On the Scope and Limits of the Application of National Law by the European Central Bank within the Single Supervisory Mechanism

Florin Coman-Kund and Fabian Amtenbrink[*]

Regulation 1024/2013 has established the Single Supervisory Mechanism (SSM) as a milestone towards the establishment of a full-fledged European Banking Union (EBU). This mechanism represents an unprecedented centralization in the area of financial market supervision in the internal market by shifting powers from national supervisory authorities to the European Central Bank (ECB), to be exercised primarily by its newly established Supervisory Board. In principle, the ECB is in charge of direct supervision of significant credit institutions, whereas the competent national supervisors remain in charge of all other credit institutions. Yet it can be observed as a rather peculiar feature of the SSM model that the ECB has the duty to carry out its tasks under EU law by directly applying national legislation. More specifically, Article 4(3) of the SSM Regulation compels the ECB to apply both national legislation implementing relevant EU directives and national rules exercising options granted by EU regulations.

This paper examines the application by the ECB of national rules in fulfilling its tasks under the SSM Regulation by focusing on a number of salient legal challenges posed by these novel regulatory arrangements in the EU. For this purpose, the application of different national implementing rules by the ECB is scrutinized. Here the analysis focuses on the difficulties that a supranational authority such as the ECB may face in interpreting, applying, and enforcing the national rules of different member states, as well as the implications these difficulties may have for the coherence of the European financial regulatory and supervisory system that was one of the main goals of the establishment of the EBU. Next, the challenges arising in terms of legal review and protection against ECB measures that are based on the application of national law are analyzed. In particular, issues pertaining to access to justice as regards the competent court(s) and the law applicable to disputes involving the application of national legislation by the ECB are investigated.

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[*] Dr. Florin Coman-Kund is Assistant Professor at the Department for International and European Union Law at the Erasmus School of Law at Erasmus University Rotterdam. Dr. Fabian Amtenbrink is Full Professor of European Union Law at the Department for International and European Union Law at the Erasmus School of Law at Erasmus University Rotterdam and Visiting Professor at the College of Europe (Bruges).

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Le *Règlement 1024/2013* a établi le mécanisme de surveillance unique (MSU) comme une étape essentielle vers l'établissement d'une union bancaire européenne (UBE) véritablement achevée. Ce mécanisme entraîne une décentralisation sans précédent dans le domaine de la surveillance des marchés financiers du marché interne en transférant les pouvoirs des autorités de surveillance nationales vers la Banque centrale européenne (BCE), et principalement vers son conseil de surveillance prudentielle nouvellement établi. En principe, la BCE est chargée de la surveillance directe des établissements de crédit majeurs, tandis que les autorités de surveillance nationales demeurent en charge de tous les autres établissements de crédit. Pourtant, il convient de le souligner, le modèle du MSU comporte une caractéristique particulière : la BCE doit s'acquitter de ses fonctions en vertu de la législation de l'UE en appliquant directement le droit national. Plus particulièrement, l'article 4(3) du règlement sur le MSU oblige la BCE à appliquer la législation nationale mettant en œuvre les directives pertinentes de l'UE et, à la fois, les règles nationales relatives aux options accordées par les règlements de l'UE.

Dans cet article, les auteurs examinent l'approche de la BCE à l'égard des règles nationales, dans le cadre de l'exécution des tâches qui lui incombent en vertu du règlement sur le MSU; ils s'attardent sur un certain nombre d'importants défis de nature juridique soulevés par ces mesures réglementaires novatrices dans l'UE. À cette fin, la mise en œuvre par la BCE de différentes règles nationales est examinée de près. Les auteurs se concentrent sur les difficultés auxquelles pourrait être confrontée une autorité supranationale comme la BCE au moment d'interpréter et d'appliquer les règles nationales de différents États membres, ainsi que sur leur conséquences sur la cohérence du système européen de surveillance et de réglementation financières, dont la protection était l'un des principaux objectifs de l'établissement de l'UBE. Ensuite, les auteurs analysent les défis que présentent l'examen juridique des mesures de la BCE fondées sur l'application des lois nationales. Plus particulièrement, les enjeux liés à l'accès à la justice concernant la détermination des tribunaux compétents et des lois applicables aux litiges portant sur l'application de la législation nationale par la BCE sont examinés.

1. INTRODUCTION

The establishment of the Single Supervisory Mechanism (SSM)[1] as one of the pillars of the European Banking Union (EBU) marks an unprecedented centralization in the area of banking supervision in the European Union (EU), whereby supervisory powers previously exercised by national competent authorities (NCAs) are entrusted to the European Central Bank (ECB).[2] As

1 European Union, *Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions*, [2013] O.J., L. 287/63 [SSM Regulation].

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such, not only does the ECB bear the responsibility for direct supervision of most "significant institutions" (SIs) primarily within the euro area, but it also exercises system oversight by performing specific responsibilities and facilitating cooperation vis-à-vis competent national supervisors. In this way, the SSM aims at replacing the nationally fragmented landscape of banking supervision by advancing what the SSM Regulation characterizes as a viable solution to ensure coherent and effective implementation of EU standards regarding prudential supervision of credit institutions (CRIs).[3] While officially in operation since November 2014,[4] the SSM remains a work in progress, as various aspects of this new model require further clarification.

One such aspect pertains to the way in which the ECB is discharging its supervisory tasks, and specifically to the application by the ECB of national law.[5] As is pointed out by Witte, this arguably constitutes a novel solution for executing EU law by entrusting an EU institution with the task of directly applying legal provisions of the EU member states.[6] This novel regulatory arrangement entails a number of salient legal problems and challenges that are the focal point of this contribution. What is essentially argued is that, while the direct application of national law entails allegedly far-reaching powers for the ECB, it also places the ECB in a difficult position. Indeed, the capacity of this new mode to contribute to the effectiveness of the SSM depends to a large extent on the interplay between the ECB and the NCAs. Moreover, the application of national law by the ECB pursuant to Article 4(3) of the SSM Regulation is liable

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2 Questioning the efficacy of this system: see T.H. Tröger, "The Single Supervisory Mechanism — Panacea or Quack Banking Regulation? Preliminary Assessment of the New Regime for the Prudential Supervision of Banks with ECB Involvement" (2014) 15 European Business Organization Law Review 449 at 461.

3 See SSM Regulation, Recital 12 of the Preamble.

4 See SSM Regulation, Article 33(2). See also ECB, *Guide to Banking Supervision* (2014) at 4, online: <https://www.bankingsupervision.europa.eu/press/publications/html/index.en.html>.

5 SSM Regulation, Article 4(3) compels the ECB to apply both national legislation implementing relevant EU directives and, under certain circumstances, national rules exercising options granted by EU regulations.

6 See A. Witte, "The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?" (2014) 21 Maastricht Journal of European and Comparative Law 89. According to the SSM Regulation, in addition to this novel mode of executing EU law, the ECB is also empowered to use the more traditional direct and indirect EU administration models (i.e., the power to apply relevant EU law directly to credit institutions, and the ECB's power of instruction towards NCAs to implement the SSM legal framework according to their own national laws). On the different administrative modes in EU law, see A.J. Gil Ibáñez, *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits* (Oxford-Portland: Hart Publishing, 1999) at 18-19; P. Craig, "European Governance: Executive and Administrative Powers under the New Constitutional Settlement" (2005) 3:2-3 International Journal of Constitutional Law 410; and J. Schwarze, *European Administrative Law*, 1st ed. (London: Sweet and Maxwell, 2006) at 25.

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to make legal review of ECB's actions difficult, possibly resulting in lacunae in the legal protection of natural and legal persons.

In section 2, the newly established SSM is linked to the relevant overall EU legal-policy framework with a view to better understanding its logic and mechanics in the context of the wider environment within which it operates. For this purpose, the SSM is positioned within the EBU, of which it forms an essential pillar, as well as linked to the substantive body of EU prudential rules (the Prudential Regulation), in particular the so-called CRD IV package. Thereafter, the design and operation of the SSM is examined in section 3, including the role and tasks of the ECB under the SSM, the division of tasks and interplay between the ECB and NCAs, and the evolving SSM model of supervision upon which the functioning of the SSM framework is premised.[7] Section 4 then turns to the legal framework governing the application of national law by the ECB under Article 4(3) of the SSM Regulation. In this context, the different scenarios entailing the application of national law by the ECB are examined, together with the theoretical approaches that could explain and support this rather atypical mode of execution of EU law. Section 5 identifies problems that arise from this governance model, namely relating to the actual scope of application of national law, the particularly complex situation of the non-implementation and incorrect transposition of EU directives, and legal review of the legal measures of ECB and NCAs. Finally, section 6 concludes this contribution with main findings.

2. THE SINGLE SUPERVISORY MECHANISM AS A KEY PILLAR OF THE EUROPEAN BANKING UNION

The creation of the SSM can best be understood by observing the wider relevant legal, political, and institutional framework within which it operates. The idea of a EBU can be traced back to the report "Towards a Genuine Economic and Monetary Union," presented by the president of the Council of the European Union on 26 June 2012, calling for a closer integration of the European Economic and Monetary Union (EMU).[8] The report envisaged "[a]n integrated financial framework to ensure financial stability in particular in the euro area and minimize the cost of bank failures to European citizens" as one of the fundamental elements for building a stronger EMU.[9] The direct link between the state of the internal financial market and the recent financial crisis prompts

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7 See on the functioning of the SSM model of supervision, ECB, *Annual Report on Supervisory Activities 2014* (2015) at 33, online: <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmar2014.en.pdf?c50e4de7ccc030381567868a76b97e1d>.

8 European Council, *Towards a Genuine Economic and Monetary Union: Report by President of the European Council Herman Van Rompuy* (2012) EUCO 120/12, online: <http://data.consilium.europa.eu/doc/document/ST-120-2012-INIT/en/pdf>. This report was prepared in collaboration with the President of the Commission, the President of the Eurogroup, and the President of the European Central Bank.

9 *Ibid.* at 3. For a more detailed analysis, see K. Alexander, "European Banking Union: A

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identifying the reversal of "the fragmentation of financial markets since the euro crisis, by weakening the link between banks and their national sovereigns" as a key objective of the Banking Union.[10] Not only the resolution and resolution funding of significant banks is identified as a means to achieve this aim, but also supervision as such.[11]

The new European legal framework encompasses a reinforced regulatory approach by focusing on the body of substantive common rules applicable to CRIs, as well as a new executive-institutional component in the shape of structures and mechanisms ensuring the implementation and enforcement of the common EU rules on CRIs.[12] The common substantive rules applicable to CRIs, designated generically as the "rulebook for the Banking Union"[13] or the "single rulebook,"[14] cover the EU prudential requirements, risk control and crisis prevention, as well as credit institution resolution and deposit guarantees.[15] More concretely, these rules come in the shape of several secondary documents of the EU (secondary Union law), including the Capital Requirements Directive (CRD IV),[16] the Capital Requirements Regulation (CRR),[17] the Directive on Bank Recovery and Resolution (BRRD),[18] and the Directive on Deposit Guarantee Schemes (DGSD).[19] From an all-encompassing perspective, all the EU non-legislative acts and soft law instruments, as well as national

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Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism" (2015) 40 European Law Review 154 at 159.

10 European Commission, *Towards the Completion of the Banking Union* (2015) COM 2015/587 final at 3.

11 *Ibid.*

12 For this delineation, see N. Moloney, "European Banking Union: Assessing Its Risks and Resilience" (2014) 51 Common Market Law Review 1609 at 1611. The term "credit institution" is defined in Article 4(1) of Regulation 575/2013 as "an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account."

13 *Towards the Completion of the Banking Union*, *supra* note 10 at 4.

14 *Ibid.* at 3.

15 *Ibid.*

16 European Union, *Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC*, [2013] O.J., L. 176/338 [CRD IV].

17 European Union, *Regulation 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation 648/2012*, [2013] O.J., L. 176/1 [CRR].

18 European Union, *Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) 1093/2010 and 648/2012, of the European Parliament and of the Council*, [2014] O.J., L. 173/190.

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implementing measures[20] adopted under secondary Union law, also form part of the rulebook.[21] Building on this regulatory framework, the executive-institutional side of the EBU relies on two main elements for its implementation: the previously mentioned SSM, and the Single Resolution Mechanism (SRM).[22] While the SSM is supposed to ensure coherent and effective prudential supervision over CRIs established in the EU,[23] the SRM, supported institutionally by the Single Resolution Board (SRB), is aimed at ensuring effective recovery and resolution of banks and other credit institutions in distress.[24] The SSM constitutes the first pillar of the EBU, and has been characterized as "an essential precondition" for the other two pillars of the Banking Union (i.e., the SRM and the common European Deposit Insurance Scheme (EDIS)).[25] As such, it has been referred to as the "cornerstone of Europe's banking union."[26]

3. THE INSTITUTIONAL CHARACTERISTICS OF THE EUROPEAN SINGLE SUPERVISORY SYSTEM

Considering past arrangements under the Lamfalussy structure and even the 2010 European System of Financial Supervision (ESFS),[27] it is hardly

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19 European Union, *Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes*, [2014] O.J., L. 173/149.

20 See M. Meissner, "The Supervisory Review and Evaluation Process (SREP): Ultimate Test for the Banking Union?" (2016) Journal of International Banking Law and Regulation 331.

21 In this regard, see Moloney, *supra* note 12 at 1625.

22 European Union, *Regulation 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) 1093/2010*, [2014] O.J., L. 225/1. The SRM has been operational from 1 January 2016. For an extensive analysis of the SRM, see K-P. Wojcik, "Bail-In in the Banking Union" (2016) 53 Common Market Law Review 91.

23 See SSM Regulation, Recital 12 of the Preamble.

24 In this regard, see Moloney, *supra* note 12 at 1629 and 1638.

25 On the launching of the European Deposit Insurance Scheme (EDIS) as the third pillar of the Banking Union, alongside bank supervision and resolution, see European Commission, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* (2015) at 11, online: <https://ec.europa.eu/priorities/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en>.

26 See D. Schoenmaker & N. Véron, eds., *European Banking Supervision: The First Eighteen Months* (Bruegel: Blue Print Series, 2016) at 1. See also Alexander, *supra* note 9 at 164.

27 European Union, *Regulation 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC*, [2010] O.J., L. 331/12 [EBA Regulation]; European Union, *Regulation 1094/2010 of the European Parliament and of the Council of 24 November 2010*

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controversial to observe that the SSM stands for an unprecedented transfer of supervisory powers from the national to the supranational level. While the ESFS was designed as a rather decentralized network consisting of the NCAs of the participating member states and three newly established European supervisory authorities (ESAs), namely EBA, ESMA and EIOPA, with mainly monitoring and coordination tasks,[28] the SSM entails the exercise by the ECB of tasks, powers, and responsibilities traditionally carried out by the competent supervisory authorities of the member states. Although the ECB is at the core of the new system, it cannot simply be concluded from this fact that banking supervision in the EU has been centralized altogether and that the NCA's are hierarchically subordinated to the ECB in all matters. Instead, the SSM introduces a complex division of tasks and close interactions between the ECB and the NCAs, and as such stands for a rather complicated governance structure.[29]

While the ECB is responsible for the overall functioning of the system and has significant supervisory tasks and powers,[30] the NCAs still play a crucial role.[31] Therefore, to understand the relationship between the ECB and the NCAs, the distinction made by the SSM Regulation between "tasks" as specific aspects and areas of banking supervision and "powers" as the means and instruments enabling the EU banking supervisor to fulfill its tasks is useful.[32] Whereas in general it may be expected that the tasks of a supervisory authority are matched by corresponding powers, under the SSM this is not necessarily always the case. This fact becomes clear from the third paragraph of Article 9(1) of the SSM Regulation, which foresees the possibility of the ECB calling upon the NCAs "(. . .) to make use of their powers, under and in accordance with the conditions set in national law (. . .)" to the extent that the ECB itself has not been provided with such powers.

establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, [2010] O.J., L. 331/48 [EIOPA Regulation]; European Union, *Regulation 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC*, [2010] O.J., L. 331/84 [ESMA Regulation].

28 For an overview, see T. Papadopoulos, "European System of Financial Supervision" in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2014).

29 See Moloney, *supra* note 12 at 1630; Tröger, *supra* note 2.

30 See SSM Regulation, Articles 2(9) and 6(1). See also Moloney, *ibid.*

31 Tröger, *supra* note 2.

32 See G. Schuster, "The Banking Supervisory Competences and Powers of the ECB" (2014) European Journal of Business Law 3 at 6. In this respect, Articles 4 to 5 of the SSM Regulation refer to the tasks of the ECB, while Articles 9 to 18 (Chapter III, "Powers of the ECB") cover the ECB's supervisory and investigatory powers.

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From the outset, the SSM Regulation appears to introduce a *specific* mandate for the ECB in line with the general principle of conferred powers and the legal basis of the SSM Regulation, which is Article 127(6) of the Treaty on the Functioning of the European Union (TFEU).[33] After all, the ECB is entrusted with a set of tasks confined to prudential supervision of CRIs as defined under EU law.[34] Thus, the NCAs are left with any prudential supervisory tasks not conferred on the ECB by the SSM Regulation, the prudential supervision of entities qualified as "credit institutions" under national law, and the exercise of supervisory tasks not directly linked to prudential aspects.[35]

At the same time, in the area of prudential supervision of CRIs, the tasks vested in the ECB by Articles 4 and 5 of the SSM Regulation are extensive. An examination of Article 4(1) of the SSM Regulation reveals in this regard that the ECB is in principle *exclusively* competent to take the final decision relating to major prudential supervisory tasks that have been traditionally exercised by the NCAs with regard to all CRIs.[36] These include: issuing and withdrawing authorizations; assessing notifications and disposals of qualifying holdings in CRIs; ensuring compliance with rules imposing prudential requirements; ensuring compliance with rules imposing robust governance arrangements; carrying out supervisory reviews and stress tests; carrying out supervision on a consolidated basis over credit institutions' parents established in the participating member states; and carrying out supervisory tasks in relation to recovery plans, early intervention, and structural changes. In principle, this leaves NCAs in these areas with supervisory tasks related to consumer protection, receiving notifications from CRIs regarding the right of establishment and the free provision of services, supervision of third-country CRIs, daily verifications of CRIs, and fulfilling the role of competent authorities in relation to markets in financial instruments.[37] While all of this suggests a clear-cut distribution of decision-making powers largely in favour of the central level, in practice a somewhat more differentiated picture emerges, as NCAs are involved in preparing the relevant ECB decisions.

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[33] See also K. Neumann, "The Supervisory Powers of National Authorities and Cooperation with the ECB: A New Epoch of Banking Supervision" (2014) European Journal of Business Law 9 at 10.

[34] See SSM Regulation, Article 1.

[35] SSM Regulation, Recital 28 of the Preamble and Article 1. See also M. Abascal, T. Alonso-Gispert, S. Fernández de Lis & W.A. Golecki, "A Banking Union for Europe: Making a Virtue Out of Necessity" (2014) BBVA Working Paper 14/18 at 21; K. Alexander, "The European Central Bank and Banking Supervision: The Regulatory Limits of a Single Supervisory Mechanism" (2016) 3 European Company and Financial Law Review 467 at 487.

[36] In this respect, see B. Wolfers & T. Voland, "Level the Playing Field: The New Supervision of Credit Institutions by the European Central Bank" (2014) 51 Common Market Law Review 1463, 1470; E. Wymeersch, "The Single Supervisory Mechanism or 'SSM', Part One of the Banking Union" (2014) NBB Working Paper Number 255 at 37.

[37] SSM Regulation, Recital (28) of the Preamble. See also Neumann, *supra* note 33 at 11.

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Concerning the day-to-day supervision of CRIs, the SSM Regulation foresees a division of work whereby the ECB supervises "significant" credit institutions (SIs) directly, whereas the NCAs are in charge of supervising the "less significant" credit institutions (LSIs) under ECB oversight.[38] In practice, as of 1 January 2017, the ECB exercises direct supervision over 127 SIs accounting for more than 80 percent of the assets of the euro area banking sector,[39] leaving some 3,500 LSIs under the supervision of the NCAs.[40] The ECB still keeps important formal powers with regard to LSIs, through the competence to issue general instructions and guidelines to the NCAs and the power to take over supervision of specific CRIs from NCAs in cases where this action is "necessary to ensure consistent application of high supervisory standards."[41]

The SSM Regulation vests substantive supervisory and investigatory powers in the ECB.[42] The ECB's specific supervisory powers consist of a set of intervention powers to ensure that CRIs take the necessary measures to comply with EU supervisory law and relevant national implementing legislation.[43] The ECB's investigatory powers encompass requesting wide-ranging information from CRIs and other relevant natural and legal persons, conducting general investigations, and carrying out on-site inspections at the premises of the relevant credit institution and other relevant legal persons.[44] Finally, the ECB can apply administrative pecuniary penalties to CRIs that breach directly applicable EU law.[45] In addition to these specific powers, the SSM Regulation includes broad

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38 See SSM Regulation, Article 6(4). This provision lays down a set of criteria for assessing the "significance" of credit institutions related to size, economic importance, significance of cross-border activities, value, and ratio of their assets. Further detailed provisions and procedures for determining the significance of credit institutions are prescribed in ECB, *Regulation 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17)*, [2013] O.J., L. 141/1 [SSM Framework Regulation].

39 See the list of entities supervised by the ECB, online: <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/list_of_supervised_entities_201611.en.pdf?a9caa144-fa232a75fb36cf1213edd990>; see also Schoenmaker & Véron, *supra* note 26 at 11. It should be noted that the list of institutions supervised by the ECB is updated on a regular basis.

40 *Guide to Banking Supervision*, *supra* note 4 at 13.

41 SSM Regulation, Article 6(5).

42 For an overview, see K. Lackhoff, "The Framework Regulation for the Single Supervisory Mechanism" (2015) 26 International Company and Commercial Law Review 18 at 22.

43 SSM Regulation, Article 16. See also Wolfers & Voland, *supra* note 36 at 1477.

44 SSM Regulation, Articles 10-13. See also Wolfers & Voland, *supra* note 36 at 1476, and Schuster, *supra* note 32 at 8.

45 SSM Regulation, Article 18. For a comprehensive analysis of the ECB's sanctioning powers, see S.H. Schneider, "Sanctioning by the ECB and National Authorities within the Single Supervisory Mechanism" (2014) European Journal of Business Law 18.

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wording that refers to "all powers (. . .) which competent and designated authorities shall have under relevant Union law."[46] Whereas it may be assumed that the ECB would rely on such powers only in the absence of a more specific power, the precise range of the ECB's general powers remains unclear. In this context, it has been suggested that the ECB might even exercise powers provided under national law implementing relevant EU legislation.[47]

The exercise of the ECB's powers is subject to a duty of close cooperation with the NCAs.[48] The general duty of the NCAs to lend assistance in the preparation and implementation of any acts of the ECB within the scope of its tasks under Article 4 of the SSM Regulation[49] arguably also encompasses the exercise of the ECB's related powers.[50] Furthermore, the NCA's duty to provide assistance to the ECB is expressly stated in provisions regarding the ECB's specific investigatory and supervisory powers, such as general investigations and on-site inspections.[51] At the same time, the NCAs are to complement the lack of the ECB's supervisory powers under the SSM Regulation by exercising their own powers under national law at the ECB's request and under its instructions.[52]

Observing even more closely the mode of cooperation between the ECB and the NCAs, consistent with Articles 6 and 9 of the SSM Regulation, the SSM Framework Regulation[53] and the ECB's *Guide to Banking Supervision* sketch a supervisory model premised on "intensive cooperation" between the ECB and the NCAs.[54] From this model it appears that the ECB's vision of the functioning of the SSM does not so much entail a hierarchical relationship with the NCAs, but rather favours an integrated system of peers based on smooth cooperation and the combining of different strengths and resources with a view to ensuring

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46 SSM Regulation, Article 9(1).

47 See Schuster, *supra* note 32 at 8. This view seems to find support in Article 93(2) of the SSM Framework Regulation, which provides that the ECB "shall have the supervisory powers that competent authorities have under the relevant Union and national law" with a view to assess the suitability of managers of significant supervised entities.

48 SSM Regulation, Article 9(2).

49 SSM Regulation, Article 6(3).

50 See Schuster, *supra* note 32 at 9. According to this author, in such instances, the resulting legal acts addressed to third parties should be considered as ECB acts.

51 SSM Regulation, Articles 11-12.

52 SSM Regulation, Article 9(1). For more details in this regard, see Schuster, *supra* note 32 at 9. This author maintains that acts resulting from the exercise of NCAs' powers in such situations remain acts of the NCAs, and not acts of the ECB.

53 SSM Framework Regulation, in particular Articles 20 to 22 and 90 to 92.

54 See *Guide to Banking Supervision*, *supra* note 4 at 9. It should be noted that this guide is a shortened public version of the detailed supervisory manual covering the processes, procedures, and methodology for the supervision of both significant and less significant institutions. The latter document is considered to be a "living document" and is updated on a regular basis, ECB, *Annual Report on Supervisory Activities* 2015 (2016) at 33, online: <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmar2015.-en.pdf?76bfa705d9eb131ceed673b36b94079a>.

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effective banking supervision.[55] The facts that the planning and execution of the tasks conferred on the ECB, namely drafting supervisory decisions, lie with the newly established Supervisory Board and that the final decision-making power lies with the ECB Governing Council seem to imply a centralized governance structure.[56] However, on closer examination, a more complex governance structure emerges also in this area.

Under the SSM Framework Regulation, separate Joint Supervisory Teams (JSTs) have been set up as operational units for the supervision of each significant credit institution.[57] A JST brings together staff from the ECB as well as from the respective NCA, and is in charge of the day-to-day supervision of a credit institution that has been designated as a significant entity.[58] Heralded as "the cornerstone in the implementation of the SSM model of supervision,"[59] JSTs are managed by an ECB coordinator assisted by a sub-coordinator from the NCA of the credit institution's home country, and are further made up of supervisory staff from the ECB and the relevant NCA.[60] The main tasks of the JSTs include performing the common supervisory review and evaluation process (SREP) of the supervised CRIs, proposing the supervisory program, implementing appropriate supervisory actions, and coordinating the on-site inspection teams.[61] In practice, it appears that the supervisory process is often organized from the bottom up, in that the ECB's Supervisory Board relies to a

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[55] See *Guide to Banking Supervision*, *supra* note 4 at 9; see also Tröger, *supra* note 2 at 470. Yet, in a recent judgement, the General Court affirms the exclusive competence of the ECB regarding its supervisory tasks listed under Article 4(1) of the SSM Regulation, and that such exclusive competence is exercised "within a decentralised framework" whereby NCAs' prudential supervisory activities have a subordinate nature and are aimed at assisting the ECB to fulfill its role, *Landeskreditbank Baden-Württemberg — Förderbank v. European Central Bank* (May 16, 2017), Doc. T-122/15, EU:T:2017:337 at ¶54 and 58-59; see for an analysis R. Smits, "Interplay of Administrative Review and Judicial Protection in European Prudential Supervision — Some Issues and Concerns" Paper presented at the Conference *Judicial review in the banking Union and in the EU financial architecture*, jointly organized by the Banca d'Italia and the European Banking Institute, Rome, 21 November 2017 at 8-11, online: SSRN <https://ssrn.com/abstract=3092805 or http://dx.doi.org/10.2139/ssrn.3092805>. This judgment is subject to an appeal before the Court of Justice, Landeskreditbank Baden-Wurttemberg, Doc. C-450/17P.

[56] See SSM Regulation, Article 26.

[57] See K. Lackhoff, "The Framework Regulation (FR) for the Single Supervisory Mechanism (SSM): An Overview" (2014) 29 Journal of International Banking Law and Regulation 498 at 501; Schoenmaker & Véron, *supra* note 26 at 10.

[58] See *Guide to Banking Supervision*, *supra* note 4 at 9.

[59] ECB, *Annual Report on Supervisory Activities*, *supra* note 54 at 30.

[60] SSM Framework Regulation, Article 3(1); see also Lackhoff, *supra* note 57.

[61] SSM Framework Regulation, Article 3. See also ECB, *Questions & Answers for the Public Consultation on the Draft ECB SSM Framework Regulation* (2014) at 4; L. Wissink, T. Duijkersloot & R. Widdershoven, "Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection" (2014) 10 Utrecht Law Review 92 at 95.

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great extent on the proposals, advice, and information provided by the JSTs when adopting its draft decisions.[62] Additionally, the common methodologies, namely the SREP,[63] through which the ECB aims to harmonize supervisory practices among euro area member states are adopted by the ECB in close cooperation with the NCAs, *inter alia* through the participation of the NCAs in the Supervisory Board.[64] In view of its role to ensure overall consistency of the SSM mechanism, the ECB also seeks to convince the NCAs to apply the common methodologies to the supervision of LSIs.[65]

As well as providing for cooperation within the JSTs, the SSM Framework Regulation and the ECB's 2014 guidelines further elaborate on the ways in which the NCAs as separate entities remain closely associated with the ECB's direct supervision of banks. In this context, more detailed provisions and procedures are provided as regards the draft decisions prepared by the NCAs for the ECB, the assistance they lend to the ECB regarding the daily supervision of banks' risk situation, the fit and proper testing of management board members, and assistance with on-site inspections and enforcement procedures.[66]

All this suggests that the exercise of all the ECB's tasks is embedded in a system of close cooperation and interaction with the NCAs.[67]

4. APPLICATION OF EU LAW AND NATIONAL LAW BY THE EUROPEAN CENTRAL BANK: AN OVERVIEW

The close cooperation and interaction between the ECB and the NCAs also become clear from a study of the main modes in which the ECB executes EU law under the SSM Regulation.[68] In brief, Witte delineates the following three modes in which the ECB fulfills its supervisory function: (1) by directly exercising powers under the SSM Regulation; (2) by giving instructions to the NCAs to make use of their powers; and (3) by directly applying national law provisions. These governance modes are shaped by the interplay between the SSM and the EU financial regulatory framework for the banking sector (the single rulebook).

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[62] See *Guide to Banking Supervision*, *supra* note 4 at 30.

[63] ECB, *SSM SREP Methodology Booklet* (2015), online: <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm_srep_methodology_booklet.en.pdf>.

[64] See SSM Regulation, Article 26(1); see also ECB, *Annual Report on Supervisory Activities*, *supra* note 54 at 34, and the *SSM SREP Methodology Booklet*, *supra* note 63 at 6.

[65] *Guide to Banking Supervision*, *supra* note 4 at 39; see also Meissner, *supra* note 20 at 337.

[66] See SSM Framework Regulation, Articles 90-95 and 120-146. See also *Guide to Banking Supervision*, *supra* note 4 at 27, and *Questions & Answers for the Public Consultation on the Draft ECB SSM Framework Regulation*, *supra* note 61 at 3.

[67] See SSM Regulation, Articles 6 and 9, and further, Articles 14-15, as regards authorizations and acquisitions of qualifying holdings; see also Schuster, *supra* note 32 at 7.

[68] Witte, *supra* note 6 at 89.

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The rulebook consists primarily of several directives, as well as one regulation. While a regulation is usually aimed at total harmonization through common European rules that are directly applicable in all member states, directives require transposition in the member states and allow in principle for divergences among national rules, as the national legislator is provided with some discretion in the implementation of these Union directives into domestic law.[69] The CRD IV and CRR (the "CRD IV package") form the backbone of the single rulebook, implementing the Basel III global standards on bank capital in the EU legal framework.[70] In a nutshell, the CRD IV package includes harmonized rules governing bank capital, liquidity, leverage, risk management, and governance, as well as supervisory review processes;[71] as such, it represents the bulk of the rules implemented under the SSM.[72] While the CRD IV by its very legal nature leaves a certain degree of discretion to the member states in its implementation, the CRR comprises detailed and highly prescriptive provisions on calculating capital requirements that are directly applicable.[73]

To be sure, the current EU banking regulatory framework certainly does not yet stand for total harmonization in this area.[74] Moreover, while the regulatory framework in the banking area applies to all EU Member States, the SSM (and also the SRM) from the outset applies only to the euro area member states.[75]

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[69] *Treaty on the Functioning of the European Union*, 13 December 2007, O.J., C. 115/47 [TFEU], Article 288. On these legal instruments, see generally D. Chalmers, G. Davies & G. Monti, *European Union Law* (Cambridge: Cambridge University Press, 2014) at 112.

[70] See Abascal, Alonso-Gispert, Fernández de Lis & Golecki, *supra* note 35 at 14 and 16.

[71] See Moloney, *supra* note 12 at 1616.

[72] See SSM Regulation, Recital (34) of the Preamble. Among the EU legislative instruments relevant for the SSM, the same recital also mentions those dealing with financial conglomerates (i.e., European Union, *Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council*, [2003] O.J., L. 35/1.)

[73] For more details and examples, see section 5(a).

[74] See section 5(a) for further discussion. The *Five Presidents' Report*, *supra* note 25 at 11, states that:

> All banks participating in the Banking Union need to enjoy a level playing field. This will require further measures, in addition to and beyond the single rule book, to address the still significant margin for discretion at national level which has important implications, notably for the quality and composition of banks' capital. A large part of the discrepancies could be addressed within the context of the Single Supervisory Mechanism. But for other issues legislative changes are necessary, in particular for those related to differing legal and institutional frameworks. Similarly, the recent revision of the Deposit Guarantee Schemes Directive has led to more harmonisation, especially on prefunding of national schemes, but it still contains some national discretion, which should be reviewed.

See also Wissink, Duijkersloot & Widdershoven, *supra* note 61 at 95. On the Capital Markets Union, see N. Moloney, "Capital Markets Union: 'Ever Closer Union' for the EU Financial System?" (2016) 41 European Law Review 307.

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This is symptomatic of the limits and complexities pertaining to the design and functioning of the SSM.

(a) Direct Application of Union Law by the ECB

In what arguably constitutes the most straightforward mode of governance, the ECB directly applies EU law in discharging its tasks within the SSM. This corresponds to the direct Union administration model whereby EU institutions are equipped with powers to apply EU law directly to natural and legal persons.[76] This model is used for implementing directly applicable primary and secondary Union law, and normally entails decisions being adopted by the competent EU institution and addressed to the relevant legal entities. For Witte, Article 16 of the SSM Regulation, which empowers the ECB to directly impose a set of requirements and measures on CRIs,[77] is the clearest example of direct execution of EU law by this Union institution.[78] The ECB's actions under this execution mode arguably extend to the exercise of its general and specific investigatory and supervisory powers whenever they materialize in an ECB act addressed to a credit institution or another third party.

(b) Application of Union Law by National Competent Authorities on Instructions by the ECB

In a second mode of operation, the ECB can ensure execution of the EU legal framework within the SSM framework indirectly through instructions addressed to the NCAs. This stands for an application of the traditional indirect

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75 Non-euro area member states can join the SSM by means of close cooperation agreements that have to be established between the ECB and the NCA of the non-euro area member state concerned (SSM Regulation, Article 7). So far, no non-euro member state has joined the SSM; see ECB, *Annual Report on Supervisory Activities*, *supra* note 54 at 57.

76 The most obvious example is to be found in the area of competition law, wherein the European Commission is entrusted with wide-ranging powers to apply and enforce EU competition rules directly against undertakings.

77 SSM Regulation, Article 16(2) enables the ECB to: (a) require institutions to hold their own funds in excess of the capital requirements; (b) require the reinforcement of the arrangements, processes, mechanisms, and strategies; (c) require institutions to present and implement a plan to restore compliance with supervisory requirements; (d) require institutions to apply a specific provisioning policy or treatment of assets; (e) restrict or limit the business, operations, or network of institutions or request the divestment of activities; (f) require the reduction of the risk inherent in the activities, products, and systems of institutions; (g) require institutions to limit variable remuneration as a percentage of net revenues; (h) require institutions to use net profits to strengthen their own funds; (i) restrict or prohibit distributions by the institution to shareholders, members, or holders of Additional Tier 1 instruments; (j) impose additional or more frequent reporting requirements; (k) impose specific liquidity requirements; (l) require additional disclosures; (m) remove at any time members from the management body of CRIs.

78 See Witte, *supra* note 6 at 96.

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administration model in which national authorities are in charge of the direct application of EU law under the oversight of EU institutions. The main provisions enshrining this mode of execution of EU law by the ECB are Articles 6 and 9 of the SSM Regulation. As previously observed, Article 6(3) allows the ECB to address specific instructions to the NCAs when the NCAs assist the ECB with the preparation and implementation of acts in the exercise of the ECB's tasks under Article 4 of the SSM Regulation. This suggests a broad scope of the ECB's powers of instruction corresponding to its supervisory tasks and powers under the SSM Regulation.[79] A combined reading of the provisions of Article 6 of the SSM Regulation with the provisions of the SSM Framework Regulation permits fine-tuning the ambit of the ECB's powers of instruction. The reference in Article 6(3) of the SSM Regulation to the ECB's tasks "related to all credit institutions" followed by the delineation between significant institutions and less significant institutions by Article 6(4) implies that the ECB's powers of instruction with regard to all CRIs target particularly their authorization[80] and notification of acquisition/disposal of qualifying holdings.[81] Additionally, the SSM Framework Regulation makes clear that the NCAs are under a duty to follow the ECB's instructions in the context of the performance of its supervisory tasks concerning significant institutions.[82] Yet when the final decision affecting a CRI is issued by the ECB (for instance in the case of authorisation of CRIs where NCAs perform essentially preparatory acts), the situation reverts back to the direct application mode. With regard to LSIs, Article 6(5) of the SSM Regulation enables the ECB to address general guidelines and instructions to the NCAs without interfering with NCA supervision in individual cases.[83] As for the previously mentioned paragraph 3 of Article 9(1), it permits the ECB to instruct the NCAs to exercise their powers granted by national law that are not conferred to the ECB under the SSM Regulation.[84] As will be discussed in more detail in section 5(c), this two-fold execution mode raises complex questions regarding the *locus standi* for judicial review.

(c) Direct Application of National Law by the ECB

Article 4(3) of the SSM Regulation entails a third mode of execution of EU law by a Union institution that has been rightly characterized as "a genuine novelty."[85] Paragraph 1 of Article 4(3) of the SSM Regulation reads as follows:

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79 *Ibid.* at 103. This seems further supported by the phrasing of Article 6(3) of the SSM Regulation, which stipulates that NCAs must assist the ECB "where appropriate."

80 SSM Regulation, Article 4(1)(a).

81 SSM Regulation, Article 4(1)(c).

82 ECB Regulation, Article 90(2).

83 See Witte, *supra* note 6 at 103.

84 Wymeersch, *supra* note 36 at 40, labels this situation as a form of "substitute supervision."

85 See Witte, *supra* note 6 at 109.

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> For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the *national legislation transposing those Directives*. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also *the national legislation exercising those options*.[86]

The rationale of Article 4(3) of the SSM Regulation is to enable the ECB to exercise effective and coherent supervision over banking institutions with regard to all aspects covered by the set of EU rules on prudential supervision.[87] If the ECB were only able to apply directly applicable EU law, the scope of its direct supervisory role would be limited to the CRR, and — in the opinion of some commentators — also to directly applicable provisions of the CRD IV, the directive on financial conglomerates, and the BRRD.[88] Beyond this, the ECB would in principle only monitor enforcement by the NCAs of national rules implementing EU directives and make use of its powers of instruction in relation to these rules.[89] However, what may be considered a pragmatic solution is not entirely unproblematic when it comes to its theoretical underpinnings, and moreover its practical implications.

The phrasing of paragraph 1 of Article 4(3) suggests that the application of national law by the ECB is integrated within its wider obligation to apply "all relevant EU law" for the purpose of discharging its tasks under the SSM Regulation. In this respect, one may inquire what the implications are of the application by the ECB of national law as a matter of EU law. Is the national law applied by the ECB according to the SSM Regulation "transformed" into some kind of EU law? Does this represent a hybrid solution that challenges the distinction between the law adopted by the EU institutions and the law enacted by the member states, as well as our current understanding of what "EU law" means?

Witte suggests that the peculiar mode of execution of EU banking supervisory law foreseen in Article 4(3) could be conceptualized by 'borrowing' dualist theories regarding the implementation of international law in the domestic law of states.[90] The author advances two alternatives for explaining the application of national law by the ECB. First, the scenario

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86 Emphases added.

87 In this respect, see Witte, *supra* note 6 at 109.

88 See Schuster, *supra* note 32 at 8.

89 For a parallel with the EBA's supervisory powers pre-SSM Regulation, see Witte, *supra* note 6 at 91 and 97.

90 *Ibid.* at 106. More precisely, Witte refers to the transformation theory, which suggests that the national statute implementing a treaty changes the nature of the treaty provisions from international to domestic law, and to the theory of adoption, which suggests that the implementing national statute simply ensures the application of the treaty without affecting its international law character.

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covered by Article 4(3) could be understood as some sort of "transformation" of national law transposing directives or exercising member state options into EU law by means of the SSM Regulation.[91] Alternatively, the duty placed on the ECB to apply national law could be regarded as a "command to apply" the SSM Regulation without the nature of the relevant national law being changed as such.[92] While displaying a preference for the "command to apply" model,[93] Witte acknowledges that the consequences of the two approaches are alike.[94]

However, it is questionable to what extent dualist theories regarding the implementation of international law in domestic law are appropriate with a view to explaining this peculiar mode of execution of EU law. As observed by Witte, the situation of diffusing a national measure into the EU legal order with a view to making it directly applicable by an EU institution is basically a "mirror image" of the dualist theories.[95] Furthermore, the question is whether theories premised upon a clear separation between the international and domestic legal orders can really be applied in the context of the rather monistic approach followed by the Court of Justice of the European Union (CJEU) in its *Flaminio Costa v. E.N.E.L* line of case law,[96] which entails a unique degree of integration between the EU and member states' legal orders. While for the time being the mode of execution to be found in Article 4(3) of the SSM Regulation may thus seem rather peculiar, it arguably reflects the ever-increasing degree of

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[91] *Ibid*. at 107.

[92] *Ibid*. at 108.

[93] A similar view is followed by M. Lamandini, D.R. Muñoz & J.S. Álvarez, "Depicting the Limits to the SSM's Supervisory Powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection" (2015) 79 Banca d'Italia, Quaderni di Ricerca Giuridica della Consulenza Legale 90. The main argument invoked by Witte in supporting his choice is based on Recital 34 of the Preamble of the SSM Regulation, which, in his view, indicates that the relevant EU law consists only of regulations and directives without national measures being included. However, a close reading of Recital 34 suggests that the listing of the acts included under relevant EU law is not exhaustive (i.e., "Those rules are composed of the relevant Union law, *in particular* [emphasis added] directly applicable Regulations or Directives (. . .)"). This raises the question of what else is to be included under "relevant Union law" in the context of the ECB's discharge of its tasks and powers under the SSM. One interpretation could be that the scope of relevant EU law is limited to other acts and measures adopted by the EU institutions. A more extensive interpretation in line with the transformation scenario would be that, for the purpose of fulfilling its supervisory role under the SSM Regulation, the relevant Union law also encompasses the national measures giving full effect to directives and specific provisions of regulations in the member states.

[94] Witte, *supra* note 6 at 108.

[95] *Ibid*.

[96] *Flaminio Costa v. E.N.E.L.* (July 15, 1964), Doc. C-6/64, EU:C:1964:66; *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (December 17, 1970), Doc. C-11/70, EU:C:1970:114; *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* (March 9, 1978), Doc. C-106/77, EU:C:1978:49.

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interdependence and interpenetration between the law enacted by the EU institutions and the law of the member states.

Indeed, the conventional model restricting EU institutions to directly applying only EU legal acts in combination with the use of national institutions as decentralized units to apply Union law might no longer suffice to achieve the objectives of Union legal acts. Such is arguably the case for the ECB under the SSM Regulation, in that its supervisory role, tasks, and powers could be severely impaired within the scope of, for instance, the CRD IV if it were not in the position to apply all relevant Union law, including transposed directives, in a consistent way, but instead had to rely on the cooperation of the NCAs. From this point of view, the application by the ECB of national measures giving effect to EU law may actually be regarded as *a derivative of the direct administration model*. Accordingly, the application by virtue of the SSM Regulation of national measures instrumental to the EU prudential rules could be considered equivalent to the direct application of EU law by an EU institution. The advantage of such a construct that conceives of the application of national law by an EU institution as direct application of EU law is that it accounts for the hybridity that characterizes the Union and member states' legal orders.

This in turn calls for a reflection on the current understanding of the concept of EU law. One way to approach it is to make a distinction between EU law *sensu stricto* (i.e., the founding treaties and the acts adopted by the EU institutions) and EU law *sensu lato* (i.e., the founding treaties and the acts adopted by the EU institutions plus national measures ensuring their effectiveness). One obvious advantage of this approach is that it makes clear that such instances fall within the CJEU's jurisdiction, since an EU institution applying national legislation is ultimately executing EU law.[97] At the same time, this scenario is limited to the issue of the application of rules and does not question the nature of national law as such. Accordingly, the national legislation applied by the ECB remains national in that it is adopted by each member state and is applicable only within its own territory, and it must comply with EU law *sensu stricto*.

An alternative approach entails considering the acts adopted by an EU institution in the application of national law as similar to acts of national authorities, triggering the jurisdiction of national courts, such as is the case with the procedural acts affecting third parties of the European Public Prosecutor's Office (EPPO).[98] However, the situation of the EPPO may be considered very

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[97] This is important especially in view of the basic constitutional principle that the CJEU does not interpret and apply national law (see, for instance, *Francisco Javier Rosado Santana v. Consejería de Justicia y Administración Pública de la Junta de Andalucía* (September 8, 2011), Doc. C-177/10, EU:C:2011:557 at ¶60). For a more detailed analysis of the CJEU's jurisdiction regarding the ECB's acts applying national law, see section 5(c).

[98] European Union, *Council Regulation (EU) 2017/1939 of 12 October 2017 implementing*

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specific,[99] and, therefore, it is questionable whether the derogatory judicial review model envisaged by the EPPO Regulation could apply *mutatis mutandis* to the ECB under the SSM Regulation.

5. THE MANY (POTENTIAL) PITFALLS OF THE APPLICATION OF NATIONAL LAW BY THE EUROPEAN CENTRAL BANK

Apart from the challenge to legally conceptualize the approach taken with Article 4(3) of the SSM Regulation to the application of national law, this mode of governance also entails myriad practical legal issues with potentially far-reaching implications for not only the working of the SSM but also the Union legal order more broadly.

(a) The Scope of Application of National Law by the ECB

Article 4(3) of the SSM Regulation entails two different scenarios under which the ECB is applying national law, namely national measures transposing relevant EU directives and national measures through which options granted to the member states by relevant EU regulations are exercised. As to the directives and regulations that are relevant under Article 4(3) of the SSM Regulation, these pertain mainly to the substantive body of EU prudential rules, in particular the previously mentioned CRD IV and CRR, and to a certain extent the BRRD (as regards supervisory powers related to early intervention).[100] To be sure, the scope of application of national law by the ECB is largely determined by the CRD IV, covering the previously mentioned authorization of CRIs, the acquisition of qualifying holdings, CRI governance, initial capital requirements and capital buffers, the exercise of the freedom of establishment and of the freedom to provide services, and the prudential supervision of CRIs together with the related powers of the competent authorities.[101] Next to these provisions, the CRR sets detailed prudential rules for CRIs,[102] covering detailed and highly prescriptive provisions on calculating capital requirements.[103] In brief, the CRD IV thus provides a set of prudential supervisory tasks, powers, and tools[104] to be

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enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), [2017] O.J., L. 283/1 (EPPO Regulation), Article 42(1).

[99] Article 86(2) of the TFEU reserves for the EPPO the exercise of specific investigative and prosecution functions within the national legal orders and in the competent courts of member states. For this purpose, the EPPO Regulation (*ibid.*) rather approximated the EPPO to a national authority and subjected its acts of investigation and prosecution to the jurisdiction of national courts.

[100] See S. Lautenschläger, "Single Supervisory Mechanism — Single Supervisory Law?" (Keynote speech delivered at the Workshop of the European Banking Institute (EBI) hosted by the ECB, Frankfurt, 27 January 2016) at 36, online: <https://www.ecb.europa.eu/press/key/date/2016/html/sp160127_2.en.html>. See also *Guide to Banking Supervision*, *supra* note 4 at 36.

[101] CRD IV, Recital 2 and Article 1.

[102] See CRR, Recital 7 of the Preamble.

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applied by competent authorities on CRIs, while the CRR introduces a set of uniform and detailed prudential requirements that CRIs need to fulfill.

A combined reading of the CRD IV and CRR[105] entails extending the application of the range of supervisory tasks, powers, and tools under the CRD IV to the areas covered by the CRR.[106] Initially exercised exclusively by the NCAs of the member states, most of the tasks, powers, and tools provided under the CRD IV package are now conferred on the ECB under the SSM Regulation.[107] This conclusion is also supported by the second subparagraph of Article 9(1) of the SSM Regulation, which specifies that in carrying out its tasks under the SSM Regulation, the ECB has "all the powers and obligations, which competent authorities and designated authorities shall have under relevant Union law, unless otherwise provided by this Regulation."

As was briefly mentioned,[108] the CRD IV requires national transposition in order to become fully effective, whereas the CRR in principle establishes uniform rules directly applicable in the member states. The CRD IV does not stand for full harmonization, as is clear from the preamble of the directive stating that its "main objective and subject-matter (. . .) is to coordinate national provisions concerning access to the activity of CRIs and investment firms, the modalities for their governance, and their supervisory framework."[109] Besides, various provisions allow member states to exercise options and discretions[110] that permit the adoption of additional or stricter rules and requirements[111] (the so-called "gold plating" provisions[112]) or the departing from certain requirements

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[103] CRR, Recital 7 of the Preamble and Article 1.

[104] Such powers and tools cover authorization, supervision, capital buffers, sanctions, etc.

[105] See CRR, Recital 5 of the Preamble, and CRD IV, Recital 2 of the Preamble.

[106] See CRR, Article 2.

[107] SSM Regulation, Article 4 (this is obvious at least regarding micro-prudential supervision). As for macro-prudential supervision, the NCAs still hold the primary role, though the ECB may replace them "if deemed necessary" (SSM Regulation, Article 5).

[108] See section 4.

[109] CRD IV, Recital 2 of the Preamble.

[110] In the supervisory jargon, "options" refer to instances where a choice is given to the member states or their competent authorities between alternative solutions provided in EU legislation, whereas "discretions" designate the possibility to apply or not to apply certain EU law provisions (see ECB, *Feedback Statement: Responses to the Public Consultation on a Draft Regulation and Draft Guide of the European Central Bank on the Exercise of Options and Discretions Available in Union Law* (2016) at 5).

[111] E.g., with regard to corporate governance standards (see CRD IV, Recital 54 of the Preamble), to remuneration policies (see CRD IV, Recital 65 of the Preamble), or administrative penalties (see CRD IV Recital 41 of the Preamble and Articles 66-67).

[112] On the use of the term "gold plating" in the context of the implementation of EU legislation by the member states, see, e.g., European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Better Regulation for Better Results*

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and conditions laid down in the CRD IV.[113] This has also been observed by the ECB itself, which has noted that the member state's freedom to choose how to implement the CRD IV into national legislation has resulted in several provisions of the CRD IV having been transposed differently across the euro area.[114] As for the CRR, while it aims at ensuring full harmonization of general prudential requirements by means of a single set of uniform rules applicable to all CRIs throughout the Union, the regulation also maintains a degree of flexibility for the member states in certain regards. This flexibility translates into options and discretions allowing member states to maintain or introduce national legislation waiving the application of certain CRR provisions or imposing stricter ("gold-plating") requirements.[115]

As Article 4(3) of the SSM Regulation does not make any specific distinction in this regard, it may be concluded that the ECB should apply these national provisions as it finds them in the exercise of its supervisory tasks, as long as they do not contravene EU law.[116] This reading is also supported by the fact that a scenario in which the ECB would not necessarily apply national rules in their entirety to SIs, while NCAs do so for the LSIs, would result in unequal treatment

— *An EU Agenda*, COM 2015/215 final. For the use of the term "gold plating" by academics, see Schuster, *supra* note 32 at 8, Wolfers & Voland, *supra* note 36 at 1485, and Lackhoff, *supra* note 42 at 19.

[113] E.g., as regards requirements for access to the activity of credit institutions (CRD IV, Article 12(3)), to investment firms' initial capital grandfathering clause (CRD IV, Article 32(1)), and to setting variable elements of remuneration (CRD IV, Article 94(1)(g)).

[114] *Annual Report on Supervisory Activities*, *supra* note 54 at 67. In this respect, Colaert anticipates that the EU prudential banking legislation will increasingly feature the adoption of regulations, as "[t]he current situation where the ECB needs to apply 19 national implementations of the Capital Requirements Directive seems untenable in the long run" (V. Colaert, "European Banking, Securities and Insurance Law: Cutting Through Sectoral Lines" (2015) 52 Common Market Law Review 1579 at 1608).

[115] E.g., the possibility for the member states to maintain or introduce national provisions regarding liquidity coverage requirements (CRR, Article 412(5)) or stable funding requirements (CRR, Article 413(3)), to apply stricter national measures for addressing macro-prudential or systemic risks at the national level (CRR, Article 458), or to exempt, for a transitional period running until 31 December 2028, large exposures from the limits set by the CRR (CRR, Article 493(3)).

[116] This view seems to be confirmed by the ECB in the context of the option granted to member states under Article 493(3) of the CRR, which states that it will exercise any discretion left to the NCAs according to the criteria stipulated in relevant national legislation (see *Feedback Statement*, *supra* note 110 at 13). A similar deferent stance towards national law is taken by the ECB in the context of the application of options and discretions conferred on competent authorities under CRD IV, in that the ECB commits to not affecting the application of national legislation transposing that directive (see ECB, *ECB Guide on Options and Discretions Available in Union Law* (2016) at 4). Specifically with regard to governance arrangements and prudential supervision of CRIs under CRD IV, the *ECB Guide on Options and Discretions* indicates (at 34) that the relevant legal framework taken into consideration encompasses the "national implementations" of the respective CRD IV provisions.

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of CRIs and, more broadly, in an inconsistent application of the SSM legal framework, contrary to Article 1 of the SSM Regulation.[117]

In principle, it could be concluded that all relevant national legislation is liable to be applied by the ECB when carrying out its tasks under the SSM Regulation with regard to SIs and LSIs. In fact, the wording of the first subparagraph of Article 4(3) of the SSM Regulation prescribes the application of relevant national legislation as a duty for the ECB,[118] which has expressed its commitment to exercising the options and discretions granted by the CRD IV to NCAs "with due respect for the national implementing legislation."[119] While matters thus seem to be fairly straightforward, on closer inspection the scope of the ECB's direct application of national legislation also includes complex problems.

First, the application by the ECB of national law is not limited arguably to national legislation *sensu stricto*. Depending on the specific features of the transposition process of directives and of the exercise of options and discretions under the CRR in each euro area member state, more complex situations may arise, as in practice the ECB may not only have to observe primary national legislation, but also various executive acts of general application giving full effect to the CRD IV and CRR. Thus, for example, in France the CRD IV has been transposed via a legislative act enabling the government to adopt the necessary orders (*ordonnances*) to that effect.[120] Somewhat similarly, in Ireland the CRD has been transposed via a statutory instrument adopted by the Ministry of Finance.[121] In contrast, in the Netherlands the CRD has been transposed through a legislative statute, while the implementation of some of the more detailed provisions of the directive has been delegated to the government and the Dutch central bank.[122]

Second, it is not entirely clear to what extent the ECB should apply national legislation exceeding the scope of the EU rules ("gold-plating") or even national autonomous legislation in the field of banking supervision.[123] While the effectiveness of EU law and the consistency of the SSM militate for an

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[117] Article 1 of the SSM Regulation refers to "(. . .) equal treatment of credit institutions with a view to preventing regulatory arbitrage" as an essential element upon which the SSM rests.

[118] Article 4(3) of the SSM Regulation specifies that the ECB "shall apply."

[119] ECB, *Public Consultation on a Draft Regulation and Guide of the European Central Bank on the Exercise of Options and Discretions Available in Union Law: Explanatory Memorandum* (2015) at 12, online: <https://www.bankingsupervision.europa.eu/legal-framework/publiccons/pdf/reporting/pub_con_explanatory_memorandum_options_-discretions.en.pdf?bf95087a9a34cd3d654446e5bb462c8a>.

[120] Article 11 of *Loi n° 2014-1 du 2 janvier 2014 habilitant le Gouvernement à simplifier et sécuriser la vie des enterprises*, J.O.R.F. No. 2, 3 January 2014.

[121] *European Union (Capital Requirements) Regulations 2014*, S.I. No. 158 of 2014, on the basis of the *European Communities Act, 1972*, S.I. No. 27 of 1972.

[122] Wet van 25 November 2013 tot wijziging van de Wet op het financieel toezicht en enige andere wetten (Wijzigingswet financiële markten 2014), *Stb*. 2013, 487.

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extensive reading of the terms "transposition" and "national legislation exercising (. . .) option" it is not always clear in practice whether the ECB should intervene whenever the matter is within the scope of its tasks under the SSM Regulation and is linked to relevant EU law.[124] In cases of doubt,[125] the ECB could refrain from exercising "unfamiliar" national law and instead fall back on the more comfortable mode of application of national legislation via instructions issued to NCAs. As will be seen, this alternative also poses challenges, particularly as regards legal review and access to justice.

Third, despite the distinction made by the SSM Regulation between SIs and LSIs, disparities may still emerge in the interpretation and application of national legislative measures.[126] Schuster has argued in this context that the ECB should in any case interpret and apply national law in conformity with EU law and, within the scope of this obligation, rely on the interpretation given to national law by the competent national courts.[127] However, this approach is not without complications either, in that there may be jurisdictions where several courts interpret the relevant national legislation differently or provisions in the national legislation to be applied by the ECB have not yet been subject to judicial interpretation. To be sure, close cooperation and continuous dialogue between the ECB and the NCAs, as envisaged under Article 6 of the SSM Regulation, as well as within the JSTs, may help mitigate these concerns. Yet, inconsistencies and tensions might still arise in view of the fact that the ECB has overall responsibility for the consistent functioning of the SSM and that, in this role, it exercises oversight of NCAs.

A combined reading of Article 4(3) with other provisions in the SSM Regulation and general principles of EU law places some limits and nuances on the ECB's duty to apply national legislation. To begin with, the SSM Regulation

[123] For a view suggesting that the application of "gold plating" provisions and autonomous national legislation by the ECB is an issue open to discussion, but nevertheless displaying support for such a solution, see Lackhoff, *supra* note 42 at 19.

[124] See Lautenschläger, *supra* note 100. The fact remains that in practice the ECB is put in the position to interpret national legislation that is not strictly speaking directly transposing directives or exercising options and discretions under EU law, but which is nevertheless relevant for the exercise of ECB's supervisory powers under the SSM legal framework (e.g. for the purpose of determining whether a banking group in a member state qualifies as a "supervised group" according to Article 2(21)(c) of the SSM Framework Regulation and whether various components of such a group qualify as "institutions permanently affiliated to a central body" within that group according to Article 10 CRR); such situations are far from being uncontroversial and they lead increasingly to litigation in practice as illustrated by the recent judgments of the General Court in cases *Crédit Mutuel Arkéa v. European Central Bank* (December 13, 2017), Doc. T-52/16, EU:T:2017:902 and *Crédit Mutuel Arkéa v. European Central Bank* (December 13, 2017), Doc. T-712/15, EU:T:2017:900.

[125] In this respect, Lautenschläger (*ibid.*) points to the need to devise "a consistent approach towards applying national legislation that goes beyond European norms."

[126] See also Wymeersch, *supra* note 36 at 14.

[127] Schuster, *supra* note 32 at 8.

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itself restricts the application of national law by the ECB. A specific application of this restriction is provided by Article 18(5) of the SSM Regulation, which stipulates that only the NCAs may apply pecuniary penalties on CRIs for breaching national law transposing directives, albeit at the ECB's request.[128] Moreover, the exercise by the ECB of options and discretions, which the CRR makes available only to NCAs, is explicitly excluded by secondary Union law.[129] The application by the ECB of national legislation is further nuanced on the basis of the cooperative framework established under Article 6 of the SSM Regulation.[130] In this context, when adopting a final decision that entails the application of national legislation, the ECB will likely follow closely the assessment of that legislation made by the respective NCA.[131] Finally, an important limitation of this duty is to be derived from the general principles of effectiveness and primacy of EU law entailing that the ECB should not apply existing national law conflicting with EU law,[132] a view shared by the European supervisor itself.[133]

(b) The Special Case of (Partially) Non-implemented Secondary Union Law

The fact that the single rulebook is to a considerable extent based on Union law in the shape of directives forms a particular challenge. How must the ECB

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[128] Pursuant to SSM Regulation, Article 9(1).

[129] See Recitals 7-8 of the Preamble and Article 1 of ECB, *Regulation (EU) 2016/445 of the European Central Bank of 14 March 2016 on the exercise of options and discretions available in Union law (ECB/2016/4)*, [2016] O.J., L. 78/60.

[130] For more details, see section 3.

[131] *Ibid.*

[132] See for instance *Fratelli Constanzo* (June 22, 1989), Doc. C-103/88, EU:C:1989:256 at ¶31, and *Littlewoods Retail Ltd. and Others* (July 19, 2012), Doc. C-591/10, EU:C:2012:478 at ¶33, as regards the obligation of national administrative authorities to disapply national measures that contradict directives. See also *Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato* (September 9, 2003), Doc. C-198/01, EU:C:2003:430, with regard to the more general duty to disapply national measures that are in breach of provisions of the founding EU treaties. While this duty is traditionally imposed on the authorities of the member states, since they are normally responsible for applying national legislation, it is reasonable to assume that it should be extended *a fortiori* to EU institutions and bodies when they are applying national legislation. This idea is also conveyed by Recital 7 of the Preamble of Regulation 2016/445, which specifies that the national legislation applied by the ECB under relevant directives and regulations "should not affect the smooth functioning of the SSM, for which the ECB is responsible." See also R. D'Ambrosio, "The ECB and NCA Liability within the Single Supervisory Mechanism" (2015) 59 Quaderni di Ricerca Giuridica at 105. For a view suggesting that national legislation that incorrectly transposed a directive should be applied in principle by the ECB, see Schuster, *supra* note 32 at 8.

[133] See *Feedback Statement*, *supra* note 110 at 10. This is further supported by Recital 34 of the Preamble of the SSM Regulation, which specifies that the application of national legislation by the ECB is without prejudice to the principle of primacy of EU law.

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act in the case of an incorrect implementation or a (partial) non-implementation of a relevant EU directive by a member state?

With regard to the application of macro-prudential tools according to Article 102 of the SSM Framework Regulation, the application by the ECB of tools that are provided in a directive is explicitly excluded if the respective directive has not been implemented into national law. As regards all other instances of a direct application of a non-transposed directive, in addition to the wording of Article 4(3) of the SSM Regulation, according to which the ECB must apply "the national legislation transposing those directives," several arguments closely linked to the nature of directives as an EU legal instrument pursuant to Article 288 of the TFEU militate against a direct application of a directive.[134] First, the situation in which the ECB as a Union institution directly applies provisions of a non-implemented directive to CRIs in the respective member state arguably represents a variation of direct effect of a directive in a reversed vertical relation. While the ECB does not qualify as an organ of the member states, by the virtue of its powers pursuant to Article 4(3) of the SSM Regulation, it exercises public authority on the territory of the respective member state. In fact, Article 9(1) of the SSM Regulation states that, for the exclusive purpose of carrying out the tasks *inter alia* referred to it by Articles 4(1) and 4(2), "the ECB shall be considered, as appropriate, the competent authority or the designated authority in the participating Member States." The direct application of an EU directive by the European supervisor vis-à-vis a supervised credit institution thus amounts to a government authority relying on a non-implemented directive to impose certain obligations on a legal person. However, the direct application of directives to legal or natural persons in such reversed vertical situations has been rejected by the CJEU starting with the *Marshall* and *Kolpinghuis* cases, namely with reference to the principle of legal certainty and non-retroactivity.[135] Indeed, in the case of the direct application of a directive, the respective credit institution would have to abide by two sets of (likely different) rules, namely those in the non-implemented directive and those in the existing applicable national legislation. Moreover, such a scenario is liable to perturb consistency in banking supervision by subjecting SIs to supervisory standards that are not applied by the NCAs to the other CRIs. Finally, it can be noted that the creation of obligations for individuals with immediate effect as a result of the direct application of a non-implemented directive would effectively remove the essential differences between directives and regulations as foreseen in Article 288 of the TFEU.[136]

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[134] For an opposite view, see Schuster, *supra* note 32 at 8.

[135] *M.H. Marshall* (February 26, 1986), Doc. C-152/84, EU:C:1986:84; *Criminal proceedings against Kolpinghuis Nijmegen* (October 8, 1987), Doc. C-80/86, EU:C:1987:431.

[136] See *Paola Faccini Dori v. Recreb Srl.* (July 14, 1994), Doc. C-91/92, EU:C:1994:292, where the CJEU points to the differences between directives and regulations. See also Witte, *supra* note 6 at 109.

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This prohibition of a reversed vertical direct effect arguably also excludes the fact that the ECB relies on the so-called "indirect effect" of a non-implemented directive by stretching the principle of consistent interpretation as much as possible so as to avoid an open conflict between the directive and the national legislation.[137] Indeed, providing the ECB with the possibility of interpreting existing national legislation as much as possible in line with the directive in determining its measures addressed to a credit institution would effectively amount to a reversed direct effect situation if those measures resulted in imposing on the credit institution obligations laid down in the non-implemented directive.[138] To be sure, this and other limits established by the CJEU[139] do not in general exclude that the ECB as much as possible interprets existing national law consistently with existing EU law.[140]

Concerning SIs, the presently argued prohibition for the ECB to apply non-implemented or incorrectly transposed directives directly or indirectly (through interpretation in conformity with the directive) does imply that in certain cases the ECB becomes restricted in its scope of application of the single rulebook and exercises only partial supervision, limited to the application of directly applicable EU regulations and implemented EU directives. In such a scenario, the effectiveness and consistency of banking supervision may be at stake. Concerning LSIs, for which the NCAs are responsible in the first instance, the only remaining option for the ECB is to take over supervision with a view "to ensure consistent application of high supervisory standards."[141] Yet, the question remains of what rules the ECB may apply in such cases to LSIs instead of the national rules deemed to be in breach of EU law.

From the EU point of view, it will mainly be up to the European Commission to ensure the timely implementation of the secondary Union legal framework, thereby making use where necessary of the infringement procedure provided for in Article 258 of the TFEU in conjunction with Article 260(3) of the TFEU. Damages that may result from the non-implementation of a directive

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[137] The case law of the CJEU on the interpretation of national law in conformity with a non-transposed directive concerns cases in which natural or legal persons have invoked the provisions of a directive. See *Von Colson* (April 10, 1984), Doc. C-14/83, EU:C:1984:153, as regards an incorrectly implemented directive and *Marleasing* (November 13, 1990), Doc. C-106/89, EU:C:1990:395, concerning a non-implemented directive.

[138] In this regard, see *Arcaro* (September 26, 1996), Doc. C-168/95, EU:C:1996:363 at ¶42.

[139] The interpretation of national legislation in light of the directive also reaches its limits when it results in a meaning that is contrary to the respective national provision (*contra legem*) or when it breaches fundamental principles such as legal certainty and non-retroactivity of criminal liability. See, *inter alia*, *Marleasing*, *supra* note 137, and *Kolpinghuis*, *supra* note 135.

[140] According to *Pfeiffer* (October 5, 2004), Doc. C-397/01 to C-403/01, EU:C:2004:584 at ¶115, the scope of consistent interpretation covers the whole legal system of a member state.

[141] SSM Regulation, Article 6(5)(b). Due to the cooperative nature of the SSM, such an extreme scenario is not likely to occur frequently in practice.

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may moreover give rise to state liability in the domestic legal order pursuant to the principles and conditions set out by the CJEU.[142]

The fact that the ECB should not be in a position to overcome the lack of national transposing legislation does not as such exclude the possibility of a credit institution invoking the application of the non-implemented directive by the ECB. This could be the case if the credit institution considers the provisions of a directive more advantageous than existing national legislation and can show that the relevant provisions are sufficiently precise and unconditional.[143] On the one hand, it can be pointed out that this circumstance resembles a situation where the provisions of a non-implemented directive are relied upon by a natural or legal person vis-à-vis a public authority (vertical direct effect). This has in principle been accepted by the CJEU.[144] On the other hand, it can be argued that the CJEU's justification of the vertical direct effect of directives with reference to the obligation of member states to transpose directives and the *effet utile* of Union law does not equate with the situation envisaged in Article 4(3) of the SSM Regulation. After all, the ECB is neither the addressee of the directive nor is it in a position to transpose the directive into national law. At the same time, ruling out the direct vertical effect of a directive vis-à-vis the ECB due to its status apart from the NCAs can create the at least equally peculiar situation that a credit institution may rely on the more favourable provisions of a directive vis-à-vis its own NCA but not vis-à-vis the ECB, which, according to the before-mentioned Article 9(1), is to be considered the competent authority when fulfilling the prudential supervisory tasks assigned to it.

(c) Judicial Review of the Application of National Law by the ECB

When considering the previous discussion, it takes little imagination to realize that, in this system introduced mainly by Article 4(3) of the SSM Regulation, in which the ECB's decisions addressed to CRIs based on the powers vested by the SSM Regulation are at least partially based on the law of a participating member state, judicial review is perhaps among the most intricate and controversial aspects related to the application of national legislation by the ECB.[145]

The question then is at what level in the multilayered European legal order the legality of the ECB's decision can be reviewed, based on which set of rules, as well as what avenues for legal redress are available to those affected by the ECB's actions. Surprisingly, this issue does not appear to have been given much

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[142] In this respect, see *Francovich and Bonifaci v. Italy* (November 19, 1991), Doc. C-6/90 and C-9/90, EU:C:1991:428, and *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd. and others* (March 5, 1996), Doc. C-46/93 and C-48/93, EU:C:1996:79.

[143] See, for instance, *Tullio Ratti* (April 5, 1979), Doc. C-148/78, EU:C:1979:110.

[144] See, for instance, *Marshall*, *supra* note 135.

[145] For an overview regarding judicial review of decisions adopted under the SSM, see Lamandini, Muñoz & Álvarez, *supra* note 93 at 86.

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reflection during the process of the drafting of the SSM Regulation. It is notable that the Commission's proposal for the SSM Regulation had not been preceded by a formal impact assessment due to the urgency of enacting the new banking supervisory framework.[146] In fact, in the initial September 2012 proposal, Article 4(3) did not state anything about the ECB applying national law in the exercise of its supervisory tasks.[147] The legal implications of the application of national legislation by the ECB were also not at all addressed in the ECB's opinion on the proposed SSM Regulation.[148] As a matter of fact, the application of national legislation by the ECB appears for the first time in Article 4(3) in the November 2013 version of the proposed SSM Regulation.[149]

Turning first to the question of the competent court,[150] it can be noted at the outset of the analysis that the ECB's decisions applying relevant national law are ultimately adopted in carrying out its tasks and exercising its powers conferred by the SSM Regulation. From this perspective, its application of national law can be viewed as instrumental to the implementation of the SSM Regulation and thus deeply rooted in secondary Union law. Accordingly, the ECB's decision applying national law under the specific circumstances of the SSM remains in principle an act adopted by an EU institution, entailing legal review by the CJEU.[151] More precisely, the General Court has jurisdiction to judge in first instance actions brought against ECB decisions, with the possibility of lodging

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[146] European Commission, *Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions*, COM 2012/511 final at 3.

[147] In its initial draft version, Article 4(3) simply provided that the ECB could enact regulations, recommendations, and decisions "to implement or apply Union law, to the extent necessary to carry out the tasks conferred upon it by this Regulation" (*ibid.* at 21). The only instance in which application of national legislation was mentioned was with regard to the authorization of CRIs, where the ECB was required to "take into account the additional conditions that may be set out by national legislation" (*ibid.* at 6).

[148] See ECB, *Opinion of the European Central Bank of 27 November 2012 on a proposal for a Council regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions and a proposal for a regulation of the European Parliament and of the Council amending Regulation 1093/2010 establishing a European Supervisory Authority (European Banking Authority)*, CON 2012/96, [2013] O.J., C.30/6.

[149] European Commission, *Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (Presidency compromise)*, 16668/12 of 27 November 2013 at 28. In this version of the proposal, Article 4(3) stipulated that the ECB would apply national legislation transposing relevant directives.

[150] For more elaborated discussions on this issue, see G. Ter Kuile, L. Wissink & W. Bovenschen, "Tailor-Made Accountability within the Single Supervisory Mechanism" (2015) 52 Common Market Law Review 155 at 181; Lamandini, Muñoz & Álvarez, *supra* note 93 at 87.

[151] In particular under TFEU, Articles 263, 265, 267, and 277. See also Ter Kuile, Wissink & Bovenschen, *ibid.* at 182.

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an appeal before the CJEU.[152] The fact that, according to Article 13 of the SSM Regulation, on-site inspections conducted by the ECB require *prior* domestic judicial authorization does not mitigate this conclusion. Indeed, while the competent national court may pursue an authenticity and arbitrariness check of the ECB decision, the legality review of that decision is explicitly reserved to the Luxembourg courts.[153] Furthermore, the SSM Regulation does not include special provisions regarding legal review,[154] unlike, for example, the case of the EPPO Regulation, which assimilates specific acts of the EPPO to acts of the national competent authorities for the purpose of judicial review.[155] In the absence of such a derogatory provision, the general system established by the founding treaties arguably applies to the ECB's decisions applying national legislation within the SSM. This approach also best fits what was observed in section 4(c) with regard to the nature of the application of national law by the ECB, which can be understood as resulting from the hybridity characterizing the Union and member states' legal orders.

To be sure, the CJEU's exclusive jurisdiction over the ECB's decisions applying national legislation transposing directives or exercising options under the CRR raises major concerns. First, natural and legal persons intending to challenge an ECB decision will be subject to the strict admissibility requirements of the fourth paragraph of Article 263 of the TFEU, as interpreted in the *Plaumann* case.[156] This may not be much of an issue for the CRIs concerned. After all, according to Article 2(26) of ECB Regulation 468/2014,

> ECB supervisory decision' means a legal act adopted by the ECB in the exercise of the tasks and powers conferred on it by the SSM Regulation, which takes the form of an ECB decision, is addressed to one or more supervised entities or supervised groups or one or more other persons and is not a legal act of general application.

From this definition, it can be concluded that the decisions adopted by the ECB in the exercise of its supervisory tasks are in principle individual acts. Thus, the CRIs to whom these decisions are addressed should have no particular difficulties in meeting the direct and individual concern requirements according to the *Plaumann* criteria.[157] However, access to justice may not be so

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[152] TFEU, Article 256. See also Wolfers & Voland, *supra* note 36 at 1483.

[153] For a brief analysis of these issues, see Gy. Bándi et al., eds., *European Banking Union, Proceedings of the XXVII FIDE Congress*, vol. 1 (Wolters Kluwer: Budapest, 2016) at 263 and 333; Wissink, Duijkersloot & Widdershoven, *supra* note 61 at 109.

[154] Lamandini, Muñoz & Álvarez, *supra* note 93 at 86.

[155] *EPPO Regulation*, *supra* note 98.

[156] *Plaumann & Co v. Commission* (July 15, 1963), Doc. C-25/62, EU:C:1963:17. Generally, with regard to the standing requirements for non-privileged applicants, see, e.g., Chalmers, Davies & Monti, *supra* note 69 at 443.

[157] See Wolfers & Voland, *supra* note 36 at 1484. With regard to the standing of individual members of a banking group, see *Crédit Mutuel Arkéa v. European Central Bank*

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straightforward for third parties such as shareholders or members of the management boards of CRIs who are indirectly affected by an ECB decision addressed to a credit institution as a legal person.[158]

Another concern triggered by the application of national law by the ECB concerns a situation in which the ECB's decision is challenged before the General Court on the ground that the decision has been adopted in breach of the relevant national law that the European supervisor has or should have applied, or where otherwise an assessment of such national legislation is required with a view to determining the legality of the decision in question. Such a situation is not purely theoretical, as for instance the respect of national legislation (in particular transposing CRD IV) in the exercise of options and discretions is essential for safeguarding the principle of legitimate expectations generated in supervised CRIs.[159] The main problem arises from the fact that the Luxembourg courts have to refer to the relevant national legislation with a view to determining the legality of the ECB's decision under the SSM framework. Even if it may be argued that an ECB decision adopted on the basis of the SSM Regulation and breaching relevant applicable (compliant with EU law) national legislation may ultimately be considered a breach of EU law *senso latu*, the fact remains that European judges will have to interpret and apply national law. This situation seems to be in contradiction with the CJEU's own approach so far that "(. . .) it is not the role of the CJEU to rule on the interpretation of provisions of national law."[160]

Another situation involves the contestation of ECB's decisions that entail the application of national legislation transposing directives or exercising member states' options allegedly in breach of relevant EU law. A decision of such a type may be considered a breach of the ECB's duty under Article 4(3) of the SSM Regulation to act in compliance with relevant EU law, and thus can be challenged before the General Court. In practice, this would involve the review of the compliance of national legislation with EU law in the context of a direct action before the General Court. However, as the law stands, the only means for the CJEU to rule *on the interpretation of EU law* in the context of a dispute involving national legislation is by way of the preliminary ruling procedure enshrined in Article 267 of the TFEU. This process requires a dispute before a

(December 13, 2017), Doc. T-52/16, *supra* note 124 at 130 and *Crédit Mutuel Arkéa v. European Central Bank* (December 13, 2017), Doc. T-712/15, *supra* note 124 at 34.

158 See Wissink, Duijkersloot & Widdershoven, *supra* note 61 at 98.

159 See *Public Consultation on a Draft Regulation and Guide of the European Central Bank on the Exercise of Options and Discretions Available in Union Law: Explanatory Memorandum*, *supra* note 119 at 12.

160 In this respect, see *Francisco Javier Rosado Santana*, *supra* note 97 at ¶60; for a recent confirmation of this principle in that "(. . .) the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts," see *Commission v. Slovakia* (September 16, 2015), Doc. C-433/13, EU:C:2015:602 at ¶81.

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national court concerning a challenge brought by a credit institution against a decision taken by an NCA in the exercise of its tasks under the SSM that can result in a preliminary reference to the CJEU. The General Court itself has made clear in the *MEM* case that it does not have jurisdiction to refer questions to the CJEU for a preliminary ruling.[161] Moreover, the plea of illegality under Article 277 of the TFEU enabling incidental review of acts of general application adopted by EU institutions, bodies, offices, or agencies does not seem capable of covering acts of general application adopted by the member states.

Thus, considering the CJEU's approach to national law to this point, it is questionable whether a full legal review of the ECB's decisions directly applying national law is feasible. This situation is in contrast to the situation of LSIs supervised by NCAs, which may challenge an act of the competent authority before a competent national court and avail themselves of the preliminary ruling procedure. In these circumstances, the principle of effective judicial review affirmed by the CJEU[162] and enshrined in Article 47 CFR requires stretching the existing system of the Union's legal remedies as much as legally possible in order to fill the gaps in legal protection resulting from the direct application of national law by the ECB under Article 4(3) of the SSM Regulation. Here, a viable strategy might be to consider, solely for the purpose of judicial review, the relevant national legislation applied by the contested ECB decision as part of the overall EU legal framework that needs to be taken into account for the purpose of determining its legality. Without a specific provision in the treaties to that effect, such a solution could derive from a creative and combined reading of Articles 263 and 277 of the TFEU, as has been observed by other authors.[163] However, against such an approach it may be argued that, in order to maintain the division of tasks between the Luxembourg and national courts, the CJEU should refrain from authoritatively interpreting national law, but rather liaise closely with the national courts with a view to establishing the correct meaning of the national rules relevant for assessing the legality of the ECB's decision. In this context, Schuster has argued that the CJEU will have to establish "whether the ECB correctly applied national law as interpreted by the highest national courts."[164] One evident question in this context is how to deal with a situation where such an

[161] *Marques de l'État de Monaco (MEM) v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (January 15, 2015), Doc. T-197/13, EU:T:2015:16 at ¶37.

[162] According to the CJEU, "the European Union is a union based on the rule of law in which the acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, the general principles of law and fundamental rights," and the treaties have established a "complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union" (see *Inuit Tapiriit Kanatami and Others v. Parliament and Council* (October 3, 2013), Doc. C-583/11 P, EU:C:2013:625 at ¶91).

[163] In this regard, see Schuster, *supra* note 32 at 8, as well as Wolfers & Voland, *supra* note 36 at 1485.

[164] Schuster, *ibid.* at 8. This approach has been confirmed very recently by the General Court

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authoritative interpretation by the highest court is absent or pending. Taking a somewhat more permissive view, Lamandini, Muñoz, and Álvarez have argued that the CJEU "could limit itself to gather the opinions of the courts and experts to assess the actual state of national law, and evaluate the ECB's actions in its light, rather than making an authoritative interpretation of that domestic law."[165] However, with both these approaches it cannot be ignored that the result could be an inconsistent interpretation and application not only of the national law within any of the euro area member states, but also of the EU legal framework across the different jurisdictions forming part of the SSM. For this reason, it is presently submitted that a close dialogue between the EU and the national courts will be essential with a view to affording appropriate legal protection to individuals against ECB decisions that incorrectly apply national measures that are compliant with EU law within the scope of Article 4(3) of the SSM Regulation, or that apply national measures that are not compliant with EU law. This somewhat unsatisfactory solution is reflective on the judicial review side of the complex intermingling between EU and national law as well as between the tasks and powers of the ECB and NCAs within the SSM, and its success will depend very much on the cooperation between the EU and national courts.

Strikingly, in two recent judgments, the General Court seems to challenge the CJEU's long-standing orthodoxy regarding the jurisdictional interplay between EU and national courts, by affirming its own power to interpret national legislation, when national courts have not done so, for the purpose of assessing the legality of ECB's supervisory decisions.[166] In these cases, concerning the interpretation of national legislation relevant for the application of the concepts of "supervised group" and "institutions permanently affiliated to a central body" defined in the SSM legal framework, the General Court is attempting to bridge the jurisdictional gap described above. However, such a solution, if upheld by the CJEU on appeal, will likely have far-reaching implications for the role division between EU and national courts and might require re-defining the EU judicature as it currently is.

To be sure, the issue of effective judicial review does not arise only in the context of legal measures taken by the ECB, and thus at the European level, but also at the member state level. As shown previously, the complex intermingling between the ECB's and NCAs' powers and tasks under SSM, and the fact that the exact scope of the ECB's duty to directly apply national legislation is not always crystal clear may result in the ECB relying increasingly on instructions issued to NCAs to apply such legislation.[167] In this context, the ECB may

in its judgment in Joined Cases, *Caisse régionale de crédit agricole mutuel Alpes Provence and Others v. European Central Bank*, Doc. T-133/16 to T-136/16, EU:T:2018:219.

165 Lamandini, Muñoz & Álvarez, *supra* note 93 at 91.

166 *Crédit Mutuel Arkéa v. European Central Bank* (December 13, 2017), Doc. T-52/16, *supra* note 124 at 130 and *Crédit Mutuel Arkéa v. European Central Bank* (December 13, 2017), Doc. T-712/15, *supra* note 124 at 132.

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instruct the NCAs either to provide assistance in the implementation of its acts directly applying national law[168] or to make use of their powers under national law where it is deemed that the ECB does not have such powers.[169] While either scenario might arguably alleviate some of the difficulties associated with the judicial review of the ECB's acts applying national legislation, still the question arises of how to deal with situations in which an NCA acts on instructions from the ECB. Can such a decision be challenged in the national court that is otherwise competent for decisions of the NCA or before the General Court? In principle, it could be argued that a decision by an NCA should as a matter of principle in all circumstances be challenged before the competent national court. In the national procedure, the compatibility of the NCA measure with EU law and thus, indirectly, the legality of the ECB's instructions can then be reviewed.[170] In the event of questions concerning the interpretation of Union law, a national court can then make a preliminary reference to the CJEU pursuant to Article 267 of the TFEU.[171]

For a direct action brought before the General Court by an affected credit institution against the ECB's instructions to the NCA to be admissible, the ECB's instructions will have to be considered to intend to produce legal effects vis-à-vis third parties. Moreover, the credit institution in question would have to be directly and individually affected by these instructions.[172] With regard to the former requirement, it is settled case law that "any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position" can be challenged pursuant to Article 263 of the TFEU, whereby the form in which an act or a decision are cast is irrelevant in principle.[173] The question here is how to legally qualify the ECB's instructions to an NCA in the exercise of its supervisory tasks. To begin with, according to the first paragraph of Article 263 of the TFEU, the ECB's acts, other than recommendations and opinions, are in principle reviewable by the CJEU, provided that they are intended to produce legal effects vis-à-vis third parties. From the ECB's Rules of Procedure, it becomes clear that the instrument of instructions issued in the exercise of the ECB's supervisory functions is introduced separately from recommendations and guidelines. The former is a

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[167] On the basis of Article 9(1) of the SSM Regulation and, even more obviously, under Article 18(5) of the SSM Regulation. For a hypothetical example regarding the use of the power of instruction in the context of application by the ECB of national law, see Lamandini, Muñoz & Álvarez *supra* note 93 at 89.

[168] SSM Regulation, Article 6(3).

[169] SSM Regulation, Articles 9(1) and 18(5).

[170] See for this type of approach, *Regione Siciliana v. Commission* (March 22, 2007), Doc. C-15/06 P, EU:C:2007:183 at ¶39.

[171] See also Lamandini, Muñoz & Álvarez, *supra* note 93 at 89.

[172] TFEU, Article 263(1) and (4). For an analysis supporting this scenario by drawing an analogy with the state aid area, see Witte, *supra* note 6 at 99.

[173] *IBM v. Commission* (November 11, 1981), Doc. C-60/81, EU:C:1981:213 at ¶9.

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legal instrument intended to be directed towards the NCAs,[174] whereby the SSM Regulation makes clear that the NCAs are under a duty to follow the ECB's instructions.[175] It follows that the ECB's instructions related to its supervisory tasks can be qualified as legal acts intended to produce effects vis-à-vis third parties, and therefore are subject to judicial review by the CJEU.[176]

Regarding the admissibility of actions brought by a natural or legal person other than an NCA against Union measures in general, the fourth paragraph of Article 263 of the TFEU requires that the measure is of direct and individual concern to the applicant. According to *Plaumann*, the "individual concern" requirement in case of instructions issued by the ECB is met if the instructions that are addressed to the NCA affect the applicant by reason of certain attributes that are peculiar to it or by reason of circumstances in which it is "differentiated from all other persons and by virtue of these factors" it is distinguished individually "just as in the case of the person addressed."[177] It may be argued that this test is met in cases where the ECB issues instructions to an NCA concerning dealings with a specific credit institution.[178] However, this test is questionable in the case of instructions drafted in general terms and indeterminately targeting SIs, or in the case of general instructions addressed to NCAs under Article 6(5) of the SSM Regulation regarding the prudential supervision of LSIs. In order to be "directly concerned," the legal situation of an applicant credit institution would be directly affected by the ECB instructions and in doing so "leave no discretion to the addressees of that measure [i.e., the respective NCA], who are entrusted with the task of implementing it, such implementation being purely automatic."[179]

Whether an action brought before the General Court by a credit institution against an ECB instruction is admissible thus depends on whether the NCA is left with any degree of discretion in following the instructions of the ECB.[180] Thus, where an NCA follows the ECB's instructions in the exercise of the ECB's own tasks and powers, and where the NCA does not have any discretion,[181] the

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[174] European Union, *Decision of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2004/2)*, [2004] O.J., L. 80/33, Article 17a.

[175] See in particular Article 6(3) of the SSM Regulation.

[176] See also Witte, *supra* note 6 at 102.

[177] *Plaumann*, *supra* note 156.

[178] This may well be the case for the ECB's instructions issued under Articles 6(3), 9(1), and 18(5) of the SSM Regulation.

[179] See, *inter alia*, *National Front v. Parliament* (June 29, 2004), Doc. C-486/01 P, EU:C:2004:394 at ¶34, and *Regione Siciliana*, *supra* note 170 at ¶31.

[180] For an analysis of attribution and jurisdiction in cases involving measures adopted by NCAs on the basis of ECB's instructions, see D'Ambrosio, *supra* note 132 at 112, and Wolfers & Voland, *supra* note 36 at 1484.

[181] This is likely to be the case as regards ECB instruction issued under Article 6(3) of the SSM Regulation. See also D'Ambrosio, *ibid.* at 106.

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ECB instruction may be viewed as directly affecting the credit institution in question.[182] However, it is unclear whether a situation in which the ECB instructs an NCA to act in the application of its own powers under national law and thus to apply powers that the ECB itself does not have can be treated in the same way.[183] On the one hand, following Schuster, it may be argued that in such cases the NCAs, not the ECB, will be ultimately responsible for the acts addressed to CRIs.[184] From this point of view, an affected natural or legal person should in principle be in a position to challenge the decision before a competent national court. On the other hand, Witte advances a more nuanced view that differentiates between the situation in which an NCA acts on its own initiative and that in which an NCA acts on instructions from the ECB. In the latter case, it should be taken into account that the NCAs have a duty to follow the ECB's instructions imposing a particular course of action even where the relevant national legislation would allow certain discretion for the NCA. In other words, discretion granted to NCAs in the exercise of their own powers according to national law is not necessarily matched by the same degree of discretion when NCAs are acting upon the ECB's instructions under EU law.[185] The degree of discretion left to NCAs in exercising their own powers under national law with a view to enabling the ECB to carry out its supervisory tasks will depend mainly on the content and wording of the ECB instruction. Due to the legal uncertainty surrounding the competent court,[186] it has even been suggested that the applicant should challenge both the NCA's act and the ECB's decision instructing the respective NCA in order to increase the prospect of success.[187]

In any case, the discussion on the admissibility of an action brought before the General Court against the ECB's instructions is not merely theoretical. As noted by Advocate General Jacobs in the *UPA* case, the preliminary ruling procedure features several disadvantages as compared to direct challenges based on Article 263 of the TFEU. First, in the context of Article 267 of the TFEU the

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182 By analogy with cases concerning the admissibility of annulment actions against the Commission's decisions entailing (automatic) implementing measures by national authorities; see *International Fruit Company v. Commission* (May 13, 1971), Doc. C-41/70 to C-44/70, EU:C:1971:53 at ¶23, and *Piraiki-Patraiki v. Commission* (January 17, 1985), Doc. C-11/82, EU:C:1985:18 at ¶7. For an example of a case in the area of state aid, where the Court decided that the challenged Commission decision left such a margin of appreciation to the national authorities that it could not be considered of direct and individual concern to the applicant, see *Municipality of Differdange v. Commission* (July 11, 1984), Doc. C-222/83, EU:C:1984:266 at ¶12.

183 It has been suggested that in cases entailing general instructions (SSM Regulation, Article 6(5)) and in those where NCAs are instructed to exercise their own powers under national law (SSM Regulation, Articles 9(1) and 18(5)) NCAs will normally enjoy a certain degree of discretion (D'Ambrosio, *supra* note 132 at 112).

184 Schuster, *supra* note 32 at 9.

185 Witte, *supra* note 6 at 102.

186 See Witte, *ibid.*, and D'Ambrosio, *supra* note 132 at 112.

187 D'Ambrosio, *ibid.* at 115.

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applicant has no control over whether a reference is made and on what grounds.[188] Moreover, the Advocate General referred to several procedural disadvantages of the preliminary reference procedure, namely concerning ‘‘the participation of the institution(s) which adopted the measure, the delays and costs involved, the award of interim measures or the possibility of third-party intervention.’’[189] Additionally, an interest in challenging the ECB's instructions directly before the General Court can be motivated by the desire to trigger the EU non-contractual liability regime grounded in Article 340 of the TFEU,[190] in particular where member states have strictly limited the liability of their NCAs.[191] To be sure, recognizing in principle the possibility of CRIs challenging the ECB's instructions to NCAs before the General Court would have the consequence that they cannot invoke the illegality of these instructions before the national court for the purpose of triggering a reference for a preliminary ruling under Article 267 of the TFEU in cases where they did not bring an action according to Article 263 of the TFEU.[192]

As a final point, Article 24 of the SSM Regulation provides for an Administrative Board of Review in order to ensure the internal legal review of the decisions adopted by the ECB in the exercise of its supervisory function.[193] This mechanism enables natural and legal persons to challenge both on substantive and procedural grounds the ECB's decisions addressed to them or affecting them directly and individually.[194] Considering the previous discussion, in addition to the ECB directly applying national legislation to individual CRIs, this mechanism could arguably also cover ECB's instructions addressed to NCAs to the extent that they can be qualified as legal acts of direct and individual

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188 Opinion of A.G. Jacobs, *Unión de Pequeños Agricultores v. Council* (March 21, 2002), Doc. C-50/00 P, EU:C:2002:197 at ¶102.

189 *Ibid.*

190 According to Recital 61 of the Preamble of the SSM Regulation, the ECB should in accordance with Article 340 of the TFEU ‘‘make good any damage caused by it or by its servants in the performance of their duties’’ and this should not exclude ‘‘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’’; the reference to the ECB's non-contractual liability is merely a restatement of the principle of the ECB's non-contractual liability established in the third paragraph of Article 340 of the TFEU. For an extensive study of the ECB's non-contractual liability under the SSM mechanism, see D'Ambrosio, *supra* note 132.

191 See Ter Kuile, Wissink & Bovenschen, *supra* note 150 at 185.

192 See, *inter alia*, *TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland* (March 9, 1994), Doc. C-188/92, EU:C:1994:90 at ¶23, and *Unión de Pequeños Agricultores v. Council*, (July 25, 2002), Doc. C-50/00 P, EU:C:2002:462 at ¶40.

193 The details regarding the composition and operation of the Administrative Board of Review are laid down in European Union, *Decision 2014/360/EU of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16)*, [2014] O.J., L. 175/47.

194 SSM Regulation, Article 24(5).

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concern to natural and legal persons. Applications are in principle dealt with in a written procedure, but an oral hearing allowing the applicant and the ECB to present their views is also possible.[195] The outcome of this procedure is an opinion of the Administrative Board proposing to the Supervisory Board the adoption of a draft decision revoking, amending, or maintaining the initial decision.[196] In practice, this internal administrative review procedure seems to provide a good opportunity for the CRIs and the ECB to enter into a close supervisory dialogue. In this way, the challenges brought by CRIs to the ECB's supervisory decisions can be solved without actually having recourse to litigation before the EU courts. So far this tool seems to have proved effective, with some requests for review being withdrawn by the applicants following positive resolution even before the issuing of an opinion by the Administrative Board.[197] According to the ECB, the opinions of the Administrative Board are not usually followed by further legal proceedings.[198] However, even if such an internal review mechanism may reduce court litigation under the SSM Regulation, such a review will not exclude court litigation altogether.[199] In fact, the Administrative Board itself has noted that the lack of harmonization in the national implementation of EU law makes it difficult to ensure consistent review of the ECB's decisions.[200] This lack is particularly problematic in the case of the direct application of national legislation by the ECB. Against this background it is rather unsurprising that an increasing number of cases have been brought before the General Court in which ECB supervisory decisions interpreting and applying national legislation have been challenged by CRIs.[201]

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195 ECB Decision 2014/16, Article 14.

196 SSM Regulation, Article 24(7). The opinion of the Administrative Board of Review does not, however, bind the Supervisory Board or the Governing Council (ECB Decision 2014/16, Article 16).

197 *Annual Report on Supervisory Activities*, *supra* note 54 at 14.

198 *Ibid*. at 55.

199 As demonstrated by the recent judgements of the General Court in *Landeskreditbank Baden-Württemberg — Förderbank v. European Central Bank*, *supra* note 55 , regarding an ECB decision classifying that CRI as a significant entity within the meaning of Article 6(4) of the SSM Regulation, as well as in cases *Crédit Mutuel Arkéa v. European Central Bank* (December 13, 2017), Doc. T-52/16, *supra* note 124, and *Crédit Mutuel Arkéa v. European Central Bank* (December 13, 2017), Doc. T-712/15, *supra* note 124, concerning the notions of "supervised group" and "institutions permanently affiliated to a central body;" see also Smits, *supra* note 55, 6-19.

200 *Annual Report on Supervisory Activities*, *supra* note 54 at 15; see also ECB, *Annual Report on Supervisory Activities 2016* (2017) at 56, online: <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmar2016.en.pdf?e6209395b9450c2655f04a4e24ffa463>.

201 For instance, see cases *Fininvest and Berlusconi v. ECB* (December 23, 2016), Doc. T-913/16; and *Ferri v. ECB* (February 28, 2018), Doc. T-641/17, EU:T:2018:113, as well as in Joined Cases, *Caisse régionale de crédit agricole mutuel Alpes Provence v. European Central Bank*, Doc. T-133/16 to zy-136/16, *supra* note 164; see also Smits, *supra* note 55, 6-19. At the moment of writing, the *Ferri v. ECB* case has been closed as a result of the withdrawal of the action by the applicant, whilst in Joined Cases, T-133/16 to T-136/16,

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6. CONCLUSION

In response to the European financial crisis, the EU has engaged in what can without exaggeration be considered one of the most ambitious European regulatory projects in many years. Starting with the establishment of the ESFS with the three ESAs at its core, followed by the even more far-reaching SSM and SRM, financial market regulation and supervision has been awakened from its slumber and received a major integration boost. With the SSM, financial market supervision is for the first time anchored at the supranational level and (seemingly) in large parts entrusted to a Union institution. Considering the viscous and largely fruitless discussions of the past on the establishment of a European supervisory capacity in the emerging internal financial market, the speed at which these reforms have been introduced is remarkable indeed. However, the need for a swift regulatory response to the crisis that moreover had to be based on the existing Union competences, legal bases, and institutional framework has arguably resulted in a legal framework that is far from picture perfect, particularly pertaining to prudential supervision. This legal framework raises numerous institutional and substantive questions addressed.

One particular challenge arises from the hybrid nature of the SSM supervisory model, which involves both the ECB and the NCAs, making a clear delineation of the tasks and powers assigned to the supranational and national levels difficult. One remarkable expression of this hybrid nature does not derive so much from the differentiation under the SSM between significant and less-significant credit institutions or the fact that the ECB at the same time exercises certain supervisory tasks for all euro area CRIs, but primarily from the fact that the SSM Regulation foresees the application by the ECB of relevant national law in the exercise of its supervisory powers vis-à-vis CRIs. The need for this rather unusual construction derives from the legal nature of the substantive regulatory framework applicable to CRIs, which for a large part takes the shape of directives.

While Article 4(3) of the SSM Regulation certainly aims at ensuring effective and coherent supervision over CRIs under the SSM, therewith serving the overall objective of post-crisis financial market reform, the applicable legal arrangements somewhat paradoxically also have considerable potential to stand in the way of a coherent application of the European legal framework. Leaving aside the interesting — from an academic point of view — discussions on the theoretical underpinning of the application of national law by Union institutions, it is mainly the exercise of this power that raises pressing practical legal concerns. In practice, the ECB has to apply the national law of at least the 19 euro area member states, which despite their European roots are not necessarily assimilated or comparable. Adding to this, the same national legal

the General Court upheld ECB's challenged supervisory decisions applying French legislation, by relying on the interpretation of the relevant provisions of national law given by the French Supreme Administrative Court (Conseil d'État).

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framework is also applied by the NCAs in the case of the LSIs that remain in their scope of supervision. This arrangement bears the risk of inconsistencies and contradictions in the interpretation and application of the new European supervisory framework. While the ECB has taken steps to minimize the side effects of the application of national legislation on the overall consistency of EU banking supervision by adopting common procedures such as the SREP methodology and by taking steps to harmonize the exercise of options and discretions under the CRD IV package, these efforts cannot bridge the gap entirely.

A close examination of concrete supervisory powers reveals that the SSM Regulation foresees a crucial role for the NCAs that clearly goes beyond the supervision of LSIs, in which they assist the ECB in exercising its supervisory powers. Thus, while the SSM on the face of it appears to introduce a hierarchical system, due to the hybrid nature of the substantive regulatory framework applied to CRIs, the relationship between the ECB and the NCAs is actually characterized by intensive cooperation, whereby the success of the European supervisory system depends to a large extent on an effective interplay between the EU and competent national actors. In this respect, the ECB's supervisory practice reveals a rather bottom-up approach to banking supervision, whereby much of the daily supervision takes place in a decentralized fashion at the level of the JSTs while the ECB Supervisory Board's formal decisions are largely based on the input and advice received from the JSTs and NCAs.

Still, the application of national law by the ECB and the complex interplay between the European supervisor and the NCAs raises serious questions concerning the legal review of ECB's actions, and more generally of access to justice, even if it is argued that the ECB's decisions applying national law under the specific circumstances of the SSM remain in principle acts adopted by an EU institution, open to judicial review by the CJEU. The difficulties mainly arise from the fact that, where the ECB's decision is challenged on the ground that it has been adopted in breach of the relevant national law it has applied, or in other situations where an assessment of such national legislation is required to determine the legality of decisions, the CJEU will have to interpret the relevant national legislation. However, according to the CJEU's established case law, the Luxembourg courts cannot interpret and apply national law, nor can the General Court in a direct action directly assess the compliance of national legislation with EU law. Since Article 267 of the TFEU is of no use in this context, the result is an unfortunate situation where the European Courts cannot exercise full legal review with regard to the ECB's decisions directly applying national law, creating gaps in the legal protection of individuals (in particular significant CRIs) against ECB decisions affecting them. In two recent judgements, the General Court attempted to address this paradox by taking up the gap-filling function of interpreting national law in case national courts had not done so, but it remains to be seen whether the CJEU will sanction this brave departure from its long-standing tenet that national courts have exclusive jurisdiction on national law

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matters.[202] Such a solution, would likely have far-reaching implications for the orthodox distribution of jurisdiction between EU and national courts and might require reforming the current EU judicature.

Avoiding the complex issues linked to a direct application of national law by relying on the ECB's power to give instructions to the NCAs is not a perfect solution either. In particular, this scenario brings in a significant degree of uncertainty concerning the avenues for judicial review to follow, as it will depend ultimately on the discretion left to the NCAs in following the ECB's instructions whether the final supervisory act affecting a credit institution qualifies as an NCA act or as an instance of direct application of national law by the ECB "in disguise."

While admittedly the Administrative Board of Review has so far been an effective tool for solving disputes related to the ECB's supervisory decisions, nevertheless, the problematic judicial review of the ECB's supervisory decisions applying national law is anything but a purely theoretical matter, as CRIs have increasingly started bringing proceedings against such acts before the General Court. Meeting the expectations of a "complete system of legal remedies"[203] proclaimed by the CJEU will thus require a rather creative stretching of the existing Union system of judicial review, and, as with the overall operation of the SSM, very much will depend on close dialogue and cooperation, this time between the EU and national judicatures.

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[202] Both judgments have been appealed before the CJEU, *Crédit Mutuel Arkéa v. ECB*, Doc. C-153/18 P (appeal against the judgments of the General Court in (December 13, 2017), Doc. T-52/16 and (December 13, 2017), Doc. T-712/15).

[203] See *Inuit Tapiriit Kanatami and Others v. Parliament and Council* (October 3, 2013), Doc. C-583/11 P, *supra* note 162.

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