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Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection

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1. Introduction

In the process of EU integration, one can see a tendency to transfer decisive and regulatory powers as well as powers concerning enforcement – investigations, measures and penalties – to the EU level. One striking example of such a transfer is the new supervisory system for credit institutions that has recently been put into effect, the so-called Single Supervisory Mechanism (SSM).¹ Under the new system, the European Central Bank (ECB) is exclusively competent to carry out the prudential supervision of credit institutions.² But the system also foresees the involvement of national competent authorities (NCAs) of Member States in the supervisory process. The process may thus be characterized as a shared and, at times, mixed administration.³

This article addresses the consequences of these developments with respect to individual judicial protection. Will its shift result in ambiguity, deficits and gaps in judicial protection? Given the impact of

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1 Based on Council Regulation (EU) No. 1024/2013 of 15 October 2013, conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (SSM Regulation), OJ L 287, 29.10.2013, p. 63, and elaborated in more detail in ECB Regulation (EU) No. 468/2014 of 16 April 2014, establishing the framework for cooperation with the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17), OJ L 141, 14.15.2014, p. 1. With regard to the new banking supervisory system in general, see: E. Ferran & V. Babis, 'The European Single Supervisory Mechanism', University of Cambridge Faculty of Law Research Paper No. 10/2013 (electronic copy available at: <http://ssrn.com/abstract=2224538>), last visited 6 November 2014); E. Wymeersch, 'The European banking union, a first Analysis', Ghent University Financial Law Institute Working Paper Series WP 2012-07 (electronic copy available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171785), last visited 6 November 2014); G. Ferrarini & L. Chiarella, 'Common Banking Supervision in the Eurozone: Strengths and Weaknesses', ECGI – Law Working Paper No. 223/2013 (electronic copy available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309897), last visited 6 November 2014); E. Wymeersch, 'The single supervisory mechanism or 'SSM', Part one of the banking union', National Bank of Belgium Working Paper No. 255, 2014 (electronic copy available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427577), last visited 6 November 2014).

2 Within the framework of Art. 6 of the SSM Regulation, the ECB shall be exclusively competent to carry out, for prudential supervisory purposes, the tasks mentioned in Art. 4(1) of the SSM Regulation in relation to all credit institutions established in the participating Member States. Furthermore, Arts. 4(2) and 5(2) lay down specific ECB tasks within the SSM.

3 With regard to this terminology, see: J.H. Jans et al., *Europeanisation of Public Law*, 2007, pp. 6-7 and 29. 'Shared administration' refers to the common situation where EU institutions adopt generally applicable rules, harmonizing or unifying substantive national law, which are implemented and enforced in the Member States by means of national law and through national administrative authorities. 'Mixed administration' exists where administration by the EU institutions and by the Member States are so closely intertwined that it is hardly possible to distinguish one from another.

such ambiguity and possible uncertainty on the behaviour of key players in the field, would the process diminish the effectiveness of the supervision of credit institutions?

This study will further explore these questions against the background of two judicial protection requirements developed in the case law of the Court of Justice of the European Union (CJEU). There is, firstly, a formal requirement to have access to the courts. This requirement relates to the question as to whether acts and decisions in the supervisory process of credit institutions can be challenged before a court and, if so, which courts – the Union or national courts – are competent. As both the Union and national courts can be involved in various stages of the supervisory process, questions of interference and cooperation must also be addressed. Secondly, judicial protection implies a substantive element, namely the verification by the courts so as to whether competent supervision authorities have complied with the applicable rules and principles. Both (formal and substantive) requirements are connected to the rule of law (or the principle of the *Rechtsstaat*), the fundamental principle which governs the EU legal order as a whole.⁴

Regarding the first (formal) requirement, it is important that the CJEU has developed the leading principle of *effective judicial protection* in its case law.⁵ This principle has been derived from the constitutional traditions of the Member States as well as from Articles 6 and 13 ECHR and is now codified in Article 47 of the Charter of Fundamental Rights (CFR). According to this principle, individuals must be able to enforce rights conferred upon them by Union law before an independent court. In order to comply with this principle, it is necessary that individuals first have effective access to a court. Secondly, the court and the process before it must meet several institutional and procedural requirements, namely, impartiality and independence, fair trial, reasonable time and a public hearing. In the Union's legal order, which is characterized by the concept of shared government between European institutions and national authorities, the principle of effective judicial protection is realized at two separate levels.⁶

At the *Union level*, several remedies exist. For the purposes of this article, the most important remedy for individuals is the action for reviewing the legality of acts taken by a Union institution (Article 263, fourth paragraph, TFEU), with the competent court being the CJEU in Luxembourg. In the first instance, appeals by individuals are decided by the General Court (GC), formerly the Court of First Instance (CFI). A judgment by the GC can be contested before the Court of Justice.

At the *National level*, legal protection against the application of EU law is provided for by national courts. Article 19 TFEU states that Member States must provide for sufficient remedies to ensure effective protection in the fields covered by Union law. Determining which national court is competent and what procedural rules and principles to apply is in principle a matter of national (procedural) law. The national courts can be considered as *juge du droit commun*. They have the task of ensuring an effective application of EU law in the Member State. To guarantee a uniform application of EU law, national courts have the opportunity or (in the last instance) the obligation to refer preliminary questions concerning the validity and interpretation of EU law to the CJEU (Article 267 TFEU). This judicial cooperation mechanism forms the interface between the Union and the national legal order.

According to the CJEU the remedies at Union and national level together (should) provide for a complete system of legal remedies in the Union legal order.⁷

As indicated above, judicial protection provided by both Union and national courts should include a judicial verification as to whether competent supervision actors have complied with the applicable rules

4 Cf. Case C-50/00 P, *Union de Pequenos Agricultores (UPA)*, ECLI:EU:C:2002:462; Case C-263/02 P, *Commission v Jégo-Quéré*, ECLI:EU:C:2004:210.

5 See in particular Case C-222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206; *Union de Pequenos Agricultores (UPA)*, supra note 4; *Commission v Jégo-Quéré*, supra note 4; Case C-432/05, *Unibet*, ECLI:EU:C:2007:163; Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625. With regard to the principle of effective judicial protection, see inter alia: Jans et al., supra note 3, pp. 49-54; C.D. Munding, *Das Grundrecht auf effektiven Rechtsschutz im Rechtssystem der Europäischen Union*, 2010; R.J.G.M. Widdershoven, 'European Administrative Law', in: R.J.G.H. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States, a Comparative Analysis*, 2012, pp. 245-316, in particular pp. 60-62; K. Kulms, *Der Effektivitätsgrundsatz. Eine Untersuchung zur Rechtsprechung des Europäischen Gerichtshof*, 2013.

6 Cf. Jans et al., supra note 3, pp. 241-242; P. Craig, *EU Administrative Law*, 2012, Chapter 23; Widdershoven, supra note 5, pp. 60-62; I. Pernice, 'The Rights to Effective Judicial Protection and Remedies in the EU', in: A. Rosas et al. (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law*, 2013, pp. 381-395.

7 *Inuit Tapiriit Kanatami and Others v Parliament and Council*, supra note 5.

and principles (i.e. the substantive requirement). In this contribution we cannot elaborate on every rule and principle which may be of importance to banking supervision. We will therefore limit ourselves to a number of guarantees which are essential for the legality of supervisory activities. Most are connected with the principle of respecting the rights of defence.⁸ This principle is a general principle of Union law and is – with regard to EU administration – partly codified in Article 41 CFR.⁹ Moreover, defence rights are also guaranteed in Articles 47(2) and, regarding penalties of a criminal nature, 48 CFR and in Article 6 ECHR. Furthermore, we shall discuss rights pertaining to respect for the home, especially important when searching premises by the ECB.¹⁰ This right has been recognized by the CJEU as a general principle of Union law and is implied in Article 7 CFR and Article 8 ECHR.

The principles and rights mentioned above are not only binding for the Union institutions involved in the banking supervision process. Such principles and rights are also binding for the NCAs involved in banking supervision, since they undoubtedly act within the scope of Union (banking supervision) law.¹¹ When describing the contents of the rights and guarantees we will refer to the case law of both the CJEU and the European Court of Human Rights (ECtHR). After all, the meaning and scope of Charter rights is the same as the corresponding rights laid down in the ECHR (and as elaborated in the case law of the ECtHR).¹²

This study will thus focus on the question of how the rights of access to the courts and compliance with some essential guarantees will be both realized and guaranteed in the new supervisory system for credit institutions and whether there are possible omissions or loopholes. For reasons of brevity, the focus will be on the most pertinent aspects. In Section 2, the new supervisory system will be mapped out. Section 3 will mainly deal with questions of formal judicial protection with respect to the so-called common procedures such as authorising credit institutions. In Section 4 questions of formal and substantive judicial protection concerning investigations and the imposition of administrative measures and penalties will be analyzed. The main conclusions will be summarized in Section 5.

2. The supervisory structure in the SSM

Pursuant to the SSM, constituted by the Council's SSM Regulation and the ECB's SSM Framework Regulation,¹³ the ECB is exclusively competent to carry out, for prudential supervisory purposes, inter alia the tasks mentioned in Article 4(1) SSM Regulation in relation to all credit institutions established in the participating Member States. These tasks include, amongst others, the competence to authorise and to withdraw authorisations of credit institutions, the competence to ensure compliance with the rules imposing prudential requirements on credit institutions in various areas and the rules imposing requirements on credit institutions to have robust governance arrangements in place, the competence to carry out supervisory reviews and to carry out supervisory tasks in relation to recovery plans and certain

8 Cf. X. Groussot, *General Principles of Community Law*, 2006, pp. 228-234; O. Jansen & P. Langbroek (eds.), *Defence Rights during Administrative Investigations*, 2007; Jans et al., *supra* note 3, pp. 187-197; A.J.C. de Moor-van Vugt, 'The Ghost of the 'Criminal Charge': the EU Rights of the Defence in Dutch Administrative Law', 2012 *Review of European Administrative Law*, no. 2, pp. 5-16.

9 It is partially codified, since Art. 41 CFR only codifies the right to be heard and several sub-rights to guarantee the effective exercise of this right, but it does not guarantee other defence rights such as legal professional privilege and the right against self-incrimination (*nemo tenetur*). See Section 4.2.4 for more details.

10 See Section 4.2.3 for more details.

11 With regard to the meaning of the phrase 'acting within the scope of Union law', which is decisive for the obligatory application by the Member States of both general principles of Union law and CFR rights, see: Case C-617/10, *Akerberg Fransson*, ECLI:EU:C:2013:280. Please note that the codification of the rights of defence included in Art. 41 CFR as such does not apply to the Member States. Nevertheless – according to Case C-604/12, *H.N.*, ECLI:EU:C:2014:302 – the rights contained in the article are binding for the Member States when acting within the scope of Union law, because they constitute a general principle of Union law.

12 Cf. Art. 52(3) CFR. This provision shall not prevent Union law from providing more extensive protection under the CFR rights. Moreover, the fundamental rights as guaranteed by the ECHR are also binding for the EU because they constitute general principles of Union law (Art. 6(3) TEU). With regard to the interaction between the ECHR and the CFR in general, see: S. Prechal & R.J.G.M. Widdershoven, 'Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection', 2011 *Review of European Administrative Law*, no. 2, pp. 31-50.

13 SSM Regulation, *supra* note 1, and SSM Framework Regulation, *supra* note 1. With regard to the operationalization of the supervisory framework, see: T.H. Tröger, 'The single supervisory mechanism – panacea or quack banking regulation?', SAFE Working Paper Series no. 27, 2013, especially Chapter 3; Wymeersch 2014, *supra* note 1, especially Chapter 6; Ferran & Babis, *supra* note 1, especially Chapter 2, Paras. 2-4.

early intervention measures. The ECB shall carry out its tasks within a ‘single supervisory mechanism’ (SSM), which is composed of the ECB and NCAs.¹⁴

The responsibilities for the tasks defined in Article 4 are divided between the ECB and NCAs,¹⁵ except for responsibilities regarding authorisations, the withdrawal of authorisations and assessments of notifications of the acquisition and disposal of qualifying holdings in credit institutions (hereinafter together called the ‘common procedures’; they are discussed separately in Section 3). The division is made on the basis of the significance of a credit institution. This significance is determined on the basis of inter alia the size, the importance for the economy of the Union or any Member State and the significance of cross-border activities.¹⁶ The ECB is the direct supervisor of the so-called ‘significant credit institutions’ (SIs) and the NCAs take the lead in the supervision of the so-called ‘less-significant credit institutions’ (LSIs).¹⁷ Besides, the ECB shall be responsible for the effective and consistent functioning of the SSM.¹⁸ According to Article 6(3) SSM Regulation, there is a general obligation for NCAs to assist the ECB and to follow the ECB’s instructions.¹⁹

The ECB shall apply all relevant Union law²⁰ and, where this Union law is composed of directives, the national legislation transposing those directives. Where the applicable regulations explicitly grant options for Member States, the ECB shall also apply the national legislation exercising those options.²¹ Although prudential rules for credit institutions have been harmonised to a large extent with the introduction of the so-called Single Rulebook,²² there are still national differences. Such national differences stem from the fact that part of the prudential rules is still covered by a directive, so national implementation is required, and the applicable prudential rules (both the regulation and the directive) provide for national options and supervisory discretions.

For the supervision of SIs, so-called joint supervisory teams (JST) will be established. A JST will be assigned to one SI. JSTs shall be composed of staff members from the ECB and NCAs and will be coordinated by a designated ECB staff member (the JST coordinator) and one or more NCA sub-coordinators.²³ A JST is the main tool within which the NCA shall assist the ECB in the supervision of SIs²⁴ and is a far-reaching example of a mixed administration. The ECB shall be in charge of the establishment and composition of JSTs, but the appointment of staff members from the NCAs to JSTs shall be made by the respective NCAs.²⁵ JST members shall follow the JST coordinator’s instructions as regards their tasks in the JST.²⁶ The tasks of a JST will include, amongst other things, performing the supervisory review and evaluation process (SREP), participating in the preparation of a supervisory

14 Art. 6(1) SSM Regulation.

15 Art. 6(4) SSM Regulation.

16 Art. 6(4) SSM Regulation. The criteria for significance have been set out in Part IV SSM Framework Regulation.

17 Art. 6(5) and 6(6) SSM Regulation.

18 Art. 6(1) SSM Regulation.

19 The role of the NCAs in assisting the ECB is further explained in Art. 90 SSM Framework Regulation.

20 The term ‘all relevant Union law’ is not defined in the SSM Regulation. Especially Regulation (EU) No. 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 (EU) No. 648/2012 (CRR), OJ L 176, 27.6.2013, p. 1, and 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 (CRD IV), OJ L 176, 27.6.2013, p. 338 are relevant in this respect. The CRR and CRD IV contain the most relevant banking regulation. Hereinafter, we will refer to ‘relevant Union law’ or ‘banking regulation’.

21 Art. 4(3) SSM Regulation. Furthermore, Art. 9(1)(3) SSM Regulation states that, to the extent necessary to carry out the tasks conferred on the ECB by the SSM Regulation, the ECB may require, by way of instructions, NCAs to make use of their powers, under and in accordance with the conditions set out in national law, where the SSM Regulation does not confer such powers on the ECB.

22 The Single Rulebook refers to the aim of a unified regulatory framework for the EU financial sector and provides a single set of harmonised prudential rules applicable to inter alia credit institutions in the EU, see: <<http://www.eba.europa.eu/regulation-and-policy/single-rulebook>>, last visited 6 November 2014.

23 Art. 3(1) SSM Framework Regulation. Each NCA that appoints more than one staff member to the JST shall designate one of them as the sub-coordinator (the NCA sub-coordinator), who shall assist the JST coordinator as regards the organisation and coordination of the tasks in the JST (Art. 6(2) SSM Framework Regulation). See for a practical explanation of the banking supervision: ECB Guide to Banking Supervision, September 2014 (available at: <<http://www.ecb.europa.eu/pub/pdf/other/ssmguidebankingsupervision201409en.pdf?85e39f5cf761e11147f6e828cd4088b1>>, last visited 6 November 2014).

24 CP1 – Framework Regulation Consultation, February 2014, p. 10.

25 Art. 4(1) SSM Framework Regulation.

26 Art. 6(1) SSM Framework Regulation.

examination programme and implementing such programme and any ECB supervisory decisions with respect to SIs.²⁷

Besides JSTs, on-site inspection teams are established in order to carry out on-site inspections. The ECB shall be in charge of the establishment and composition of the on-site inspection team with the involvement of NCAs and shall designate the head of the on-site inspection team from among ECB and NCA staff members.²⁸ In case of the supervision of SIs, the head of the team shall be responsible for the coordination between the relevant JST and on-site inspection team.²⁹

Matters shall be referred to a separate investigating unit if the ECB considers that there is reason to suspect that one or more breaches under relevant directly applicable Union law, as referred to in Article 18(1) SSM Regulation, or of an ECB regulation or decision, as referred to in Article 18(7) SSM Regulation, are being or have been committed by an SI.³⁰ The investigating unit is an internal independent unit established by the ECB, which consists of investigating officers designated by the ECB.³¹

3. Common procedures

The distinction between SIs and LSIs is not applicable to the so-called common procedures, being authorisation, the withdrawal of authorisation and the assessment of acquisitions of a qualifying holding.³² In these procedures both the ECB and NCAs are involved, according to different arrangements, which raises some interesting questions concerning judicial protection. Most of them are related to the authorisation process as such. We will therefore focus on this authorisation process in Section 3.1. These findings can be extrapolated *mutatis mutandis* to the withdrawal process as well as the assessment of an acquisition of a qualifying holding. Only a few brief remarks will be made about the withdrawal process in Section 3.2.

3.1. Authorisation

3.1.1. A one or two-stage procedure

With regard to authorisation a one or two-stage structured procedure has been created, depending on whether the authorisation is *rejected* or *granted*. The *first stage* consists of submitting the application for an authorisation to take up the business of a credit institution by the applicant to the NCA of the Member State where the credit institution is to be established.³³ This NCA shall assess whether the applicant complies with all conditions of authorisation set out in relevant national law. If the applicant does not comply with the national requirements, in this first stage the NCA shall reject the application. In this situation there is no role for the ECB. The ECB will only be provided with a copy of the decision by the NCA.³⁴

If the applicant does comply with the national requirements, the procedure will step up to the *second stage*. The NCA prepares a draft authorisation decision proposing that the ECB grants the applicant authorisation to take up the business of a credit institution. The NCA shall ensure that the draft authorisation decision is notified to the ECB and to the applicant at least 20 working days before the end of the maximum assessment period provided for by the relevant national law. The NCA may propose attaching recommendations, conditions and/or restrictions to a draft authorisation decision in accordance with national and Union law. In such cases, the NCA shall be responsible for assessing compliance with the conditions and/or restrictions.³⁵ The ECB shall assess the application on the basis of the conditions for authorisation laid down in relevant Union law. If, in its view, these conditions

27 Art. 3(2) SSM Framework Regulation.

28 Art. 144(1) and 144(2) SSM Framework Regulation.

29 Art. 146(2) SSM Framework Regulation.

30 Art. 124 SSM Framework Regulation.

31 Art. 123 SSM Framework Regulation.

32 Points (a) and (c) of Art. 4(1) SSM Regulation are excluded from the division of responsibilities pursuant to Art. 6(4) SSM Regulation.

33 The NCA shall notify the ECB of the receipt of an application within 15 working days and also inform the ECB of the national time limit within which a decision on the application has to be taken (Art. 73(1) and 73(2) SSM Framework Regulation).

34 Art. 75 SSM Framework Regulation.

35 Art. 76 SSM Framework Regulation.

are not met, the ECB shall give the applicant the opportunity to comment in writing on the facts and objections relevant to the assessment, in accordance with the right to be heard provided for in Article 31 SSM Framework Regulation. The ECB shall decide on a draft authorisation decision it receives from the NCA within 10 working days. If a meeting is considered necessary and in any other cases that are duly justified, the ECB may extend the maximum period for deciding on an application.³⁶ The extension shall be notified to the applicant.

The final ECB decision can be twofold: the ECB may *support* the draft authorisation decision and thereby agree to the authorisation or *object* to the draft authorisation decision. The ECB shall base its decision on its assessment of the application, the draft authorisation decision and any comments provided by the applicant.³⁷ If the ECB does not make a decision within the prescribed period, the draft authorisation decision prepared by the NCA shall be deemed to be adopted.³⁸ The ECB shall adopt a decision granting authorisation if the applicant complies with all the conditions for the authorisation in accordance with relevant Union law and the national law of the Member State in which the applicant is established.³⁹ This decision shall be notified by the NCA to the applicant.⁴⁰

This one or two-stage decision-making structure, involving a mix of advisory and decisive roles for both national and EU authorities (NCAs and ECB), is exemplary for the mixed banking supervisory process in the SSM. We will now highlight some interesting questions that are of relevance as far as the formal and substantive requirements regarding effective judicial protection are concerned.

3.1.2. First stage: a negative NCA decision

Firstly, there is the possibility of a *negative decision by the NCA*: the NCA rejects the application because it does not meet the conditions set out in national law. Given the fact that this is a binding and final decision of the NCA, it shall be open to judicial review on the national level. The importance of having national legal protection in such cases is implied by effective judicial protection in general and the application of this principle in inter alia the *Borelli* case.⁴¹ A national court has to be able to assess whether the applicable norms have been applied correctly by the NCA. Although *Borelli* concerned a binding negative national opinion resulting in a negative EU (Commission) decision, whereas in the case at hand there is a negative binding national decision that does not require further decision-making by the EU (ECB) as such, *a fortiori* there should be judicial protection at the national level. As the CJEU held in *Borelli*: ‘it is for the national courts, where appropriate after obtaining a preliminary ruling from the Court, to rule on the lawfulness of the national measure at issue on the same terms on which they review any definitive measure adopted by the same national authority which is capable of adversely affecting third parties and, consequently, to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case.’

One may add here that a negative decision by the NCA resulting in non-authorisation will have to be based upon non-compliance with relevant national law.⁴² Because this national law will in many respects be an implementation of EU law, possible questions as regards the interpretation or validity of the Union law in question may (or should) be referred to the CJEU for a preliminary ruling.

The second situation involving a *positive draft authorisation decision by the NCA* is more complex. The new system implies that the ECB shall accept the draft decision of the NCA unless it is of the opinion that relevant EU law has not been met.⁴³ As indicated earlier, this will result in two possible ECB decisions: acceptance, which will result in authorisation, or rejection.

36 Arts. 77(2) and 78(1) SSM Framework Regulation.

37 Art. 78(2) SSM Framework Regulation.

38 Art. 14(3) SSM Regulation and Art. 78(3) SSM Framework Regulation.

39 Art. 78(4) SSM Framework Regulation.

40 Art. 14(4) SSM Regulation and Art. 88(3) SSM Framework Regulation.

41 Case C-97/91, *Oleificio Borelli v Commission*, ECLI:EU:C:1992:491.

42 Art. 75 SSM Framework Regulation.

43 Whether the ECB can also reject the draft decision if it is of the opinion that relevant EU law has not been implemented correctly is doubtful, because this may in certain situations arguably be contrary to the prohibition of the inverse direct effect of directives. Cf. Case C-152/84, *Marshall*, ECLI:EU:C:1986:84; P. Craig & G. de Burca, *EU Law, Text, Cases and Materials*, 2011, pp. 194 et seq. Answering this question would require a broader debate about inter alia the basis/cause of the assumed incorrect implementation (e.g. national legislation / interpretation of open norms by NCA) and the possibilities for a directive’s consistent interpretation, which is outside the scope of this paper.

3.1.3. Second stage: acceptance of a positive NCA draft decision by the ECB

As far as the ECB decision involves the *acceptance of the positive draft decision* of the NCA, it is possible that the applicant wants to challenge this ECB decision because it does not agree with the conditions, if any, concerning, for instance, certain governance aspects attached to the decision. Because the applicant is the addressee of the decision, it is entitled – on the basis of Article 263, fourth paragraph, TFEU – to bring an action for a review of legality against the decision before the Union courts.⁴⁴

In theory, it is possible that third parties wish to challenge the authorisation decision of the ECB.⁴⁵ A possible third party may be a competing credit institution which is of the opinion that certain conditions, attached to the decision, are not strict enough and/or are less strict than the conditions with which it has to comply. One might also think of several credit institutions (or of an organization representing them) which may want to prevent the authorisation because they have serious doubts as regards the prudential situation of the authorised credit institution and are afraid that they will have to compensate the deposit holders in case of the bankruptcy of the credit institution.⁴⁶ One might finally even think of a consumer organization which wants to prevent the credit institution's authorisation for similar reasons. In all cases, because of the strict standing requirements since the *Plaumann* case,⁴⁷ these third parties will probably be denied access to the Union courts, as the decision is not of 'direct and individual concern' to them. The last condition in particular will stand in the way because a third party only has standing before these courts if he is in such a position that differentiates him from all other persons and, by reason of these distinguishing features, is singled out in the same way as the initial addressee.⁴⁸ Because individual credit institutions cannot be differentiated from other credit institutions, they do not comply with this strict requirement. The same applies to an organization representing the credit institutions or to a consumer organization because, according to settled case law of the CJEU, such organizations are not 'individually concerned' where the contested decision affects the general or collective interests of the group and its members do not have the right to bring an action individually.⁴⁹

In its case law, the CJEU generally justifies the impossibility for third parties (including collective interest groups) to instigate proceedings at the Union level by referring to the possibility of contesting the national decision, by which the Union decision in question is implemented, before a national court.⁵⁰ In this procedure third parties may plead the illegality of the Union decision and ask those courts to make a reference to the CJEU for a preliminary ruling. However, in case of a positive authorisation decision by the ECB access to a court at the national level will be problematic because this decision requires no national implementing measures. Previous case law has shown that the admissibility of an action for annulment before the CJEU does not depend on the question of whether a remedy exists before a national court that enables an examination of the validity of the act that is challenged.⁵¹ As a result, third parties will probably have no possibility at all to challenge the authorisation decision of the ECB before a (Union or national) court. This seems contrary to the principle of effective judicial protection.

44 There is also the possibility of an internal administrative review of such a decision. Art. 24 SSM Regulation states that any natural or legal person may request a review of a decision of the ECB under the SSM Regulation which is addressed to that person, or is of a direct and individual concern to that person. This is only optional; it is without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties.

45 This may concern a *fictitious* positive decision in case the ECB has not taken a decision within the time limit prescribed by Art. 78(1) SSM Framework Regulation. In that case the draft decision of the NCA is deemed to be adopted. See Section 3.1.1.

46 The current DGS Directive (Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, OJ L 135, 31.5.1994, p. 5) does not explicitly arrange for the harmonization of the methods of financing; the recitals only state that the cost of financing DGS must be borne, in principle, by credit institutions themselves. In the Netherlands, this has been implemented in Art. 3:259 Financial Supervision Act (*Wet op het financieel toezicht*). The recently adopted DGS Directive provides for a provision regarding the financing of the DGS, cf. Art. 10 of Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ L 173, 12.6.2014, p. 149.

47 Case 25/62, *Plaumann v Commission of the EEC*, ECLI:EU:C:1963:17; reaffirmed recently in *Inuit Tapiriit Kanatami and Others v Parliament and Council*, supra note 5.

48 Cf. Craig & De Burca, supra note 43, pp. 491 et seq.

49 Case C-321/95 P, *Greenpeace and others v Commission*, ECLI:EU:C:1998:153; Case T-236/04 and T-241/04, *EEB and Stichting Natuur en Milieu v Commission*, ECLI:EU:T:2005:426. See also Case 72/74, *Union syndicale v Council*, ECLI:EU:C:1975:43.

50 *Greenpeace and others v Commission*, supra note 49. See also Case C-362/06 P, *Sahlstedt and Others v Commission*, ECLI:EU:C:2009:243; and Case C-274/12 P, *Telefónica v Commission*, ECLI:EU:C:2013:852.

51 *EEB and Stichting Natuur en Milieu v Commission*, supra note 49; and *Union de Pequenos Agricultores (UPA)*, supra note 4.

As stated above, the beneficiary of a positive authorisation decision by the ECB, based on a positive draft decision by the NCA, can challenge the first decision before the Union courts, for example, if it disagrees with certain conditions. One can question whether possible irregularities in the procedure of the NCA that led to the draft decision, for instance as regards the application of the rights of defence,⁵² can be raised in the procedure against the ECB decision. A positive answer to this question can be inferred from the landmark *IBM* case.⁵³ Although the direct application of the *IBM* case to this type of situation is questionable, since *IBM* dealt specifically with *internal* EU procedures, as has been stressed by the CJEU itself, an analogous application of *IBM* to this *external* situation leads to the observation that those irregularities can be put forward by the applicant in the action directed against the definitive act for which they represent a preparatory step, i.e. the ECB decision granting the authorisation. It is important to stress that in most cases those irregularities will have been corrected by the ECB itself in the procedure leading to its decision. As mentioned in Section 3.1.1, various procedural guarantees, such as the right to be heard, must be observed by the ECB itself during this process. If it has complied with these provisions, it is highly unlikely that irregularities in the NCA's draft decision process will result in declaring the ECB decision void. However, if those same irregularities have not been corrected at the EU level or if this rectification is put in doubt, they will be part of the direct action against the ECB authorisation decision before the Union courts.

3.1.4. Second stage: rejection of a positive NCA draft decision by the ECB

The opposite of the acceptance of the draft decision by the ECB is the rejection of the positive NCA draft decision. Interestingly, the SSM system concerning authorisation does not comprise a formal ECB decision rejecting the application as such. This also becomes clear in Article 88 SSM Framework Regulation that foresees only the following ECB decisions concerning authorisation: the decision to authorise, the withdrawal of an authorisation and the decision to object to the draft authorisation decision. In our opinion, should the decision to object to the draft authorisation be final, the legal implications will be similar to that of the rejection of the application.⁵⁴

This decision can be challenged by the applicant before the Union courts under Article 263, fourth paragraph, TFEU. Under this procedure the applicant may raise all kinds of arguments such as the possible non-compliance by the ECB with the defence rights of Article 31 SSM Framework Regulation (and Article 41 CFR) or concerning the reasoning for the ECB decision. One might wonder whether the positive draft decision by the NCA may have raised legitimate expectations by the applicant that have to be honoured by the ECB. The answer to this question seems to be in the negative since the SSM Regulation makes it clear that such a deviation by the ECB is possible. After all, the ECB is, in the end, the competent authority to decide on the authorisation and shall make its own assessment on the basis of relevant Union law. As such, the ECB is not bound by the expectations created by the NCA.⁵⁵ Another interesting aspect regarding the rejection of an authorisation by the ECB concerns the following: although the ECB in the end is permitted to deviate from the positive draft decision by the NCA, it is not unthinkable that the Member State in question does not agree with the decision. The Member State may wish to challenge this decision before the CJEU. In practice, these conflicts will most likely be dealt with internally. However, if the dispute is not resolved, a Member State may contest the rejection before the CJEU. Because of its 'privileged status' under Article 263, second paragraph, standing for the Member State does not seem problematic at all.

52 As stated in Section 1, this Union principle applies to Member States when they are acting within the scope of (banking) Union law. Cf. inter alia: Case C-349/07, *Sopropé*, ECLI:EU:C:2008:746.

53 Case 60/81, *IBM v Commission*, ECLI:EU:C:1981:264.

54 This seems to be confirmed by the wording of Art. 14(3) SSM Regulation, in which 'rejection' is used as a synonym for 'object to a draft decision'.

55 That only competent authorities can create legitimate expectations can be derived from inter alia Case C-5/89, *Commission v. Germany*, ECLI:EU:C:1990:320; and Case C-169/95, *Spain v. Commission*, ECLI:EU:C:1997:10.

3.2. Remarks about the withdrawal of authorisation

The ECB can, either on its own initiative or at the NCA's request, withdraw the authorisation in the cases set out in relevant Union law.⁵⁶ If the NCA proposes to withdraw the authorisation, it shall submit a draft decision in that respect to the ECB. The ECB shall assess the draft decision without undue delay. It may accept or reject this draft decision.⁵⁷ If the ECB considers withdrawing the authorisation of its own motion, it must consult the competent NCA. The consultations shall in particular ensure that the ECB should allow, before any decision regarding withdrawal, sufficient time for the national authorities to decide on necessary remedial actions, including possible resolution measures. As the NCA remains competent to resolve credit institutions in cases where it considers that the withdrawal of the authorisation would prejudice resolving the credit institution or maintaining financial stability, it can refer objections to the ECB. The ECB then abstains from proceeding to the withdrawal for a mutually agreed period of time. However, if the ECB determines that proper actions necessary to maintain financial stability have not been implemented by the NCA, the withdrawal of the authorisation(s) shall apply immediately.⁵⁸

This system also comprises decisions that might be challenged before a court, just like the authorisation decision described above. The decision to withdraw authorisation will always be taken by the ECB, either on its own initiative or at the NCA's request. This decision can be challenged before the Union courts under Article 263, fourth paragraph, TFEU by the addressee, which is the credit institution involved. In case the Member State in which the credit institution is established does not agree with this withdrawal of authorisation, it may, as pointed out above concerning the refusal of authorisation, start an action before the Union courts under Article 263, second paragraph, TFEU.

There may also be numerous third parties which wish to challenge the withdrawal decision before the Union courts. One may think of certain⁵⁹ (groups of) deposit holders who stand to lose a substantial amount of money as a consequence of the withdrawal, or of (groups of) shareholders of the credit institution concerned.⁶⁰ Although the interests of these individuals seem to be affected by the withdrawal decision, these (groups of) individuals will probably be denied access to the Union courts, because they will not be 'directly and individually concerned' by the decision according to the strict standing requirements since *Plaumann* referred to in Section 3.1.3. This constitutes a gap in the legal protection.

Finally, there is the decision to reject the draft withdrawal decision of the NCA. This decision may be challenged before the Union courts by the Member State involved, or by a third party. In line with what has been stated before, an appeal by the Member State is admissible under Article 263, second paragraph, TFEU, but third parties will be denied access because they are not individually concerned by the decision.

3.3. Interim conclusion

As far as the authorisation procedures are concerned, in the end there are not many lacunae in the judicial protection. In most cases, in line with earlier case law, the Union courts will provide such protection, especially where the applicant is concerned. Irregularities concerning the NCA draft decision will have been solved at the EU level by the ECB or – if not – will be part of the proceedings before the Union courts against the ECB decision. Because of the strict standing requirements of Article 263, fourth

⁵⁶ Art. 14(5) SSM Regulation.

⁵⁷ Arts. 80, 81 and 83 SSM Framework Regulation.

⁵⁸ A withdrawal of a licence would likely trigger bankruptcy or resolution procedures. Such resolution procedures are governed by the resolution authorities (Art. 3 of 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 (BRRD), OJ L 173, 12.6.2014, p. 190). The ECB's powers are limited to early intervention measures (Art. 4(1)(i) SSM Regulation) and the assessment whether a credit institution is failing or likely to fail (Art. 32 BRRD and Art. 18 of Regulation (EU) No. 806/2014 of the European Parliament and 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 (SRM Regulation), OJ L 225, 30.7.2014, p. 1).

⁵⁹ The withdrawal of a licence does not automatically mean that deposit holders will lose substantial amounts of money, since generally a withdrawal outside bankruptcy or resolution will be well ordered, deposit guarantee schemes may apply in certain circumstances and an order of ranking applies in case of resolution which may protect deposit holders.

⁶⁰ In this respect it is interesting to note that the decision of the Dutch Minister of Finance to nationalize the SNS Bank and SNS REAAL was appealed against by several hundred appellants, both individuals and collective interest groups. According to the Dutch Council of State (*Raad van State*) on 25 February 2013, ECLI:NL:RVS:2013:BZ2265, these appeals were all admissible.

paragraph, TFEU, third parties (individuals and collective interest organizations) will probably have no access before the CJEU. Since access before the national courts also seems impossible due to the fact that the ECB decisions in question are not implemented at the national level, a gap with regard to judicial protection for these groups seems likely. As such, the system of legal remedies provided by the Union and national courts together is not as complete as it should be.

As far as the negative ECB authorisation decision based upon a positive NCA draft is concerned, there is the possibility that this decision might be challenged before the Union courts by the NCA's Member State. Because of its privileged status, this Member State will undoubtedly have standing, although in practice solutions for such a situation will probably be dealt with 'internally'. The same holds true for the situation in which a Member State does not agree with the ECB decision to withdraw the authorisation.

4. Investigations, measures and penalties

Whereas the ECB and NCAs have distinctive roles in the common procedures (as described in the previous section), this division is more complex for the day-to-day supervision and the enforcement in the SSM. The SSM has become a real mixed administration with tasks and responsibilities at both the European and national level. It should be considered what the exact powers of the supervisors are and what the consequences of this system are for legal protection in case of day-to-day supervision and enforcement. The focus will be on the SIs, since particularly the investigations of SIs concern a complex cooperation between the ECB and NCAs.

Firstly, this section will describe the ECB's investigation powers and, where relevant, the role of NCAs in that respect. After all, the day-to-day supervision and on-site inspections will be carried out by respectively the JSTs and on-site inspection teams, which consist of both ECB and NCA staff. Subsequently, the measures and penalties available in the SSM will be considered. On the basis of this, relevant issues with respect to both formal and substantive judicial protection that stem from the created 'mixed administration' will be discussed in Section 4.2.

4.1. Powers regarding investigation, measures and sanctions

4.1.1. Investigatory powers

Article 9(1) SSM Regulation states that, for the exclusive purpose of carrying out the tasks conferred upon it by Articles 4(1), 4(2) and 5(2) SSM Regulation, the ECB shall be considered the competent authority in the participating Member States as established by the relevant Union law.⁶¹ Read in conjunction with Article 6 SSM Regulation, this means that the ECB is the direct supervisor of SIs and the NCAs remain in the lead for LSIs.

Whereas the ECB is the competent authority for SIs, the day-to-day supervision shall be carried out by the JSTs.⁶² The on-site inspections will be carried out by a separate team, the so-called on-site inspection teams.⁶³ When describing the ECB's investigatory powers, the involvement of the different teams and the NCAs in these teams will be taken into account.

The ECB's investigatory powers consist of requiring information, general investigations and on-site inspections. The ECB may require the legal and natural persons listed in Article 10(1) SSM Regulation⁶⁴ to provide all necessary information in order to carry out the tasks conferred on the ECB by the SSM

61 The SSM Regulation refers to designated authorities as well, which term is also used in relevant Union law for certain tasks such as macroprudential tasks. Furthermore, Art. 9(1) SSM Regulation states that the ECB shall have – briefly stated – all the powers and obligations that NCAs have under relevant Union law and may require, by way of instructions, NCAs to make use of their powers under and in accordance with the conditions set out in national law, where the SSM Regulation does not provide such powers to the ECB and to the extent necessary for the ECB to carry out its SSM tasks. These powers are not discussed separately in this paper.

62 CP1 – Framework Regulation Consultation, supra note 24, p. 10.

63 See Section 2 for a description of the JST, on-site inspection teams and investigation units.

64 Being credit institutions, financial holding companies, mixed financial holding companies and mixed-activity holding companies, which are established in the participating Member States as well as persons belonging to these entities and third parties to whom these entities have outsourced functions or activities.

Regulation.⁶⁵ Those legal and natural persons shall supply the information requested.⁶⁶ Before making such a request, the ECB shall verify what required information is already available to the NCAs and, upon receipt of the required information, the ECB shall make a copy of the information available to the relevant NCA.⁶⁷

Furthermore, on the ground of Article 11(1) SSM Regulation, the ECB may conduct all necessary general investigations of the same persons. To that end, the ECB shall have the right to (a) require the submission of documents, (b) examine the books and records and take copies or extracts from such books and records, (c) obtain written and oral explanations from the persons mentioned or their representatives or staff, and (d) interview any other person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation. When a person obstructs the conduct of the investigation, the relevant NCAs shall afford, in compliance with national law, the necessary assistance, so that these rights can be exercised.⁶⁸

Finally, the ECB may conduct on-site inspections at the business premises of the legal persons listed in Article 10(1) SSM Regulation and any other undertaking included in supervision on a consolidated basis where the ECB is the consolidated supervisor.⁶⁹ As said above, the ECB shall establish special on-site inspection teams for this purpose. In principle the ECB has to notify the legal person subject to the on-site inspection of the ECB decision to conduct an on-site inspection at least five working days before the start of the on-site inspection. The relevant NCA shall be notified by the ECB at least one week before notification of the legal person subject to the on-site inspection.⁷⁰ However, the ECB may also carry out on-site inspections without prior announcement to the legal persons subject to the inspection where the proper conduct and efficiency of the inspection so require. In such a case, the relevant NCA shall be notified as soon as possible before the start of such on-site inspection.⁷¹

4.1.2. Measures and penalties

For the purpose of its supervisory tasks,⁷² the ECB shall have the power to impose the supervisory measures mentioned in Article 16(2) SSM Regulation. These measures include, for example, the power to require institutions to hold their own funds in excess of the capital requirements laid down in relevant Union law related to elements of risks and risks not covered by the relevant Union acts, the power to require the reduction of the risk inherent in the activities, products and systems of institutions and the power to remove members from the management board of credit institutions which do not fulfil the requirements set out in relevant Union law.⁷³ The ECB has such powers also to require inter alia any credit institution to take the necessary measures at an early stage to address relevant problems in case the credit institution does not meet or is likely to breach the requirements of relevant Union law or when, based on a determination in the framework of a supervisory review, the arrangements, strategies, processes and mechanisms implemented by the credit institution and its own funds and liquidity held by it do not ensure a sound management and coverage of the risks.⁷⁴

Furthermore, pursuant to Article 18(1) SSM Regulation, the ECB may impose administrative pecuniary penalties where SIs intentionally or negligently breach a requirement under relevant directly applicable acts of Union law in relation to which such penalties shall be made available to competent authorities under the relevant Union law.⁷⁵ The SSM Regulation states that the ECB shall publish such a

65 Art. 10 SSM Regulation.

66 Art. 10(2) SSM Regulation.

67 Art. 139 SSM Framework Regulation.

68 Art. 11(2) SSM Regulation.

69 Art. 12 SSM Regulation.

70 Art. 12(1) SSM Regulation and Art. 154(1) SSM Framework Regulation.

71 Art. 12(1) SSM Regulation and Art. 154(2) SSM Framework Regulation.

72 The article states 'for the purpose of Art. 9(1)', which refers to the exclusive purpose of carrying out the tasks conferred on the ECB by Arts. 4(1), 4(2) and 5(2) SSM Regulation.

73 Art. 16(2) SSM Regulation. Such powers are similar to the powers that competent authorities at least shall have according to Art. 104 CRD IV. In addition to that, Art. 16(2), sub (m), SSM Regulation confers an extra power on the ECB with regard to the removal of members from the management board.

74 Art. 16(1) SSM Regulation.

75 For a discussion about the allocation of the powers to impose administrative penalties, see: R. D'Ambrosio, 'Due process and safeguards of the persons subject to the SSM supervisory and sanctioning proceedings', Legal Research Papers Banca d'Italia, no. 74, 2013, pp. 38-39.

penalty, whether it has been appealed or not, in the cases and in accordance with the conditions set out in relevant Union law.⁷⁶

In other cases, not covered by this Article 18(1), where necessary for the purpose of carrying out the tasks conferred on the ECB by the SSM Regulation, the ECB may require NCAs to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with relevant Union law and any relevant national legislation which confers specific powers which are currently not required by Union law. These cases include, inter alia,⁷⁷ the imposition of penalties in the event of a breach by natural persons (for instance, members of the management board) and the imposition of criminal law sanctions.⁷⁸ The NCA shall open such proceedings only at the request of the ECB, whereby the NCA itself can ask the ECB for such request. The NCA shall inform the ECB about the completion of such procedure and in particular about the penalties imposed, if any.⁷⁹

Furthermore, in case of a breach of ECB regulations or decisions by SIs or LSIs where the relevant ECB regulations or decisions impose obligations on LSIs vis-à-vis the ECB, the ECB may impose sanctions in accordance with Council Regulation (EC) No. 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions ('Regulation (EC) No. 2532/98').⁸⁰ Such sanctions include both fines and periodic penalty payments.⁸¹

As mentioned in Section 2 above, the ECB shall establish an internal independent investigating unit, which consists of investigating officers designated by the ECB. For the investigation of such alleged breaches, the investigating unit may exercise the powers granted to the ECB under the SSM Regulation.⁸²

4.2. Issues of formal and substantive judicial protection

4.2.1. Which decisions are subject to an appeal before which court?

As stated in the preceding section, the SSM Regulation provides for the imposition of measures and penalties. Measures are, in general, imposed by the ECB and can thus be contested before the Union courts. The same applies to penalties imposed by the ECB in accordance with Article 18(1) and 18(7) SSM Regulation.⁸³ As mentioned above, pursuant to Article 18(5) SSM Regulation, the ECB may also require NCAs to open proceedings with a view to taking action in order to ensure that appropriate national penalties are imposed. In such a case, the ECB request will not be subject to an appeal before the Union courts. The request only aims at opening a proceeding; the decision to impose an appropriate penalty is up to the NCA and can be challenged before the national courts. This can be derived from the judgment of the CFI in the case of *Tillack*.⁸⁴ In this case the European anti-fraud office (OLAF) had sent the results of an investigation conducted by it, from which the suspicion arose that Tillack had breached his duty of professional secrecy and had been bribed, to the national competent authorities, which had

76 Art. 18(6) SSM Regulation and Art. 132 SSM Framework Regulation.

77 Art. 18(5) SSM Regulation and Art. 134(1) and 134(2) SSM Framework Regulation. Such cases can concern the application of non-pecuniary penalties for a breach of directly applicable Union law, pecuniary penalties for a breach of directly applicable Union law by a natural person, penalties for a breach of national law transposing relevant directives, penalties to be imposed in accordance with relevant national law which confers specific powers on the NCAs which are currently not required by relevant Union law and any administrative penalties or measures to be imposed on members of the management board of inter alia credit institutions.

78 In this respect, see also: Art. 136 SSM Framework Regulation, according to which the ECB, where it has reasons to suspect that a criminal offence may have been committed, shall request the relevant NCA to refer the matter to the appropriate national authorities.

79 Art. 134(3) SSM Framework Regulation.

80 Art. 18(7) SSM Regulation in conjunction with Art. 122 SSM Framework Regulation. The ECB has published a Recommendation for a Council Regulation amending Regulation (EC) No. 2532/98 concerning the powers of the European Central Bank to impose sanctions (ECB/2014/19), OJ C 144, 14.5.2014, p. 2. It states that certain amendments should now be considered taking into account, amongst other things, the fact that the scope of the ECB's powers to impose sanctions was extended by the SSM Regulation.

81 Art. 1(7) Regulation (EC) No. 2532/98.

82 Art. 125 SSM Framework Regulation.

83 The fact that such decisions are prepared by a JST, consisting of both ECB and NCA staff, does not alter this. The CJEU has pointed out in previous case law that 'although a decision to suspend, reduce or withdraw Community assistance may sometimes reflect an assessment and evaluation by the competent national authorities, under article 6(1) of Regulation No. 2950/83, it is the Commission which adopts the final decision and it alone assumes responsibility in law vis-à-vis the beneficiaries'. So in the context of the SSM, the ECB remains responsible for the final decision, even though the NCAs assist the ECB. This also ensures the equal treatment of credit institutions in the SSM. In this respect, see: Case C-32/95, *Commission v Lisrestal and others*, ECLI:EU:C:1996:402; Case C-413/98, *Frota Azul-Transportes e Turismo*, Paras. 30-31, ECLI:EU:C:2001:55.

84 Case T-193/04, *Tillack v Commission*, ECLI:EU:T:2006:292.

to decide what action should be taken. Tillack started proceedings against the OLAF information before the CFI. The Court stated that ‘(...) the national judicial authorities have to examine that information carefully and draw the appropriate consequences from it in order to comply with Community law, if necessary by initiating legal proceedings if they consider such action justified. Such a duty of careful examination does not, however, require an interpretation of that provision to the effect that the forwarded information in dispute has binding effect, in the sense that the national authorities are obliged to take specific measures, (...)’.⁸⁵ The national authorities are free to decide what action to take and have as such – as the only authority – the power to adopt decisions that affect the legal position of the subjects of the investigation.⁸⁶ Therefore the appeal by Tillack against OLAF was declared inadmissible.

When a final decision to impose measures or sanctions is reviewed by the court, any legal defect in the preparatory stage will be the subject of such review as well.⁸⁷ This is only different in case investigatory measures taken at this stage, e.g. the ECB decision ordering the use of investigatory power(s) or the decision to start an on-site inspection, can themselves be contested before the Union courts. In such a case, the proceedings against the investigatory measure should be instituted within two months of the notification to the plaintiff pursuant to Article 263, sixth paragraph, TFEU. If no proceeding is instituted within this period, the decision is held to be valid. It can no longer be challenged in an action for annulment brought against the measure or penalty imposed by the ECB or the NCA (before the Union or national courts) on the basis of the evidence which has been obtained using the investigatory powers.⁸⁸

An ECB decision ordering the use of any investigatory power is appealable if the decision intends to produce legal effects vis-à-vis the institution, i.e. is legally binding.⁸⁹ Hereinafter, it will be considered at what moments in the investigatory procedure there might exist a decision that would be appealable. A comparison with the Commission’s investigatory powers in the field of competition law shall be made in order to determine when the use of investigatory powers by the ECB is subject to review by the courts.

With regard to information requests, the Commission can address a ‘simple’ request for information to the undertaking. Such a simple request, pursuant to Article 18(2) Regulation No. 1/2003,⁹⁰ does not oblige the addressee to reply and does not change the legal position of the addressee. Therefore it cannot be challenged before the Union courts. In competition law the Commission also has, however, the possibility to request information by a decision on the basis of Article 18(3) Regulation No. 1/2003. A decision requiring information may only be taken after a prior simple request has proved unsuccessful.⁹¹ Such decision must indicate the right to have the decision reviewed by the Union courts.

The SSM Regulation does not make a distinction between simple information requests and information requests by decision. Article 10 SSM Regulation states that the ECB may require the legal and natural persons listed in Article 10(1)⁹² – for the sake of clarity, hereinafter credit institutions will only be referred to, but the analysis also applies to the other legal and natural persons as listed in Article 10(1) – to provide all information necessary in order to carry out the tasks conferred on the ECB by the SSM Regulation. Furthermore, it states that the credit institutions shall supply the information requested.⁹³ In practice, it is conceivable that the ECB will also adopt a formal decision for an information request in case a simple request would not be successful. As soon as the ECB requests information by decision,

85 Ibid., Para. 72.

86 Ibid., Para. 69.

87 *IBM v Commission*, supra note 53, Para. 12; Case T-123/03, *Pfizer v Commission*, ECLI:EU:T:2004:167, Para. 24.

88 K. Lenaerts et al., *EU procedural law*, 2014, pp. 275 and 277; Cf. Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *LVM v Commission*, ECLI:EU:T:1999:80, Paras. 441 and 442.

89 Art. 263 TFEU. With regard to the requirement of being legally binding, see inter alia: R. Barents, *Procedures en procesvoering voor het Hof van Justitie en het Gerecht van eerste aanleg van de EG*, 2005, pp. 110-111; T.C. Hartley, *The foundations of European Union law, an introduction to the constitutional and administrative law of the European Union*, 2014, pp. 349-359; A. Dashwood et al., *Wyatt and Dashwood’s European Union Law*, 2011, pp. 156-160.

90 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation No. 1/2003), OJ L 1, 4.1.2003, p. 1

91 Case 374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, Para. 26.

92 Being credit institutions, financial holding companies, mixed financial holding companies and mixed-activity holding companies, which are established in the participating Member States as well as persons belonging to these entities and third parties to whom these entities have outsourced functions or activities.

93 Art. 10(2) SSM Regulation.

under penalty of a fine, the decision changes the addressee's legal position and can thus be reviewed by the Union courts.

Also in the case of inspections, admissibility depends on the obligatory nature of the inspection. In the field of competition law, the Commission again has two possibilities. It can carry out inspections under authorisation,⁹⁴ which may only be carried out if the undertaking concerned is willing to cooperate⁹⁵ and cannot be challenged before the courts. However, the Commission may also carry out inspections ordered by a decision of the Commission, in which case undertakings and associations of undertakings are required to submit to such an inspection.⁹⁶ Due to the binding character of this decision, an undertaking can challenge the legality of such a decision.⁹⁷ The decision ordering an inspection shall also indicate that the undertaking concerned has the right to have the decision reviewed by the Union courts.⁹⁸

In the SSM, both general investigations and on-site inspections shall be conducted on the basis of an ECB decision.⁹⁹ If the on-site inspection follows an investigation and it has the same purpose and scope, the ECB decision for the investigation shall also be the basis for the on-site inspection.¹⁰⁰ Such ECB decision is, however, not a so-called ECB supervisory decision,¹⁰¹ which has to be carried out in accordance with Article 22 SSM Regulation and Title 2 of Part III SSM Framework Regulation.¹⁰² Nevertheless, credit institutions shall be subject to investigations launched or on-site inspections on the basis of an ECB decision.¹⁰³ When a person obstructs the investigation or on-site inspection, the NCA of the participating Member State where the relevant premises are located shall afford the necessary assistance in accordance with national law.¹⁰⁴ Furthermore, any obstruction of the investigation constitutes a breach of an ECB decision within the meaning of Article 18(7) SSM Regulation.¹⁰⁵ This implies that the ECB may impose fines or periodic penalty payments in accordance with Regulation (EC) No. 2532/98.¹⁰⁶ Therefore, as such, the ECB decisions ordering an investigation or on-site inspection are likely to be subject to review by the Union courts.

Although, at first sight, this might lead to an overload of procedures and thus hamper effective supervision, it can also be useful in order to obtain legal certainty quickly. Again the two-month period of Article 263, fifth paragraph, TFEU is applicable, within which a proceeding in which the legality of the investigatory decision is challenged has to be instituted. After that period, the undertaking can only contest the way the decision was implemented, but not the legality of the decision itself.¹⁰⁷ Besides, a decision of an EU institution, e.g. an ECB decision, is fully effective as long as it has not been declared invalid by the Union courts and it will remain enforceable unless this court has decided to suspend the operation of the said measures.¹⁰⁸ In this respect, Lenaerts, Maselis and Gutman point out that the (theoretical) possibility of bringing an action for interim relief is probably not useful either, since it is difficult to prove that an inspection has irreparable damage as a result.¹⁰⁹ So, the effectiveness of supervision will probably not be hampered, since in general it is impossible for an undertaking to prevent an inspection from taking place in practice.

94 Inspections carried out on the basis of Art. 20(3) Regulation No. 1/2003, i.e. inspections carried out upon production of a written authorisation.

95 Lenaerts et al., supra note 88, p. 276.

96 Art. 20(4) Regulation No. 1/2003.

97 Lenaerts et al., supra note 88, p. 276.

98 Art. 20(4) Regulation No. 1/2003.

99 Respectively Art. 11(2) SSM Regulation in conjunction with Art. 142 SSM Framework Regulation and Art. 12(3) SSM Regulation in conjunction with Art. 143(2) SSM Framework Regulation.

100 Art. 143(3) SSM Framework Regulation.

101 As defined in Art. 2(26) SSM Framework Regulation.

102 Art. 25 SSM Framework Regulation.

103 Respectively Art. 11(2) and 12(3) SSM Regulation.

104 Respectively Art. 11(2) and 12(5) SSM Regulation.

105 Arts. 142(c) and 143(2)(b) SSM Framework Regulation.

106 Art. 18(7) SSM Regulation.

107 Cf. *LVM v Commission*, supra note 88, Paras. 408-410 and 413-414; Case 85/87, *Dow Benelux v Commission*, ECLI:EU:C:1987:379, Para. 49; Cf. Lenaerts et al., supra note 88, p. 277.

108 Joined cases 46/87 and 227/88, *Hoechst v Commission*, ECLI:EU:C:1989:337, Para. 64; Cf. Lenaerts et al., supra note 88, p. 276.

109 Lenaerts et al., supra note 88, pp. 276 and 277; Cf. Case 46/87 R, *Hoechst v Commission*, ECLI:EU:C:1987:167, Paras. 32-36; *Dow Benelux v Commission*, supra note 107, Paras. 16-19.

Nevertheless, the credit institutions will have the necessary legal protection, given the fact that it is possible to have the decision ordering an investigation or on-site inspection reviewed after the actual investigation or inspection has taken place, as long as it has been challenged within the two-month period under Article 263, fifth paragraph, TFEU. In the context of competition law, the CJEU has pointed out in this regard that, when an undertaking against which the Commission has ordered an investigation brings an action against that decision before the Union courts under Article 263 TFEU and the decision ordering an investigation is annulled by the courts, the evidence gathered by that investigation cannot be used by the Commission to impose a penalty. In the wording of the CJEU: ‘(...), the Commission would be prevented from using, for the purposes of proceedings in respect of an infringement of the Community competition rules, any documents or evidence which it might have obtained in the course of that investigation, as otherwise the decision on the infringement might, in so far as it was based on such evidence, be annulled by the Community judicature.’ The same will apply to penalties imposed by the ECB (or by an NCA or Member State).

The possibility to contest the ECB decision ordering an on-site inspection afterwards will also be useful in case of on-site inspections without prior announcements. Whereas the possibility to challenge the ECB decision ordering an on-site inspection with prior announcement provides institutions, at least theoretically, with the possibility to try to stop such an inspection, the existence of such an appealable ECB decision will not be helpful in the case of an on-site inspection without prior announcement. In this case, it will definitely be too late to challenge such decision in order to stop an on-site inspection. However, it is still possible to have the legality of such decision reviewed by the Union courts afterwards.

4.2.2. Do the supervisors have adequate powers?

Many SIs that will be supervised by the ECB are large banking groups with subsidiaries in different Member States.¹¹⁰ This will require transnational supervision, which can be operationalised in several ways. The ECB has created the JSTs in order to effectuate cooperation between the ECB and NCAs. Within a JST, ECB staff members have the necessary investigatory powers provided by the SSM Regulation. The NCA staff members in a JST are still employed by the NCA and can, therefore, use their investigatory powers stemming from their national laws.¹¹¹

A simple example of transnational cooperation would be that the ECB and the NCA of the Member State in which the institution is established both exercise their investigatory powers on the basis of respectively Union and relevant national law.¹¹² It should only be assured that national legislation provides for the powers for the relevant NCA to assist the ECB – this includes the use of coercive measures such as the sealing of any business premises if necessary – which might require an amendment of national law. If an investigation in other Member States is required, the NCAs of that Member State should be empowered to provide for assistance as well. The information requests can be carried out by the ECB and the relevant NCA, which shall in general be able to exchange such information with other NCAs given the fact that all NCAs within the SSM are subject to the professional secrecy requirements of the CRD IV through the national implementation thereof.¹¹³

With regard to the general investigatory powers, one should bear in mind that it might require additional national regulation in the event that the ECB would want all JST members to be able to use their investigatory powers in all Member States, i.e. if the ECB wants to go beyond the simple example of transnational cooperation as mentioned above. First of all, the national legislation of the Member States where the investigation takes place should provide for the possibility that ‘foreign’ supervisors can use

110 <<https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm-listofsupervisedentities1409en.pdf?59d76de0c5663687f594250ebf228c6b>> (last visited 20 November 2014).

111 The SSM Regulation includes the obligation for NCAs to assist the ECB, but does not provide for any investigatory powers for the NCAs other than related to onsite inspections. The CRD IV sets forth what powers competent authorities at least should have, which have to be implemented in national law.

112 With regard to transnational cooperation in general, see: F. Wettner, *Die Amtshilfe im Europäischen Verwaltungsrecht (diss. Heidelberg)*, 2005; M.J.J.P. Luchtman, *Grensoverschrijdende sfeercumulatie: over de handhavingssamenwerking tussen financiële toezichthouders, fiscale autoriteiten en justitiële autoriteiten in EU-verband (diss. Utrecht)*, 2007; A. Gil Ibáñez, *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits*, 1999, p. 282; A. David, *Inspektionen im Europäischen Verwaltungsrecht’ (diss. Heidelberg)*, 2003.

113 Art. 56 CRD IV.

their investigatory powers – or at least are entitled to join the investigation – in that Member State.¹¹⁴ Subsequently, the NCA should be able to use its investigatory powers abroad. The ECB's supervisory powers are applicable in all participating Member States, but this is not necessarily the case for NCAs' investigatory powers. The SSM Regulation does not mention the use of powers by NCAs in transnational investigations, other than for on-site inspections (as discussed below). Whether NCA supervisors have the necessary powers for transnational investigations thus depends on their national legislation. The national legislation of the NCA should provide for the possibility for the NCA to use its powers abroad. Furthermore, it should be verified what the exact scope of the NCA's investigatory tasks is, i.e. does that include, for example, ensuring compliance with (foreign) laws of other Member States implementing the relevant Union law as well or only compliance with directly applicable Union law and with their national legislation.

The SSM Regulation provides for additional clauses regarding the use of powers in case of an on-site inspection. Pursuant to Article 12(2) SSM Regulation, officials of and other persons authorised by the ECB to conduct an on-site inspection may enter any business premises and property of the legal persons subject to an on-site inspection decision adopted by the ECB. Furthermore, these officials and other authorised persons shall have all the general investigatory powers set forth in Article 11(1) SSM Regulation. Officials of and other accompanying persons authorised or appointed by the NCA of the Member State where the inspection takes place shall actively assist the officials and other persons authorised by the ECB,¹¹⁵ under the supervision and coordination of the ECB. To that end, such national officials and other accompanying persons shall also have the same powers as the officials and other persons authorised by the ECB.¹¹⁶ Where the ECB officials and other persons authorised by the ECB find that a person opposes an inspection, the NCA of the Member State where the inspection is conducted shall afford them the necessary assistance in accordance with national law. This assistance may include the sealing of any business premises and books or records.¹¹⁷ If this assistance obligation does not exist in national law, it should be created by means of national law.¹¹⁸

The foregoing means that the ECB and the staff of the NCA of the Member State where the inspection is conducted have the necessary investigatory powers in order to conduct an on-site inspection. Inspectors of other NCAs can possibly be authorised by the ECB and as such obtain the necessary investigatory powers pursuant to Article 12(2) SSM Regulation. This reasoning would imply that the ECB can determine which NCA officials shall have the relevant investigatory powers in respect of an on-site inspection. A similar construction can be found in the fishery sector,¹¹⁹ where inspectors of different Member States are appointed by the Commission in order to supervise waters that are under other Member States' sovereignty and to exercise supervisory powers therein.¹²⁰ Whether such a construction is appropriate – or, in other words, whether an ECB decision authorising officials of other NCAs offers, without any implementation in national law, a sufficient legal basis for exercising investigatory powers on the territory of another Member State – is difficult to say. It seems defensible that further implementation in national law is not required, since the SSM Regulation clearly states what powers such 'foreign' officials will have. However, in the area of fisheries some Member States, namely Germany and Spain, nevertheless considered further national legislation to be necessary and chose to implement the investigatory powers

114 Pursuant to the CRD IV, a supervisory authority can carry out on-the-spot checks and inspections of branches established in another Member State as well. The CRD IV provides that host Member States, i.e. where the branch is established, shall provide for such possibility (Art. 52(1) CRD IV). Such investigations of branches shall be conducted in accordance with the law of the Member State where the check or inspection is carried out (Art. 52(4) CRD IV).

115 Officials of the relevant NCAs also have the right to participate in the on-site inspections (Art. 12(4) SSM Regulation).

116 Art. 12(4) SSM Regulation.

117 Art. 12(5) SSM Regulation.

118 In the Netherlands similar assistance has been regulated as regards Commission inspections in competition cases. Cf. R.J.G.M. Widdershoven, 'The Role of National Administrative Law in Transnational Enforcement Cooperation', in J.A.E. Vervaele, *Transnational Enforcement of the Financial Interests of the European Union*, 1999, pp. 130-150, in particular pp. 137-138.

119 P. Boswijk et al., 'Transnationale samenwerking tussen toezichthouders in Europa', WODC report 2008, p. 183.

120 Inspectors of Member States are registered with the Commission by their Member State (so-called Community inspectors) and are empowered to supervise waters that are under other Member States' sovereignty. Pursuant to that regulation, such inspectors have the same powers as inspectors of that Member State where the inspection takes place. The Commission adopts a decision determining the list of appointed Community inspectors in accordance with the regulation.

of the (foreign) Community inspectors in their national laws.¹²¹ This can be understood in light of the principle of legality.¹²²

In accordance with Article 143(1) SSM Framework Regulation, an on-site inspection team shall carry out the on-site inspections. The explanation above, regarding other investigatory powers of JSTs, is applicable to on-site inspection teams too, since Article 12(2) SSM Regulation prescribes that the officials of and other persons authorised by the ECB shall have the general investigatory powers stipulated in Article 11(2) SSM Regulation when conducting an on-site inspection. The same applies to investigating units, which may exercise the powers granted to the ECB under the SSM Regulation.¹²³

4.2.3. On-site inspections at the premises of legal persons¹²⁴

A powerful investigatory competence of the ECB is the on-site inspection at the business premises of a legal person referred to in Article 10(1) SSM Regulation. As already stated above, on-site inspections are conducted by on-site inspection teams, established by the ECB. The officials of the NCA of the Member State where the inspection is to be conducted are obliged to actively assist the on-site inspection team. If a person opposes the inspection, this NCA shall afford the inspection team the necessary assistance in accordance with national law, which may include coercive measures, such as the sealing of any business premises and books or records.¹²⁵ In Section 4.2.2 we already discussed the competences and powers which should be created by the national laws of the NCAs to ensure that officials of the different NCAs involved in an on-site inspection team can exercise the required powers effectively. In this section we focus on questions of formal and substantive judicial protection.

To understand these questions it is important to note that an on-site inspection at the business premises – and the use of coercive measures for this purpose – is a far-reaching power which as such interferes with the right of respect for the home of the legal person in question. This right has been recognized by both European courts, the ECtHR and the CJEU.¹²⁶ The ECtHR bases the right on Article 8 ECHR. In the case law of the CJEU the right has been developed as a general principle of Union law, namely the general principle that protects against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any natural and legal person. After the coming into force of the CFR in December 2009, the right will probably be based on Article 7 CFR, the Union equivalent of Article 8 ECHR.

The right of respect for the home can be restricted, for instance – as is the case in the SSM Regulation – for reasons of conducting an on-site inspection. According to the case law of the European courts such restrictions are justified if they are in accordance with the law, have a legitimate aim and are necessary in a democratic society (Article 8(2) ECHR), and respectively are, subject to the principle of proportionality, necessary and genuinely meet the objectives of general interests recognized by the Union (Article 52(1) CFR).¹²⁷ The on-site inspections of the ECB are in accordance with the law, Article 10 SSM Regulation, and have as such a legitimate aim, namely the supervision of credit institutions. A possible limitation to the inspection of the premises may however be set by the necessity principle as part of the proportionality principle. In practice the judicial assessment of the inspection is therefore concerned with the proportionality of the inspection (and the coercive measures applied theretofore that purpose) in the light of the legitimate aim pursued.¹²⁸

121 Boswijk et al., supra note 119, pp. 102-103 and 146-148.

122 At least in 2008. Cf. Boswijk et al., supra note 119, p. 183.

123 Art. 125(1) SSM Framework Regulation.

124 For writing Sections 4.2.3 and 4.2.4 we also made use of the Utrecht University Master's thesis by Nina Bontje, 'Supervision by Multiple States versus sanctioning in a Single State', 2014.

125 Art. 12(4) and 12(5) SSM Regulation.

126 See ECtHR 16 December 1991, appl. no. 13710/88 (*Niemetz*); ECtHR 16 April 2002, appl. no. 37971/97 (*Colas Est*); *Hoehst v Commission*, supra note 108; Case C-94/00, *Roquette Frères*, ECLI:EU:C:2002:603.

127 See inter alia: *Colas Est*, supra note 126; *Roquette Frères*, supra note 126.

128 P. van Dijk et al. (eds.), *Theory and Practice of the European Convention of Human Rights*, 2006, p. 747; A. van Hoek & M. Luchtman, 'The European Convention of Human Rights and Transnational Cooperation in Criminal Matters', in A. van Hoek et al. (eds.), *Multilevel Governance in Enforcement and Adjudication*, 2006, p. 68.

The judicial proportionality test is a twofold test.¹²⁹ First, it should be assessed whether a search is as such necessary. Second, it should be examined whether it is not arbitrary and excessive having regard to the subject-matter of the inspection. The second test should be based on the specific circumstances of the case. Important matters to take into account when examining the possible excessiveness of a search are, for instance, the number of premises that will be inspected, the length of the inspection and the scale of this inspection. Furthermore, it should be noted that the inspection of private homes of individuals requires more safeguards than the inspection of business premises.¹³⁰ Finally the grounds which the authorities have for suspecting an infringement of rules and the seriousness of the infringement should be taken into account.

An important aspect of the excessiveness test of a search of the premises of also legal persons is whether it is conducted on the basis of a prior authorisation by a judicial authority. The importance of this requirement became clear in the landmark ECtHR case of *Colas Est*.¹³¹ The case was concerned with the inspection of several business premises of Colas Est by the French competition authority during which numerous documents were seized. The ECtHR declared this search incompatible with Article 8 ECHR, because the authority enjoyed very wide powers of inspection (it had the exclusive competence to determine the expedience, number, length and scale of the inspection), without sufficient safeguards against abuse. In this respect the fact that the inspection took place without prior judicial authorisation was a decisive factor for the negative outcome of the case.

Applying the foregoing to the ECB on-site inspection it is clear that a judicial assessment of both the necessity and the excessiveness of the inspection is required. A complication in conducting this test is that the inspection takes place in, as it were, two legal orders, the EU and the national legal order. After all, the inspection is conducted on the basis of a decision of the ECB, an EU institution, but physically takes place in a national legal order, that should provide for assistance possibly by using coercive powers in case a person opposes the inspection. The CJEU had to deal with the same problem in the area of competition law in the case of *Roquette Frères*,¹³² and the SSM Regulation is obviously inspired by this case. According to *Roquette Frères* the judicial assessment of an inspection is divided between the Union courts and the national courts.¹³³ Briefly stated, the Union courts are the competent courts to assess the necessity of the inspection, while the national courts should examine whether the coercive measures envisaged in the inspection are not arbitrary or excessive. In the SSM Regulation this division of tasks is visible.

- a. Union courts: a legal person is subject to an on-site inspection on the basis of a decision of the ECB.¹³⁴ As we explained in Section 4.2.1, the legal person can challenge this decision before the Union courts under Article 263, fourth paragraph, TFEU. In this procedure the necessity of the inspection is examined as part of the lawfulness test referred to in Article 13(2) SSM Regulation, last sentence.
- b. National courts: if an on-site inspection or the assistance in such an inspection requires authorisation by a judicial authority according to national law, such authorisation shall be applied for.¹³⁵ In this procedure the national court shall control that the ECB decision is authentic and the coercive measures envisaged are neither arbitrary nor excessive with regard to the subject-matter of the inspection. In this procedure – and in line with the duty of sincere cooperation under Article 4(3) TEU, as interpreted in *Roquette Frères* – the national court may ask the ECB for detailed explanations, in particular, inter alia, relating to the grounds which the ECB has for suspecting that an infringement of the banking

129 For this twofold test, see: *Colas Est*, supra note 126; *Roquette Frères*, supra note 126. With regard to the different aspects that should be taken into account in the excessiveness test, besides these cases, see also: ECtHR 6 January 2004, appl. no. 15848/03 (*Cronin*); ECtHR 8 January 2002, appl. no. 51578/99 (*Keslassy*); ECtHR 28 April 2005, appl. no. 41604/98 (*Buck*).

130 *Roquette Frères*, supra note 126.

131 *Colas Est*, supra note 126.

132 *Roquette Frères*, supra note 126.

133 Cf. A. David, 'Inspektionen als Instrument der Vollzugskontrolle', in E. Schmidt-Assmann & B. Schöndorf-Haubold, *Der Europäischen Verwaltungsverband*, 2005, pp. 236-264, in particular pp. 257-263.

134 Art. 12(3) SSM Regulation.

135 Art. 13(1) and 13(2) SSM Regulation.

rules has taken place and the seriousness of the suspected infringement. However, the national court shall not review the necessity of the inspection, because this test is conducted by the CJEU.

At first sight this system seems to be in line with the requirements on the judicial assessment of inspection decisions that can be derived from the case law of the European courts. Problematic, however, is that the prior judicial assessment of the inspection by the national court with regard to excessiveness only takes place if the national law of a Member State requires such authorisation. This dependency on national law leaves room for differences between the Member States and in practice such differences do exist.

After the *Colas Est* case, for instance, France introduced a general prior judicial authorisation as a necessary requirement for searching the premises of legal persons by supervisory authorities, such as the competition authority. Other Member States, however,¹³⁶ for instance the Netherlands, reacted differently. In the Netherlands the possibility (not an obligation) to apply for a prior judicial authorisation has been introduced in the area of competition law, but in practice most inspections by the competition authority are still conducted without such authorisation.¹³⁷ Outside the area of competition law, for instance in the area of banking supervision, the possibility of applying for a prior judicial authorisation does not exist at all. So, every inspection in this area is conducted without a prior judicial authorisation. The reason for not introducing prior authorisation is, in short, that in the Netherlands the inspection powers of the authorities are not considered to be as wide as the inspection power of the French authorities in the *Colas Est* case, because under Article 5:13 of the General Administrative Law Act (*Algemene wet bestuursrecht*) Dutch inspectors always have to comply with the principle of proportionality. Possible infringements of the principle during the inspection can be raised by the legal person concerned in the judicial procedure against the penalty which may be imposed on the basis of the information seized during the inspection. In this procedure also the excessiveness of the coercive measures is examined.

Thus, the SSM Regulation allows two systems of judicial control of the excessiveness of the use of coercive measures in an on-site inspection, the *ex ante* French system (prior judicial assessment) and the *ex post* Dutch system (a subsequent judicial assessment when a penalty or measure is imposed). The Dutch system has as a possible drawback for the effectiveness of banking supervision that a measure or a penalty may be annulled by the competent court because – and in so far as – it has been based on material which is obtained in an on-site inspection that is *ex post* considered to be illegal by the court because the use of coercive powers was excessive. Such drawbacks do not occur in the French system.

However, another problem might also occur. Under the SSM Regulation, breaches of the banking rules that have been discovered in an on-site inspection conducted in, for example, the Netherlands without prior judicial authorisation, are sometimes penalized by the Dutch NCA. In that case a judicial assessment of the excessiveness of the inspection can be conducted by the Dutch court which assesses the penalty. However, it is likely that in most cases penalties and measures will be imposed by the ECB. Furthermore, it is possible that an NCA of another Member State imposes a penalty which is (partly) based on information obtained during an inspection in the Netherlands. In these situations it seems highly unlikely that the competent courts concerning these decisions – the Union courts or the national courts of another Member State – can and will seriously assess the excessiveness of the inspection in the Netherlands. Most probably they will assume that the procedures in the Netherlands have been conducted in a regular fashion. Such an approach can be based on the rule of non-inquiry (in Dutch: the *vertrouwensregel*), which allows the courts in one country to refrain from investigations into, inter alia, the legal matters of another country.¹³⁸ The rule has as its rationale the mutual trust that underlies the system of legal cooperation between states in general and between the EU Member States in particular.¹³⁹

136 According to De Moor-van Vugt, in 2003 only Austria, Finland, Ireland, the Netherlands and Sweden did not require prior judicial authorisation for searching business premises. However, all Member States require such authorisation for the search of private homes. See: A. de Moor-van Vugt, 'Administrative Sanctions in EU Law', 2012 *Review of European Administrative Law*, no. 1, pp. 5-41, in particular p. 25.

137 Cf. R. Stijnen, 'Het huisbezoek en de vordering van informatie: adequate rechtsbescherming door de strafrechter, de bestuursrechter en de burgerlijke rechter', 2014 *JBplus*, no. 3; M.M. Slotboom, 'De NMa staat voor de deur. Maar waar is de rechterlijke machtiging? Tien jaar na *Colas Est*', 2012 *Markt & Mededinging*, no. 3, pp. 110-116.

138 Van Hoek & Luchtman, *supra* note 128, pp. 26-27.

139 *Ibid.*, pp. 27-28.

Although within the EU such trust generally seems to be justified, as all Member States are party to the ECHR and have to comply with the CFR, in the current case it might lead to the situation that the excessiveness of the inspection is not judicially examined at all.¹⁴⁰ This seems inconsistent with the case law of the European courts.

So, the system of ex post judicial assessment of ECB on-site inspections might either hamper the effectiveness of the supervision or it might lead to a gap in substantive legal protection. Both problems could have been avoided if the SSM Regulation would have prescribed mandatory prior judicial authorisation also in Member States where such authorisation currently does not exist.¹⁴¹

However, to avoid misunderstandings, such authorisation is only required in case the NCA of the Member State where the inspection takes place has to take coercive measures to facilitate the inspection because it is opposed. In our expectations legal (banking) persons will not as a rule oppose the inspection and will cooperate with the ECB. In that case coercive measures are not needed and neither is a prior judicial authorisation for the inspection in which the excessiveness of these measures could have been examined. However, in the event that national coercive measures are necessary, a preventive judicial excessiveness test should be provided for.

4.2.4. Rights of defence

The exercise of ECB investigatory powers and the imposition of measures and administrative penalties by the ECB and NCAs should comply with the principle of respect for the rights of defence.¹⁴² This principle implies various sub-rights. The most important sub-right – the right of individuals to be heard before the authorities can take a measure which would adversely affect the individual – has already been referred to in Section 3 where we discussed the common procedures. To exercise this right effectively the person concerned should have access to the file and should have sufficient time to prepare for the hearing. All these rights obviously also apply to the imposition of measures and penalties. As regards the imposition by the ECB they are codified in Articles 126 and 127 SSM Framework Regulation.

Another sub-right of the rights of defence, which should already be guaranteed by the ECB and the NCAs in the investigatory stage, is legal professional privilege (LPP). The importance of this principle is explicitly acknowledged in Recital (48) SSM Regulation, which states that ‘Legal profession privilege is a fundamental principle of Union law, protecting the confidentiality of communications between natural or legal persons and their advisors, in accordance with the conditions laid down in the case-law of the Court of Justice of the European Union (CJEU)’. These conditions are twofold.¹⁴³ First, LPP only protects the communication between the (legal) person and an external or independent lawyer. So, it does not apply to in-house lawyers who are bound to the legal person by a relationship of employment. Other advisors besides lawyers are *a fortiori* not protected by the principle. In the second place correspondence is only protected by LPP if it has taken place for the sole purpose and in the interests of the (legal) person’s rights of defence.

The principle of LPP is of particular importance where the ECB exercises the general investigation powers, referred to in Article 11(1), sub (a), SSM Regulation – requires the submission of documents – and sub (b) – examines the books and records of the legal person and takes copies –, powers that can also be exercised during an on-site inspection. After all, such documents, books and records might contain privileged information. In the competition case of *AKZO and Akcros* the CFI stated that, to ensure compliance with the LPP principle, the Commission is only allowed to examine a document which is

140 In international criminal law, the situation in which an individual is offered no legal protection against coercive measures because the measures are taken in one country (which applies a system of ex post judicial control) and criminal procedures are conducted in another country (which applies the rule of non-inquiry), is referred to as a ‘systematic flaw’. See: A.M.M. Orie, ‘De verdachte tussen wal en schip of de systeem-breuk in de kleine rechtshulp’, in E. André de la Porte et al. (eds.), *Bij deze stand van zaken*, 1983, pp. 351-361; A.H. Klip, *Criminal Law in the European Union*, 2005, p. 64.

141 For the same opinion, see: Van Hoek & Luchtman, supra note 128, p. 69, and De Moor-van Vugt, supra note 136, pp. 24-26.

142 With regard to the rights of defence and the different sub-rights of the rights of defence, see inter alia: De Moor-van Vugt, supra note 8, pp. 5-16; Jans et al., supra note 3, pp. 188-196; Jansen & Langbroek, supra note 8; Groussot, supra note 8, pp. 228-334; T. Tridimas, *The General Principles of EU Law*, 2006, pp. 370-417; Widdershoven, supra note 118, pp. 137-143.

143 Case C-155/79, *AM&S v Commission*, ECLI:EU:C:1982:157; Joined cases T-125/03 and T-253/03, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:T:2007:58, as confirmed in Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:512.

privileged according to the legal person, after the legal person has been offered the opportunity to start ex ante proceedings before the courts.¹⁴⁴ In the event of such an appeal the Commission is obliged to place the contested document in a sealed envelope until the court has decided on the privileged status of the document. In our opinion the ECB should follow the same line where it exercises the investigatory powers mentioned.

A final sub-right of the rights of defence that is of importance for the exercise of investigatory powers by the ECB is the right not to incriminate oneself or the principle of *nemo tenetur prodere seipsum* (the ‘right to remain silent’). According to the CJEU in the competition case of *Orkem* this right implies that the ‘Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.’¹⁴⁵ The right is only applicable to investigations in case they may lead to the imposition of a measure or penalty of a punitive or criminal nature. This limitation can be derived from the case law of the CJEU in which the right is always applied in cases concerning punitive competition fines.¹⁴⁶ The limitation is even more obvious in the case law of the ECtHR where the scope of the right is restricted to criminal charge cases within the meaning of Article 6 ECHR.¹⁴⁷ Therefore, before the compliance of the ECB investigations with the right not to incriminate oneself can be examined, it is first necessary to establish which measures and penalties provided for in the SSM Regulation qualify as a punitive/criminal charge (ECtHR), respectively are criminal in nature (CJEU).¹⁴⁸

According to both European courts, three criteria are relevant in respect of the qualification, namely,¹⁴⁹ (a) the legal classification of the offence under national law, (b) the very nature of the offence and (c) the nature and degree of severity of the penalty that the person concerned is liable to incur. As regards the last criterion it is of importance whether the purpose of a penalty is punitive, in the sense that it seeks to punish and deter.¹⁵⁰ The measures and penalties which may be imposed by the ECB have been listed in Section 4.1.2 of this contribution. Concerning criterion (a) it can be observed that all measures and penalties provided for in the SSM Regulation are not regarded as criminal in nature by Union law – which, as the CJEU has stated in the case of *Bonda*, must be equated with ‘national law’ within the meaning of the case law of the ECHR¹⁵¹ – but as administrative. However, in the case law of the European courts criterion (a) is seldom decisive.

On the ground of the other two criteria and criterion (c) in particular, it seems quite obvious that ‘measures’ do not qualify as criminal in nature. After all, their purpose is not punitive (or deterrent), but to maintain a sound and stable banking system. As regards the ECB penalties both the administrative pecuniary penalty of Article 18(1) SSM Regulation and the fines provided for in Regulation (EC) No. 2532/98 qualify as criminal in nature (a criminal charge). According to both European courts administrative fines seek to punish and deter, even if the amount of the fine is very low.¹⁵² According to Article 18(6) SSM Regulation the ECB shall publish an administrative pecuniary penalty, whether it has been appealed or not. In our opinion this publication (‘naming and shaming’) does not qualify as a (separate) penalty, let alone as a penalty of a criminal nature. This opinion is in line with the case *Lomardiclub* of the CFI,¹⁵³ in which a similar publication of a competition fine, which was not yet definite,

144 Joined cases T-125/03 and T-253/03, *Akzo Nobel Chemicals and Akros Chemicals v Commission*, ECLI:EU:T:2007:58.

145 *Orkem v Commission*, supra note 91. Cf. De Moor-van Vugt, supra note 136, pp. 22-24.

146 Cf. Case C-60/92, *Otto v Postbank*, ECLI:EU:C:1993:876, in which the court declared that the right does not apply to civil law cases, as they do not entail the imposition of a sanction by the administration.

147 ECtHR 25 February 1993, appl. no. 10828/84 (*Funke*); ECtHR 17 December 1996, appl. no. 19187/91 (*Saunders*).

148 For a similar test of the SSM measures and penalties, see: D’Ambrosio, supra note 75, pp. 22-27. Please note that the terminology of both European courts is slightly different in this respect. The ECtHR uses the Art. 6 ECHR term ‘criminal charge’ (see for example the cases *Funke* and *Saunders*, supra note 147), while the CJEU uses the term ‘criminal in nature’ (see for example Case C-489/10, *Bonda*, ECLI:EU:C:2012:319, and *Akerberg Fransson*, supra note 11).

149 Cf. ECtHR 8 June 1976, appl. no. 5100/71 (*Engel*); ECtHR 21 February 1984, Series A No. 73 (*Öztürk*); *Bonda*, supra note 148; and *Akerberg Fransson*, supra note 11.

150 See: *Öztürk*, supra note 149. The CJEU in *Bonda*, supra note 148, assesses the punitive purpose of a penalty under criterion (b).

151 *Bonda*, supra note 148.

152 *Öztürk*, supra note 149; ECtHR 23 July 2002, appl. no. 34619/97 (*Janosevic*); Case C-45/08, *Spector Photo Group and Van Raemdonck*, ECLI:EU:C:2009:806.

153 Case T-198/03, *Bank Austria Creditanstalt v Commission (Lombard Club)*, ECLI:EU:T:2006:136. If the publication of the pecuniary penalty would be considered criminal in nature (quod, in our opinion, non), this measure could not be applied at all. After all, the combination of two penalties of a criminal nature for the same offence is contrary to the principle of *ne bis in idem* (Art. 50 CFR).

was not considered to be a penalty, but was characterized as a means of informing the public in general and competitors in particular about conduct contrary to the competition rules.¹⁵⁴ The final penalty to be qualified is the periodic penalty payment provided for in Regulation (EC) No. 2532/98. In our opinion this penalty is not criminal in nature, because its purpose is not to punish and deter, but to put an end to a continuing breach of a regulation or a supervisory decision.¹⁵⁵ So, its primary aim is reparation. Moreover, the individual can avoid the execution of the penalty by complying with the rules or decisions in question.

As stated in Section 4.1.2, sometimes infringements of the banking rules are sanctioned by the NCAs. For reasons of feasibility it is not possible to analyze the very different penalties which may exist in the Member States. However, the foregoing analysis also applies to national penalties. So, in so far as the NCAs are competent to impose the same ‘penalties’ as the ECB, administrative fines imposed by an NCA are criminal in nature, but decisions to publish the fine and to impose a national periodic penalty payment are not. If a Member State applies criminal law sanctions against an infringement of the banking rules, these sanctions are obviously criminal in nature.

On the ground of the foregoing the right not to incriminate oneself applies in ECB investigation procedures that may lead to a pecuniary penalty/fine imposed by the ECB or NCA and to criminal law procedures in the Member States. Concerning the consequences of this, one has to consider three questions, namely the scope of the right, the starting point thereof and the consequences of not observing the right.

1. The scope of the right: According to the CJEU the right applies to written and oral information that might involve an admission on the individual’s part of the existence of an infringement, but not to merely factual information.¹⁵⁶ So the ECB is allowed to compel the investigated individual to provide it with *factual information* by means of a duty to cooperate. In the case law of the ECtHR a similar distinction is made between information which exists independently from the will of the individual and will-dependent information.¹⁵⁷ The right not to incriminate oneself only applies to the latter and not to will-independent information. Examples of will-independent information are breath, blood and urine samples and bodily tissues, but also – and more important for the investigatory activities of the ECB – documents, books and records (including computer data). However, also the latter information may be protected by the right not to incriminate oneself in the event that the information possibly exists (independent from the individual’s will), but the authorities have to apply excessive force to obtain it.¹⁵⁸ Although the existence of such a situation cannot be excluded in advance, we do not expect such an extreme situation to occur very often in banking supervision cases. If our expectation is correct the right not to incriminate oneself will as a rule not apply to the investigatory powers, referred to in Article 11(1), sub (a), SSM Regulation – the ECB’s right to require the submission of documents – and (b) – the ECB’s right to examine the books and records of the individual. These powers are concerned with factual (CJEU) or will-independent (ECtHR) information. However, the ECB should comply with the right where it exercises its investigatory right under Article 11(1), sub (c) to obtain written or oral explanations from the banking institutions or their representatives or staff.¹⁵⁹
2. Starting point: according to the *Orkem* case individuals are entitled to the right not to incriminate oneself from the moment that the authorities entertain a reasonable suspicion that the banking rules have been infringed.¹⁶⁰ This seems to be the same moment at which the ECB – according to Article

154 According to Art. 132(2) SSM Framework Regulation, if an appeal to the CJEU against a pecuniary penalty which has been published is pending, the ECB shall also publish on its official website information on the status of the appeal and the outcome thereof. So, the public knows that the published penalty is not definite.

155 Moreover, Art. 129(1) SSM Framework Regulation contains several guarantees concerning the amount of the penalty payment (the amount should be effective and proportionate, but not dissuasive), the period within which the individual should comply and the periods for imposition.

156 *Orkem v Commission*, supra note 91; Case T-112/98, *Mannesmannröhren-Werke v Commission*, ECLI:EU:T:2001:61.

157 *Saunders*, supra note 147.

158 ECtHR 3 May 2011, appl. no. 31827/96 (*JB v. Switzerland*); ECtHR 11 July 2006, appl. no. 54810/00 (*Jalloh*).

159 The ECB’s investigation right, provided for in Art. 11(1), sub (d), SSM Regulation, to interview other persons who consent to be interviewed is concerned with persons not connected to a bank. Because possible punitive ECB penalties cannot be applied against these persons, the right not to incriminate oneself does not apply.

160 *Orkem v Commission*, supra note 91.

124 SSM Framework Regulation – should refer the case to the investigation unit (see Section 2). So, in practice it is this unit which has to ensure compliance with the right. Therefore – and although this obligation has not been codified in the SSM Regulation or SSM Framework Regulation – the investigation unit is not allowed to force a legal person or its representatives or staff to provide for information or explanations which might involve an admission of the existence of an infringement which should be proved by the ECB (CJEU), respectively will dependent information (ECtHR). Moreover, from that moment and in so far, (legal) persons mentioned are not anymore under an obligation to cooperate with the investigation and can exercise their right to remain silent. Before the moment of a reasonable suspicion, when the case is handled by a JST, this right does not exist yet. So individuals are obliged to cooperate and have to provide for the written or oral explanations, even when it concerns will dependent material. Such material can be used by the ECB as evidence to impose a measure or a non-punitive penalty (not criminal in nature). The CJEU has not yet ruled on the question whether it is also possible to use this information for the imposition of a penalty which is criminal in nature, such as a fine. According to the ECtHR such use is in principal not allowed and the same applies, by the way, in the Netherlands.¹⁶¹ We presume that the CJEU will follow the same line.

3. Consequences of infringing the right not to incriminate oneself: if the right is infringed the material obtained illegally cannot be used as evidence to impose the punitive sanctions (criminal in nature) mentioned above, the ECB pecuniary penalties/fines and NCA's fines and possible national criminal law sanctions.¹⁶² Such infringements may occur if the investigation unit does not comply with the right, but also if the ECB – and in practice a JST – does not refer the case to the investigation unit although it entertains a reasonable suspicion that a legal person has infringed the banking rules.

Summarizing, the right not to incriminate oneself is primarily of importance for the ECB where it exercise its investigatory rights to obtain written and oral explanations from, for example, credit institutions and their representatives and staff, from the moment that it entertains reasons to suspect that the banking rules are infringed. According to the SSM Regulation at that moment the case should be referred to the investigating unit which should ensure observance with the right. In our opinion, it would have been wise if the ECB obligation to ensure compliance with the right not to incriminate oneself would have been codified in the SSM Regulation or SSM Framework Regulation. For reasons of legal certainty of individuals, but also to prevent possible non-compliance with the right by the investigation unit. As stated above such non-compliance may also occur if a case is not referred to the investigation unit, although the ECB (JST) entertains a reasonable suspicion or should have had such a suspicion that the rules are being infringed. Non-compliance with the right can seriously hamper effective supervision, because will-dependent information provided by the individuals cannot be used as evidence to impose a punitive penalty (criminal in nature), by both the ECB and the NCAs/criminal courts of the Member States.

5. General conclusion

The SSM involves a complex system of mixed administration in order to ensure effective banking supervision within the Eurozone. Whereas such mixed administration might be necessary in order to achieve effective cross-border supervision, it also creates legal uncertainties due to the different legal orders involved. In this article, the effect of the mixed administration on formal and substantive judicial protection is discussed. Although there is much more to discuss, we had to limit ourselves to only a few of the most interesting legal issues in this respect.

We have investigated whether the complex banking supervisory structure would result in gaps in formal judicial protection (the right of access to the courts). In general, it can be stated that there is

¹⁶¹ See: ECtHR 5 April 2012, appl. no. 11663/04 (*Chambaz*), and as regards the Dutch courts, Central Appeals Court 21 November 2012, ECLI:NL:PHR:2013:BZ3640; Central Appeals Court 3 April 2013, ECLI:NL:CRVB:2013:BZ6621; Supreme Court 12 July 2013, ECLI:NL:HR:2013:BZ3640.

¹⁶² *Orkem v Commission*, supra note 91.

sufficient judicial protection for the relevant parties in most cases discussed by us. So, although the system is complex, it seems not to lead to many gaps in judicial protection.

In the case of common procedures, in most cases the final decision is subject to review by the Union courts. This is only different when the NCA immediately rejects the authorisation, in which case the national courts are competent. We see, however, a gap with regard to the legal protection of third parties (individuals and collective interest organisations) due to the strict standing requirements of Article 263, fourth paragraph, TFEU and the fact that the ECB decisions in question are not implemented at the national level.

ECB decisions imposing measures or penalties can be contested before the Union courts, unless the ECB requires an NCA to open proceedings with a view to taking action in order to ensure that appropriate national penalties are imposed. In line with the *Tillack* case, any penalty imposed by the NCA in such a case is subject to review by the national courts. Any legal defects in the preparatory stage will be the subject of review in the judicial procedure before the Union or national courts, unless the preparatory measures themselves can be contested before the Union courts. It is likely that many of the ECB decisions ordering an investigation or an on-site inspection are legally binding and, thus, can be contested before the Union courts. This will provide legal certainty quickly, without hampering the effectiveness of supervision too much since it will be difficult to halt the investigation or inspection itself by means of an appeal against the relevant ECB decision.

ECB and NCA staff will closely cooperate in carrying out supervision. The powers provided to the ECB seem, in general, to be sufficient. However, it is important that national legislation provides for the possibility and relevant investigatory powers which would allow the NCA to assist the ECB and, if so desired, that the NCA can exercise its powers across the borders of its Member State and other NCAs can exercise their powers in that Member State.

Formal access to the courts is a necessary, but not a sufficient requirement to comply with the rule of law. The courts should also verify whether the competent supervision authorities have complied with the applicable rules and principles (substantive judicial protection). In this article we have examined two principles which are essential for the substantive legality of supervisory activities: the right of respect for the home, which applies to the ECB's on-site inspection of business premises, and the rights of defence from which several requirements can be derived as regards the general investigations conducted by the ECB.

The right of respect for the home requires a judicial assessment of both the necessity of an on-site inspection and the excessiveness of coercive measures. In the system of the SSM Regulation the necessity is examined by the Union courts and the excessiveness of coercive measures by the national courts. Possibly problematic is that the regulation recognises national systems wherein the judicial control of excessiveness takes place *ex post* (when assessing the penalty or measure imposed). Such systems may hamper the effectiveness of the supervision, but may also lead to a gap in judicial protection because the Union courts and the courts of a Member State will possibly not assess the excessiveness of coercive measures applied in another Member State. Both problems could have been avoided if the SSM Regulation would have prescribed a mandatory prior authorisation in all Member States.

As regards the rights of defence two important sub-rights already apply in the ECB's investigatory stage. First, the legal professional privilege should be complied with by the ECB when exercising its investigatory rights to require the submission of documents and to examine the books and records of a credit institution. To prevent an infringement of this right, the ECB should apply the system of *ex ante* judicial assessment of privileged information that has been designed by the Union courts in competition law cases. Second, the ECB – and more in particular the ECB's investigating unit – should observe the right not to incriminate oneself when exercising its investigatory right to obtain written and oral explanations from a credit institution or its representatives or staff. An infringement of this right can seriously hamper effective supervision, because the information which has been illegally obtained cannot be used to impose a punitive penalty (which is criminal in nature). As such qualify the pecuniary penalties and fines imposed by the ECB and the administrative fines and possible criminal law penalties imposed by the NCAs and the criminal courts. To prevent this from happening it would have been wise if the right not to incriminate oneself had been codified in the SSM regulatory framework. ¶