessary to organise or specify the modalities for the carrying out” of the tasks conferred on the ECB by the SSM Regulation.

Of general application and thus applicable also to the less significant credit institutions are, rather, the ECB provisions on supervisory fees under Article 30 of the SSM Regulation.

Under Article 30(1) these fees are calculated in relation to the tasks conferred on the ECB under Articles 4 to 6. Since the responsibilities related to the tasks under Article 4 are, for the less significant credit institutions, shared by the ECB and the NCAs, the ECB is entitled to apply the fees also to these credit institutions.

Even more so the ECB is entitled to apply the fees to the less significant credit institutions in relation to its micro-prudential tasks, which are not affected by the division of responsibilities, under Article 6 of the SSM Regulation.

The rule imposing fees may therefore create an obligation on the less significant credit institutions whose violation may be sanctioned under Article 18(7).

ECB decisions may be addressed to the less significant credit institutions in the specific cases provided for under Article 6(5)(b) and 6(5)(d), i.e.: (i) where the ECB decides to exercise directly all the relevant powers for one or more less significant credit institutions; (ii) where the ECB decides to use the supervisory powers referred to in Articles 10 to 13 vis-à-vis these credit institutions.

Besides the fines, in the case of violation of its regulations and decisions the ECB may also impose the periodic penalty payments provided for under the Council Regulation 2532/98.

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<sup>125</sup> Under Article 6(5)(a) of the SSM Regulation the ECB “shall issue regulations..., according to which the tasks defined in Article 4... are performed and supervisory decisions are adopted by national competent authorities”.

Under Article 1, point 6, of the Regulation above “‘periodic penalty payments’ shall mean amounts of money which, in the case of a continued infringement, an undertaking is obliged to pay as a sanction, which shall be calculated for each day of continued infringement following the notification of the undertaking of a decision, in accordance with the second subparagraph of Article 3(1), requiring the termination of such an infringement”.

So at the end of the sanctioning procedure the ECB will apply, if appropriate, a periodic penalty payment calculated for each day of continued infringement following the notification of the bank of a decision to initiate the procedure.

The periodic penalty payment is therefore applied to the continued infringement at the end of the procedure, but for a period preceding the adoption of the decision itself. So, as already noted<sup>126</sup>, it is not an *astreinte* but is tantamount to a penalty.

For the principle of legality, periodic penalty payments may only apply to violations of ECB regulations and decisions, according to Article 18(7) of the SSM Regulation<sup>127</sup>.

In the case of violation of a requirement under directly applicable Union law, Article 18(1) of the SSM Regulation does not refer to Council Regulation 2532/98, but directly stipulates which pecuniary administrative penalties can be applied.

Periodic penalty payments are not included within the pecuniary administrative penalties provided for under Article 18(1). Thus they are not applicable to the violations referred to under this latter<sup>128</sup>.

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126 See § 2.5.

127 Article 6(2) of ECB Regulation 2157/1999 provides for that the obstruction, non-compliance or non-performance by the undertaking concerned of duties imposed by the ECB in the exercise of its powers under the infringement procedure may provide sufficient grounds to initiate an infringement procedure under the terms of the Regulation itself and give rise to the imposition of periodic penalty payments. Against this background, a question arises as to whether ECB may apply this provision also within the sanctioning procedure under Article 18(7) of the SSM Regulation. Article 18(7) only refers to the Council Regulation 2532/98 and not also to the ECB Regulation 2157/99. For the principle of legality there would be a doubt that Article 6(2) of the ECB Regulation 2157/99 also applies to the procedure for the application of sanctions under Article 18(7) of the SSM Regulation. Moreover, Article 6(2) of the ECB Regulation 2157/99 seems not in line with Article 6(2) of the Council Regulation 2532/98 on the basis of which the ECB Regulation was adopted. Article 6 (2) of the Council Regulation stipulates that “subject to the limits and conditions laid down in this Regulation, the ECB may adopt Regulations to specify further the arrangements whereby sanctions may be imposed in accordance with this Regulation as well as guidelines to coordinate and harmonise the procedures in relation to the conduct of the infringement procedure”. The provision of a new case to which apply the periodic penalty payments could be not allowed by Article 6(2) of the Council Regulation of 1998. Last but not least, the provision under Article 6(2) of ECB Regulation 2157/1999 seems to violate the right to remain silent under a sanctioning procedure which is now recognised by the case law of the ECtHR; the respect of right to remain silent requires that the authority vested with sanctioning powers cannot compel an undertaking to provide it with answers, which the authority should prove.

128 Nevertheless where a violation of a requirement under directly applicable Union law has been committed, the ECB, instead of applying one of the administrative pecuniary penalties provided for by Article 18(1), may adopt a decision to oblige the bank to comply with that requirement. The violation of

Moreover, periodic penalty payments may be applied only to entities and not to natural persons<sup>129</sup>.

As noted with regard to the penalties under Article 18(1), also for sanctions under Article 18(7) ECB enjoys a certain margin of discretion, since it “may” (not “shall”) apply them.

The criteria for determining the level of sanctions to be applied are nonetheless those provided for under Article 2(3) of Council Regulation 2532/98 rather than those mentioned under Article 70 of the CR Directive<sup>130</sup>.

#### ***4.3.4. The power of the ECB to require the NCAs to apply administrative penalties in the remaining cases***

The interpretation of Article 18(5) follows the same reasoning as for Article 18(1), since in both the ECB’s powers are limited to the “purpose of carrying out the tasks conferred upon it” by the SSM Regulation.

Thus the ECB’s power under Article 18(5) to require NCAs to open proceedings aimed at ensuring that appropriate penalties are imposed needs to be read as limited to the significant credit institutions only.

NCAs should not be empowered to open these procedures against the significant credit institutions without an ECB initiative<sup>131</sup>.

Within these constraints, Article 18(5) of the SSM Regulation refers to cases not covered by paragraph 1.

Since the latter only applies to the administrative pecuniary penalties that the ECB may impose for violations of directly applicable Union law by credit

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that decision may be sanctioned by a periodic penalty payment, as provided for by Article 18(7) of the SSM Regulation and Regulation 2532/98.

<sup>129</sup> See Recital 53 of the SSM Regulation.

<sup>130</sup> Under Article 2(3) of Council Regulation 2532/98: “The ECB shall take into consideration, where relevant, the circumstances of the specific case, such as: (a) on the one hand, the good faith and the degree of openness of the undertaking in the interpretation and fulfilment of the obligation arising from an ECB regulation or decision as well as the degree of diligence and cooperation shown by the undertaking or, on the other, any evidence of wilful deceit on the part of officials of the undertaking; (b) the seriousness of the effects of the infringement; (c) the repetition, frequency or duration of the infringement by that undertaking; (d) the profits obtained by the undertaking by reason of the infringement; (e) the economic size of the undertaking; and (f) prior sanctions imposed by other authorities on the same undertaking and based on the same facts”.

<sup>131</sup> As is correctly observed in the literature - see MANCINI, M., *Dalla vigilanza nazionale armonizzata alla Banking Union*, p. 31 – “in realtà, parrebbe poco ragionevole configurare in capo alle Autorità nazionali l’autonoma titolarità di un potere/dovere di irrogare sanzioni nei confronti di soggetti sottoposti alla vigilanza altrui, a prescindere da un atto di impulso proveniente dal titolare della funzione, ove si consideri che le prime, pur dovendo assistere la BCE nella preparazione e nell’attuazione degli atti di sua competenza, non hanno ovviamente una visione completa del soggetto vigilato e non si trovano, quindi, nella miglior posizione per avere piena consapevolezza delle violazioni commesse dallo stesso. Seguendo tale ordine di idee e ritenendo quindi la richiesta imprescindibile ai fini dell’avvio del procedimento sanzionatorio da parte delle Autorità nazionali, l’atto di impulso della BCE sarebbe sostanzialmente qualificabile come una condizione di procedibilità dell’azione sanzionatoria nazionale”.

institutions, financial holding companies and mixed financial holding companies, paragraph 5 consequently refers to:

- (i) the application of any penalties to natural persons, irrespective of the nature of the rule violated;
- (ii) the application of any penalties in the case of violations of national law transposing directives or of violations of national law conferring on NCAs powers not required by the Union law;
- (iii) the application of any non-pecuniary penalties, including those which may be imposed in the case of violations of directly applicable Union law.

A problem arises of the extent to which NCAs are obliged to comply with the ECB request.

As mentioned, the wording of Article 18(5) of the SSM Regulation suggests that NCAs are only obliged to open a proceeding and retain a margin of manoeuvre on the conclusion of this proceeding and on the specific penalty to be applied.

Paragraph 5 of Article 18 stipulates, in fact, that “in the cases not covered by paragraph 1 of this Article... the ECB may require national competent authorities to open proceedings with a view to taking action in order to ensure that appropriate sanctions are imposed...”. Recital 36 confirms this view since it clarifies that “where the ECB considers it appropriate for the fulfilment of its tasks that a sanction is applied for [violations of national law transposing directives], it should be able to refer the matter to national authorities for those purposes”.

## **5 The different regimes applicable to the proceedings for the adoption of decisions under the SSM Regulation**

### **5.1. The regime applicable to the proceedings for the adoption of micro-prudential decisions**

#### ***5.1.1. The ECB’s obligation to abide by the EU banking law and to apply the national law transposing the banking directives without prejudice to the principle of the primacy of EU law***

Pursuant to Article 4(3) of the SSM Regulation the ECB must apply all relevant Union Law (basically the CR Regulation) and, where this Union law is composed of directives, also the national laws transposing those directives. Moreover, where the CR Regulation explicitly grants an option for Member States, the ECB must apply the national law implementing this option.

Recital 34 of the SSM Regulation clarifies that “for the carrying out of its tasks and the exercise of its supervisory powers, the ECB should apply the material rules relating to the prudential supervision of credit institutions. Those

rules are composed of the relevant Union law, in particular directly applicable Regulations or Directives, such as those on capital requirements for banks and on financial conglomerates. Where the material rules relating to the prudential supervision of credit institutions are laid down in Directives, the ECB should apply the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and in areas where, on the date of entry into force of this Regulation, those Regulations explicitly grants options for member States, the ECB should also apply the national legislations exercising such options. Such options should be construed as excluding options available only to competent and designated authorities...”.

Nevertheless, national law transposing directives or exercising options granted in regulations may lead to the adoption of diverging legal frameworks and therefore to a non-uniform supervisory policy.

Since the framework within which the ECB may act in performing its supervisory tasks is set by the relevant Union law, Recital 34 adds that “this is without prejudice to the principle of the primacy of EU law. It follows that the ECB should, when adopting guidelines or recommendations or when taking decisions, base itself on, and act in accordance with, the relevant binding Union law”<sup>132</sup>.

Thus where the national law has failed to respect the wording or the aim of the CR Directive or the CR Regulation granting options for Member States, the ECB is empowered to apply this national law in conformity with the EU law.

The ECB cannot, however, apply national law not transposing EU legislation on banking.

In such cases ECB has only the power to require NCAs “by way of instructions... to make use of their powers, under and in accordance with the conditions set out in national law” where the SSM Regulation “does not confer such powers on the ECB” (art. 9, paragraph 1, sub-paragraph 3, of the SSM Regulation)<sup>133</sup>.

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132 As is correctly noted in the literature “it will be the first time that a European institution - the ECB as the SSM - will apply such a multilayered body of law, including European laws, national laws, as well as the non-legally binding acts of a European agency such as the EBA: TEIXEIRA, P.G., “The Single Supervisory Mechanism: Legal and Institutional Foundations”, draft text prepared for the conference *Dal Testo Unico Bancario all’Unione bancaria: tecniche normative e allocazione dei poteri*, Rome, Banca d’Italia, 16 September 2013, p. 16.

133 See Recital 35: “Within the scope of the tasks conferred on the ECB, national law confers on national competent authorities certain powers which are currently not required by Union law, including certain early intervention and precautionary powers. The ECB should be able to require national authorities in the participating Member States to make use of those powers in order to ensure the performance of full and effective supervision within the SSM”. A similar rule to that provided for under Article 9, paragraph 1, sub-paragraph 3, is provided for under Article 18(5) of the SSM Regulation. Under this latter the ECB may require NCAs to open proceedings in order to ensure that appropriate penalties are imposed in accordance not only with the national law transposing directives but also with “any relevant national legislation which confers specific powers which are currently not required by Union law”.

This rule assumes that there are powers provided for under the national law that may impinge on the sound and prudent management of a credit institution but that are not conferred on the ECB by the SSM Regulation<sup>134</sup>.

A different issue is that pertaining to the discretionary administrative powers that ECB may enjoy as competent or designated authority in one participating Member State, under the provision of Article 9(1) of the SSM Regulation.

As noted above, ECB is obliged to interpret the national law transposing banking Directives in conformity with the EU law, but where this national law does not exceed the margin of manoeuvre allowed by these Directives ECB is obliged to respect the legislative options exercised by the Member States.

This is confirmed by Article 53(1) TFEU which, for the harmonisation of the rules relating to the taking-up and pursuit of activities as self-employed persons, only allows for the use of Directives.

Under Article 288 TFEU, “a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.

According to the interpretation of the CJEU, this Article entails that Member States have both an obligation to transpose and a right to choose the form and methods to do so<sup>135</sup>.

Consequently, the body of material law to be applied by the ECB in its supervisory tasks will, under the current Treaty provisions, be composed partly, but significantly, of acts taking the form of Directives, which Member States will be bound to transpose.

But what happens where Union law grants the options above not to the national legislators but to the NCAs?

Since the ECB has all the powers which competent authorities have under the relevant Union law<sup>136</sup>, the ECB should be allowed to make use of these options.

A further problem arises in the cases where the exercise of these options implies the use of regulatory powers.

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134 Under Italy’s Consolidated Law on Banking this is the case of the power conferred on the Bank of Italy by Article 56(1) to “verify that amendments to the by-laws of banks do not conflict with their sound and prudent management”, which may impinge on the ECB power under Article 16(2) (a) of the SSM Regulation to “require credit institutions to hold own funds in excess of the capital requirements” laid down in the Union law.

135 See ECJ, Case C-343/08 *Commission v Czech Republic*, at §§ 40 and 42: the “principle of legal certainty and the need to secure the full implementation of directives in law and not only in fact require that all Member States reproduce the rules of the directive concerned within a clear, precise and transparent framework providing for mandatory legal provisions” and “it is only where transposition of a directive is pointless for reasons of geography that it is not mandatory”.

136 See Article 9(1), subparagraph 2, of the SSM Regulation.

On the one hand, one could argue that in the light of Article 4(3), second subparagraph, of the SSM Regulation the ECB is entitled to adopt regulations “only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred upon it” by the Regulation itself.

On the other hand, one could maintain that the rule empowering the ECB to enjoy the same powers granted to the NCAs should prevail over the rule contained in Article 4(3) of the SSM Regulation.

Even supposing that for the purpose of exercising the options granted to the supervisory authority the ECB may avail itself of regulatory powers, these latter can be employed at the national level only, hence taking national peculiarities into account.

### ***5.1.2. The ECB obligation to respect fundamental rights and to abide by the general principles of EU law***

When applying Union law, the ECB is obliged to respect its fundamental rights and general principles.

These rights and principles apply to all ECB supervisory procedures, even though, as we will better explain later, the safeguards granted to the addressee of the ECB decisions gradually increase as we move from supervisory decisions to penalties with a *coloration pénale*.

Compliance with the fundamental rights and general principles of the EU law must be guaranteed not only by the ECB but also by the NCAs when assisting the ECB with the preparation of its final decisions.

Under Article 6(3) of the SSM Regulation “national competent authorities shall be responsible for assisting the ECB... with the preparation and implementation of any act relating to the tasks referred to under Article 4” and “follow the instructions given by the ECB” when performing these tasks. The framework under Article 6(7) (b) of the Regulation itself shall regulate the procedures for the adoption of the ECB decisions addressed to the significant credit institutions “including the possibility” for the NCAs “to prepare draft decisions to be sent to the ECB for consideration”.

#### ***5.1.2.1. Protection against entering business premises***

The privacy of the home is protected by Article 7 of the Charter as well as by Article 8(2) of the Human Rights Convention and it is applied by the European Courts to both natural and legal persons.

In the *Chapelle* case the ECtHR held that undertakings are protected when authorities wish to enter their business premises<sup>137</sup>. In the *DEB* case the CJEU

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<sup>137</sup> See ECtHR, *Chapelle* case, 30 March 1989, Appl. 1461/83.

clarified that legal persons too are protected by the fundamental rights of the Charter<sup>138</sup>.

Moreover, under the *Cola Est* case the ECtHR laid down the conditions for interference in the right of privacy of home, requiring some form of previous judicial control in order to prevent possible arbitrary actions where the authority's investigative powers are very broad<sup>139</sup>.

The same reasoning was followed by the CJEU in the *Roquette* case.

In this judgment the Court also clarified the standard of the information that should be furnished to the national courts in order to decide on the legality of the investigation, explaining that the Commission should provide "detailed explanations showing that the Commission possesses solid factual information and evidence providing grounds for suspecting such infringement on the part of the undertaking concerned"<sup>140</sup>.

The rules laid down in the case law above were incorporated to some extent in Article 20 of Regulation 1/2003 and, as far as this paper is concerned, in Article 13 of the SSM Regulation.

Under paragraph 1 of this latter "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" by the ECB.

Paragraph 2 explains, in turn, that "where authorisation as referred to in paragraph 1 of this Article is applied for, the national judicial authority shall control that the decision of the ECB is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the ECB for detailed explanations, in particular relating to the grounds the ECB has for suspecting that an infringement of the acts referred to in the first subparagraph of Article 4(3) has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the inspection or demand to be provided with the information on the ECB's file. The lawfulness of the ECB's decision shall be subject to review only by the CJEU".

A problem arises here as to whether the above provision is fully compliant with the case law of the ECtHR, since it requires the Court's previous judicial control only where it is provided for by the national law, whilst under the *Cola Est* rule such a control should be made available in any case.

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138 See ECJ, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*.

139 See ECtHR, 16 April 2002, 37971/97, *Société Colas Est and others*, §§ 45-50.

140 See ECJ, Case C-94/00, *Roquette*, § 99.

This notwithstanding, the solution under Article 13(2) of the SSM Regulation seems to represent a fair compromise between the values involved, since it preserves the effectiveness of the ECB's supervisory powers without prejudice to the protection of business premises to the extent that it is recognised in the relevant national law.

#### 5.1.2.2. *Time limits for the adoption of supervisory decisions*

In the light of the principle of sound administration<sup>141</sup> and in order to preserve the rights of defence<sup>142</sup>, a certain time frame is requested for the adoption of the ECB supervisory decisions<sup>143</sup>.

Nevertheless, in the Court's view there is no need for strict time limits. The assessment of the required time frame is rather based on the principle of proportionality and depends on the circumstances of the case.

Specific time limits are provided for under Article 4 of Council Regulation 2532/98 on the ECB's sanctioning powers, but they are inadequate to the complexity of the supervisory subjects.

#### 5.1.2.3. *Statement of reasons*

The ECB must respect the requirement for acts to state the reasons on which they are based. Article 22(2), second sub-paragraph, of the SSM Regulation requires that "the decisions of the ECB shall state the reasons on which they are based".

The obligation to state the reasons is functional to judicial control called for under Article 263 of the TFEU<sup>144</sup> and is of even more fundamental importance where the authority, as in the case of the ECB's supervisory powers, enjoys broad power of appraisal<sup>145</sup>.

#### 5.1.2.4. *Right to express one's view and its component aspects*

The core aspect of the right to a fair trial is the right to express one's view on the proceeding<sup>146</sup>.

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141 See ECJ, Case *Guérin Automobiles*, C-282/95, § 37: "the Commission's definitive decision must, in accordance with the principles of good administration, be adopted within a reasonable time after it has received the complainant's observations".

142 See ECJ, Case C-105/04, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied*, § 49: "the excessive duration of the first phase of the administrative procedure may have an effect on the future ability of the undertakings concerned to defend themselves, in particular by reducing the effectiveness of the rights of the defence in the second phase of the procedure".

143 See also ECJ, Case C-238/99, *Limburgse Vinyl Maatschappij NV (LVM)*, §§ 167-171.

144 If the Court finds the statement inadequate, it will annul the contested act: see ECJ, Case C-18/57, *Nold v. High Authority*, §§ 51-52.

145 See ECJ, Case C-269/90, *Technische Universität München*, §§ 14 and 27.

146 See TRIDIMAS, T, *The General Principles of EU Law*, Oxford, 2009, pp. 378 ff.. The author notes that "the Community judicature views the right to a hearing as a functional rather than as an objective requirement. Infringement of the right leads to the annulment of the act in question only if it can be shown that the outcome of the procedure might have been different had the right to a hearing been respected... It

As is clearly pointed out by the CJEU in the *Lisretal* case<sup>147</sup>, this right is recognised in all proceedings which are initiated against a person and are liable to culminate in a decision adversely affecting that person.

Developed in the contest of competition law, the right to express one's view is now recognised, in its several aspects, under the Charter<sup>148</sup> and, within the SSM Regulation, is provided for by Article 22(1).

Article 41(2) of the Charter expressly provides for “the right of every person to be heard, before any individual measure which would affect him or her adversely is taken”.

Article 22 of the SSM Regulation, in turn, stipulates that “before taking supervisory decisions in accordance with Article 4 and Section 2 of Chapter III [including therefore the decision to adopt an administrative measure or to apply an administrative penalty], the ECB shall give the persons who are the subject of the proceedings the opportunity to be heard” and that “the ECB shall base its decisions only on the objections on which the parties concerned have been able to comment”.

Under Article 22(1), second sub-paragraph, of the SSM Regulation the addressee's right to express his view can be suspended “if urgent action is needed in order to prevent significant damage to the financial system. In such a 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”.

Since this provision represents an exception to a fundamental right, it should be interpreted strictly and should therefore not apply outside the circumstance expressly provided for in Article 22(2).

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may be objected that the right to a hearing is a requirement of form, not one of substance, and that whether the hearing might have made a difference to the outcome should be irrelevant. The courts should not attempt to step *ex post facto* into the shoes of the administration. *Belgium v. Commission* [Case C-142/87, para 48] however does not suggest that the Court attempt to second guess what would have been the outcome of the procedure had the right of a hearing been respected. It merely exercises a residual control based on the criterion of reasonableness. It is conceivable that the outcome *might* have been different if a hearing had been given? Only if that question is answered in the affirmative, may breach of the rights of defence be sanctioned by annulment... The approach of the Community courts can best be described as pragmatic. It seeks to balance two conflicting principles: on the one hand, to uphold the right of the defence as procedural safeguards for the protection of the individual and, on the other hand, to avoid undue formalism which might encourage abusive reliance on procedural principles. The undertaking concerned must prove that the results might be different if the documents in issue had been disclosed. It seems that, overall, the burden imposed on the undertaking is not a difficult one to discharge”: pp. 391-392.

147 ECJ, Case C-32/95 P, § 21: “observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question (see, *inter alia*, Case C-135/92 *Fiskano v Commission* [1994] ECR I-2885, paragraph 39, and Joined Cases C-48/90 and C-66/90 *Netherlands and Others v Commission* [1992] ECR I-565, paragraph 44). That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views”.

148 See, in the literature, RABINOVICI, I., “The Right to Be Heard in the Charter of Fundamental Rights of the European Union”, *European Public Law* No. 1 (2012): 149-173.

As clarified in both the case law and the literature, the right to express one's view depends on several conditions<sup>149</sup>. More to the point the party involved must:

- (i) be informed in timely fashion about the investigation and about the allegation;
- (ii) have access to the files of the authority and have sufficient time to prepare the defence;
- (iii) have the right to express its view<sup>150</sup>.

(i) *The right to be informed in timely fashion about the investigation and about the allegation*

The right to be informed in timely fashion about the investigation is an essential precondition of the right to express one's view.

Information must be timely; otherwise the right to be heard can be irreparably harmed in the preparatory phase of the decisions. The party concerned must be informed about all the allegations.

In the case of administrative measures and penalties the party concerned should be informed about the facts and the rules allegedly broken.

(ii) *The right to have access to the files*

The right to have access to the files is now expressly recognised in point (b) of Article 41(2) of the Charter and, within the SSM Regulation, under Article 22(2).

This latter stipulates that the persons concerned "shall be entitled to have access to ECB's files".

The right to such access has been generally seen, both in case law and in the literature, as an essential precondition of the right to be heard.

In the *Solvay*<sup>151</sup> and *ICI*<sup>152</sup> cases the Court observed that "the purpose of providing access to the file in competition cases is to enable the addressees of statements of objections to examine evidence in the Commission's file so that they are in a position effectively to express their views on the conclusion reached by the Commission in its statement of objections on the basis of that evidence. Access to

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149 See TRIDIMAS, T, *The General Principles of EU Law*, pp. 385 ff.

150 In the case *Hoffmann-La Roche & Co v. Commission* (case 85/76, § 9) the ECJ held that observance of the right to be heard is, in all proceedings in which sanctions, in particular fines and periodic payments, may be imposed, a fundamental principle of law which must be respected even if the proceedings in question are administrative proceedings. The right to a hearing does not necessitate a formal hearing if the relevant legislation does not provide for it (CFI, cases *OMPI II*, T- 256/07, § 99, and *Common market Fertilisers v. Commission*, T-134-5/03, § 108).

151 CFI, T-30/91, § 59.

152 CFI, T-36 and 37/91, §§ 69 and 49 respectively.

file is thus one of the procedural safeguards intended to protect the rights of the defence”<sup>153</sup>.

This is the SSM Regulation’s perspective too. Recital 63 clarifies that “when determining whether the right of access to the file by persons concerned should be limited, the ECB should respect the fundamental rights and observe the principles recognised in the Charter of Fundamental Rights of the European Union, notably the right to an effective remedy and to a fair trial”, making the relationship between the right of access to files and the rights of defence clear.

It is worth noting that the right of access to files under Article 41(2) (b) of the Charter is distinct from the general right of access to documents under Article 42.

The former is an aspect of the right of defence and is subject to the two conditions that: (i) a specific administrative proceeding is initiated against a person; (ii) this proceeding is liable to culminate in a measure adversely affecting that person.

The latter pursues the general interest of any citizen of the Union in the transparency of Union’s institutions and bodies<sup>154</sup>.

Against this background a person requesting access to documents under Article 42 of the Charter does not need to demonstrate any specific interest in such access<sup>155</sup>. The person concerned can ask for the precise contents of the documents if he thinks they are essential for the exercise of its defence.

Some restrictions on access to files are provided for in some EU legal acts in order to protect business secrets or other confidential information<sup>156</sup>.

The same is true under Article 22(2) of the SSM Regulation, according to which access to files is “subject to legitimate interest of other persons in the protection of their business secrets”. Moreover, under the same provision, “the right of access to files shall not extend to confidential information”.

It is worth noting that, as is correctly observed in literature, “the Court is very precise in its examination of the necessity of confidentiality, because as the ECHR shows it is a fundamental aspect of the right to a fair trial that proceedings leading to a penalty should be adversarial and that there should be equality of arms between the authorities and the defence. The right to an adversarial trial means that both

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153 See also, in the literature, LENAERTS, K. and VANHAMME, J., “Procedural rights of parties in the Community administrative process”, in *CMLR*, 1997, 541.

154 The general rules on access to ECB documents are determined by the regulation referred to in Article 15(3) of the TFEU. See Recital 59 of the SSM Regulation.

155 See CFI, Case T-2/03, *Verein für Konsumenteninformation*, 2005, § 109.

156 A set of detailed rules governing access to files within antitrust proceedings is contained in the *Commission Notice on the rules for access to the Commission files in cases pursuant to Articles 81 and 82 of the EC treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) 139/2004*. For non-accessible documents see paragraph 3 of the *Notice*. See also, in the literature, LEVITT, M., “Access to the file: the Commission’s Administrative Procedures in Cases under Articles 85 and 86”, 1997, *Com. Mark. L. Rev.*, 1997, 1424.

sides must be given the opportunity to have knowledge of and to comment on the observations filed and the evidence adduced by the other party. Article 6 § 1 ECHR requires that the authorities disclose to the defence all material evidence in their possession for or against the accused<sup>157</sup>.

*(iii) The right to express one's view*

The CJEU has shown on several occasions the importance of the right to be heard.

This right is all the more important where the EU authority enjoys broad discretionary powers<sup>158</sup>, as may be the case in the field of the prudential supervision.

The person concerned should have sufficient time to prepare the defence, in proportion to the complexity of the case.

Nevertheless, if an undertaking, as may be the case of credit institutions, is a professional on the market, even a short period of time can be justified<sup>159</sup>.

The party concerned expresses its view in a written opinion.

There is therefore no need of a hearing, even in the field of administrative measures and penalties<sup>160</sup>.

## **5.2. The regime applicable to the proceedings for the adoption of macro-prudential decisions**

Article 22 of the SSM Regulation only applies to micro-prudential decisions, since it refers to the decisions taken under Article 4 and not also to those under Article 5.

Macro-prudential decisions are therefore not subject to the rules of due process under Article 22.

Here the problem arises of whether these decisions are subject to Article 41(2) of the Charter.

Under the provisions of Article 41(2), every person has a right to be heard “before an individual measure which would affect him or her adversely is taken” and a right to have access to files as an essential precondition of the right to be heard.

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157 DE MOOR-VAN VUGT, A., “Administrative sanctions in EU law”, p. 21.

158 ECJ, Case C-19/70, *Almini*, § 11: “the exercise of discretionary powers which are so widely defined nevertheless requires that the official concerning whom such a measure is contemplated should first have an opportunity of effectively defending his interests”.

159 ECJ, Case C-349/07, *Sopropé*, § 41.

160 See, for example, the Commission delegated Regulation 946/2012 of 12 July 2012 on ESMA sanctions regarding CRAs. Under Articles 2(4) and 3(5) of the delegated regulation, the party concerned may be invited or not to attend an oral hearing. Moreover, oral hearings shall not be held in public.

Thus for these rights to be guaranteed to the addressees of a decision adversely affecting them, the decision has to be an individual decision.

Since macro-prudential decisions are basically general and not individual decisions, their addressees do not have the right to be heard (and to have access to files) before the decision is adopted.

Nevertheless it cannot be excluded that a macro-prudential decision could be addressed to a single credit institution, as is the case of the capital conservation measures provided for under the CR Directive. In these cases the right to be heard and the right to access to files do apply as fundamental rights provided for within the Charter.

The right to be heard and the right to access to files also apply where the supervisory measures under Article 16(2) of the SSM Regulation are adopted in order to ensure compliance with macro-prudential decisions.

Unlike the right to be heard and to have access to files, the obligation of the administration to give reasons for its decisions provided for under Article 42(2) of the Charter applies to both individual and general decisions. In the case of measures of general application the statement of reasons may nonetheless be limited to indicating the general objectives which it is intended to achieve, as results from the case law of the CJEU<sup>161</sup>.

Thus even though macro-prudential decisions are not encompassed within the scope of Article 22 of the SSM Regulation, the ECB must nevertheless state the reasons on which such decisions are based in the light of the Charter provision.

### **5.3. The regime applicable to the proceedings for decisions to grant and withdraw the banking licences and to the proceedings for the assessment of qualifying holdings**

The procedure for the adoption of the decision to grant or withdraw banking licences is regulated under Article 14 of the SSM Regulation.

Applications for authorisation are submitted to the NCA of the Member State where the credit institution is to be established in accordance with the requirements set out in relevant national law.

If the applicant complies with all the conditions for the authorisation set out in the relevant national law of that Member State, the NCA takes, within the period provided for by relevant national law, a draft decision to propose that the ECB grant the authorisation.

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161 ECJ, Case C-168/98, *Luxembourg v. European Parliament and Council*, §§ 62-68. See in the literature LENAERTS, K. and VAN NUFFEL, P., *European Union Law*, London, 2011, p. 889 and LENEARTS, K., ARTS, D. and MASELIS, I., *Procedural Law of the European Union*, London 2006, 303. On the relationship between the right to a hearing and the requirement to give reasons see TRIDIMAS, T., *The General Principles of EU Law*, pp. 408-410.

The draft decision is notified to the ECB as well as to the applicant and it is deemed to be adopted by the ECB unless this latter objects within a maximum period of ten working days, extendable once for the same period in duly justified cases.

The ECB can object to the draft decision only where the conditions for authorisation set out in relevant Union law are not met, stating the reasons for the rejection in writing.

In other cases, the national competent authority must reject the application for authorisation.

If the authorisation is rejected the procedure ends at the national stage.

The procedure ending with the granting of the authorisation, on the contrary, is a composite administrative procedure, since the relevant acts are adopted by both the NCA and the ECB<sup>162</sup>.

The ECB may withdraw the authorisation in the cases set out in relevant Union law on its own initiative or at the proposal of the relevant NCA.

In the first case the ECB must consult the NCA of the participating Member State where the credit institution is established.

Consultations here are only aimed at ensuring that before taking any decision regarding the withdrawal the ECB allows sufficient time for the national authorities to decide on the necessary remedial actions, including possible resolution measures, and takes these into account<sup>163</sup>.

That is to say, there is no real national phase within which there should be a need for the addressee to be heard.

In the second case, where the NCA which has proposed the authorisation considers that the authorisation must be withdrawn in accordance with the relevant national law, it submits a proposal to the ECB.

In this case the ECB adopts the decision on the proposed withdrawal, taking full account of the justification for withdrawal put forward by the NCA. The NCA

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162 On composite administrative procedures see DELLA CANANEA, G., "The European Union's mixed administrative procedures", in *Law and contemporary problems*, 2004, 197 ff., and in *Il procedimento amministrativo nel diritto europeo*, edited by Bignami F. and Cassese S., Milano, 2004, 307 ff.

163 Under Article 14(6) of the SSM Regulation "as long as national authorities remain competent to resolve credit institutions, in cases where they consider that the withdrawal of the authorisation would prejudice the adequate implementation of or actions necessary for resolution or to maintain financial stability, they will duly notify their objection to the ECB explaining in detail the prejudice that a withdrawal would cause. In those cases, the ECB shall abstain from proceeding to the withdrawal for a period mutually agreed with the national authorities. The ECB can choose to extend that period if it is of the opinion that sufficient progress has been made. If, however, the ECB determines in a reasoned decision that proper actions necessary to maintain financial stability have not been implemented by the national authorities, the withdrawal of the authorisations shall apply immediately".

phase here is relevant for the addressee, since it is in that phase that the conditions for the withdrawal are assessed.

The safeguards of defence must therefore be granted as from this phase.

Thus, unlike the withdrawal procedure at the ECB's own initiative, this is a true composite administrative procedure.

A composite administrative procedure is also provided for under Article 15 of the SSM Regulation with regard to the assessment of qualifying holdings in a credit institution.

Notifications of acquisitions of qualifying holdings are introduced with the NCAs. The latter assess the proposed acquisition and forward the notification and a proposal for a decision to oppose or not to oppose the acquisition, based on the relevant Union law and the national law transposing this Union law.

Unlike the authorisation to take up the business of a credit institution, qualifying holdings do not entail the need to assess the applicant's compliance with the relevant national law, since Union law regulates in a sufficiently detailed manner both the criteria and the procedural rules for the assessment of the acquisition.

The ECB decides whether or not to oppose the acquisition on the basis of the assessment criteria set out in the relevant Union law as well as in accordance with the procedure and within the assessment periods set out in this law.

Since the previous assessment is carried out by the NCA, the safeguards of the defence have to be granted to the addressees as from the national phase of the procedure.

There is no doubt that, as a result of the primacy of Union law, actions taken by the NCAs within all the composite administrative procedures above (granting of the authorisation, withdrawal of it on a proposal of NCA, assessment of qualifying holding) have to comply with the Union requirements on the safeguard of fundamental rights.

This conclusion is grounded on the following arguments: (i) the acts adopted by the NCA are in fact necessary steps in the procedure for the adoption of the relevant ECB decision; moreover (ii) the ECB does not enjoy a broad margin of manoeuvre since it has to take into account the previous national assessment and/or the proposal of the NCA.

#### **5.4. A common regime applicable both to administrative measures and to administrative penalties?**

As is pointed out in the literature "the adoption of the Charter as part of the Lisbon Treaty has stimulated the further clarification and specification of safeguards in administrative sanctioning procedures for both measures (of a reparatory nature) and penalties (of a punishing nature). The difference in approach" between the two types of sanctions "is gradual, which makes the reluctance of the CJ to qualify

a sanction as criminal even more questionable. Most procedural safeguards that have been implemented apply to both categories. The penalties demand a more restrictive approach in the sense that the authorities need to respect the guarantees that have been set by the ECHR and the Charter, when it comes to a criminal charge”<sup>164</sup>.

Safeguards applied by the EU Courts to both the administrative measures and penalties are those applicable also to the supervisory decisions and pertaining to the rights of defence, basically to the right to be heard and to the right to have access to files<sup>165</sup>.

These rights must be ensured also by the national authorities when imposing administrative measures or penalties<sup>166</sup>.

Safeguards applied by the EU Courts only to the administrative penalties that are criminal in substance are, as will better clarified later<sup>167</sup>: the principle of culpability<sup>168</sup>, the right to remain silent, the principle of separation, the *ne bis in idem* and the full jurisdiction of the severity of the penalty<sup>169</sup>.

For all the other safeguards (basically for the principle of legality and for the principle of separation) the question is still open.

#### ***5.4.1. The uncertain application of the principle of legality to administrative measures***

It is, first of all, questionable whether the principle of legality and, as the case may be, the connected rule of the *lex mitior*, apply both to administrative penalties and to administrative measures or only to the former.

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164 DE MOOR-VAN VUGT, A., “Administrative sanctions in EU law”, p. 40-41.

165 ECJ, Case C-32/95P, *Listrestal*.

166 See ECJ, Case C-28/05, *Docter*, § 74: “it is equally settled case-law that respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views on the evidence on which the contested decision is based (see, inter alia, Case C-32/95 P *Commission v Lisrestal and Others* [1996] ECR I-5373, paragraph 21; Case C-462/98 P *Mediocurso v Commission* [2000] ECR I-7183, paragraph 36; and Case C-287/02 *Spain v Commission* [2005] ECR I-5093, paragraph 37). Given the important consequences for breeders flowing from decisions taken on the basis of Article 5 of Directive 85/511, Article 2 of Decision 2001/246 and Article 10(1) of Directive 90/425, that principle requires, in connection with the control of foot-and-mouth disease, that the addressees of such decisions be, in principle, placed in a position in which they may effectively make known their views on the evidence on which the contested measure is based”.

167 See § 5.6.

168 See ECJ, Case C-137/85, *Maizena*, § 14.

169 The residual category of penalties not having a criminal nature did not capture the Courts attention. Some EU regulations apply to these penalties the principle of the full jurisdiction of the Court, but, as clarified in § 5.5.2, this is probably not the case for the ECB penalties under the SSM Regulation.

As mentioned, where the EU law is composed of directives, compliance with the principle of legality implies the implementation of the directives through the relevant national law.

Should the principle of legality not apply to the administrative measures, ECB would not wait for the approval of the national law for the adoption of these measures.

Nevertheless, both the EU legislation and the case law are ambiguous on this point.

Article 2(2) of Regulation 2988/1995 stipulates that “no administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it. In the event of a subsequent amendment of the provisions, which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively”.

This text might suggest that the principle of legality only applies to the penalties.

In the *Könicke* case the CJEU emphasises that a “penalty”, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis<sup>170</sup>.

Despite the use of the term “penalty”, the judgment refers to the forfeiture of a deposit, which is of reparatory nature and might be considered as a “measure” under Regulation 2988/95.

The judgment seems therefore to suggest, at first glance, that a legal basis is necessary for reparatory measures too.

In the literature it has nonetheless been observed that “the forfeiture of a deposit, in combination with the recovery of sums paid, is in reality a penalty, and that was what the case was about. In conclusion, the principle of legality certainly applies to penalties in EU law; however, it is uncertain whether it applies to measures as well”<sup>171</sup>.

#### ***5.4.2. The need of an ad hoc provision for application to administrative measures of the principle of separation between investigative and decision-making powers***

A further problem arises as to whether ECB should comply with the principle of separation between the investigative and the adjudicatory functions not only in applying administrative penalties but also in applying administrative measures.

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170 See ECJ, Case C-117/83, § 11.

171 DE MOOR-VAN VUGT, A., “Administrative sanctions in EU law”, p. 16.

Both the Regulation on CRA<sup>172</sup> and the Regulation on OTC derivatives, central counterparties and trade repositories<sup>173</sup> apply the principle of separation between investigative and decision-making powers to any response to an unlawful behaviour, irrespective of its qualification as an administrative measure or as an administrative penalty.

A different approach seems to be followed under the case law of the ECtHR.

Under the *Dubus* case<sup>174</sup> the ECtHR refers to the “criminal nature” not only of any severe pecuniary penalty but also to deletion from the list of authorised firms<sup>175</sup>.

This latter was nonetheless considered under the relevant national law as a (non-pecuniary) penalty and not as an administrative measure.

In the absence of a specific rule requiring the application of the principle of separation for the administrative measures, the ECB is not obliged to follow the principle of separation for the adoption of the cease-and-desist order and the suspension of voting rights.

## **5.5. The rules applicable to all administrative penalties**

### ***5.5.1. Publication of administrative penalties***

Under Article 18(6) of the SSM Regulation “the ECB shall publish any penalty referred to in paragraph 1, whether it has been appealed or not, in the cases and in accordance with the conditions set out in relevant Union law”.

The provision is, of course, confined to the pecuniary administrative penalties, since these are the only penalties that ECB may apply under the SSM Regulation.

Whilst under Article 68 of the CR Directive Member States may or may not permit the publication of penalties against which an appeal has been lodged, Article 18(6) of the SSM Regulation provides for publication irrespective of a pending appeal.

For all other aspects the conditions for the publication of penalties are those contained in Article 68 of the CR Directive.

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<sup>172</sup> See Article 23e.

<sup>173</sup> See Article 64.

<sup>174</sup> ECtHR, 11 June 2009, *Dubus v. France*, (App. 5242/04).

<sup>175</sup> See § 37: “La Cour observe que la requérante s’est vue infliger un blâme, sanction de nature administrative en droit interne. Toutefois, la lecture de l’article L. 613-21 du CMF (paragraphe 24 ci-dessus) démontre que la société requérante pouvait encourir une radiation et/ou une sanction pécuniaire «au plus égale au capital minimum auquel est astreinte la personne morale sanctionnée». De telles sanctions entraînent des conséquences financières importantes, et partant, peuvent être qualifiées de sanctions pénales (*mutatis mutandis*, *Guisset c. France*, 33933/96, § 59, CEDH 2000-IX). En effet, la Cour rappelle que la coloration pénale d’une instance est subordonnée au degré de gravité de la sanction dont est a priori passible la personne concernée (*Engel et autres précité*, § 82) et non à la gravité de la sanction finalement infligée. Elle constate également, à l’instar de la requérante, que le blâme qui a été prononcé était de nature à porter atteinte au crédit de la société sanctionnée entraînant pour elle des conséquences patrimoniales incontestables”.

Thus, where an appeal to the CJEU in respect of an ECB decision to impose a penalty is pending, the ECB shall, without undue delay, also publish on its official website information on the status of such appeal and the outcome thereof<sup>176</sup>.

The publication shall contain any information on the type and nature of the breach and the identity of the supervised entity concerned<sup>177</sup>.

In accordance with Article 68(2) of the CR Directive, the ECB must publish the penalties on an anonymous basis where the publication may: (i) jeopardise the stability of the financial markets or an on-going criminal investigation; or (ii) cause, insofar as it can be determined, disproportionate damage to the supervised entity concerned<sup>178</sup>.

Where the circumstances above are likely to cease within a reasonable period of time, the publication may be postponed for such a period.

In the light of Article 68(3) of the CR Directive, the ECB is required to ensure that information published in accordance with the conditions set out under paragraphs 1 and 2 of Article 68 remains on its official website for at least five years.

Personal data shall be kept on the official website of the ECB only for the period necessary in accordance with applicable data protection rules.

In the light of Article 69 of the CR Directive and subject to the professional secrecy requirements referred to in Article 27 of the SSM Regulation, the ECB must inform the European Banking Authority (EBA) of all the administrative pecuniary penalties applied to a supervised entity under Article 18(1) of the SSM Regulation, including any appeal in relation to such penalties and the outcome thereof.

This rule is aimed at creating a central data base by the EBA for the assessment of the good repute of the members of management bodies of credit institutions.

NCAs are obliged to publish all the administrative penalties provided for under the provisions of the CR Directive according to the qualification laid down in the relevant national law and irrespective of their pecuniary nature.

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176 See Article 68(1), second sub-paragraph, of the CR Directive.

177 See Article 68(1), first sub-paragraph, of the CR Directive.

178 Article 68(2) of the CR Directive also mentions the case where the penalty is imposed to a natural person and, following an obligatory prior assessment, the publication of personal data is found to be disproportionate. Nevertheless, this case does not apply to the ECB, since ECB penalties are only addressed to legal persons. Similar provisions are contained in Article 36d(1) of Regulation 1060/2009 as amended by Regulation 513/201 on CRA: “ESMA shall disclose to the public every fine and periodic penalty payment that has been imposed pursuant to Articles 36a and 36b, unless such disclosure to the public would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved”. See also Article 68(1) of Regulation 648/2012 on OTC derivatives, central counterparties and trade repositories. As correctly noted in the literature, the publication regime applicable to the ECB penalties under Article 18 of the SSM Regulation is “notably different from the regime under the ECB Sanctioning Regulation [Regulation 2532/98], where, once the ECB’s sanctioning decision has become final, the Governing Council of the ECB may” – but is not obliged to – “decide to publish the decision or information relating thereto in the Official Journal of the European Union”: LOOSVELD, S., “The ECB’s Investigatory and Sanctioning Powers under the Future Single Supervisory Mechanism”, p. 425.

The publication of penalties subject to appeal is admitted only where expressly provided for in national law.

In the case of penalties applied by an NCA to natural persons, the publication cannot be an automatic effect of the decision imposing these penalties; otherwise it would be illegal under the rules and the case law on the protection of personal data<sup>179</sup>.

This point needs to be further clarified.

The protection of personal data is a fundamental right, closely linked to that of respect for private life<sup>180</sup>. “Personal data” is “any information relating to an identified or identifiable natural person”<sup>181</sup>.

Any measure or operation of data processing is an interference with the protection of personal data<sup>182</sup>.

“Data processing” includes “any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction”<sup>183</sup>.

Since the publication of administrative penalties may be included within the above definition of “data processing”, it must, to be lawful, be justified in accordance with the following three criteria:

- (i) the interference must be in accordance with the law<sup>184</sup>, which in turn must be accessible to individuals and foreseeable by them<sup>185</sup>;
- (ii) the interference must pursue a legitimate aim<sup>186</sup>; and

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179 To the extent that the safeguards granted to natural persons tend to be applied by the case law of the EU Courts to legal persons too, a problem arises as to whether the publication of penalties by the ECB would be subject to the same limits to which NCAs are subject where publishing the penalties imposed to the natural persons.

180 See Article 8 ECHR, Article 16 TFEU, and Articles 7 and 8 Charter. See also CJEU, case *Schecke*, of C-92/09, § 47.

181 Article 2(a) of Directive 95/46/EC.

182 See ECtHR, *S. and Marper v. the United Kingdom* (applications nos. 30562/04 and 30566/04), § 67, according to which even “the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8. The subsequent use of the stored information has no bearing on that finding”. See also ECJ, C-92/09, *Schecke*, § 49.

183 Article 2(b) of Directive 95/46/EC.

184 See ECJ, C-465/00 *Österreichischer Rundfunk*, § 76.

185 In accordance with the case law of the European Court of Human Rights. See *Rotaru v. Romania* (28341/95) [2000] ECtHR 191 of 4 May 2000, at § 55: “The Court reiterates its settled case-law, according to which the expression ‘in accordance with the law’ not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects”. See also ECJ, C-465/00 *Österreichischer Rundfunk*, § 77.

186 See ECJ, C-465/00 *Österreichischer Rundfunk* at § 76 and C-92/09 *Schecke* at § 65.

(iii) the interference must prove proportionate and therefore be adequate to the aim and necessary to attain it, without going beyond such necessity<sup>187</sup>.

Whilst there is no doubt that the publication of penalties provided for under the CR Directive is in accordance with law<sup>188</sup> and pursues a legitimate aim<sup>189</sup>, at first glance it is not entirely clear whether it is also proportionate.

The respect of the principle of proportionality is ensured by Article 68(2)(a) of the CR Directive.

This obliges NCAs to publish the penalties on an anonymous basis “where the penalty is imposed on a natural person and, following an obligatory prior assessment, publication of personal data is found to be disproportionate”.

This provision is grounded in the CJEU jurisprudence as laid down in the *Schecke* case, under which “no automatic priority can be conferred on the objective of transparency over the right to protection of personal data (...), even if important economic interests are at stake”<sup>190</sup>.

In the light of the above the EU legislator avoided making automatic publication the rule and rather made publication conditional on the outcome of a compulsory case-by-case test of proportionality<sup>191</sup>.

#### ***5.5.2. The full jurisdiction of the CJEU where provided for by a specific provision contained under the EU Regulations. The absence of any such specific provision from the SSM Regulation***

One feature of the approach to control of legality under the EU Treaties is that the only remedy available to the Court is to quash the decision of an EU institution or body, in whole or in part.

The Court cannot substitute its own decision for that under review, nor can it re-formulate the decision.

Moreover, where the EU institution or body enjoys some margin of discretion the decision can be quashed only where it is manifestly wrong.

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187 See ECJ, C-92/09, *Schecke*, § 74.

188 The provisions of the CR Directive imposing the publication are drafted in a clear and precise manner and are accessible by virtue of their publication in the *Official Journal*.

189 The purpose of Article 68 of the CR Directive is to have a general dissuasive effect and as part of the sanctioning regime to which it belongs ultimately contribute to the establishment of the internal market, which is one of the main objectives of the Union. See Recital 38 of the CR Directive, which reads: “In order to ensure that administrative penalties have a dissuasive effect, they should normally be published, except in certain well-defined circumstances”.

190 See ECJ, C-92/09, *Schecke*, § 85.

191 The problem of avoiding automatic disclosure of personal data may also arise with regard to the public statement provided for under Articles 66(2)(a) and 67(2)(a) of the CR Directive. Nevertheless, the application of the public statement is subject to the previous assessment by the competent authority of the criteria laid down under Article 70 of the CR Directive and is therefore not an automatic consequence of the previous infringement.

An important exception to this principle is Article 261 TFEU, whereby EU regulations may give the CJEU “unlimited jurisdiction with regard to the penalties provided for in such regulations”.

Thus, the TFEU contains no general principle imposing unlimited jurisdiction on penalties but leaves it up to secondary legislation to give the Court such jurisdiction.

In the field of EU competition law, Article 31 of Regulation 1/2003 stipulates that “the Court of Justice shall have unlimited jurisdiction within the meaning of [Article 261 TFEU] to review decisions whereby the Commission has fixed a fine or penalty payment; it may cancel, reduce or increase the fine or penalty payment imposed”.

Similar rules are also provided for in other EU Regulations with regard to the review of the decisions applying administrative penalties<sup>192</sup>.

The same is true for Council Regulation 2532/98 on the ECB’s sanctioning powers; Article 5 stipulates that “the Court of Justice of the European Communities [now Union] shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty [now Article 261 of the Treaty on the Functioning of the European Union] over the review of final decisions whereby a sanction is imposed”.

It is not clear whether the ECB penalties and sanctions under Article 18(1) and (7) of the SSM Regulation are subject to Article 5 of Council Regulation 2532/98.

In the absence of a special provision, the rule contained in Article 263 of the TFUE on the review of the mere legality of EU acts should therefore apply.

The unlimited jurisdiction of the Court is nonetheless required by the case law of the ECtHR and of the CJEU as regards penalties having a *coloration pénale*, as an element of the right to an effective judicial remedy.

To the extent that the penalties and the sanctions under Articles 18(1) and 18(7) of the SSM Regulation are to be considered as criminal in nature they should be subject to the unlimited jurisdiction of the CJEU<sup>193</sup>.

## **5.6. The special regime applicable to the imposition of administrative penalties having a *coloration pénale***

The application of pecuniary administrative penalties having a “*coloration pénale*” will be subject to the more stringent safeguards applicable to the criminal sanctions.

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<sup>192</sup> See Article 69 of Council Regulation 648/2012 on trade repositories, Article 36e of Council Regulation 1060/2009, as amended by Council Regulation 513/2011 (CRA), Article 16 of Council Regulation 139/2004 (EC merger regulation), and Article 31 of Council Regulation 1/2003 (implementation of rules on competition).

<sup>193</sup> See § 5.6.3.

Under the case law of the CJEU<sup>194</sup> and the ECtHR<sup>195</sup> and under the sanctioning procedures provided for in the directly applicable Union law<sup>196</sup>, these safeguards apply not only to natural persons but to legal persons as well<sup>197</sup>.

The “*coloration pénale*” of an administrative penalty implies at least the application of the following principles:

- (i) the principle of culpability;
- (ii) the principle of *ne bis in idem*;
- (iii) the right to remain silent<sup>198</sup>;
- (iv) the principle of the full jurisdiction of the severity of the sanction;
- (v) the principle of the separation between investigative and decision-making functions.

### 5.6.1. The principle of culpability

In the case *Kaserai Champignon Hofmeister*<sup>199</sup>, the CJEU excluded the application of the *nulla poena sine culpa* principle since, in the particular

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194 See ECJ, Case 85/76, *Hofmann-la Roche*, 1979.

195 See ECtHR, 11 June 2009, *Dubus v. France*.

196 See Article 64 of Council Regulation 648/2012 on OTC derivatives, central counterparties and trade repositories, Article 23e of Council Regulation 1060/2009 as amended by Regulation 513/2011 on CRA, and Commission Delegated Regulation 946/2012 on the rules of procedures on ESMA fines on CRA.

197 See also DE MOOR-VAN VUGT, A., “Administrative sanctions in EU law”, p. 18 ff. The author notes that: “The character of EC law as economic law brings about that the protection of the individuals extends to legal persons (companies) as well. This is not self-evident, since the ECHR was originally drafted for natural persons, and the CJ has tried to follow that Convention when developing specific guarantees in EU law. Still, the case law of both the CJ and the ECtHR has been moving towards the recognition of guarantees for legal persons/companies...”.

198 ECJ, case *Orkem*, C-374/87 [1989].

199 See ECJ, C-210/00, 11 July 2002, §§ 43-44: “43. Lastly, it should be pointed out that the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation 3665/87 consists of the payment of a penalty, the amount of which is determined on the basis of the amount which would have been unduly received by the trader had an irregularity not been detected by the competent authorities. It is, therefore, an integral part of the export refund scheme in question and is not of a criminal nature. 44. It follows from all of the foregoing considerations that point (a) of the first subparagraph of Article 11(1) of Regulation 3665/87 cannot be said to be of a criminal nature. It follows that the principle ‘nulla poena sine culpa’ is not applicable to this penalty”. In the same case the AG concluded (opinion of the Advocate General Stix-Hackl delivered on 27 November 2001) that the fault principle is not a general principle of Community law when it comes to administrative sanctions: “46. Firstly, a comparison of the legal systems of the Member States, as made by the plaintiff in its written observations, reveals, in particular, that the boundary between criminal and administrative penalties is a fluid one. 47. Thus, in the legal systems of the Member States the principles of criminal law, to which the fault principle undisputedly belongs, are variously applied. The narrower the range of purely administrative penalties – and hence the broader the range of criminal penalties – the clearer the distinction between criminal and administrative sanctions with respect to their legal treatment. 48. The scope of the fault principle also appears to vary. In the case of criminal penalties which give expression to minor social disapproval, the behavioural obligation may be so conceived that individual reprehensibility is induced merely by its not being fulfilled. Moreover, in its written observations the plaintiff itself acknowledges that where a sanction is based on objective criteria the possibilities of exemption could lead to more or less the same results as liability based on fault with reversal

circumstances, the sanction was not considered as having a criminal nature. The same view was taken in *Maizena*<sup>200</sup>.

In the light of the above it is clear that under CJEU case law the culpability principle only applies to penalties having a criminal nature.

As regards the penalties under the SSM Regulation, the principle of culpability is provided for by Article 18(1) for penalties imposed by the ECB for violations of directly applicable Union law.

For the sanctions applied for breaches of ECB regulations and decisions, no culpability is expressly required by Article 18(7). Nor is culpability provided for by Council Regulation 2532/98, in accordance with which these sanctions are imposed.

To the extent that the sanctions under the Council Regulation above may be considered as having a “*coloration pénale*”, a problem arises as to whether the provisions are compatible with the principle of culpability or not.

Under Article 1, of the Regulation ‘infringement’ shall mean any failure by an undertaking to fulfil an obligation arising from ECB regulations or decisions’.

A question here arises as to whether the culpability requirement can be considered as enshrined, within the definition of infringement, in the assumption that any breach of obligations under the ECB regulations or decisions is tantamount to culpability (*culpa in re ipsa*).

### ***5.6.2. The right to remain silent and obstruction of the supervisor’s investigative powers: where to strike the balance?***

In both national and EU administrative law it is quite usual for individuals or companies to be required to cooperate with inspections and enquiries, answer questions, produce documents, etc.

The EU legal framework lays down rules on cooperation with inspections and enquiries in many Regulations and Directives<sup>201</sup>.

In particular, under Article 10(1) of the SSM Regulation, the ECB may require the legal and natural persons mentioned therein<sup>202</sup> “to provide all information that is necessary in order to carry out the tasks conferred on it” by the regulation. Paragraph 2 adds that “the persons referred to in paragraph 1 shall supply the information

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of the burden of proof. 49. It therefore appears that the general applicability of the fault principle to penalties of an administrative nature cannot be derived from the legal traditions of the Member States”.

200 ECJ, C-137/85, 1987, §§ 12-14. In *Germany v. Commission* (C-240/90, 1992) the Court excluded the application of the principle of culpability since the “fine” was deemed to protect the Common Agricultural Policy (CAP), and not in order to punish the offender.

201 Examples are Article 5 of Council Regulation 2185/96 as well as Article 3 of Council Regulation 2532/98 on the ECB’s sanctioning powers.

202 These persons are all legal entities subject to the ECB’s supervisory powers, natural persons belonging to those entities and third parties to whom the entities have outsourced functions and activities.

requested” and clarifies that even “professional secrecy provisions do not exempt those persons from the duty to supply that information” and that “supplying that information shall not be deemed to be in breach of professional secrecy”.

The persons mentioned in Article 10(1) are also subject to ECB investigations and on-site inspections under Articles 11 and 12 of the SSM Regulation. Where these persons obstruct the conduct of an ECB investigation or inspection, NCAs are required to provide the necessary assistance to the ECB officials.

Under some national jurisdictions obstructing the NCA’s investigatory powers is tantamount to a criminal or administrative offence.

A problem arises here as to whether the ECB can be considered as a national competent authority for the purposes of national criminal law. Under Article 2638 of the Italian Civil Code, obstructing the supervisory authorities’ activity is tantamount to a criminal offence. The provision does not establish which authorities enjoy such legal protection. Since the ECB is vested with supervisory tasks in respect of significant credit institutions, it should be considered as a supervisory authority under Italian law too and thus protected by the provisions of Article 2638 above<sup>203</sup>.

This notwithstanding, in view of the EU’s commitment to guarantee fundamental rights, enshrined in the Charter and in the ECHR, the EU needs to set certain safeguards to protect the individual from self-incrimination.

The respect of the right to remain silent requires that the authority vested with sanctioning powers be prohibited from compelling an undertaking to provide it with answers, which the authority itself should prove<sup>204</sup>.

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203 Union law may be relevant for national criminal law. See in that sense PULITANÒ, D., *Diritto penale*, Turin, 2013, p. 169: “fermi restando i controlimiti derivanti dai principi fondamentali dell’ordinamento costituzionale e dai diritti inviolabili dell’uomo, il diritto europeo è legittimato a produrre effetti sul diritto penale nazionale, allo stesso modo in cui è a ciò legittimato l’insieme dell’ordinamento legale nazionale (per es. in forza di variegate modalità di rinvio da parte della norma penale di diritto interno: elementi normativi giuridici, norme penali in bianco)”. For the penal protection of the supervisory authorities under Italian law see CAPOLINO, O. and D’AMBROSIO, R., *La tutela penale dell’attività di vigilanza*, *Quaderno di ricerca giuridica della Consulenza Legale*, 67, October 2009, and the case law therein.

204 In *Orkem* (ECJ, C-374/87) and *Solvay* (ECJ, C-27/88) the ECJ held that the right under Article 6 of the ECHR not to give evidence against oneself applied only to persons charged with an offence in criminal proceedings and that it was not a principle which could be relied on in relation to infringements in the economic sphere, in order to resist a demand for information such as may be made by the Commission to establish a breach of EU competition law. Under paragraphs 29 and 30 of *Orkem*, the ECJ took the view that: “29 In general, the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings. A comparative analysis of national law does not therefore indicate the existence of such a principle, common to the laws of the Member States, which may be relied upon by legal persons in relation to infringements in the economic sphere, in particular infringements of competition law. 30 As far as Article 6 of the European Convention is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself”. The right against self-incrimination is therefore recognised by ECJ only to the extent that it is necessary to prevent the rights of defence from being irremediably impaired during preliminary inquiry procedures, as results from §§ 32 to 35 of the *Orkem* case: “32 It is necessary, however, to consider whether certain limitations on the Commission’s powers of investigation are implied by the need to safeguard the rights of the defence which the Court has held to be a

To assess where to strike the balance between the need to ensure the effectiveness of supervisory activity and the obligation to guarantee the individuals against self-incrimination the following aspects should be considered.

According to the case law above, the right to remain silent only requires that the persons concerned cannot be forced to admit that they have committed an infringement, but it does not dispense these persons from answering factual questions.

This is clearly shown by the Regulation 1/2003, Recital 23 of which clarifies that “when complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement”. Not surprisingly, Article 20 of the regulation only obliges undertakings to answer questions on facts and to cooperate in the examination of books and other documents.

Against this background, the ECB’s power under Article 3 of Regulation 2532/98 to require the undertakings subject to the ECB’s sanctioning powers to submit to an infringement procedure under which the ECB itself has the power to obtain the submission of documents as well as written or oral explanations should be interpreted in line with the principles outlined above.

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fundamental principle of the Community legal order... 33 In that connection, the Court observed recently... that whilst it is true that the rights of the defence must be observed in administrative procedures which may lead to the imposition of penalties, it is necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings and for which they may be liable. Consequently, although certain rights of the defence relate only to contentious proceedings which follow the delivery of the statement of objections, other rights must be respected even during the preliminary inquiry. 34 Accordingly, whilst the Commission is entitled, in order to preserve the useful effect of Article 11(2) and (5) of Regulation No 17, to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned. 35 Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove”. To sum up, “an undertaking under investigation by the Commission in competition law proceedings is under an obligation to answer questions of purely factual nature and produce pre-existing documents. It is however not obliged to answer questions regarding the purpose and motive of its actions or other questions which might involve the admission of an infringement”: see TRIDIMAS, T., *The General Principles of EU Law*, p. 377. The case law of the ECJ was placed in doubt by the ECtHR ruling in the case *Funke v. France* (ECtHR, Appl. 10828/84, 1993). The ECtHR ruled that Article 6 of the ECHR according to its “autonomous meaning” was broad enough to be applied to penalties imposed in the circumstances and that under this provision any person charged with a criminal offence had the right to remain silent and not to contribute towards self-incrimination (*Funke v. France*, § 44). The ECJ case law appears to offer less protection than the ECtHR case law. The reason for this is that the ECJ prioritizes the values involved differently. The ECJ concern “is that a full endorsement of the right against self-incrimination might render the Commission’s investigatory powers ineffective”: TRIDIMAS, T., 2009, 377.

To the extent that the sanctions provided for in that Regulation could be considered as having a criminal nature, in order for the right to remain silent to be preserved the undertakings may only be obliged to answer to factual questions.

This solution seems to be a fair compromise between the values involved, since it preserves the effectiveness of the ECB's supervisory powers without prejudice to the core aspects of the protection against self-incrimination.

### ***5.6.3. The full jurisdiction of the CJEU as an element of the right to an effective judicial remedy***

As noted, it is up to EU secondary legislation to provide for a full jurisdiction of the CJEU in the field of penalties.

Nevertheless, where penalties have a criminal nature the full jurisdiction of the Court is always required by the case law of the ECtHR.

Article 6(1) of the ECHR provides that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

By virtue of Article 47 of the Charter, now formally part of the Treaty on European Union, the guarantees offered by Article 6(1) ECHR are explicitly recognized in EU law.

It is established in case law that decisions of the Commission imposing fines in competition cases involve a criminal charge for the purposes of Article 6(1), not least because the purpose of such fines is to punish and deter.

It is also established that, in order to satisfy Article 6(1) of the ECHR, the tribunal determining the criminal charge must not only be independent and impartial, but must also have full jurisdiction. The same holds with regard to Article 47 of the Charter and the right to the effective judicial remedy therein.

In the light of Recital 86, the SSM Regulation is supposed to respect fundamental rights and to observe the principle of the Charter, thus including “the right to an effective remedy and to a fair trial”, and to be implemented “in accordance with those rights and principles”.

We have noted that the ECB penalties under Article 18(1) of the SSM Regulation have a criminal nature under the *Engel* criteria.

It is nonetheless unclear whether Article 5 of Council Regulation 2532/98, providing full jurisdiction on ECB sanctions, applies to ECB penalties and sanctions under Article 18, paragraphs (1) and (7) respectively, of the SSM Regulation.

More to point, under Article 18(4) the ECB must apply the whole of Article 18 in accordance with the rules of procedure contained in Council Regulation 2532/98, only as appropriate. Moreover, the rule contained under Article 5 of

Council Regulation 2532/98, concerning the full jurisdiction of the CJEU, is not strictly speaking a rule of procedure that ECB is bound to apply.

Article 18(7) of the SSM Regulation refers to the whole of Council Regulation 2532/98, but only with regard to the ECB's power to impose sanctions. Even in this case there is therefore a doubt as to whether Article 5 of Council Regulation 2532/98, concerning the full jurisdiction of the CJEU, is referred to in Article 18 of the SSM Regulation.

Even though the interpreter is required<sup>205</sup> to make an effort in order to read the SSM provisions in conformity with the principles of the Charter and thus to read Article 18(4) and (7)'s reference to Council Regulation 2532/98 as including the rule on the full jurisdiction of the CJEU, the question remains debatable.

Nor may the ECB rules implementing the SSM Regulation modify the scope of the CJEU jurisdiction, since the mere review of legality prescribed by Article 263 of the TFEU may be derogated only through Regulations adopted jointly by the EU Parliament and the Council or by the Council pursuant of the provision of the Treaties<sup>206</sup>.

#### ***5.6.4. The principle of separation as an element of the fair trial under the case law of the ECtHR***

In the judgment *Dubus v. France*<sup>207</sup>, as regards the application of Article 6 of the ECHR, the ECtHR not only took the view that the French *Commission Bancaire*, when it imposed the penalty in that case, was to be considered to be a tribunal for the purposes of Article 6(1) of the ECHR, but also that, in the circumstances of the case, the penalty had a *coloration pénale* and was a criminal charge for the purposes of that Article.

Against this background the application of pecuniary administrative penalties (and non-pecuniary ones) is subject to the safeguards applicable to criminal sanctions, including the principle of separation between the investigative and the decision-making powers.

The aim of the principle is to preserve the impartiality of the body that is vested with power to rule.

The principle of separation is followed in some recent EU regulations and in some Member State laws.

Consistent with this principle, Article 23e(1) of the Regulation on Credit Rating Agencies (as well as Article 64 of Council Regulation 648/2012 on trade repositories) stipulates that where "ESMA finds that there are serious indications of the possible existence of facts liable to constitute one or more of the infringements

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205 See the Recital 86.

206 See Article 261 of the TFEU.

207 ECtHR, 11 June 2009, *Dubus v. France*.

listed in Annex III”, it shall appoint “an independent investigating officer”; the officer “shall perform his functions independently from ESMA’s Board of Supervisors”. Moreover, under Article 23e(6) of the CRA Regulation, “the investigating officer shall not participate in the deliberations of ESMA’s Board of Supervisors or in any other way intervene in the decision-making process of ESMA’s Board of Supervisors”.

Compliance with the principle of the separation is ensured, albeit to differing extents, in Italy<sup>208</sup>, France<sup>209</sup> and Belgium<sup>210</sup>.

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208 See Article 24(1) of Law 262/2005 under which “ai procedimenti della Banca d'Italia, della CONSOB, dell'ISVAP e della COVIP volti all'emanazione di provvedimenti individuali si applicano, in quanto compatibili, i principi sull'individuazione e sulle funzioni del responsabile del procedimento, sulla partecipazione al procedimento e sull'accesso agli atti amministrativi recati dalla legge 7 agosto 1990, n. 241, e successive modificazioni. I procedimenti di controllo a carattere contenzioso e i procedimenti sanzionatori sono inoltre svolti nel rispetto dei principi della facoltà di denuncia di parte, della piena conoscenza degli atti istruttori, del contraddittorio, della verbalizzazione nonché della distinzione tra funzioni istruttorie e funzioni decisorie rispetto all'irrogazione della sanzione. Le Autorità di cui al presente comma disciplinano le modalità organizzative per dare attuazione al principio della distinzione tra funzioni istruttorie e funzioni decisorie rispetto all'irrogazione della sanzione”. Under the Bank of Italy provisions of 27 June 2011, the decision on whether or not to initiate an infringement procedure is taken by a dedicated supervisory office which also notifies the charges to the parties involved. The submissions of the latter are evaluated by a panel that formulates a proposal for the application of sanctions to the Governing Board of the Bank. The Governing Board decides whether to apply the sanctions or not.

209 The power to initiate an infringement procedure is conferred on the Collège of the ACP, whilst the investigatory and the adjudicatory powers are allocated to the Commission des sanctions, an independent body within the ACP. See Art. L. 612-38 of the COMOFI. “L'une des formations du collège examine les conclusions établies, dans le cadre de la mission de contrôle de l'Autorité de contrôle prudentiel, par les services de l'Autorité ou le rapport établi en application de l'article L. 612-27. Si elle décide l'ouverture d'une procédure de sanction, son président notifie les griefs aux personnes concernées. Il transmet la notification des griefs à la commission des sanctions qui désigne un rapporteur parmi ses membres (first paragraph). La commission des sanctions veille au respect du caractère contradictoire de la procédure. Elle procède aux communications et convocations à l'égard de toute personne visée par la notification de griefs. Toute personne convoquée a le droit de se faire assister ou représenter par un conseil de son choix. La commission des sanctions dispose des services de l'Autorité pour la conduite de la procédure (second paragraph). Le membre du collège désigné par la formation qui a décidé de l'ouverture de la procédure de sanction est convoqué à l'audience. Il y assiste sans voix délibérative. Il peut être assisté ou représenté par les services de l'Autorité. Il peut présenter des observations au soutien des griefs notifiés et proposer une sanction (third paragraph). La commission des sanctions peut entendre tout agent des services de l'Autorité (fourth paragraph). La récusation d'un membre de la commission des sanctions est prononcée à la demande d'une personne mise en cause s'il existe une raison sérieuse de mettre en doute l'impartialité de ce membre (fifth paragraph). La commission des sanctions ne peut siéger que si la majorité des membres sont présents. Elle délibère hors la présence des parties, du rapporteur, du directeur général du Trésor ou du directeur de la sécurité sociale ou de leurs représentants, du membre du collège et des services de l'Autorité chargés d'assister ce dernier ou de le représenter. Elle rend une décision motivée (sixth paragraph)...”.

210 See Section 3 of the *Statute organique de la Banque Nationale de Belgique* (L. 22.2.1998 text in force at 1.12.2012). Art. 36/9. - § 1er. Lorsque la Banque constate, dans l'exercice de ses missions légales en vertu de l'article 12bis, qu'il existe des indices sérieux de l'existence d'une pratique susceptible de donner lieu à l'imposition d'une amende administrative ou d'une astreinte, ou lorsqu'elle est saisie d'une telle pratique sur plainte, le Comité de direction décide de l'ouverture d'une instruction et en charge l'auditeur. L'auditeur instruit à charge et à décharge (*first sub-paragraph*). L'auditeur est désigné par le Conseil de régence parmi les membres du personnel de la Banque. Il bénéficie d'une totale indépendance dans l'exercice de sa mission d'auditeur (*second sub-paragraph*). Aux fins d'accomplir sa mission, l'auditeur peut exercer tous les pouvoirs d'investigation confiés à la Banque par les dispositions légales et réglementaires régissant la matière concernée. Il est assisté dans la conduite de chaque enquête par un ou plusieurs membres du personnel de la Banque qu'il choisit parmi les membres du personnel désignés à cet effet par le Comité de

Unlike the situation in France<sup>211</sup> and Belgium<sup>212</sup>, In Italy the right to be heard is confined to the investigatory phase only<sup>213</sup>.

In some other EU Regulations and Member State laws the principle of separation is not applied.

This is the case of some EU Regulations issued prior to the *Dubus* judgment, such as Council Regulation 2532/98 on the ECB's sanctioning powers, where the decision on whether or not to initiate an infringement procedure is to be taken

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direction (*third sub-paragraph*). § 2. À l'issue de l'instruction, les personnes concernées ayant été entendues ou du moins dûment appelées, l'auditeur établit un rapport et le transmet au Comité de direction". Article 36/10. - § 1er. Sur la base du rapport de l'auditeur, le Comité de direction décide de classer sans suite, de proposer un règlement transactionnel ou de saisir la Commission des sanctions. § 2. Si le Comité de direction décide de classer un dossier sans suite, il notifie cette décision aux personnes concernées. Il peut rendre la décision publique. § 3. Si le Comité de direction fait une proposition de règlement transactionnel, et que sa proposition est acceptée, le règlement transactionnel est publié de manière non-nominative sur le site web de la Banque. Le montant des règlements transactionnels est recouvré au profit du Trésor par l'administration du Cadastre, de l'Enregistrement et des Domaines. § 4. Si le Comité de direction décide de saisir la Commission des sanctions, il adresse une notification des griefs accompagnée du rapport d'instruction aux personnes concernées et au président de la Commission des sanctions. Si le Comité de direction estime que les griefs peuvent donner lieu à l'imposition d'une astreinte, il en fait expressément mention...". Article 36/11. - § 1er. Les personnes auxquelles une notification de griefs a été adressée disposent d'un délai de deux mois pour transmettre au président de la Commission des sanctions leurs observations écrites sur les griefs. Si la notification effectuée par le Comité de direction mentionne que les griefs peuvent donner lieu à l'imposition d'une astreinte, ce délai est réduit à huit jours. Dans des circonstances particulières, le président de la Commission des sanctions peut prolonger ces délais. § 2. Les personnes mises en cause peuvent prendre copie des pièces du dossier auprès de la Commission des sanctions et se faire assister ou représenter par un avocat de leur choix (*first sub-paragraph*). Elles peuvent demander la récusation d'un membre de la Commission des sanctions si elles ont un doute sur l'indépendance ou l'impartialité de celui-ci. La Commission des sanctions statue par décision motivée sur cette demande (*second sub-paragraph*). § 3. La Commission des sanctions peut, après une procédure contradictoire et l'auditeur ayant été entendu, imposer une amende administrative ou des astreintes aux personnes concernées. La Commission des sanctions statue par décision motivée. Aucune sanction ne peut être prononcée sans que la personne ou son représentant ait été entendu ou du moins dûment appelé. Lors de l'audition, le Comité de direction se fait représenter par la personne de son choix et peut faire entendre ses observations...".

211 See Articles R. 612-38 and R. 612-38 of the COMOFI. Under R. 612-38, "I. – Le président de la commission des sanctions désigne un rapporteur parmi les membres de la commission... Le président en informe la personne mise en cause et le représentant du collège prévu à l'article L. 612-38 selon les modalités prévues au I de l'article R. 612-9... Selon les modalités prévues au I de l'article R. 612-9, le rapporteur précise à la personne mise en cause le délai dont elle dispose, qui ne peut être inférieur à trente jours francs à compter de la réception de la notification des griefs, pour transmettre au président de la commission des sanctions ses observations écrites sur ces griefs... La personne mise en cause peut être entendue à sa demande par le rapporteur". Under Art. R. 612-48. – I. – Lors de la séance, le rapporteur présente son rapport. Le directeur général du Trésor et, le cas échéant, le directeur de la sécurité sociale ou leurs représentants peuvent présenter des observations. Le représentant du collège ou l'agent des services de l'autorité qui l'assiste ou le représente peut présenter des observations au soutien des griefs notifiés. La personne mise en cause et, le cas échéant, son conseil présente sa défense. Dans tous les cas, la personne mise en cause et, le cas échéant, son conseil doivent pouvoir prendre la parole en dernier".

212 See Articles 36/9, § 2, and 36/11, § 3.

213 The consolidated case law of both the Italian lower courts and the Court of Cassation ensure the right to be heard by the investigatory body only: see Corte di cassazione, sez. II, 15019/13 of 14.6.2013, § 3.2; Corte di cassazione, SS.UU. civ., 20939/09 of 30.9.2009, § 4.2; Corte di cassazione, SS.UU. civ. No. 20935/09 of 30.9.2009, § 5.2.; *contra* Consiglio di Stato, sez. III, opinion 13.4.1999, No. 485; see in literature CECI IAPICHINO, S., "Le sanzioni amministrative", in *Diritto delle banche e degli intermediari finanziari*, edited by Galanti, E., Padova, 2008, p. 1439, Note 27 and the case law therein.

by the Executive Board of the ECB, which also decides whether an undertaking has committed an infringement, together with the sanction to be imposed. As a consequence, the Executive Board cumulates the investigative and decision-making functions, in contrast with the principle of separation.

Some national laws (in Germany and Austria, for instance) do not apply the principle of separation to every administrative body imposing sanctions where there is a judge with unlimited jurisdiction on the penalty.

This point of view seems to be confirmed by the *Menarini* case<sup>214</sup>. In this judgment, the ECtHR confirmed first that Article 6(1) was applicable in that the sanction was penal and a criminal charge was involved. The Court then held that it was not incompatible with Article 6(1) for the sanction to be imposed by an administrative authority, provided that the decision was subject to control by a court having full jurisdiction. Such a court should have the power to decide on all aspects of law and fact and if necessary reformulate the decision on both facts and law<sup>215</sup>.

In *KME Germany*, Advocate General Sharpston confirmed that it was sufficient for the purposes of Article 6(1) of the ECHR that the decisions of the Commission be subject to review by a Court having the full jurisdiction required by Article 6(1). The fact that the Commission, rather than the Court, is the initial decision-maker is not necessarily incompatible with Article 6(1), provided that the jurisdiction of the Court complies with Article 6(1).

The essential question is whether *Menarini* definitively lays to rest any suggestion that the EU system of judicial review does not comply with the “full jurisdiction” requirement. According to a traditional view “full jurisdiction” under Article 261 TFEU merely gives the Court the power to adjust the amount of the fine and so does not alter the scope of the “control of legality” review provided for by Article 263 TFEU.

This is also the CJEU’s point of view.

The Court says that “the review provided for by the Treaties thus involves review by the Courts of the European Union of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for

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214 See ECtHR, *Menarini Diagnostic s.r.l. c. Italie* (Requête n° 43509/08) of 27.9.2011.

215 See paragraph 59 of the judgment: “Le respect de l’article 6 de la Convention n’exclut donc pas que dans une procédure de nature administrative, une «peine» soit imposée d’abord par une autorité administrative. Il suppose cependant que la décision d’une autorité administrative ne remplissant pas elle-même les conditions de l’article 6 § 1 subisse le contrôle ultérieur d’un organe judiciaire de pleine juridiction (*Schmautzer, Umlauf, Gradinger, Pramstaller, Palaoro et Pfarrmeier c. Autriche*, arrêts du 23 octobre 1995, série A n°s 328 A-C et 329 A-C, respectivement §§ 34, 37, 42 et 39, 41 et 38). Parmi les caractéristiques d’un organe judiciaire de pleine juridiction figure le pouvoir de réformer en tous points, en fait comme en droit, la décision entreprise, rendue par l’organe inférieur. Il doit notamment avoir compétence pour se pencher sur toutes les questions de fait et de droit pertinentes pour le litige dont il se trouve saisi (*Chevol c. France*, n° 49636/99, § 77, CEDH 2003-III, et *Silvester’s Horeca Service c. Belgique*, n° 47650/99, § 27, 4 mars 2004)”.

under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter”<sup>216</sup>.

Another view assumes on the contrary that the concept of “full jurisdiction” for fines implicitly empowers the Court to go into all the aspects of the underlying merits, not merely to exercise limited control of legality on the substance<sup>217</sup>. This second approach seems to be suggested by the assumption that the criminal nature of the severe administrative penalties implies an assessment by the Court on the merits similar to that allowed to the penal judge<sup>218</sup>.

The *Menarini* judgment cannot in any case be overvalued. In fact, it has been ignored by the French *Conseil Constitutionnel* (see decisions 2012-280<sup>219</sup> and 2013-

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216 ECJ, Case C-389/10 P, *KME Germany AG*, § 133.

217 For these aspects see BELLAMY, C., “ECHR and competition law post *Menarini*: an overview of EU and national case law”, *e-Competitions*, No. 47946, July 2012.

218 See on this point *Menarini Diagnostic s.r.l. c. Italie*, dissenting opinion of the Judge Pinto de Albuquerque: “la notion de «pleine juridiction» dans le domaine pénal a une portée élargie et illimitée puisqu’elle inclut non seulement le contrôle du quid des sanctions administratives (est-ce que les sanctions appliquées étaient prévues par la loi?) et du quantum des sanctions administratives (est-ce que les sanctions appliquées étaient proportionnées à la gravité des faits reprochés?), mais aussi de la réalité de l’infraction administrative (est-ce que les personnes ont, par action ou par omission, commis de façon illicite et avec culpabilité une infraction punie par la loi?). La plénitude de juridiction suppose que le juge aille au-delà du simple contrôle des erreurs manifestes (ou «illogiques», «incohérentes», «déraisonnables») d’évaluation et puisse écarter les erreurs d’évaluation qui ne sont pas manifestes (ou «illogiques», «incohérentes», «déraisonnables»). Toute l’opération d’évaluation des preuves, d’établissement et de qualification des faits, d’interprétation de la loi applicable et de modulation des sanctions à la gravité de l’infraction peut être annulée et refaite par le juge, indépendamment de la nature fixe ou variable de la sanction prévue par la loi, le tribunal n’ayant aucun devoir de renvoyer l’affaire aux autorités administratives. En termes classiques, le recours de «pleine juridiction» n’est pas une simple reformatio (réforme) de la décision administrative contestée, il est plutôt un revisio (réexamen) de l’affaire. Autrement dit, l’affaire est dévolue au juge administratif”.

219 See paragraphs 19 to 21: “19. Considérant qu’au regard de ces garanties légales, dont il appartient à la juridiction compétente de contrôler le respect, le paragraphe II de l’article L. 461-1 et l’article L. 461-3 du code de commerce ne méconnaissent pas les principes d’indépendance et d’impartialité indissociables de l’exercice de pouvoirs de sanction par une autorité administrative indépendante; 20. Considérant, en second lieu, que si les dispositions du paragraphe III de l’article L. 462-5 du code de commerce autorisent l’Autorité de la concurrence à se saisir «d’office» de certaines pratiques ainsi que des manquements aux engagements pris en application des décisions autorisant des opérations de concentration, c’est à la condition que cette saisine ait été proposée par le rapporteur général; que ces dispositions, relatives à l’ouverture de la procédure de vérification de l’exécution des injonctions, prescriptions ou engagements figurant dans une décision autorisant une opération de concentration, ne conduisent pas l’autorité à préjuger la réalité des manquements à examiner; que l’instruction de l’affaire est ensuite assurée par le rapporteur général dans les conditions et selon les garanties prévues par les articles L. 463-1 et L. 463-2 dudit code; que le collègue de l’Autorité est, pour sa part, compétent pour se prononcer, selon les modalités prévues par l’article L. 463-7 du même code, sur les griefs notifiés par le rapporteur général et, le cas échéant, infliger des sanctions; que les deux derniers alinéas de cet article disposent que, lors de la séance, le rapporteur général peut présenter des observations, tout en prévoyant que lorsque l’autorité statue sur des pratiques dont elle a été saisie en application de l’article L. 462-5, le rapporteur général et le rapporteur n’assistent pas au délibéré; 21. Considérant qu’au regard de ces garanties légales, dont il appartient à la juridiction compétente de contrôler le respect, la saisine de l’Autorité de la concurrence n’opère pas de confusion entre les fonctions de poursuite et d’instruction et les pouvoirs de sanction; que, dans ces conditions, les dispositions du paragraphe III de l’article L. 462-5 du code de commerce ne portent aucune atteinte aux principes d’indépendance et d’impartialité découlant de l’article 16 de la Déclaration de 1789”.

331<sup>220</sup>) and by EU Regulation 648/2012 as well as by national laws and regulations adopted after *Menarini*, which all still apply the principle of separation.

#### 5.6.5. Avoiding the accumulation of sanctions: *ne bis in idem* or proportionality?

In the light of the *ne bis in idem* principle the accumulation of penalties is generally seen as undesirable. EU law offers various remedies. Under the Charter *ne bis in idem* is restricted to the criminal offences<sup>221</sup>. Nevertheless, according to the case law of the ECtHR, the indications furnished by domestic law as to the criminal nature of the offence have only a relative value, the term “criminal” within the meaning of Article 6 of the ECHR being autonomous<sup>222</sup>.

The criteria for establishing whether a sanction has a criminal nature are laid down in the *Engel* and *Zolothukin* judgments of the ECtHR and in the *Bonda* judgment of the CJEU; they comprise, as noted: (i) the legal classification of the national law; (ii) the nature of the offence; and (iii) the severity of the penalty. To the extent that an administrative pecuniary sanction is considered as having a criminal nature under the CJEU and the ECtHR case law, the *ne bis in idem* principle should therefore apply.

The ECtHR has followed different criteria to identify the “idem”: “*idem factum*”<sup>223</sup>, “same offence”<sup>224</sup>, and “same essential elements of the offence”<sup>225</sup>. The latter is the criterion now followed.

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220 See paragraph 12: “considérant que, selon le premier alinéa de l'article L. 132 du code des postes et des communications électroniques, les services de l'Autorité de régulation des communications électroniques et des postes sont placés sous l'autorité du président de l'Autorité; que, selon l'article D. 292 du même code, le directeur général est nommé par le président de l'Autorité, est placé sous son autorité et assiste aux délibérations de l'Autorité; que, par suite et alors même que la décision de mise en demeure relève du directeur général, les dispositions des douze premiers alinéas de l'article L. 36-11 du code des postes et des communications électroniques, qui n'assurent pas la séparation au sein de l'Autorité entre, d'une part, les fonctions de poursuite et d'instruction des éventuels manquements et, d'autre part, les fonctions de jugement des mêmes manquements, méconnaissent le principe d'impartialité; que celles de ces dispositions qui sont de nature législative doivent être déclarées contraires à la Constitution”. The decision pertains to a case of unlimited jurisdiction of the courts: see Article 36-11, paragraph 5, of the *Code des postes et des communications électroniques* under which “Les décisions sont motivées, notifiées à l'intéressé et publiées au Journal officiel. Elles peuvent faire l'objet d'un recours de pleine juridiction et d'une demande de suspension présentée conformément à l'article L. 521-1 du code de justice administrative, devant le Conseil d'État”.

221 Article 50 of the Charter: “no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law”.

222 See ECtHR, *Ozturk v. Germany*, App. 8544/79, §§ 50 and 52; *Lutz v. Germany*, Appl. 9912/82, § 55; *Bendenoun v. France*, Appl. 11547/86, § 47; *Jussila v. Finland*, App. 73053/01, §§ 29 ff.; see also for an application of these criteria in French law, the judgment of the *Cour de cassation, Chambre commerciale*, 31 March 2004, under which, in the particular circumstances, the COB, when applying pecuniary sanctions, decided “du bien fondé d'accusation en matière pénale au sens des dispositions de l'article 6 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales”; in the literature see WILS, W.P.J., “The principle of Ne Bis in Idem in EC Antitrust Enforcement: a Legal and Economic Analysis”, in *World Competition*, vol. 26, No. 2, 2003, pp. 133 ff..

223 See ECtHR, *Gradinger v. Austria*, 23 October 1995, Series A No. 328-C, § 55.

224 See ECtHR, *Oliveira v. Switzerland*, 30 July 1998, A.No. 25711/94, §§ 25-29.

225 See ECtHR, *Franz Fischer v. Austria*, No. 37950/97, 29 May 2001, § 29.

In its ruling on the *Akerberg Fransson* case, the CJEU states that the *ne bis in idem* principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with VAT declaration obligations, a tax penalty and a criminal penalty in so far as the former is not criminal in nature, a matter which is for the national court to determine<sup>226</sup>.

Article 23e(8) of Council Regulation 1060/09 as amended by Council Regulation 513/11 on CRA establishes that “ESMA shall refer matters for criminal prosecution to the relevant national authorities where, in carrying out its duties under this Regulation, it finds serious indications of the possible existence of facts liable to constitute penal offences. In addition, ESMA shall refrain from imposing fines or periodic penalty payments where a prior acquittal or conviction arising from identical facts, or for facts which are substantially the same, has acquired the force of *res judicata* as the result of criminal proceeding under national law”.

An identical provision is contained in Article 64(8) of Council Regulation 648/12 on OTC derivatives, central counterparties and trade repositories.

Notwithstanding the case law and the provision of the Regulations, the substantial and procedural criteria for the application of administrative and criminal sanctions are not necessarily the same<sup>227</sup>.

The EU law offers other remedies as well - both procedural and in substance - to avoid the accumulation of sanctions. Article 6 of Council Regulation 2988/95 stipulates that the imposition of financial penalties may be suspended if criminal proceedings have been initiated against the person in connection with the same facts. When the criminal proceeding is concluded, the administrative procedure is resumed but the penalty applied may take into account any other penalty already imposed on the person by the judicial authority in respect to the same facts. Similarly, under Article 11(6) of Regulation 1/2003, the authorities of the Member States are automatically relieved of their competences if the Commission initiates its own proceedings. Moreover, under Article 13, if the authorities of two or more Member States have started proceedings, the others should suspend the procedure or reject the complaint in question.

The remedy in substance - the application of the principle of proportionality to the total of the sanctions - is also applied under the case law of the CJEU. In the *Walt Wilhelm* case the Court held that “a general requirement of natural justice... demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed”<sup>228</sup>.

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226 See ECJ, Case C-617/10.

227 See the “European Commission’s Staff Working Document, Annex to the Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, SEC (2005) 1767, December 23, 2005, pp. 52 ff.

228 See ECJ, Case 14/68, 13 February 1969, § 11. See also CFI, Case T-149/89, *Sotralenz*, 6 April 1995, § 29, and Case *Konecke*, 117/83, Opinion of the AG, § 4.4.

The same view is taken by the French *Conseil Constitutionnel* in its decision 1989-260<sup>229</sup> and by the EU legislator in Directive 2003/6/EC, which requires Member States to provide for both penal and administrative sanctions as reaction to market abuse conducts. Under Article 187-ter and 187-terdecies of the Italian Consolidated Law on Finance (Legislative Decree 58/1998 as amended) both the penal and the administrative sanctions are applied with the only limit being the proportionality principle<sup>230</sup>.

ECB sanctions are imposed on credit institutions, not natural persons. Thus the need to avoid the accumulation of sanctions under the ECB's sanctioning powers follows from the fact that some Member States admit the criminal liability of the legal persons while others provide for an administrative liability

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229 See § 22: “22. Considérant que la possibilité n'en est pas moins reconnue à la Commission des opérations de bourse de prononcer une sanction pécuniaire pouvant aller jusqu'au décuple du montant des profits réalisés par l'auteur de l'infraction et qui est susceptible de se cumuler avec des sanctions pénales prononcées à raison des mêmes faits et pouvant elles-mêmes atteindre un montant identique; que, si l'éventualité d'une double procédure peut ainsi conduire à un cumul de sanctions, le principe de proportionnalité implique, qu'en tout état de cause, le montant global des sanctions éventuellement prononcées ne dépasse pas le montant le plus élevé de l'une des sanctions encourues; qu'il appartiendra donc aux autorités administratives et judiciaires compétentes de veiller au respect de cette exigence dans l'application des dispositions de l'ordonnance du 28 septembre 1967 modifiée». See also ROSENFELD E. and VEIL. J., “Sanctions administratives, sanctions pénales”, *Pouvoirs n°128 - La pénalisation*, January, 2009, pp. 64-65: “Le Conseil constitutionnel, s'il a considéré que «la séparation des pouvoirs, non plus qu'aucun principe ou règle de valeur constitutionnelle ne fait obstacle à ce qu'une autorité administrative, agissant dans le cadre de prérogatives de puissance publique, puisse exercer un pouvoir de sanction », en a, par la même décision, fixé les limites : «d'une part, la sanction susceptible d'être infligée est exclusive de toute privation de liberté et, d'autre part, l'exercice du pouvoir de sanction est assorti par la loi de mesures destinées à sauvegarder les droits et les libertés constitutionnellement garantis» [Cons. const., n° 89-260 DC, 28 juillet 1989]. S'inspirant de la Cour de justice des communautés européennes (Cjce) [CJCE, 13 février 1969, *Walt Wilhelm*, aff. 14/68; *TPICE*, 6 avril 1995, *Tréfileurope*, aff. T-141 / 89, *Rec.*, p. II-791, § 191.], il a de même posé que «si l'éventualité d'une double procédure peut conduire au cumul de sanctions, le principe de proportionnalité implique qu'en tout état de cause le montant global des sanctions éventuellement prononcées ne dépasse pas le montant le plus élevé de l'une des sanctions encourues»[Cons. 22.], solution notablement plus équitable et réaliste que celle de la Cour suprême américaine qui a en définitive choisi de se désintéresser du résultat concret du cumul”. Accumulation of sanctions is contested by the Rapport Coulon, *La dépenalisation de la vie des affaires*, January 2008, p. 61: “Le cumul des sanctions pénales et administratives, qui existe notamment s'agissant des sanctions prononcées par l'Autorité des marchés financiers (AMF) et le Conseil de la concurrence, fait l'objet de vives critiques, même si cette situation a été juridiquement validée par le Conseil constitutionnel, sous réserve du respect du principe de proportionnalité (sanctions cumulées non supérieures au maximum prévu par l'une ou l'autre des deux législations applicables). La position de la France apparaît également fragile au regard de nos engagements internationaux, notamment de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, dont le protocole no 7 demande aux États parties de se conformer à l'adage *non bis in idem*. La France a certes émis sur ce point des réserves, mais dont la portée pourrait apparaître limitée au regard de l'évolution de la jurisprudence de la Cour européenne des droits de l'homme, qui estime que «la matière pénale s'entend de toute matière punitive et ayant une certaine gravité» [CEDH, 21 février 1984, *Özturk c/ RFA* ; CEDH, 24 février 1994, Aff. 12547/86, *Bendenoun c/France*; CEDH, 23 septembre 1998, Aff. 27812/95, *Malige c/France*]... Cette situation est peu satisfaisante et entraîne un accroissement des frais engagés par l'État pour réguler ces secteurs. Les autorités administratives indépendantes concernées, et notamment l'AMF, sont accusées d'avoir un rôle quasi-pénal sans disposer des garanties attachées à la procédure pénale, et il est reproché au juge pénal la méconnaissance de ces matières techniques, la faiblesse des sanctions prononcées ainsi que la lenteur de ses procédures”.

230 See the Italian *Corte di cassazione*, sez. VI, No. 15199 of 25 of May 2006, in *Foro it.*, 2007, II, p. 629, and Trib. Turin, sez. I pen., 21 December 2010 and 18 March 2011, both on <http://pluris-cedam.utetgiuridica.it>.

of the undertakings based on organisational failures, where criminal offences are committed by the company's officers<sup>231</sup>.

Article 18 of the SSM Regulation provides no remedy to avoid accumulation of sanctions. Article 3(10) of the Regulation 2532/98 stipulates, on the contrary, that "this provision shall be without prejudice to the application of criminal law and to prudential supervisory competencies in participating Member States".

To the extent that ECB penalties and sanctions under Article 18 of the SSM Regulation are not subject to the rules of procedure contained in Regulation 2532/98 the *Walt Wilhelm* rule applies.

### **5.7. Which rules of procedures for the ECB sanctions under Article 18(1) and (7) of the SSM Regulation?**

Since the administrative pecuniary penalties under Article 18(1) and, to some extent, the administrative sanctions under Article 18(7) of the SSM Regulation may be deemed to have a criminal nature, they are basically subject to the same safeguards as the penal sanctions. This goes not only for the procedural safeguards (rights of defence and principle of separation) but also for the substantial ones (culpability, full jurisdiction of the CJEU) and for the *ne bis in idem* principle (which has both a procedural and a substantial nature).

Against this background, the question arises whether the application of Council Regulation 2532/98 to the SSM sanctions under Article 18(1) and (7) grants all the above safeguards to the persons concerned<sup>232</sup>.

As already explained, the Regulation 2532/98 is not in line with most of the procedural and substantial safeguards laid down in the case law of the ECtHR and of the CJEU, with the only exception of the principle of full jurisdiction.

Moreover, the rules of procedure contained in the Council Regulation 2532/98 and the competence of the Executive Board therein seems to be incompatible with Article 25 of the SSM Regulation, on the separation of supervisory functions from

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231 For a survey of corporate criminal liability in Western Europe see: SUN BEALE, S. and SAFWAT, A.G., "What Developments in Western Europe tell us about American Critiques of Corporate Criminal Liability", in *Buffalo Criminal Law Review*, vol. 8, p. 89 ff.

232 See LOOSVELD, S., "The ECB's Investigatory and Sanctioning Powers under the Future Single Supervisory Mechanism", p. 423: "The ECB sanctioning Regulation [Regulation 2532/98] was adopted in view of the introduction of the euro on January 1, 1999 and the full transfer of the monetary policy competence in the eurozone member States from the national level (...) to the European level (...). It is important to bear this in mind when legislation that concerns the euro as single currency and the tasks of the ECB in this area, is now envisaged to apply to the new supervisory tasks of the ECB under the SSM. Since 1999 and as long as the Banking Union is not in force, the ECB has, first and foremost, tasks related to monetary policy. A central bank's (...) monetary policy tasks are, in many regards, different from a supervisor's (...) prudential supervision tasks, regardless of historical and geographical examples of central banks that have exercised, or still exercise, both tasks. The above caveat needs to be borne in mind when the ECB Sanctioning Regulation, which was adopted in the context of the ECB's monetary policy tasks will, under the SSM, have to be applied to the ECB's tasks regarding prudential supervision. This application might require a number of modifications to the ECB Sanctioning Regulation to bring it in line with the SSM Regulation".

the monetary ones, and with Article 26(1), according to which “the execution of the tasks conferred on the ECB [by the SSM Regulation] shall be fully undertaken by...” the Supervisory Board<sup>233</sup>.

A possible solution to these problems could be to disregard Council Regulation 2532/98 on the basis of the following arguments. Article 18(4) of the 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 Council Regulation (EC) No 2532/98” only “as appropriate”. The wording “as appropriate” suggests that ECB may even completely ignore Regulation 2532/98<sup>234</sup> and adopt new rules of procedure for the application of administrative penalties and sanctions under Article 18(1) and 18(7)<sup>235</sup>.

Since Article 18(4) pertains to the application of the whole of Article 18, hence including paragraph 7, one may conclude that the rules of procedure contained in Regulation 2532/98 may be waived not only for the application of penalties under paragraph 1 of Article 18 but also for the application of sanctions under paragraph 7<sup>236</sup>.

This interpretation is nonetheless not sure, at least for the application of sanctions under paragraph 7 of Article 18. Under Article 18(7) the ECB may impose sanctions for breach of ECB regulations or decisions “in accordance”

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233 See also Recital 65 under which the exercise of supervisory and monetary tasks should be carried out “in full separation”.

234 The French and Italian versions of Article 18(4) are even clearer. According to the French translation, “la BCE applique le présent article conformément aux actes visés à l'article 4, paragraphe 3, premier alinéa, du présent règlement, y compris, *le cas échéant*, les procédures prévues dans le règlement (CE) n° 2532/98 du Conseil”. In the Italian version: “la BCE applica il presente articolo in combinato disposto con gli atti di cui all'articolo 4, paragrafo 3, primo comma, del presente regolamento comprese le procedure previste nel regolamento (CE) n. 2532/98 del Consiglio, *se del caso*”. Regulations and other documents of general application must be drafted in all the official languages (Article 4 of Regulation 1). As a result of the need for uniform interpretation of Union law, texts are considered in isolation, but in case of doubt are interpreted and applied in the light of the other authentic language versions: ECJ, Case 19/67, *Bestuur van de Sociale Verzekeringsbank*.

235 These rules of procedures may be grounded on Article 6(7) of the SSM regulation under which “the ECB shall, in consultation with national competent authorities of participating Member States, and on the basis of a proposal from the Supervisory Board, adopt and make public a framework to organise the practical modalities of implementation of this Article”. Since Article 6 refers to the ECB’s tasks and these include ensuring compliance with the prudential rules on credit institutions, the rules on sanctioning procedure could be contained in this framework. Another solution would be to adopt a separate set of rules under Article 4(3), second sub-paragraph, of the SSM Regulation. Under the provision above the ECB “may also adopt regulations only to the extent necessary to organise or specify the modalities for the carrying out” the tasks conferred upon it by the SSM regulation, including again ensuring compliance with the prudential rules.

236 Article 18(7) stipulates that ECB may impose sanctions in the case of breach of ECB regulations or decisions in accordance with Council Regulation 2532/98, “without prejudice to paragraphs 1 to 6” of the same Article and hence without prejudice of paragraph 4. Moreover, the imposition of sanctions “in accordance with the regulation...” under Article 18 (7) of the SSM Regulation may be interpreted as referring to the kind and the level of sanctions to be applied (Articles 1 and 2 of Regulation 2532/98) or simply to the grounds of the relevant ECB power (see the wording of Recital 36 of the SSM Regulation: “in accordance with Article 132(3) TFUE and the Council Regulation (EC) No 2532/98... the ECB is entitled...”) rather than to the procedure for their application.

with Council Regulation 2532/98 and therefore, one can infer, following the rules contained in the Regulation<sup>237</sup>.

### **5.8. Administrative internal review under Article 24 of the SSM Regulation and its relationship with the judicial review of the CJEU**

Article 24 of the SSM Regulation provides for an internal review of all the ECB decisions under the Regulation itself by an *ad hoc* body: the Administrative Board of Review.

The scope of this review “shall pertain to the procedural and substantive conformity” with the SSM Regulation<sup>238</sup>, “while respecting the margin of discretion left to the ECB to decide on the opportunity to take those decisions”<sup>239</sup>.

The review therefore should not extend to the merit of the assessment<sup>240</sup>, in conformity with the EBA Regulation<sup>241</sup>. The Board of Appeal against the decisions of the European Supervisory Authorities (ESAs) can only “confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority”<sup>242</sup>; it cannot assess the merits of the case.

An unlimited review of the decisions of the ESAs is in any case not necessary, since they cannot enjoy any discretionary power, in accordance with the Meroni doctrine. A different solution would have been worked out under the SSM Regulation considering the margin of discretion given the ECB in the adoption of the supervisory decisions.

Article 24 of the SSM Regulation is without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties<sup>243</sup>. Nevertheless, the Court’s review of the ECB decisions under the SSM Regulation, as is confirmed by Recital 60<sup>244</sup>, is confined to their legality according to the general principle on the judicial control laid down under Article 263 of the TFEU.

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237 Similarly, the wording “without prejudice to paragraphs 1 to 6” in paragraph 7 of Article 18 can be read in the sense that the ECB not only may apply the penalties provided for in paragraphs 1 and 2, according to the rules laid down in paragraphs 3, 4 and 6, and asking NCAs to apply penalties under paragraph 5, but may also impose the sanctions provided for in Regulation 2532/98 according to the rules of procedure therein. The groundwork of the SSM regulation too may support this different reading and the aim of the EU legislator to apply different regimes to the penalties under Article 18(1) and 18(7). Whilst paragraph 15(4), now Article 18(4), has been amended, Article 15(7), now Article 18(7), remained unchanged. This confirms the initial purpose of the EU legislator to reserve to sanctions for violations of the ECB’s regulations or decisions the special regime provided for under Regulation 2532/1998.

238 See Article 24(1) of the SSM Regulation.

239 See Recital 64 of the SSM Regulation.

240 See in literature LACKHOFF K., “How will the Single Supervisory Mechanism (SSM) Function? A Brief Overview”, 27.

241 Regulation 1093/2010.

242 See for example Article 60(5) of Regulation 1093/2010.

243 See Article 24(11) of the SSM Regulation.

244 Recital 60 of the SSM Regulation stipulates that “pursuant to Article 263 TFEU, the CJEU is to review the legality of acts of, inter alia, the ECB, other than recommendations and opinions, intended to

Moreover, the decisions of the Administrative Board of Appeal are not compulsory for the Governing Council. Under Article 60(5) of the EBA Regulation the competent body of the Authority “shall be bound by the decision of the Board of Appeal”, whilst under Article 24(7) of the SSM Regulation the Governing Council is not bound by the decision of the Administrative Board of Review<sup>245</sup>.

Under Article 24(7) of the SSM Regulation, the Administrative Board of Review only expresses its opinion. Even though the Supervisory Board must take this opinion into account and promptly submit a new draft decision to the Governing Council, the latter maintains the final power to decide differently from the Supervisory Board draft<sup>246</sup>.

## **6. Compliance with the rules on due process and the role of the ECB within the SSM supervisory procedures**

As noted, compliance with the fundamental rights and general principles of EU law is obligatory not only for the ECB but also for the NCAs when assisting the ECB in the preparation of its final decisions. In these cases the ECB avails itself of the operational activity of the NCAs, which must follow the instructions given by the ECB, as clearly provided for under Article 6(3) of the SSM Regulation.

A different case is that of the administrative mixed procedures under Articles 14 and 15 of the SSM Regulation. Here the Regulation itself clearly assigns the competences for the final decision and for the preparatory acts to the ECB and to the NCAs, respectively. No provision is in place giving the ECB the power to instruct the NCAs. The latter must follow their own national law.

Since the previous assessment of the interests at stake is carried out by the NCAs, the safeguards of the defence must be granted to the addressees as from the national phase of the procedure.

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produce legal effects vis-à-vis third parties”.

245 See LOOSVELD, S., “The ECB’s Investigatory and Sanctioning Powers under the Future Single Supervisory Mechanism”, p. 425: “ [The Administrative Board of Review] is similar to, but not assimilated with, the powers of the so-called ‘Board of Appeal’. This is a joint body of ESMA, the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA), which hears appeals by persons who are affected by decisions made by one of these authorities. One notable difference is that the ECB’s Board of Review will have no decision-making power. It will only rule on the admissibility of the review, examine the case and remit this for preparation of a new draft decision that will need to be adopted by the Governing Council of the ECB”. See also in this context LOOSVELD, S., “Appeals Against Decisions of the European Supervisory Authorities”, in *Journal of International Banking Law and Regulation*, 2013, pp. 9-13.

246 Article 24(7) stipulates that: “After ruling upon the admissibility of the review, the Administrative Board of Review shall express an opinion within a period appropriate to the urgency of the matter and no later than two months from the receipt of the request and remit the case for preparation of a new draft decision to the Supervisory Board. The Supervisory Board shall take into account the opinion of the Administrative Board of Review and shall promptly submit a new draft decision to the Governing Council. The new draft decision shall abrogate the initial decision, replace it with a decision of identical content, or replace it with an amended decision. The new draft decision shall be deemed adopted unless the Governing Council objects within a maximum period of ten working days”.

Increasingly, EU case law regards composite administrative procedures as unitary procedures and assesses the acts of which these procedures are composed under the common standards of legality laid down in Community law, including that for the rights of the defence.

In the *Borelli* case<sup>247</sup> the CJEU only extended the safeguards provided for in Community law to the national stage<sup>248</sup>, stopping short of extending its jurisdiction over the latter. The national and community levels were considered as distinct, and flaws at the national stage were considered as not affecting the final decision adopted at Community stage<sup>249</sup>.

Subsequently, a different case law trend emerged. The Court of First Instance started to extend its jurisdiction over the national stage of a composite procedure and to admit that flaws in national acts may also affect the validity of the final decision at Community (now Union) level<sup>250</sup>. If this were so, it would be debatable whether the Union authority competent for the final decision (the ECB) had the duty to monitor the conduct of the national authorities (the NCAs). This conclusion would be the logical consequence of the vertical dimension of the procedural protection of the rights of defence as well as of the imputation of the defects of the acts of the entire procedure to the final decision.

However, there is no clear support for this opinion in the case law.

Aside from the above cases, as regards the decisions adopted by the NCAs under their exclusive competence (those addressed to the less significant credit

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247 ECJ, Case C-97/91.

248 See §§ 13-14: “13. Accordingly, it is for the national courts, where appropriate after obtaining a preliminary ruling from the Court, to rule on the lawfulness of the national measure at issue on the same terms on which they review any definitive measure adopted by the same national authority which is capable of adversely affecting third parties and, consequently, to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case. 14. As the Court observed in particular in Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18, and in Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097, paragraph 14, the requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

249 See §§ 9-12: “9. It should be pointed out that in an action brought under Article 173 of the Treaty the Court has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority. 10. That position cannot be altered by the fact that the measure in question forms part of a Community decision-making procedure, since it clearly follows from the division of powers in the field in question between the national authorities and the Community institutions that the measure adopted by the national authority is binding on the Community decision-taking authority and therefore determines the terms of the Community decision to be adopted. 11. That is so where the competent national authority issues an unfavourable opinion on an application for aid from the Fund. It follows from Article 13(3) of Regulation No 355/77 that a project may receive aid from the Fund only if it is approved by the Member State on whose territory it is to be carried out and that, consequently, where the opinion is unfavourable the Commission can neither follow the procedure for the examination of the project in accordance with the rules laid down in that regulation nor *a fortiori* review the lawfulness of the opinion thus issued. 12. In those circumstances, any irregularity that might affect the opinion cannot affect the validity of the decision by which the Commission refused the aid applied for”.

250 See CFI, Case T-450/93, *Lisrestal*, § 2, and Case T-346/94, *France-aviation v. Commission*.

institutions), the ECB retains only its powers as the authority responsible for the effective and consistent functioning of the SSM.

The ECB is not hierarchically superior to the NCAs, nor do the latter act in a system of decentralised authorities. This is the model of Council Regulation 2532/98 governing the ECB's monetary policy sanctioning powers<sup>251</sup>, but it cannot be applied in the field of banking supervision.

The supervisory tasks conferred on the ECB under Article 127(6) of the TFEU are not included within the tasks of the ESCB<sup>252</sup>, so they cannot be considered as exclusive Eurosystem responsibilities, pertaining as such to the area of the monetary pillar. They should therefore not be subject to decentralisation under Article 12(1), third sub-paragraph of the ESCB Statute.

Even though any action taken by the NCAs within the scope of Union law has to comply with the Union's safeguards for fundamental rights<sup>253</sup>, the role of the ECB as responsible for the effective and consistent functioning of the SSM does

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251 See TEXEIRA, P.G., and MARTIN, J.M.F., "The imposition of regulatory sanctions by the European Central Bank", pp. 400-401: "First of all, irrespective of the level involved, the Bank sanction procedure is established in all its details from beginning to end by two Community acts, a Council Regulation, supplemented by an ECB Regulation, both of them directly applicable in the national legal orders. Unlike the cases on composite procedures discussed by the Court of First Instance, the space left for the operation of national procedures is practically non-existent. Secondly, the intervention by NCBs relates to the establishment of the factual circumstances and their initial qualification, acts which will circumscribe the final decision by the Bank. NCB acts are therefore indissolubly linked to and determine the decision to be adopted at the Community level. Thus, whether the rights of defence of the undertaking concerned have been respected throughout the inquiry phase becomes crucial to assess the validity of the final decision by the Bank. It follows that the control of the acts carried out during the whole sanctions procedure must be subject to a uniform standard of legality and to uniform judicial treatment. It is difficult to accept that two different patterns of legality and judicial procedures may apply depending on who initiates and carries out the inquiry phase and under which national jurisdiction this is done. This position would constitute acceptance for the first time of the existence of national organs acting as administrative units of Community bodies, whose acts would be assimilated for the purposes of judicial review to Community acts. Even though this 'imputability' approach may not be easily applicable to all areas of ESCB activities, in particular areas regulated by ECB guidelines, it appears appropriate in the context of the Bank procedure for the imposition of sanctions, and possibly in other areas regulated to the same degree of detail. In brief, the infringement procedure of the System for the imposition of sanctions on legal persons as developed by the Council and ECB Regulations must be regarded as a unitary administrative system, centralised as to the final decision, but 'deconcentrated' as to the preliminary inquiry phases. The Bank, as the Community's central bank and decision making power, should be held ultimately responsible for both the proper conduct of the inquiry phase and for the final decision on whether to impose sanctions".

252 See Articles 3 and 25, paragraph 2, of the ESCB Statute.

253 See Article 51 (1) of the Charter; ECJ, Case 222/84, *Johnston*, § 18; ECJ, Case 5/88, *Wachauf*, § 19. In the literature see LENAERTS, K. and VAN NUFFEL, P., *European Union Law*, p. 834; see also TRIDIMAS, T., *The General Principles of EU Law*, 415-416: "It should be accepted that a person may invoke the rights of defence not only against the Community institutions but also against national authorities where they act within the scope of Community law even in the absence of specific provisions to that effect. This view derives from the general pronouncement of the Court that fundamental rights bind the national authorities where they act within the scope of Community law... In principle, the rights of the individual should not differ depending on whether he or she is dealing with the Community or national authorities. Thus the general approach must be that the principles applicable to the Community administration must apply mutatis mutandis to the national administration unless there is a reason which justifies the application of different standards".

not extend to obliging the NCAs to apply the same safeguards to all the sanction proceedings within the SSM itself.

The ECB has the power, under Article 6(5)(a), to issue regulations, guidelines and general instructions to NCAs; by this Article, tasks under Article 4 “are performed and supervisory decisions are adopted by national competent authorities”.

Nevertheless, these powers are confined to the substantial criteria according to which the tasks are performed and the decisions are taken by the NCAs, the purpose being merely to ensure the consistency of the supervisory outcomes within the SSM.

The procedural rules that apply to NCAs in taking supervisory decisions within their exclusive competence on the less significant credit institutions are mentioned in Article 6(7)(c) of the SSM Regulation, but they would appear to be confined to the “relation between the ECB and the national competent authorities”.

When organising the arrangements for performing its own tasks under Article 4(3), second sub-paragraph, the ECB may issue provisions to guarantee the fundamental rights and principles recognised in the Charter of Fundamental Rights of the European Union<sup>254</sup>.

These provisions will serve as “benchmark” for the national frameworks as well.

An important role will be also played by the national Courts, as has been clearly shown by the case law of the French *Conseil Constitutionnel* on the application of the principle of separation, within the sanction proceedings, of investigative from decision-making powers.

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254 See Recital 87 of the SSM Regulation.

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