FUNDAMENTAL RIGHTS ASPECTS OF THE SINGLE SUPERVISORY MECHANISM: DIFFERENTIATED STANDARDS OF PROTECTION UNDER THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

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1 INTRODUCTION

Under the Single Supervisory Mechanism (SSM), the ECB will assume the role of European Prudential Supervisor, taking over some of the functions of national authorities where 'significant' banks are concerned. All other credit institutions in the euro area Member States will continue to be supervised by the national competent authorities (NCAs), but the ECB can decide at any time to exercise direct supervision over any one of these credit institutions in order to ensure the consistent application of high supervisory standards. The powers of the ECB are extensive, ranging from administrative powers to authorize credit institutions and assess qualifying holdings to powers concerning compliance and sanctioning. *Inter alia*, the ECB has the competence to ensure compliance with the minimum capital requirements, to safeguard the adequacy of internal capital in relation to the risk profile of a credit institution, and to enforce compliance with provisions on leverage and liquidity. The ECB may take early intervention measures where capital requirements are violated, request information from credit institutions, and conduct all necessary investigations, including on-site inspections. Finally and crucially for the subject of this contribution, the ECB may impose fines directly upon credit institutions. All the while, national supervisory authorities will play a significant role, and EU financial regulation takes shape in a joint effort between the ECB and national supervisory authorities. In the end however, the ECB alone shall be responsible for the effective and consistent functioning of the SSM.

In order to prevent any undue overlap with the contribution by Prof. Lamandini, this contribution will focus mainly on potential issues of *ne bis in idem* in the SSM. In doing so, this contribution first comments briefly on some recent developments in the case law of the Court of Justice of the European Union (CJEU) on Articles 50-53 of the Charter which co-shape the interpretation and application of the *ne bis in idem* principle in the case law of the CJEU. The constituent elements of the *ne bis in idem* principle are subsequently set out in order to identify potential questions and issues in the context of the SSM. After that, some aspects of the SSM Regulation[2] (SSMR) are discussed against this background.

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

Actual infringement of the *ne bis in idem* principle can only be assessed on a case by case basis. The question discussed in the present contribution therefore is not whether an infringement of the *ne bis in idem* principle is *possible* under the SSM, but whether the enforcement architecture of the SSMR poses by its design, a risk of violations of *ne bis in idem* in certain types of situations. In addition, the contribution touches on the question of whether there are other risks that need to be identified. A comparison with competition law shows that although the systems of enforcement of the SSM and Regulation 1/2003[3] are comparable in spirit, the problems that present themselves in the context of the SSM differ from those found in competition law. Contrary to that of the SSMR, the enforcement architecture of Regulation 1/2003 creates a 'systemic risk' of violations of the *ne bis in idem* principle which are in practice usually avoided, amongst other things through cooperation and restraint on the part of competition authorities. The architecture of the SSMR as such is relatively '*ne bis in idem* proof', but there are caveats. Challenges may present themselves, in particular in the interaction with national criminal law. Such issues may be exacerbated by the diversity of national legislative responses to financial misconduct that have emerged during and after the last financial crisis. It is foreseeable that in some cases, aspects of situations falling within the scope of the supervisory competences of the ECB and the NCAs will also constitute criminal or tax offences under the laws of some Member States. There is some cause for concern on this point as the interaction of national criminal and tax law and EU law could potentially jeopardize the effective and consistent supervision of banks and credit institutions by the ECB and the NCAs. It should however be pointed out that these findings must remain somewhat tentative until such issues can be observed in actual cases. Before exploring some of these issues, this contribution will first provide some background by setting out the constituent elements of the *ne bis in idem* principle and by touching on some recent developments in the case law of the CJEU on the scope of Charter rights and their relation to the European Convention on Human Rights (ECHR).

The principle of *ne bis in idem* is a fundamental principle of law, which restricts the possibility of a defendant being prosecuted repeatedly on the basis of the same offence, act or facts. The principle has a long history and exists in national systems of law in different forms: as a constitutional guarantee, as a rule of criminal procedure, and as a guarantee in extradition law. In continental law traditions, a distinction is often made between the principle's role as an individual right and its function as a guarantee for legal certainty, although these two aspects are intrinsically linked. In the former sense, the principle protects the individual from abuses of the state's *ius puniendi* (right to punish). Several logically linked *rationale* can be identified in this regard. For one, the guarantee serves to safeguard the fair administration of criminal justice as the additional burdens arising out of the repeated prosecution of a subject 'include the duplicated costs of legal representation, coercive measures to the person and property, and psychological burdens associated with the extended procedures

3 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 (OJ L 1, 4.1.2003, p.1).

and the absence of finality'.[4] Another rationale is found in the requirement that a prosecution must be based on pre-existing legislation (principle of legality), which would become illusory if a defendant could be prosecuted continually for various legal aspects of the same act or facts.

2 LEGAL PROVISIONS AND JURISPRUDENTIAL DEVELOPMENTS

For the EU legal order, three main provisions must be taken into account: Article 50 of the Charter, Article 4 of Protocol No 7 to the ECHR, and Article 54 of the Schengen Convention. The latter is not intended to have any direct relevance outside of the context of national criminal law but there is a considerable body of case law on the interpretation of that provision which must nevertheless be taken into account also in other areas of EU law. Although there are differences in wording, all three provisions lay down the same legal principle. This places some logical limitations on the extent to which the CJEU can differentiate its interpretation of the *ne bis in idem* principle according to the characteristics of different policy fields. In addition to these provisions, Articles 51-53 of the Charter determine important aspects of the interpretation and application of the *ne bis in idem* principle in the EU legal order. Some recent developments in the case law on those provisions will be briefly presented below in order to provide some additional background. Article 51 of the Charter reads as follows:

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

From the case law of the CJEU we by now know that the scope of application of the Charter is wider than it would appear from the wording of this provision. In its judgment in *Akerberg Fransson*[5], the CJEU held that the scope of the Charter coincides with that of EU law itself but goes no further than that. In the case of *Pfleger*, the CJEU confirmed in its judgment that this also covers the so-called *ERT*-type of situation in which a Member State *derogates* from EU law.[6] It is however also clear from the *Siragusa* judgment and the order in *Sindicato dos Bancários do Norte*[7] that not every connection with EU law is sufficient to trigger the application of the Charter.[8] The case of *Sindicato dos Bancários do Norte* concerned bank personnel in Portugal litigating against a nationalised bank which had significantly reduced wages as from January 2011 to comply with the national budget law providing for wage reduction in respect of all civil servants with a view to meeting the requirements of the EU Stability and Growth Pact (SGP). Even though the national legislation was adopted in order to comply with Portugal's obligations under the SGP, the CJEU ruled that

4 Such burdens form part and parcel of law enforcement, but their repetition is by definition "unfair": M. Fletcher, The problem of multiple criminal prosecutions: building an effective EU response, Yearbook of European Law (Glasgow: 2007), p. 10.
5 Case C-617/10, *Akerberg Fransson,* EU:C:2013:105.
6 C-390/12, *Pfleger,* EU:C:2014:281.
7 Case C-128/12, *Sindicato dos Bancários do Norte* v *BPN*, EU:C:2013:149.
8 Cases C-206/13 *Siragusa*, EU:C:2014:126; C-128/12 *Sindicato dos Bancários do Norte.*

it was not competent to address the questions referred to it by the Portuguese court as there was no 'implementation of EU law' in the sense of Article 51 of the Charter. Although this ruling does not perhaps sit very comfortably with the very broad rule from *Akerberg Fransson*, any other ruling would arguably have brought national cutback laws, and perhaps even national systems of taxation as such within the scope of the Charter and therefore also within the competence of the CJEU. Such would run counter to the principle of subsidiarity from Articles 6(1) TEU and 51(2) of the Charter.

For the SSM both situations in which the ECB, as well as situations in which the NCAs act applying both EU law and national law, implementing EU law, ostensibly fall within the scope of the Charter. The same holds true in situations in which options were exercised in national legislation, regardless of the extent of discretion available to the national legislature in exercising those options. Questions may arise in situations in which the ECB for instance acts under the rules of the European Stability Mechanism, although it appears likely that the Charter will also apply in those instances if only because it is the ECB that acts. In addition, although the Charter applies in such situations, the legal situation of a supervised entity in proceedings before a national court (for example in situations in which an NCA acted under the instruction of the ECB subject to Article 4(1) to 6(1) SSMR) may in practice be quite different from that in which a decision by the ECB can be challenged directly by the supervised institution before the EU courts. Large parts of the Charter remain untouched by the case law of the CJEU, so that much is left to the particular attitudes of the national judiciary in applying Charter rights and/or referring questions to the CJEU. An interesting question may present itself with regard to Article 18(5) SSMR, where it states that 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 (…) any national legislation which confers specific powers which are currently not required by Union law'. By doing so, the ECB would arguably be bringing those national laws within the scope of EU law and therefore within that of the Charter, even though those national laws themselves are not connected to EU law in any way. To sum up: there remains a degree of uncertainty as regards the question of how 'strong' the link between national and EU law must be in order for the Charter to apply. As discussed later on in this contribution, for the SSMR a number of questions could arise in this regard in the interaction between national and EU law.

Article 52(3) of the Charter reads as follows:

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

The CJEU appears to interpret this 'homogeneity clause' rather restrictively, amongst other things by not confronting the question of the relationship between Charter and Convention rights directly in its judgments, and by omitting

references to the case law of the European Court of Human Rights (ECtHR) in some cases. As a result, it is at present uncertain to what extent the CJEU considers itself bound by the case law of the ECtHR in interpreting and applying Charter rights. This, combined with the CJEU's rejection of the EU accession agreement to the Convention presently raises many questions regarding the relation between the Charter and the Convention, including the question of whether the so-called *Bosphorus*[9] doctrine still 'stands'. At present, the ECHR is still formally not binding on the EU and the CJEU has carved out ample room for doctrinal maneuver, so that the ECtHR may not be persuaded to take a deferential approach as it did in *Bosphorus* in future cases. For the SSMR, this could for example prove relevant in situations in which an NCA acts under the instruction of the ECB, as such actions may at some point be scrutinized by the ECtHR under the ECHR. It must therefore, as well as in the light of the wording of Article 52(3), be assumed for the purposes of the present inquiry that the SSM is bound to the Convention and the case law of the ECtHR (at least) to an important degree, even though the ECHR is formally not binding on the EU.

Article 53 of the Charter reads as follows:

> **'**Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'

In the *Akerberg Fransson* and *Melloni* judgments, the Court arrived at a somewhat cryptic interpretation of this provision.[10] It was held that the Charter applies regardless of the extent to which national law is 'determined' by EU law, and therefore regardless of the degree of discretion which was available to or was exercised by the national legislator. The latter is highly relevant to the functioning of the SSM, in case national legislation is applied in which certain options were exercised. The Court added however on the basis of Article 53 of the Charter that if national law is not 'entirely determined' by EU law, higher national standards may be applied provided the 'primacy, unity and effectiveness of European Union law are not thereby compromised'. Amongst other things, this arguably implies that if an EU institution or other EU body applies national law, *implementing* EU law directly, that institution will also be bound by any relevant higher national standards of fundamental rights protection in situations in which those national laws are not 'entirely determined' by EU law. Such a situation is foreseen in Article 4(3) SSMR:

> 'For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of

9 *Bosphorus Airways* v *Ireland*, ECtHR 30 June 2005, appl. no. 45036/98.
10 Case C-399/11, *Melloni,* EU:C:2013:107.

Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options.'

The ECB may therefore have to take certain national constitutional rights into account when applying national legislation. This could raise tricky questions but it may not be much of an issue in practice; it is simply not clear how exceptional such situations will prove to be.

As for the degree to which such will (or can) deviate from the standard of protection provided in the Charter, there is much uncertainty after *Akerberg Fransson* and *Melloni*. The central question we are left with is when it is that the 'primacy, unity and effectiveness' of EU law are not 'compromised', and therefore how the Court weighs the interests of the protection of fundamental rights and against that of the enforcement of material provisions of EU law.[11]

As regards the relationship between Article 50 of the Charter and Article 4P7 ECHR, those provisions cannot simply be seen as complimentary guarantees, the one applying on the EU level and the other exclusively on the national level. One reason for this is that Charter rights are backed up by requirements of EU law such as primacy, direct effect and effectiveness, whilst the legal force of Convention rights varies widely between the Member States. Another issue is found in the limited ratification of Protocol 7 to the ECHR which leaves a gap in protection which is in some, but not all cases compensated by national laws. The Charter and the Convention can therefore be seen as qualitatively different sources of rights. Because of this (and due to the fact the CJEU appears to depart somewhat from the case law of the ECtHR in a growing number of cases) the question of whether a given situation is covered by the Charter, the Convention or both matters for the outcome in individual cases, and both standards must be taken into account by the ECB and the NCAs.

3 SUBSTANCE, SCOPE AND ELEMENTS OF THE GUARANTEE

Two distinct guarantees are commonly identified in connection with the *ne bis in idem* principle: the prohibition of double *prosecution*, and the prohibition of double *punishment*. According to established case law before both the ECtHR and the CJEU, the *ne bis in idem* principle bars the bringing of any new proceedings, regardless of whether a penalty was imposed in the first proceedings, or of the manner in which that penalty was calculated (prohibition of double prosecution).[12] The prohibition of double punishment is a corollary

11 The question of whether the CJEU is taking human rights "seriously" has lingered ever since the birth of fundamental rights protection through "general principles" in the case law of the CJEU.

12 In the *Franz Fischer* judgment, the ECtHR expressly held that Article 4 of Protocol No. 7 "is not confined to the right not to be punished twice but extends to the right not to be tried twice" *Franz Fischer v. Austria*, ECtHR 29 May 2001, appl. no. 37950/97. See also: *Sergey Zolotukhin v. Russia,* ECtHR (GC) 10 February 2009, appl. no. 1493/03.

to the *ne bis in idem* principle which forms an expression of the principle of proportionality, a fundamental principle of EU law. As for the question of who can rely on the guarantee, the answer is rather straightforward: 'only those who have actually been prosecuted and have had their prosecution finally disposed of' enjoy *ne bis in idem* protection (and not any accomplices or others who were in a similar position, but were not prosecuted).[13] Two questions arise in particular, in connection with fines under the SSMR, namely whether:

i) a bank or credit institution and its employees and/or CEOs; and

ii) different entities within a single corporate structure count as separate subjects for the application of the *ne bis in idem* principle.

Although there is no case law available to confirm this, it makes sense to treat the *legal subject* and its employees and/or executives as separate culpable subjects so that a sanction imposed on a credit institution would for example not stand in the way of the subsequent prosecution of one of its CEOs.[14] Similarly, in the case of entities within a single corporate structure the rule from the competition cases is that if they 'form an economic unit in which the subsidiary has no real economic freedom', the subsidiary cannot be seen as a separate culpable subject.[15] Subsidiaries would therefore enjoy *ne bis in idem* protection after a parent company has been fined.

As regards the material scope of application of the guarantee, the ECtHR has consistently held that 'the legal characterization of the procedure under national law cannot be the sole criterion of relevance for the applicability of the principle of *non bis in idem* under Article 4 § 1 of Protocol No. 7. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the object and purpose of the Convention.'[16] In the first paragraph, Article 4 of Protocol No. 7 refers to 'criminal proceedings', which echoes the term 'criminal charge' from Article 6 ECHR. The scope of application of Article 4 of Protocol No. 7 is accordingly determined as an autonomous concept under the Convention by reference to three criteria, commonly known as the 'Engel criteria', which were similarly adopted by the CJEU in the *Bonda* judgment.[17] The extension of the 'Engel doctrine' to the *ne bis in idem* principle has potentially far-reaching consequences for national systems of law. The n*e bis in idem* principle entails no rule of conflict or priority between different legal rules or different types of proceedings within different jurisdictions, so that the application of the *Engel* doctrine to the *ne bis in idem* principle in practice requires full procedural coordination and/or

13 Case C-467/04, *Gasparin*i, EU:C:2006:610.
14 There at present is little evidence available in case law or doctrine to substantiate this finding, so the conclusion must be that there is nothing in the spirit of the *ne bis in idem* principle or the wording of the various provisions to indicate anything else.
15 Case C-30/87, *Corinne Bodson,* EU:C:1988:225.
16 *Sergey Zolotukhin v. Russia,* ECtHR (GC) 10 February 2009, appl. no. 1493/03, para. 78.
17 *Engel and Others v. Netherlands,* ECtHR 8 June 1976, (Series A-22); CJEU Case C-489/10, *Bonda* EU:C:2012:319. In the *Bonda* judgment the CJEU gave its own rendering of the *Engel* doctrine with particular emphasis on the need to protect the own financial means of the Union.

concentration of administrative, tax and criminal proceedings. In practice, the unwanted consequences are usually mitigated through *una via* rules, or by way of the coordination of enforcement efforts through a judicial network or government database. A second problem is that this may require a level of *ne bis in idem* protection under the Charter that the CJEU may deem to be not in conformity with the requirement of effectiveness of EU law under circumstances.[18]

The Engel criteria are:

i) the legal classification of the offence under national law;

ii) the nature of the offence;

iii) the degree of severity of the penalty that the person concerned risks incurring.

The Engel doctrine leads to a presumption that the charges against a subject are 'criminal', 'a presumption (...) which can be rebutted entirely exceptionally, and only if the deprivation of liberty cannot be considered appreciably detrimental given their nature, duration or manner of execution'.[19] In applying these criteria it is the maximum potential penalty for which the relevant law provides which must be taken into account here; the sentence that was actually imposed 'cannot diminish the importance of what was initially at stake'.[20]

The first Engel criterion, the legal classification as 'criminal' under national law is of little consequence. If an offence is classified as criminal under national law it will automatically be likewise classified for the purposes of the Convention. According to the Court, the second and third Engel-criteria are 'alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge'.[21] In applying the second Engel criterion, the Court will amongst other things have regard to the seriousness of the conduct itself, and the manner in which the misconduct is classified in other Member States.[22]

Of interest in the context of prudential supervision is the fact that the Court examines amongst other things whether the rule at issue is of a 'general character', applicable to all citizens and therefore belonging to the realm of criminal law in the wider sense, or a disciplinary rule which specifically aims to protect the qualities and/or integrity needed for the exercise of certain professions. The more specific a rule is in terms of the persons it potentially applies to (the case law provides examples of doctors, journalists, politicians), the greater the likelihood

18 The *Akerberg Fransson* judgment has provided one example of this.
19 *Sergey Zolotukhin* v *Russia,* ECtHR (GC) 10 February 2009, appl. no. 1493/03, para. 56.
20 *Idem*.
21 *Putz v. Austria,* ECtHR, 22 February 1996, (Reports 1996, 312), para. 31; *Sergey Zolotukhin v. Russia,* ECtHR (GC) 10 February 2009, appl. no. 1493/03, para. 53.
22 In Öztürk the Court for instance held it to be sufficient that the charges brought against the subject under provisions of administrative law were part of the criminal law in many Member States.

that the Court will consider that a measure is disciplinary, rather than 'criminal' in nature. In the *Demicoli* it was held that if the subject is in a particular position (in this case: a politician), this does not remove the prosecution from the criminal sphere if the same legal provision *could*, by its nature also apply to others.[23] Similarly, in the case of *Grande Stevens*, the Court held that the Italian rules prohibiting market manipulation generally aim to safeguard the proper functioning and transparency of financial markets and to protect the confidence of the general public in the functioning of those markets.[24]

The third Engel criterion raises questions because the Court has not set a lower limit for its application, and this is perhaps necessarily so. It may be difficult for the Court to justify the setting of any particular amount of a fine as a 'minimum threshold' due to the differences in circumstances between individual cases. Because of this, the third Engel-criterion all but obliterates the second one in practice. It is something of an Achilles heel for the Engel doctrine as a whole, amongst other things because it could tempt the Court to set the threshold for a minimum 'criminal' fine ever lower in cases where it is more difficult to reach agreement on a principled stance on a particular aspect of the second Engel criterion. The case law so far shows that not only the deprivation of liberty, but even a relatively modest fine can be sufficient to bring a case within the criminal law sphere for the purposes of the Convention.[25]

The possibility of the withdrawal of a license under the SSMR potentially falls under the third Engel-criterion. In *Nilsson v. Sweden*, the Court found that the temporary suspension of a driving license belonged to the criminal law sphere in that case because the suspension was not an 'automatic' or 'immediate and foreseeable' consequence of the subject's conviction for a serious road traffic offence. Because some time passed between the time of the subject's conviction and the moment his driving license was suspended, the Court concluded that the measure must have been, at least in part, punitive in nature. It held that 'prevention and deterrence for the protection of the safety of road users could not have been the only purposes of the measure; retribution must also have been a major consideration.'[26] In the *Haarvig* case, the temporary revocation of a medical license was considered not to be of a 'criminal law nature' given that the provision in question laid down a professional standard and did not aim to punish and deter, but only to prevent further damage to the subjects' patients.[27] Similarly, minor disciplinary proceedings against lawyers merely leading to a warning have been

23 *Demicoli v. Malta* , ECtHR 27 August 1991, appl. no. 13057/87.

24 *Grande Stevens and Others* v *Italy*, ECtHR 4 March 2014, appl. no.s 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, at paras. 96 and 97. According to the Court, these market rules serve the "general interests of society" normally protected by criminal law, and therefore belong to the sphere of criminal law for the purposes of the Convention. It follows that the Court focuses on the nature of the rule at issue and on the question whether the *rule* is of a specific character rather than on the question whether the *subject* belongs to a specific group, or profession in applying the second Engel criterion.

25 The Court has consistently held that "the relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character": *Ruotsalainen v. Finland*, ECtHR 16 June 2009, appl. no. 13079/03, para. 43.

26 *Nilsson v. Sweden*, ECtHR 13 December 2005, appl. no. 73661/01.

27 *Knut Haarvig v. Norway*, ECtHR 11 dec. 2007 (admissibility), appl. No. 11187/05.

held to fall outside of the scope of the notion of 'criminal charge'. A finding of a criminal charge may be based on a combination of factors. In the *Matyjek* case, the Court considered that a ban from taking certain government positions was sufficiently serious to constitute a criminal charge, even though not accompanied by a fine or any other form of punishment.[28] The reason for this was, according to the Court, that 'the prohibition on practicing certain professions (political or legal) for a long period of time may have a very serious impact on a person, depriving him or her of the possibility of continuing professional life. (…) This sanction should thus be regarded as having at least partly punitive and deterrent character.'[29] In the context of the SSMR, the conclusion from this is that the withdrawal of authorization can under circumstances constitute a criminal charge and therefore trigger the application of the *ne bis in idem* principle in relation to other penalties under the SSMR. Whether the same holds true for the removal by the ECB of 'members from the management body of credit institutions' pursuant to Article 16(2)(m) of the SSMR is not all that certain as those member will not be 'banned' from practicing their profession like in the *Matyek* case. All the while, there is no doubt that such a decision may have a 'significant impact' on the person in question so that the observance of at least the minimum requisite procedural safeguards under the ECHR appears advisable, regardless of whether such decision is capable of activating the Engel doctrine in every case.

To round off this brief expose on the *ne bis in idem* principle: the guarantee comprises of two main elements: '*bis*' and '*idem*'. As for the former, the guarantee only bars further proceedings once the outcome of the first set of proceedings has become *final*. The guarantee does not bar the possibility of imposing several penalties on a subject (*e.g.* the revocation of license, the imposition of a fine, and/or imprisonment) on the basis of the same conduct, only as long as those penalties are imposed simultaneously or within the same set proceedings. A decision is final when it is a decision that is *irrevocable*, 'that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them'.[30]

As for the latter, the element of *idem*, it is by now established case law that the only relevant criterion for its determination is whether both sets of proceedings concerned *substantially the same facts*.[31] The circumstance that those facts may fit different legal qualifications under different administrative and criminal law provisions is irrelevant in this regard. This holds true even if the elements of those offences under the law differ substantially across different fields of law.

28 *Matyjek v. Poland*, ECtHR 30 May 2006 (admissibility), appl. No 38184/03.
29 *Ibid* para. 55.
30 *Sergey Zolotukhin v. Russia,* ECtHR (GC) 10 February 2009, appl. no. 1493/03.
31 One of the judges sitting on *Zolotukhin* case later admitted publicly that the term "substantially" was added in order to create some scope for considerations other than strictly factual ones, and expressed regret that the "door had thus been left a little open". So far however the issue hasn't proven very contentious. The '*Zolotukhin*-formula' ("substantially the same facts") appears to provide a sufficiently clear rule that squares well with national constitutional traditions in most of the Member States of the Council of Europe. Issues appear to present themselves mainly in the context of the application of the Engel doctrine to the *ne bis in idem* principle.

This is the case, for example, if the first proceedings merely concern one or more aspect of the litigious behaviour regulated under provisions of administrative law such as failure to comply with road traffic regulation or failure to control the vehicle, whereas the second proceedings under criminal law regard more serious aspects of the event, such as involuntary manslaughter or the causing of severe bodily harm. In the case of *Lucky Dev* the ECtHR held that bookkeeping fraud and the filing of an incorrect tax statement are sufficiently separate to constitute separate facts for the application of the *ne bis in idem* principle.[32] For prudential supervision this is an important judgment which will no doubt help to take the edge off *ne bis in idem* issues in case of complex financial infringements by banks and other credit institutions, which are more easily divided up into separate wrongdoing than most other criminal acts.

4 SANCTIONS AND ENFORCEMENT UNDER THE SSMR

In the light of the foregoing, three types of decision can be identified in the SSMR with potential *ne bis in idem* relevance:

– administrative pecuniary penalties (Article 18(1) of the SSMR) of up to twice the amount of profits gained or losses avoided or up to 10% of annual turnover;

– sanctions in accordance with Regulation (EC) No 2532/98[33] for 'failure to comply with ECB decisions or regulations' (Article 18(7) of the SSMR); and

– the withdrawal of authorization (Article 14(4) of the SSMR).

The removal by the ECB of members from the management body of credit institutions pursuant to Article 16(2)(m) SSMR could perhaps be added to this list, but this is arguably too uncertain in the present state of the case law on the Engel doctrine to consider further in this contribution. As regards the penalties under Article 18(1), the SSMR does not contain any *ne bis in idem* provision, or any 'hard', legal rules coordinating enforcement measures either between the ECB and the NCAs, or between national and EU law. In broad lines, the enforcement architecture of the SSM appears similar to that of Regulation 1/2003 (the procedural regulation for competition law) but there are also differences. The pecuniary sanctions are comparable to those found in competition law, both in nature and in size and there can be no doubt that the first and second types of sanctions belong to the 'sphere of criminal law' within the meaning of the Engel/Bonda doctrine. A marked difference with competition law is found in the third category of sanctions: the withdrawal of authorization. No such sanction is available under the competition rules and it warrants some further attention, in particular in combination with other sanctions. It follows from the Engel-jurisprudence discussed above that:

32 *Lucky Dev*, ECtHR 27 November 2014, appl. no. 7356/10.
33 Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the ECB to impose sanctions (OJ L 318, 27.11.98, p. 4).

i) the decision withdrawing a license as such is not always necessarily punitive in nature, and different circumstances may lead to different findings in individual cases;

ii) the concurrence of the withdrawal of a license and the imposition of a fine is not necessarily problematic as long as the *withdrawal of the license* (and therefore not the imposition of a fine, due to its necessarily punitive nature) forms the *immediate and foreseeable consequence* of a decision sanctioning certain conduct.

Here, the boundaries of the *Engel* doctrine and the requirement of the finality of the previous sentence as they appear from the case law of the European Court of Human Rights (ECtHR) are somewhat blurred. It is for instance not certain whether the withdrawal of a license which is per se punitive but also forms the 'immediate and foreseeable consequence' of the decision to impose a fine or another sanction is caught by the *ne bis in idem* principle, or not. From the case law of the ECtHR we know that if the revocation of a driving license automatically follows a conviction for a road traffic offence this is not problematic, but if sufficient time has passed between the initial conviction and the revocation of the license, and the latter was at least in part based on a separate assessment of the facts of the case, this provides some indication of the (partially) punitive nature of the latter decision.

From the wording of the SSMR too little can be inferred with sufficient certainty on the interaction between the procedures for adopting decisions under Articles 14 and 18 SSMR to make a full assessment on this point, although it can safely be assumed that those provisions will often prove relevant in the same situations. Similarly to Regulation 1/2003 however, the SSM Regulation purposively leaves many points to be worked out later on in more detail in practice, through delegated secondary legislation, or as is often the case in competition law through guidelines and notices. Although it is possible that the interaction between fines and decisions to withdraw a license wasn't as such considered in the drafting of the SSMR (or at least not from the perspective of *ne bis in idem*) this is therefore not necessarily a mistake or an omission. Whether such would have been necessary or better in any way is entirely up for speculation. For now, it is sufficient to point out that the interaction between these decisions can give rise of *ne bis in idem* concerns, and that the ECB is well advised to carefully coordinate the procedure leading to a decision to withdraw the license of a credit institution with the procedure leading up to the imposition of an administrative pecuniary penalty under Article 18(1) SSMR.

5 THE ENFORCEMENT ARCHITECTURE OF THE SSM: POTENTIAL ISSUES IN (DE)CENTRALIZED SANCTIONING AND ENFORCEMENT WITHIN THE SSMR

In order to get a sense of the mechanisms of enforcement and the division of tasks between the ECB and the NCAs, the considerations of the SSMR are a first point of reference. Recital 86 SSMR affirms the respect for fundamental rights and

principles and mentions the protection of personal data, the freedom to conduct a business, the right to an effective remedy and to a fair trial, but does not mention the *ne bis in idem* principle. This is perhaps somewhat unfortunate as it could convey the impression that potential problems in this connection were not duly considered in drafting the SSMR (which they were). Several other points raise interest, in particular recital 36:

> 'In order to ensure that supervisory rules and decisions are applied (…) effective, proportionate and dissuasive penalties should be imposed in case of a breach. In accordance with Article 132(3) TFEU and Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions, the ECB is entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions. Moreover, in order to enable the ECB to effectively carry out its tasks relating to the enforcement of supervisory rules set out in directly applicable Union law, the ECB should be empowered to impose pecuniary penalties on credit institutions, financial holding companies and mixed financial holding companies for breaches of such rules. National authorities *should remain able to apply penalties in case of failure to comply with obligations stemming from national law transposing Union Directives* (italics added). Where the ECB considers it appropriate for the fulfillment of its tasks that a penalty is applied for such breaches, it should be able to refer the matter to national competent authorities for those purposes.'

What this illustrates is that, similarly to competition law, the division of tasks and competences between the ECB and the NCAs within the enforcement architecture of the SSM is not characterized by 'hard' legal formalism, but could be described as a system of regulated and centralized cooperation between authorities. The difference in legal terms is that the ECB is the first and foremost party responsible for the overall functioning of the system. Article 4(1) SSMR indicates that the ECB is attributed exclusive competence for prudential supervisory purposes in respect of all banks. Article 6 SSMR sets forth a delegation of prudential supervisory competences from the ECB to the NCAs in respect of less significant banks, but this does not disqualify the ECB as the main competent authority for both significant and less significant banks. Recital 36 SSMR confirms that this system does not in principle preempt parallel or consecutive enforcement efforts of the ECB and the NCAs in respect of the same or related infringements. The same follows from paragraphs 1 and 5 of Article 18 SSMR, which read as follows:

> 1 For the purpose of carrying out the tasks conferred on it by this Regulation, where credit institutions, financial holding companies, or mixed financial holding companies, intentionally or negligently, breach a requirement under relevant directly applicable acts of Union law in relation to which administrative pecuniary penalties shall be made available to competent authorities under the relevant Union law, the ECB may impose administrative pecuniary penalties of up to twice the amount

of the profits gained or losses avoided because of the breach where those can be determined, or up to 10 % of the total annual turnover, as defined in relevant Union law, of a legal person in the preceding business year or such other pecuniary penalties as may be provided for in relevant Union law.

5 In the cases not covered by paragraph 1 of this Article, where necessary for the purpose of carrying out the tasks conferred on it by this Regulation, the ECB may require national competent authorities to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with the acts referred to in the first subparagraph of Article 4(3) and any relevant national legislation which confers specific powers which are currently not required by Union law. The penalties applied by national competent authorities shall be effective, proportionate and dissuasive. The first subparagraph of this paragraph shall be applicable in particular to pecuniary penalties to be imposed on credit institutions, financial holding companies or mixed financial holding companies for breaches of national law transposing relevant Directives, and to any administrative penalties or measures to be imposed on members of the management board of a credit institution, financial holding company or mixed financial holding company or any other individuals who under national law are responsible for a breach by a credit institution, financial holding company or mixed financial holding company.'

In principle, the NCAs competences are not suspended or withdrawn when the ECB acts or has acted with respect to a certain credit institution. On the one hand, the SSM is therefore more centralized in set-up when compared to the European Competition Network due to the primacy of the ECB, while on the other hand, the SSMR would appear to leave room for national authorities to act in various types situations (as evidenced amongst other things by recital 36 SSMR). The distinction between 'significant' and 'less significant' institutions as laid down in Article. 6 SSMR sets the division of tasks between the ECB and the NCAs, which coordinates their enforcement efforts. If this coordinating function is sufficient to avoid any confusion as regards who does what in practice, it should be possible to avoid any potential *ne bis in idem* situations as far as administrative pecuniary penalties under Article 18(1) SSMR are concerned. Another difference with competition law that is relevant in this respect is that penalties under the SSMR reflect the gains had by the institution from the infringement and are not somehow divided up according to the supposed harm inflicted on different national markets for the purpose of the calculation of fines by different national authorities, as is presently the case in competition enforcement practice. Under the SSMR, it is clear that the NCAs are fully competent to impose any penalties, whereas competition law is more ambiguous in that it is thought that the national authorities are only competent as far as their own national markets are concerned. For competition law this ambiguity is conducive to infringements of the *ne*

bis in idem.[34] Infringements are however in practice usually avoided through cooperation within the European Competition Network (ECN) and through enforcement restraint on the part of competition authorities.

From the foregoing it can be concluded that the SSMR appears rather '*ne bis in idem* proof' compared to competition law as far as the penalties of Article 18(1) are concerned, owing *inter alia* to the fact that the division of tasks within the SSM hinges on the distinction between significant and less significant institutions from Article 6 SSMR. Such a coordinating principle is essential because the *ne bis in idem* principle itself does not fulfill a coordinating function and merely leads to a 'system' of first come first served as is presently the case in competition law and in the Area of Freedom, Security and Justice. Although this forms an important first safeguard, the SSM Regulation itself does not *verbatim* exclude the possibility of infringements of the *ne bis in idem* principle. The experience from competition law however shows many remaining issues can in practice be solved through coordination and cooperation within a network like the SSM, and through self-restraint on the part of the authorities where necessary.

From the foregoing it should not be concluded that the lack of a formal division of tasks and competences between the members of the SSM in the SSMR doesn't raise any potential issues. Indeed, more legal clarity on this point in the SSM Regulation itself may have been preferable from a fundamental rights perspective. An issue that was already identified is that enforcement requires effective judicial remedies, which may not be equally available before national and EU courts in all types of situations: situations in which the ECB applies EU and/or national law, situations in which NCAs act under the instruction of the ECB, and situations in which the NCAs act in other situations. Such issues are however beyond the remit of this contribution to further address.

A *ne bis in idem* issue that can be identified within the SSMR is the interaction of an administrative pecuniary penalty and the withdrawal of a license. No parallel can be drawn here with competition law; it is a problem specific to the SSMR. It should be practically possible to avoid *ne bis in idem* infringements in this type of situation, but the SSMR does not provide any particular mechanism on this point so that this must be achieved through coordination of the proceedings leading up to the withdrawal of a license and the imposition of an administrative penalty, and where needed through enforcement self-restraint on the part of the ECB. Alas, there is no case law before the CJEU to turn to for guidance on this point. From the ECtHR case law discussed earlier in this contribution however it follows that the withdrawal of a license must be the immediate and foreseeable consequence of an investigation or a decision also imposing or leading up to the imposition of a penalty – which for prudential supervision is perhaps not

34 This (unwritten) "rule" in competition law is paradoxical because it relies on national (market) boundaries which competition law and EU law as a whole precisely aim to remove. This aspect of the method of decentralized fine-setting arguably reveals a deficiency in the enforcement architecture of Regulation 1/2003. The problem is at present obscured through the case law of the EU courts, in particular the *Toshiba*-judgment, in which the CJEU resuscitated the aged and languishing *Walt Wilhelm*-judgment against that judgments' own wish.

always as easy to achieve as, say, for the withdrawal of a drivers license or the suspension of a medical license. It is possible that, applying the rule from the *Jussilla* judgment, the ECtHR will show itself to be more lenient in this regard where it concerns banks and other large enterprises but there has been so far no case concerning the *ne bis in idem* principle specifically to confirm this.

A clear parallel with competition law exists only as regards sanctions for 'failure to comply with ECB decisions or regulations' (Article 18(7) SSMR). For reasons similar to those in competition law, those types of sanction will not typically give rise to *ne bis in idem* trouble. For one, each sanction requires a specific individual 'failure to comply', and a continued failure to comply can thus be divided up into different infringements by adopting a series of decisions, which is not possible in respect of infringement in connection with sanctions under Article 18(1) SSMR. Although the possibility that a single historical infringement may give rise to the possibility of sanctions of several types cannot *a priori* be excluded, competition enforcement practice shows that this is probably very rare (or at least never surfaces in competition proceedings before the EU courts) and there appears to be no reason to assume this will be any different under the SSMR.

6 POTENTIAL ISSUES IN THE INTERACTION WITH OTHER SANCTIONS AND PROCEDURES UNDER NATIONAL LAW

The SSMR doesn't as such mention national criminal laws, tax laws or national laws of any other kind. The only provision which may provide some indication on this point is Article 3(10) of Regulation (EC) No 2532/98, which reads as follows:

> 'If an infringement also relates to one or more areas outside the competence of the ESCB, the right to initiate an infringement procedure on the basis of this Regulation shall be independent of any right of a competent national authority to initiate separate procedures in relation to such areas outside the competence of the ESCB. This provision shall be *without prejudice to the application of criminal law* (italics added) and to prudential supervisory competencies in participating Member States.'

Although it is not certain whether this provision is still relevant, the spirit of its wording doesn't augur well for *ne bis in idem* issues. A variety of national legislative responses to financial misconduct emerged during and after the recent financial crisis, and a range of potential issues could be identified on this point. The complexity of the questions that may arise in this connection makes it difficult to arrive at general conclusions. It is worth pointing out that such issues only arise, as indicated earlier, if it is indeed the legal entity – the bank or other credit institution itself – that is penalized and not its CEOs or employees. This isn't equally the case in all Member States, because not every Member State recognizes the criminal law responsibility of legal persons. In situations in which a CEO or employee is prosecuted, this does not trigger *ne bis in idem* protection for the legal entity, and *vice versa*. At least, so it must be (and is generally) assumed, as there is at present no judgment from either court confirming this.

There is a difference between the Charter and the ECHR on this point. It should be recalled that such a combination of sanctions is only a potential issue of *ne bis in idem* as a matter of EU law, if *both* decisions (sanctions) fall within the scope of the Charter. Although the influence of EU law on national criminal law and therefore the extent to which the Charter applies in situations governed by national law is steadily growing, the vast majority of criminal cases are and will likely always remain outside of the scope of application of EU law and the Charter. In financial criminal law however, there is more relevant EU legislation to consider than in many other fields of criminal law. The possibility of the occurrence of a situation in which a single infringement triggers different enforcement responses by the ECB and/or an NCA as well as national prosecutors is therefore all but imaginary. In situations in which both instances of prosecution are (sufficiently) connected to EU law, this may violate Article 50 of the Charter. Direct taxation on the other hand is not harmonized at all on the EU level so that the risk of a violation of Article 50 of the Charter through the concurrence of a tax penalty and a penalty under the SSMR for the same conduct seems minimal.

Absent any link to EU law the potential for such issues in situations under national criminal or tax law to fall within the scope of Article 4P7 ECHR is very real and the legal situation is potentially more complex. There are various national *ne bis in idem* provisions that must be taken into account in addition to Article 4P7 ECHR, which (to further complicate matters) was not ratified by all Member States. If a case reaches the Strasbourg court and the situation concerns the application of EU law or national law implementing EU law without any discretion for the Member State by an NCA, or a situation in which an NCA acts under the instruction of the ECB, the *Bosphorus* doctrine may, or may no longer apply. As discussed earlier in this contribution there is little certainty on the point of how the ECtHR will now decide in a case in which national law implements EU law in the light of the developments that followed after the *Bosphorus* judgment. There is, in sum, as much cause for concern as there is legal limbo.

No lessons can be drawn from competition law here as such questions don't really present themselves in the context of competition law enforcement. Competition laws in the Member States are (supposedly) the fruit of a process of 'spontaneous harmonization', raising the question of whether the Charter applies to national competition law at all in situations not affecting trade between the Member States – although there are good grounds to assume that it does. What the SSM, competition law, and many other areas of EU law have in common is that there is scope for conflict between requirements of effective and dissuasive measures under EU law and Convention obligations for the Member States, and the *Akerberg Fransson* and *Bonda* judgments provide some clear examples.

7 CONCLUSIONS

The question raised in this contribution is not whether an infringement of the *ne bis in idem* principle is possible under SSM, but whether there is, to borrow a term, a *systemic risk*. In other words, we have looked at whether the enforcement architecture of the SSMR is conducive to violations of the *ne bis in idem* principle

in certain situations and competition law was used as a point of reference. The SSM is *prima facie* more '*ne bis in idem* proof' than Regulation 1/2003, but there are certain *caveats* which have been highlighted.

There is no provision on *ne bis in idem* in the SSM package; the SSMR itself does not preempt violations of the *ne bis in idem* principle. The same is true for Regulation 1/2003, but the actual problems for competition law are hardly comparable to those found in prudential banking supervision. One familiar *ne bis in idem* issue in competition law is that the internal market is in practice 'divided up' into national markets overlooked by national competition authorities. Because of this the architecture of EU competition law enforcement is conducive to infringements of the *ne bis in idem* principle, which are in practice prevented through coordination and cooperation within the ECN. Fines imposed by the ECB or NCAs on the other hand do not supposedly reflect the impact of an infringement on affected markets, but are determined according to the subjective gain had by a bank through the infringement. This difference in practice already works to limit the potential for *ne bis in idem* violations.

The ECB is well advised to carefully coordinate the procedure leading to a decision to withdraw the license of a credit institution with the procedure leading up to the imposition of an administrative pecuniary penalty under Article 18(1) SSMR, as these decision may give rise to *ne bis in idem* issues.

Other issues may also present themselves, in particular in the interaction:

i) with national criminal and possibly tax law, and

ii) between the withdrawal of authorization and the imposition of an administrative pecuniary penalty.

Little can be said in general with any certainty on these points because the potential for such issues will necessarily vary from one Member State to another. Such situations will not always fall within the scope of EU law – and therefore that of the Charter – due to the limited extent to which national criminal law is harmonized at the EU level. The same applies to tax law, due to the wholly unharmonized nature of direct taxation in the EU. This will however not always prevent possible violations of Article 4P7 ECHR. Although the ECHR is formally (still) not binding on the EU, such violations nevertheless deserve consideration in the context of the SSMR, for a number of reasons. One such reason is that, unlike the ECB, it must be assumed that the NCAs are bound by the ECHR in the performance of their tasks, regardless of whether they apply EU or national law. Another reason could be that the ECB may find itself in the same position when it applies national law, implementing EU law but this last point is debatable.