

Effective Legal Protection in Banking Supervision

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Effective Legal Protection in Banking Supervision

An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism

Effectieve rechtsbescherming in het bankentoezicht

**Een analyse van rechtsbescherming in samengestelde
administratieve procedures in het gemeenschappelijk
toezichtsmechanisme**

(met een samenvatting in het Nederlands)

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Promotoren:

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Acknowledgments

When the Single Supervisory Mechanism was put in place, I was working as a lawyer for the Dutch banking supervisor (*De Nederlandsche Bank*), where I had the good fortune to be part of the banking union team. As a member of this team I quickly gained an understanding of the urgent necessity for centralized supervision on the one hand, and the many legal questions arising as a result, on the other. Researching the subject and writing this dissertation has allowed me to obtain an in-depth and complete perspective on some of these questions and the corollary tension between effective supervision and effective legal protection. Unless expressly attributed to a specific author, all opinions contained in this book are strictly my own.

I am grateful to my supervising professors Annetje Ottow and Rob Widdershoven for their trust, valuable time, and full support throughout these years of researching and writing. Rob, thank you for the challenging and inspiring discussions and for taking the time, over and over again, to review the analyses and reasonings in every detail in order to get them right. Annetje, thank you for keeping me on track by reminding me of the bigger picture every time, and by challenging me to clarify my message. I am also indebted to Gijsbert ter Kuile for his time and much appreciated help, to my editor Laurian Kip for refining my message, and to my publisher Antoine Paris for enabling this book's publication. Furthermore, I would like to express my gratitude to Professors Sacha Prechal, Mariolina Eliantonio, Adrienne de Moor-van Vugt and Anna Gerbrandy, and to Associate Professor Mira Scholten for taking part in the examination committee and for providing me with their valuable feedback. Any remaining mistakes are obviously mine.

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Laura Wissink
Madrid, 29 November 2020

<i>Contents</i>	vii	
<i>List of Abbreviations and Terminology</i>	xii	
<i>About the author</i>	xvi	
CHAPTER 1	Introduction	
1	Effective supervision through a shared administration	2
2	Effective legal protection in case of a shared administration?	5
3	Research question	8
4	Methodology, approach & relevance	8
4.1	Broad interpretation of effective legal protection	8
4.2	Supervisory versus investigatory phase	10
4.3	Categorization of composite procedures	11
4.4	Demarcation	14
4.5	Relevance	15
5	Structure	16
CHAPTER 2	The Single Supervisory Mechanism	
1	Introduction	20
2	Genesis of prudential banking supervision in the European Union	20
3	Division of responsibilities within the SSM	23
4	Prudential banking supervision in a nutshell	25
5	Close cooperation between the ECB and NCAs	29
6	Powers and sanctions	33
6.1	Terminology	33
6.1.1	Sanctions not of a criminal nature & sanctions of a criminal nature	34
6.1.2	Supervisory and enforcement measures	37
6.1.3	Administrative penalties	37
6.2	Powers of the ECB as competent authority	39
6.3	ECB powers laid down in Articles 10-13 of the SSM Regulation	39
6.4	ECB supervisory measures	42
6.5	NCA powers	43
6.6	ECB sanctioning powers	46
6.7	NCA sanctioning powers	51
7	Due process for adopting supervisory decisions	54
8	Governance of supervisory tasks within the ECB	58
9	The Single Rulebook	60
10	Recapitulation	62
CHAPTER 3	Assessment Framework	
1	Introduction	66
2	Judicial control and the rule of law	67

3	Sources	69
4	Effective legal protection	73
4.1	Defining effective legal protection	73
4.2	Effective legal protection from a safeguard perspective	78
4.2.1	Good administration	80
4.2.2	The right of respect for private and family life	88
4.2.3	The right not to incriminate oneself	90
4.2.4	The principle of effective judicial protection	93
4.3	Effective legal protection from an instrumental perspective	100
4.3.1	The principle of effectiveness	101
4.3.2	Other elements of the instrumental perspective	105
4.4	Legal certainty and legality	106
5	A complete system of legal remedies and procedures	109
5.1	The Court's competence	110
5.2	Appealable decisions	114
5.3	Standing criteria	124
5.4	National courts	126
5.5	The preliminary ruling procedure	128
6	Recapitulation	131
CHAPTER 4	Common Procedures	
1	Introduction	140
2	A two-step procedure	140
3	Legal protection before court	144
3.1	The reviewability of national draft decisions	145
3.2	The intensity of judicial review of national draft decisions	151
4	Legal protection in the administrative procedure	157
4.1	The implementation of administrative standards	157
4.2	Applicable administrative standards	162
5	Interim evaluation: the effectiveness of legal protection in common procedures	170
CHAPTER 5	Bottom-up Procedures in Ongoing Supervision	
1	Introduction	180
2	Formal and informal cooperation in bottom-up procedures	180
3	Legal protection before court	183
3.1	The reviewability of ECB preparatory measures	184
3.2	The reviewability of national preparatory measures	193
4	Legal protection in the administrative procedure	197
4.1	Adherence to the principle of legality	198
4.2	The implementation of administrative standards	204
4.2	Applicable administrative standards	206
5	Interim evaluation: the effectiveness of legal protection in bottom-up procedures	208

CHAPTER 6	Top-down Procedures in Ongoing Supervision	
1	Introduction	218
2	Forms of cooperation in top-down procedures in ongoing supervision	218
3	Legal protection before court	221
3.1	Reviewability and standing in top-down procedures	222
3.2	Judicial review of ECB regulations, guidelines, general instructions and non-binding instruments to NCAs	227
3.3	Judicial review of ECB preparatory measures in LSI supervision	229
3.4	Judicial review of ECB preparatory measures in case of material supervisory procedures and decisions in LSI supervision	231
3.5	Judicial review of ECB instructions to NCAs with respect to SI supervision	233
4	Legal protection in the administrative procedure	235
4.1	Applicable administrative standards	235
4.2	The implementation of administrative standards	240
5	Interim evaluation: the effectiveness of legal protection in top-down procedures	244
CHAPTER 7	Investigations and Sanctions of a Criminal Nature	
1	Introduction	252
2	Types of cooperation procedures & the ECB's independent Investigating Unit	253
3	Bottom-up procedures: sanctions directly imposed by the ECB	256
3.1	Legal protection before court	256
3.2	Legal protection in the administrative procedure	257
4	Top-down procedures: sanctions imposed by NCAs at the ECB's request	260
4.1	Legal protection before court	260
5	Interim evaluation: the effectiveness of legal protection in case of investigations and sanctions of a criminal nature	264
CHAPTER 8	Observations, Findings and Recommendations	
1	Introduction	268
2	The SSM and the Court's first judgments	270
3	Assessment Framework	273
4	The effectiveness of legal protection in case of bottom-up procedures	276
4.1	The competent court	277
4.2	Applicable administrative standards	285
4.3	The implementation of administrative standards	290

4.4	Judicial review by the EU Courts	292
5	The effectiveness of legal protection in case of top-down procedures	299
5.1	The competent court	301
5.2	Applicable administrative standards	302
5.3	The implementation of administrative standards	304
5.4	Judicial review by the national courts	305
6	Long-term recommendations	307
6.1	Strengthening the cooperation between the CJEU and national courts	308
6.2	Using the legislator's tools	310
6.3	Aligning EU and national judicial proceedings concerning related cases	313
7	Conclusions	314
CHAPTER 9	Epilogue	
1	Proposals for effective legal protection in bottom-up procedures	321
2	Proposals for effective legal protection in top-down procedures	325
3	Final remarks	326
	<i>References</i>	328
	<i>Table of Cases</i>	348
	<i>Nederlandse samenvatting</i>	358

List of Abbreviations and Terminology

- ABoR:* the ECB's internal Administrative Board of Review
bank: an institution as defined in Article 2(3) of the SSM Regulation
CEBS: the Committee of European Banking Supervisors
Charter: the Charter of Fundamental Rights of the European Union
CJEU: the Court of Justice of the European Union as the institution which in accordance with Article 19(i) TEU consists of the Court of Justice, the General Court and specialized courts
common procedures: a procedure as defined in Article 2(3) of the SSM Framework Regulation
CRD IV: the fourth Capital Requirements Directive, i.e. 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 V: the fifth Capital Requirements Directive, i.e. Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures
Credit institution: an institution as defined in Article 2(3) of the SSM Regulation
CRR: the Capital Requirements Regulation, i.e. 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
CCR II: the second Capital Requirements Regulation, i.e. Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012
EBA: the European Banking Authority
EBA Regulation: Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC
ECB: the European Central Bank
ECHR: the European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR: the European Court of Human Rights
ESAs: the (three) European supervisory authorities established within the ESFS
ESFS: the European System of Financial Supervision
ESRB: the European Systemic Risk Board
euro area: for the purposes of this research, euro area refers to the area consisting of the Member States participating in the SSM as defined in Article 2(i) SSM Regulation, i.e. Member States whose currency is the euro or Member States whose currency is not the euro but who have established a close cooperation in accordance with Article 7 of the SSM Regulation (cf. Member States)
FICOD Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and

- investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council
- NCA*: a national competent authority, as referred to in Article 2(2) of the SSM Regulation
- NCA draft decision*: a draft decision which an NCA addresses to the ECB, and which is based on Articles 14 and 15 of the SSM Regulation when part of a common procedure or on Article 91(2) or Articles 91(i), 90(1)(a) and 95(2) of the SSM Framework Regulation in ongoing supervision
- LSI*: a less significant supervised entity (Less Significant Institution) as defined in Article 2(7) of the SSM Framework Regulation
- OLAF*: the European Anti-Fraud Office
- Participating Member States*: a member state as defined in Article 2(1) SSM Regulation
- Rules of Procedure CJ*: Rules of Procedure of the Court of Justice of 25 September 2012 (as lastly amended on 26 November 2019)
- Rules of Procedure GC*: Rules of Procedure of the General Court of 4 March 2015 (as lastly amended on 31 July 2018)
- SI*: a significant supervised entity (Significant Institution) as defined in Article 2(16) of the SSM Framework Regulation
- SREP*: the supervisory review and evaluation process as carried out by the ECB
- SSM*: the system as defined in Article 2(9) of the SSM Regulation
- SSM Framework Regulation*: Regulation (EU) No 648/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities with national designated authorities (ECB/2014/17)
- SSM Regulation*: 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
- SRM Regulation*: Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010
- Statute of the CJEU*: Statute of the Court of Justice of the European Union (as lastly amended on 17 April 2019)
- TEU*: the Treaty on European Union
- TFEU*: the Treaty on the functioning of the European Union
- Treaties*: TEU and TFEU

About the author

Laura Wissink was born in Goor, the Netherlands, on 22 June 1982. She studied law at Utrecht University, where she obtained her master's degree in International and European Law: Transnational Commercial Legal Practice, for which she was awarded with the qualification of 'honourable mention'. She started her career as a lawyer in the fields of corporate law and European and competition law and subsequently worked seven years for De Nederlandsche Bank (the Dutch central bank), where she held various positions in the policy and legal departments. Since 2017 she has been focusing on her family and her PhD research. Laura Wissink has also authored various papers and blogs on EU banking supervision, published on several web sites, such as EU Law Live and the EU Law Enforcement Blog, and in Dutch and international journals such as Review of European Administrative Law, Common Market Law Review and European Business Organization Law Review.

PART I
CHAPTER I

Introduction

The central question of this research is how effective legal protection can be ensured in the complex shared administration in place within the Single Supervisory Mechanism (SSM) without hampering the effectiveness of banking supervision.

The SSM is a system¹ that has been established to ensure an effective prudential banking supervision within the euro area, and in which the European Central Bank (ECB) and national banking supervisors (National Competent Authorities, NCAs) closely cooperate. The far-reaching cooperation between the EU and national levels can be framed as a truly shared administration, resulting in supervisory decisions based on complex composite administrative procedures, which involve both EU and national administrative laws.

However, the current system of legal protection does not sufficiently reflect how two different legal orders can be applied in one and the same decision-making procedure. In other words: the current system of legal protection has not yet been adapted to the reality of a shared administration and the resulting mixed legal orders. The corollary is an inherent tension between ensuring effective supervision, by means of a shared administration, and ensuring effective legal protection in case of the resulting complex composite administrative procedures. This research addresses exactly that tension.

The research examines what possibilities are available to ensure effective legal protection in a shared administration without hampering the supervisors' effectiveness. After an introduction to the topic and an explanation of the assessment framework, the research continues by analysing the legal protection in place for the various composite procedures within the SSM and its effectiveness. These analyses are followed by a discussion of the possible solutions to ensure an effective legal protection within the current system of legal remedies and procedures. In conclusion the research will put forward some possible long-term solutions, which now still are outside the current system, but may be within reach taking them on step by step.

i Effective supervision through a shared administration

The idea to 'never waste a good crisis' certainly seems applicable to the financial crisis of 2008 in the European Union. As a result of the crisis, we have witnessed significant changes to the EU system of banking

¹ Chiti & Recine see the SSM as 'a regulatory framework, a legal discipline governing the implementation of a specific EU legislation by identifying the relevant administrations and regulating the exercise of their powers, their reciprocal interactions and their relationships with private actors' (Chiti & Recine 2018, p. 103).

supervision. The financial crisis has revealed that the increased cross-border activities of the banking sector, the interconnectedness of credit institutions, and the vicious cycle between sovereign debt and bank debt require further centralization of financial supervision.² The increased risk of fragmenting EU banking markets also needed to be diminished in order to safeguard the EU's internal market.³ The motto 'More Europe' was not an aim in itself but just a tool to solve the problems the EU was facing, and to serve the Union's citizens.⁴

In 2013 the Council adopted the Single Supervisory Mechanism Regulation (SSM Regulation), by which the prudential supervisory tasks with regard to banks⁵ have been transferred from the national level to the EU level, conferring exclusive competence on the ECB.⁶ A system was created in which the ECB is the exclusive competent authority for prudential banking supervision, and the tasks and responsibilities are divided between the ECB and NCAs.⁷ This system is a major step forward in the process of Europeanization⁸ of prudential banking supervision, which is deemed necessary in order to establish effective supervision. The SSM has been established so as to guarantee strict and impartial supervisory oversight,⁹ so that Member States may trust the quality and impartiality of supervision and financial fragmentation may be overcome.¹⁰

The SSM has been established within a relatively short time frame. The financial crisis required urgent action and politicians had to find an existing legal basis for transferring the prudential banking supervision to the ECB. That legal basis has been found in Article 127(6) of the Treaty on the Functioning of the

² COM(2012) 510 final, p. 3. An effective SSM was a precondition for direct recapitalization of banks in the euro area by the European Stability Mechanism (ESM). Direct recapitalization was meant to break the vicious cycle between sovereign debt and bank debt (cf. Report Van Rompuy 2012, pp. 5-6; Bovenschen et al. 2013, p. 364).

³ COM(2012) 510 final, p. 3 (fragmentation of EU banking markets undermines the single market for financial services and impairs an effective transmission of monetary policy to the real EU economy).

⁴ Report Van Rompuy 2012, p. 3.

⁵ This research refers to 'banks' or 'credit institutions' using the definition in Article 2(3) of the SSM Regulation, which states it 'means a credit institution as defined in point 1 of Article 4(i) of Regulation (EU) No 575/2013'.

⁶ 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 L287/63.

⁷ The Court has confirmed the exclusive competence of the ECB to carry out the supervisory tasks, and the NCAs' role to assist the ECB in carrying out these tasks by defining the NCAs' role as a decentralized implementation of some of those tasks (see: Case C-450/17P, Landeskreditbank Baden-Württemberg v ECB, ECLI:EU:C:2019:372, paras 38-41).

⁸ For the process of Europeanization, see: Ottow 2012.

⁹ Report Van Rompuy 2012, p. 5.

¹⁰ COM(2012) 777 final, p. 16.

European Union (TFEU),¹¹ but it only allows for specific tasks to be transferred to the ECB and not the overall responsibility for supervision.¹² Accordingly, all key supervisory tasks have been transferred to the ECB, while all other tasks, not listed in the SSM Regulation, remain to be a national competence.¹³

Within the division of tasks and responsibilities laid down in the SSM Regulation, the ECB has been made exclusively responsible for the supervisory tasks allocated to it. It also has become responsible for the overall effective and consistent functioning of the SSM.¹⁴ The 2008 financial crisis had shown that relatively smaller banks can pose a threat to financial stability as well, so the ECB had to be empowered to exercise its tasks over all banks. The day-to-day involvement of the ECB and NCAs varies, however, according to the size of the banks.¹⁵ In layman's language, big banks fall under the direct supervision of the ECB while the NCAs have the lead with regard to the supervision of small banks. The ECB maintains, nonetheless, an oversight function with respect to these smaller banks and disposes of several competences for supervising them so as to fulfil its overall responsibility for the SSM. The NCAs are in turn responsible for assisting the ECB in the ongoing supervision of big banks.¹⁶

This division of tasks ensures centralized supervision, while also recognizing that within the SSM the NCAs are, in many cases, best placed to carry out supervisory activities. NCAs have, after all, a long-established expertise in the supervision of banks within their territories and their economic, organizational and cultural specificities. Furthermore, they have knowledge of national, regional and local banking markets, and dedicated and highly qualified staff speaking the local language.¹⁷ So, although the final responsibility for prudential banking supervision has been transferred to the EU level, this has been done within the existing legal framework and acknowledging that a big part of the work remains to be done at the national level. This arrangement illustrates the complexities of the current system for prudential banking supervision within the euro area, resulting in a supervisory structure in which both the ECB and NCAs adopt supervisory decisions, with the NCAs assisting the ECB and following the ECB's instructions and the ECB relying to a significant extent on the NCAs.¹⁸ By

¹¹ Euro Area Summit Statement 2012. Cf. Ter Kuile 2020, p. 32.

¹² Cf. MEMO/13/780, p. 4.

¹³ Recital 28 SSM Regulation. Cf. MEMO/13/780, p. 4.

¹⁴ Articles 4(i) and 6 SSM Regulation.

¹⁵ MEMO/13/780, p. 2.

¹⁶ Article 6 SSM Regulation.

¹⁷ MEMO/13/780, p. 4. Cf. Recital 37 SSM Regulation.

¹⁸ MEMO/13/780, p. 4. Cf. ECB Opinion 2012, paras 1.4 and 1.9. Cf. Recital 37 SSM Regulation.

putting in place the SSM, a truly shared administration has thus been created, in which both national and EU administrative laws are applicable.¹⁹

The EU has always depended on shared enforcement.²⁰ This form of shared administration will probably become more common within the EU, as the intertwining of administrations appears to increase and to become essential for the Union's functioning. Indeed, on the one hand, the EU often has to deal with powers that need to be transferred to the Union level in order to maintain and strengthen the internal market and be able to deal with globalization and increasing cross-border activities. On the other hand, Member States' resources, experience and knowledge remain necessary in order to achieve the objectives, and Member States often remain reluctant to give away too many of their powers. Thus, the EU and national levels both maintain an important role in implementing Union law, the intertwining between both levels will probably further increase, and shared administrations will only become more relevant.²¹

2 Effective legal protection in case of a shared administration?

As discussed in Section 1, the close cooperation and intertwining between the ECB and NCAs is wanted from the standpoint of both politics and prudent supervision. In this respect, the new supervisory framework can be viewed as an important step forward. However, the SSM affects more than just banking supervisory law. The ECB and NCAs are administrative authorities that can effectively exercise state power. The rule of law, one of the values the EU is founded on,²² requires that state power is regulated by law and subject to judicial control. This stems from fundamental principles that must be fulfilled under the rule of law, such as the legality of administrative bodies; judicial control; checks and balances between the legislative, executive and judiciary powers; and the observance of fundamental rights.²³

This research focuses on the judicial control over the administrative authorities, in this case the ECB and NCAs, as well as on the legal protection provided for in the administrative procedure. In the administrative phase, legal protection

¹⁹ Prechal et al. characterize these administrative arrangements as a 'mixed administration' in which 'the executive level administrations by the Member States and by the Commission are so closely entwined that it is hardly possible to distinguish one from the other' (Prechal et al. 2015, p. 31).

²⁰ In the words of Craig, 'shared management has been central to the implementation of EU policy' (Craig 2018, p. 80).

²¹ Cf. Hofmann 2009, p. 157; Alonso de León 2017, p. 371.

²² Article 2 TEU.

²³ Michiels 2009, p. 9; Burkens et al. 2017, p. 49; WRR Report 2002, p. 36; Brenninkmeijer 1987, p. 138; Alonso de León 2017, pp. 255-256.

consists of the legal safeguards that have to be respected by the administrative authorities. Judicial control means that an independent and impartial court carries out a judicial review of the lawfulness of an administrative body's actions.²⁴ This is a result of the required separation of powers in a state based on the rule of law, and an important mechanism for the supervision and observance of the legality principle and fundamental rights.²⁵ Can these values of the rule of law still be lived up to when such a complex structure for cooperation between the EU and national levels is in place as is the case in this shared administration?

A shared administration results in composite administrative procedures. Composite procedures are multi-step procedures that involve different administrative authorities on both the EU and national levels; in case of the SSM these are the ECB and the NCAs. A final act can be adopted by either an EU or a national administrative authority, but is ultimately based on a multi-step procedure with input from both levels.²⁶

Although the composite procedures may in the SSM form integrated processes, the legal safeguards in the administrative phase and the judicial review of actions based on such procedures are not necessarily as integrated. Due to the involvement of administrative authorities from various jurisdictions, different legal orders may be applicable to one and the same composite procedure.²⁷ This is problematic, given the fact that the applicable legal safeguards may differ and the relationship between the EU Courts and national courts generally still is organized more conservatively, i.e. the EU and national levels are strictly separated. It often remains unclear where responsibility lies in shared administrations and at what level legal protection must be sought.²⁸ Persons, be they natural or legal, may end up in a situation where there is no court to go to or, on the contrary, they may need to approach both the EU Courts and a national court when both may be competent and timelines for instituting proceedings are set to expire. Even when the competent court is rightly addressed, many uncertainties remain with respect to the review by that court of the preparatory measures carried out at the 'other' level than the level at which the final decision is adopted and thus reviewed.

²⁴ Burkens et al. 2017, p. 48; Schermers & Waelbroeck 2001, p. 310.

²⁵ Burkens et al. 2017, p. 22; Damen et al. 2006, pp. 56-57.

²⁶ Hofmann 2009, p. 136. For more about composite procedures in general and in place within the SSM, see Section 4.3 of this chapter.

²⁷ Hofmann 2009, p. 151. In light of the discussion about the right to be heard in composite procedures, Eckes and Mendes point out that the procedures in EU legislation often only focus on the cooperation between the different authorities on the EU and national levels. The EU legislator neglects the complexity of composite procedures and pays too little attention to procedural protection of the persons affected by such procedures (Eckes & Mendes 2011, p. 665).

²⁸ Prechal et al. 2015, p. 31.

Composite procedures entail intermediate steps that are preparatory acts for a final decision adopted by an authority different from the one carrying out the preparatory measures. This may be less of an issue when one single jurisdiction is involved, but may become problematic in cases where different jurisdictions interplay. It may be difficult for the court reviewing the final decision to disentangle the preparatory acts and the legal regimes that apply to such cases.²⁹ The next question is whether the court reviewing the final decision is also competent and actually able to review the preparatory measures carried out at the ‘other’ level.

The involvement of the EU and national legal orders may also result at times in a tension between ensuring effective legal protection, on the one hand, and preserving the primacy, unity and effectiveness of EU law, on the other. These EU law principles may require further centralization and harmonization of the legal protection and standards at hand, while this may not do justice to the role of national authorities and national law involved. In the context of the SSM, additional challenges arise since both a general EU administrative law and a fully harmonized set of EU banking rules are lacking.³⁰ Because of these lacunae, the question arises what administrative standards apply to which part of the decision-making procedure, resulting in situations in which the EU Courts may face differing substantive laws and supervisory powers, and even questions of law relating to national substantive laws. All these aspects bring about their own challenges for ensuring effective legal protection.

The Union legislator is generally uncomfortably silent about the legal protection of persons affected by composite procedures, as the legislation often focuses on the cooperation between the administrative authorities involved, but says little about the legal protection of persons affected by such legislation. The EU legislator seems to rely on the general principles of Union law, but within the current framework of complex composite procedures it is debatable whether it is justified for the EU legislator to rely so heavily on these principles.³¹

²⁹ Hofmann 2009, p. 159. Cf. Eckes & Mendes 2011, p. 2, where they point out with respect to the right to be heard that the artificial split, often made in composite procedures, between information and assessment of the situation may lead to problems (Eckes & Mendes 2011, p. 652).

³⁰ See Chapter 2, Section 9.

³¹ Cf. Eckes & Mendes 2011, p. 665. As they point out, it is fair to say that in general the EU legislator does not pay enough attention to the procedural protection of the persons affected by composite procedures, and, in particular, the *effet utile* of the right to be heard. In EU law, the procedures tend to focus on the coordination between the different entities operating at the national and EU levels and the intricacies of EU composite procedures are often neglected. In addition, providing participating rights in composite procedures tends to depend on policy choices. Eckes and Mendes demonstrate this by discussing three different types of composite procedures (pp. 665-668).

At the same time, one has to keep in mind that although effective judicial protection, which is part of the broader notion of effective legal protection used in this research (see Section 4.1 of this chapter), is a fundamental right within the EU, it is not without limitations and choices may need to be made to achieve it.³² Justified grounds may exist to restrict this right of effective judicial protection or to make certain choices in determining what effective judicial protection is in this context, and the way in which different relevant principles relate to each other should be explored. In this research, the tensions between the various principles relevant in the context of the SSM are explored hoping to find an acceptable middle ground for ensuring effective legal protection without hampering the effectiveness of EU banking supervision.

3 Research question

How can effective legal protection be ensured for individual decisions based on complex composite administrative procedures in place within the Single Supervisory Mechanism (SSM) without hampering an effective implementation of the relevant EU law?

4 Methodology, approach & relevance

This research analyses the effectiveness of the legal protection which is actually in place for individual supervisory decisions based on composite procedures within the SSM. The various procedures are categorized into a few main types of composite procedures, that are subsequently analysed. Whenever relevant, the research refers to and draws inspiration from other EU shared administrations, such as the structures used in the field of competition law or to investigate irregularities affecting the financial interests of the EU.

The legal analysis is based on an assessment framework composed for this research on the basis of the current legal framework, case law and literature. The assessment focuses on the Union's perspective, taking the EU laws, principles and case law as its starting point. This section sets out the main building blocks for the approach chosen in this research, followed by a brief discussion of the research' relevance.

4.1 Broad interpretation of effective legal protection

The research focuses on effective legal protection, which encompasses both the protection provided by the legal safeguards to be respected during the administrative phase and the judicial protection before

³² For a discussion on the possible restriction of fundamental rights, see Chapter 3, Section 4.1.

court. Effective judicial protection is thus part of the broader notion of effective legal protection. When reference is made to the protection provided for both in the administrative phase and before court this research uses the notion of ‘legal protection’, whereas ‘judicial protection’ is used only when it specifically concerns protection before courts and when referring to the EU principle of and right to effective judicial protection.

Within the context of the research, effective legal protection is broadly interpreted and studied from both a safeguard and an instrumental perspective. The idea underpinning this broader approach is that the principle of effective legal protection is not absolute and cannot be studied in isolation.

Note that effectiveness is an open norm in itself and can be interpreted in different ways. In this research the norm ‘effectiveness’ is only used to clarify the way in which legal protection is looked at. As explained below, this broad interpretation enables us to look at the elements that may result in tensions when ensuring legal protection. This research does not intend to measure the effectiveness of legal protection. Thus, elements such as the time it takes to finish a judicial proceeding, the number of judicial procedures or the experiences of persons involved are outside the scope of this research.

In the context of this research, effective legal protection shall be interpreted as guaranteeing the elements related to legal protection of persons, on the one hand, without hampering the effectiveness of Union law, on the other.

The first part of this definition refers to the safeguard criteria such as proper administration, the right of access to an independent and impartial court, and legal privilege. It comprises both the protection provided during the administrative phase – within the SSM context also referred to as ‘due process’³³ – and legal protection before court. The latter part means that legal protection may not be organized in such a way that the objective of relevant legislation is hampered, or put positively, legal protection should be organized so as to allow for an effective implementation of Union law.³⁴ Enforcing compliance with prudential banking legislation may be hampered by, for instance, legal uncertainty, the involvement of national laws, or an excessive number of procedures to be followed before arriving at a final judgment.

This broad interpretation has been chosen so as to integrate the various relevant principles and the possible tensions between them into an overall assessment of the effectiveness of legal protection. For legal protection to be ensured effectively according to this broad interpretation, a right balance has to be struck between both elements. In the following chapters, I analyse both the safeguard

³³ Cf. Article 22 SSM Regulation and Part II, Title 2, SSM Framework Regulation.

³⁴ Cf. Case C-68/88, Commission v Greece, ECLI:EU:C:1989:339. This case is discussed in Chapter 3, Section 4.3.1.

elements and those related to effectiveness. In the context of this research, these are referred to as the safeguard and the instrumental perspectives, respectively. This analysis will reveal whether a restriction of the right to judicial protection, or a specific interpretation of this right, is necessary and justifiable in order to achieve effective legal protection. This broad interpretation of effective legal protection is further explained in Chapter 3, Section 4.1.

4.2 Supervisory versus investigatory phase

Banking supervision within the SSM comprises ongoing supervision and investigations, and the outcome of both may result in imposing sanctions, as discussed in Chapter 2. It is, however, relevant for understanding the approach adopted in this research to already briefly explain the general distinction that can be made between sanctions not of a criminal nature and sanctions of a criminal nature.³⁵

This distinction is relevant due to the different legal safeguards applicable to sanctions of a criminal and *not* of a criminal nature, as discussed in Chapter 3, Section 4.2. This research distinguishes the different phases of supervision as well as the measures and sanctions that the supervisors may adopt along the lines traced by the distinction between these sanctions. These lines result in a distinction between ongoing supervision and investigations. Ongoing supervision is also often referred to as the monitoring phase³⁶ and concerns the day-to-day supervision carried out by the supervisor in order to verify if institutions comply with the rules applicable to them. Day-to-day supervision is carried out by inspections taking place off-site (e.g. analysing supervisory reporting, financial statements and internal documents of banks) and on-site (i.e. on the business premises).³⁷ Furthermore, ‘enforcement’ is part of this day-to-day supervision as it aims to move the persons involved to comply with the applicable rules and to stop a possible breach of those rules. This research refers to this stage of supervision as the ‘*supervisory phase*’. The following stage in supervision is investigating possible breaches that may lead to decisions imposing sanctions of a criminal nature. Since additional legal safeguards apply in this stage,³⁸ it must be distinguished from the supervisory phase. This research refers to this next stage in supervision as the ‘*investigatory phase*’.

Sections 6.4 through 6.7 of Chapter 2 discuss the nature of the various sanctions within the SSM. In this research, only fines are considered to be of a

³⁵ See Chapter 2, Section 6.1 for the criteria determining whether or not a sanction is of a criminal nature.

³⁶ Duijkersloot & Widdershoven 2017, p. 55.

³⁷ SSM Supervisory Manual 2018, pp. 45 and 89; ECB Guide to on-site inspections 2018, p. 2. Cf. Chapter 2, Section 4. Note that these powers may also be exercised by the Investigating Unit (Article 125 SSM Framework Regulation), in which case they would be part of the investigatory phase.

³⁸ Cf. Chapter 3, Section 4.

criminal nature. The discussion in these sections of Chapter 2 shows, however, that this is not a foregone conclusion. The nature of some of the sanctions is under debate and certain sanctions not of a criminal nature may in practice be heavier for a bank than a fine. In this context, however, it suffices to make this general distinction, since the research analyses the legal protection in place starting from a certain composite procedure, and not from a sanction.

4.3 Categorization of composite procedures

As stated before, the composite administrative procedures that result from shared administrations are multi-step procedures involving different administrative authorities on both the Union and national levels. The final decision may be adopted by either an EU or a national administrative authority, but is ultimately based on a multi-step procedure with input from various authorities.³⁹

Any attempt to further categorize composite procedures proves difficult since the procedures used in the different fields of law lack harmonization.⁴⁰ Procedures may be categorized, for instance, according to the level at which the procedure is initiated,⁴¹ the authority adopting the final decision,⁴² the number of authorities involved or steps within the procedure,⁴³ and the nature of the procedure, i.e. what activities are preparatory to the decision-making process. Sharing information or adopting more institutionalized measures such as an opinion or a binding decision may serve as examples of such activities.⁴⁴

Within the context of the SSM, almost all decisions adopted are based on input from the other level and the above-mentioned elements exist in many variations.⁴⁵ However, the multiple types of input and of cooperation between the administrative levels within the SSM complicate categorizing even more.⁴⁶ Note

³⁹ Hofmann 2009, p. 136. Cf. Eliantonio 2014, pp. 68-69; Della Cananea 2004, p. 198; Hofmann 2009, p. 136; Alonso de León 2017, p. 151; Brito Bastos 2018, p. 105. (Alonso de León uses a slightly stricter definition for his research. The qualifying element for a composite procedure in the context of his research is whether the contribution by the other administrative level is that relevant that it has a decisive effect on the outcome; Alonso de León 2017, p. 153.)

⁴⁰ Eliantonio 2014, pp. 69-70; Alonso de León 2017, p. 158.

⁴¹ Alonso de León 2017, p. 158.

⁴² Della Cananea 2004, p. 199; Eliantonio 2014, pp. 70-71; Alonso de León 2017, pp. 158-159; Hofmann 2009, pp. 148-149; Della Cananea 2004, p. 199.

⁴³ Alonso de León 2017, p. 159; Eliantonio 2014, pp. 72-77.

⁴⁴ Eliantonio 2014, p. 71; Hofmann 2009, pp. 138-148.

⁴⁵ The SSM and its administrative procedures are further described in Chapter 2.

⁴⁶ Categorizing the composite procedures within the SSM is challenging due to, for instance, the fact that the legal framework provides for different kinds of procedures and roles (e.g. common procedures, day-to-day supervision or on-site inspections, and draft decisions, or input providing formal views or

that all types of preparatory acts are to be taken into account, including those that do not necessarily have a decisive effect on the outcome⁴⁷ or are not needed for the decision-making authority to exercise its competences.⁴⁸ Within the context of the SSM, the NCAs may draw from many possible forms of cooperation to assist the ECB in accordance with its general obligations, without any formal steps making the ECB dependent on the NCAs' input. Given the importance of these methods of close, but informal cooperation between the ECB and NCAs, the impact of this type of cooperation on legal protection needs to be analysed as well. Therefore, this research includes these types of cooperative processes in its definition of composite procedures, on the basis of which the following categorization of composite procedures is considered most supportive to the analysis.

First of all, it is considered to be relevant which authority adopts the final decision, rather than the level at which the procedure is initiated. After all, the applicable legal regime depends on the level at which the final decision-making takes place.⁴⁹ In this context, it is either for the ECB or the NCA to adopt the final decision. Taking this as the starting point, all other measures are considered to be preparatory to the final decision, resulting in two groups of decisions and procedures. The first group is referred to as '*bottom-up procedures*', i.e. procedures ending with a final decision taken by the ECB and partly or entirely based on NCA input. The second group is called '*top-down procedures*', i.e. procedures ending with a final decision taken by the NCA and partly or entirely based on ECB input.⁵⁰

Subsequently, the steps to be taken within a procedure are considered to be relevant. The SSM procedures include a broad range of types of intermediate steps. It turns out to be especially relevant to which extent the legislator has

information). The structure in which the ECB is exclusively competent to carry out its tasks and ultimately responsible for the overall system, while the tasks and responsibilities are subsequently divided between the ECB and NCAs, complexifies the intertwining even more. In addition, the substantive rules are still partly implemented in national laws, thus also requiring complicated structures to ensure that the ECB can carry out its supervisory tasks efficiently (e.g. the ECB has to apply national laws transferring relevant EU law and needs the NCA in certain cases to take decisions or impose sanctions). Lastly, the way in which the authorities have organized their cooperation, by means of Joint Supervisory Teams and on-site inspection teams, may also be challenging from a legal perspective.

⁴⁷ See e.g. Alonso de León for a different view (Alonso de León 2017, p. 153; cf. footnote 39).

⁴⁸ Brito Bastos defines the decisional interdependence as 'that one level of administration may not exercise its competences in the procedure before the other level has concluded the previous decisional stage' (Brito Bastos 2018, p. 105).

⁴⁹ For a discussion of the relevant case law in this respect, see: Chapter 3, Section 5.1 and Chapter 4, Section 3.1.

⁵⁰ For examples of top-down and bottom-up procedures in other fields of EU law, see: Della Cananea 2004, pp. 199-203.

formalized an intermediate step in the applicable legal framework. On the one hand, the formal two-step procedure in place for common procedures, as described in Chapter 2, eliminates many legal questions and is therefore discussed separately. On the other hand, the lack of such a precisely set formal division between other preparatory steps and a final decision gives rise to more and varying questions regarding legal protection, which therefore requires a separate analysis. These procedures are discussed in their own chapters.

No further distinction has been made on the basis of the nature of the procedure, since they all contain many similar legal issues and the differences between them are small. Final decisions may be prepared, for example, by the relevant Joint Supervisory Team or NCA, and input may also come from an on-site inspection team. All input may take the form of an information transfer, a draft decision, a consultation, a binding request or instruction, or an opinion. The draft decision is considered in the context of common procedures, being a formalized part of a two-step process. A further distinction would not be useful and would only lead to an unclear categorization comprising an excessive number of categories. In order to concretize the procedures, the various possible preparatory steps in each category are nevertheless briefly explained in each chapter, and then these steps are considered when relevant to the legal analysis.

As discussed in Section 4.2 setting out the supervisory and investigatory phases, decisions imposing sanctions of a criminal nature, and the procedures preparing such decisions, must meet stricter requirements of legal protection than any decision in ongoing supervision, which do not end in a sanction of a criminal nature. These requirements justify the distinction made in this research between composite procedures in ongoing supervision (i.e. the supervisory phase) and composite procedures in the context of sanctions of a criminal nature (i.e. the investigatory phase). This distinction is moreover relevant given the different kinds of procedures in place within the SSM for imposing sanctions of a criminal nature.

All the elements above result in the following categorization of composite procedures within the SSM: common procedures; bottom-up procedures in ongoing supervision; top-down procedures in ongoing supervision; and sanctions of a criminal nature, also divided in bottom-up and top-down procedures. This categorization helps to make the analysis in this research relevant to other fields of law in which composite procedures are in place as well, since similar structures (i.e. bottom-up versus top-down) and comparable intermediate steps (formalized intermediate steps versus more informal cooperation) can often be found in other composite procedures too.

4.4 Demarcation

When studying a topic, one discovers how little is actually known. Nevertheless, I had to limit myself to certain main topics relevant to the research question, explicitly leaving out certain issues that are without any doubt worth discussing. This section sets out what is and what is not included in the research.

Firstly, the scope of this research is limited to legal protection for individual decisions based on composite procedures within the SSM during the administrative procedure and before court. Furthermore, the focus of this research is administrative law protection. Although the possibility exists that the ECB or an NCA transfer a case to national criminal investigative authorities⁵¹ and the challenges related to criminal law may to a certain extent be similar to administrative sanctions of a criminal nature, the specific legal context of criminal law requires a separate, more in-depth research. Possible legal protection that persons may gain through criminal law is thus not considered.

Although the interpretation of effective legal protection is broad in that it includes legal protection during the administrative procedure and before court, and in that it takes both the safeguard and instrumental perspectives into account, other aspects relevant to the overall protection had to be left out. The protection provided by means of actions for damages pursuant to Articles 340 and 268 of the TFEU is not explored, for example, since it would stretch the topic too much. It nonetheless still is an interesting question to follow up on.⁵² The same applies to the protection provided by the possibility to object to an ECB decision before its internal Administrative Board of Review.⁵³ Since the possibility of an internal administrative review is optional, not considered to be a review by a court or tribunal according to Article 6 ECHR,⁵⁴ and moreover does not raise specific questions directly relating to the composite administration, it is not included in this research' analysis of the effectiveness of legal protection.

The topic is studied from the EU's perspective and national perspectives are only considered within the context of the Union's point of view. The role of the national courts is thus only discussed insofar as it concerns their role within the EU system of legal remedies and procedures. No separate national analyses are made, and no national legal orders are explored or compared. National legal orders are only generically taken into account by considering possible generic

⁵¹ Cf. Luchtman et al. 2019, p. 39.

⁵² Cf. Ter Kuile et al. 2015, pp. 185-187; Ligeti & Robinson 2017, p. 233.

⁵³ Cf. Craig 2018, pp. 283-284, for interesting research questions with respect to boards of appeal in general. For a brief discussion of the Administrative Board of Review within the SSM, see Chapter 2, Section 8.

⁵⁴ See Chapter 3, Section 4.3.

clashes and possible differences between legal orders, thus revealing the general and main legal issues with respect to the national legal orders. Moreover, horizontal relations between administrative authorities are not studied either, limiting the discussion to the vertical relations between the ECB and NCAs, bottom-up and top-down, and excluding relations between NCAs with each other, since these involve different legal challenges and require their own study.

Only those aspects of legal protection are elaborated on that appear to be most affected by the far-reaching forms of composite procedures in place. For instance, the right of access to files is only discussed when it concerns the transfer of documents between authorities in composite procedures and the accessibility to these documents. This limitation also implies that the standing requirements are not discussed within the context of bottom-up procedures⁵⁵ and that the judicial review's intensity is only analysed to the extent relevant in light of composite procedures. After all, having a final decision based on a composite procedure does not necessarily affect the answers to the many legal questions arising from the topics of standing and intensity. For instance, the standard for the intensity of judicial review is debatable in general, but the issues depend on factors other than whether different authorities are involved. This discussion is thus limited to the extent it is affected by the composite procedures in place.

On a more practical note, when referring to articles of the Treaties, I use the article numbers used in the consolidated version as applicable in the Summer of 2020. The research is based on legislation, case law and literature available on 1 June 2020. In general, any amendments or materials published after this date have not been included. Lastly, any examples used in this research are illustrative and not exhaustive.

4.5 Relevance

As mentioned before, far-reaching shared administrations are part of the EU's future, which encourages – or compels - us to focus on possible ways forward. The research focuses on the legal protection within the financial sector, a sector that is in the process of rapid change. Europeanization appears to be progressing faster in this sector than in other legal fields and the SSM embodies a far-reaching step in this process. Analysing the changes in this specific sector, in particular within the SSM, helps develop a more comprehensive

⁵⁵ Bottom-up procedures end in an ECB final decision. Any addressees of an ECB decision may have standing if they fall under the criteria of Article 263, subparagraph 4, TFEU. This may lead to interesting discussions, for instance, with respect to the differences between the standing criteria on the EU and national levels (see Alonso de León 2017, pp. 310-312), but this is outside the scope of this research, since it is not related to the far-reaching shared administration in place. Standing requirements *are* taken into account in case of top-down procedures, since in such cases they are affected by the procedures in place (see Chapter 6).

view regarding legal protection in a shared administration. Conducting an in-depth analysis regarding the SSM is therefore worthwhile, not only for the SSM but to shared administrations in general.

This research contains a detailed analysis revealing the specific issues and challenges for the legal protection's effectiveness in case of composite procedures in the current legal framework, while the final discussion provides overarching observations and findings thus giving a broader picture of the topic. By combining a detailed analysis of the SSM with the overarching findings and suggestions to improve the effectiveness of legal protection in this shared administration, the research aims to contribute to the general discussion about composite procedures.

The research takes a broader point of view than solely legal protection by the court. As discussed in Section 4.1 of this chapter, this broad interpretation of effective legal protection also includes the legal safeguards in place during the administrative procedure, as well as the way in which guaranteeing legal protection impacts the effectiveness of relevant Union laws. This broader take allows me to reveal and assess the various points of view and interests at stake.

The normative framework for a broad interpretation of effective legal protection is set out on the basis of the current principles, laws, case law, and literature, and is completed by my own interpretation. The result is an assessment framework for reviewing the effectiveness of legal protection which is to ensure a more inclusive answer about the method in which effective legal protection is, or may be, guaranteed. A middle ground should be found between what is necessary to ensure effective legal protection of persons' rights (the safeguard perspective) and what may be desirable from both a prudential and political point of view so as to ensure the effectiveness of the relevant EU banking laws (the instrumental perspective).

By analysing the legal protection in case of the different types of composite procedures in place within the SSM, the research provides an overview of consequences within one and the same system of supervision, which is the SSM. Such an overview allows us to look at the overarching issues and challenges, and to try and find solutions that are coherent for both bottom-up and top-down procedures.

5 Structure

The research is divided in three parts. Part I, consisting of Chapters 1 through 3, is an introduction to the topic, the context, and the current legal framework. This is followed by Part II, comprising Chapters 4 through 7, in which the assessment framework is applied to the different composite

procedures within the SSM. Part III, Chapters 8 and 9, concludes the research with an overview and discusses the overarching issues and challenges, and possible solutions.

In this Chapter 1 the topic has been introduced, after which Chapter 2 elaborates the context of the research by explaining *inter alia* how the SSM is structured, how the tasks, responsibilities and powers are divided between the supervisors and how they collaborate. Chapter 3 describes the current state of play of legal protection in case of individual supervisory decisions based on composite procedures. It discusses the concept of the rule of law, the relevant sources of law, the general principles of law and their codification, and gives an explanation of the complete system of legal remedies and procedures within the EU as applicable to the SSM. Thus, this chapter induces a general framework indicating the relevant elements that need to be considered when assessing the effectiveness of the legal protection within the SSM, as well as how they should be weighed according to the current case law.

The assessment framework set out in Chapter 3 consists of two parts. The first covers the substantive elements, in other words the standards that have to be considered when assessing legal protection. These substantive elements provide legal safeguards such as the principle of legality and the relevant administrative standards (the principle of good administration, the right of respect for private and family life⁵⁶ and the right not to incriminate oneself) that apply as from the administrative procedure preceding a decision, and often also ensure a better judicial review of the decision afterwards. Furthermore, safeguards for legal protection before court are included, such as the right of access to court and requirements as to the standard of judicial review. These conditions relate to the safeguard perspective of effective legal protection.

The first part of the framework also covers elements related to the effectiveness of Union law, and includes elements related to the EU principle of effectiveness, and other general elements facilitating a system of legal protection that supports an effective implementation of Union law. These conditions relate to the instrumental perspective of effective legal protection.

The second part of the assessment framework sets out by which principles the tasks and responsibilities are divided between the EU Courts and national courts. The description is based on the complete system of legal remedies and procedures and the Court's interpretation of that system. This part is considered to be the institutional part of the assessment framework.

This introduction of the research topic is followed by Part II (Chapters 4-7), which applies the assessment framework to the SSM's different composite procedures as distinguished in this research. I discuss, successively, ECB decisions based on the common procedures (Chapter 4), ECB decisions in ongoing

⁵⁶ This is relevant in the SSM in case of on-site inspections.

supervision based on NCA involvement (Chapter 5), NCA decisions in ongoing supervision based on ECB involvement (Chapter 6), and decisions imposing sanctions of a criminal nature (Chapter 7). Each chapter first analyses the legal protection in place for the type of procedure discussed, and concludes with an interim evaluation of the effectiveness of that legal protection. This second part of the research thus reveals the issues and challenges that may arise within the current EU system of legal remedies and procedures regarding legal protection for individual decisions taken in composite procedures within the SSM.

Part III presents the research conclusions by providing an overall recapitulation of the topic based on the interim evaluations of Part II. In this Chapter 8, I examine the overarching issues and challenges, and possible ways to address these, either within the current legal system or by amending the system or applicable laws. The research concludes with an epilogue as a concise response to the research question posed in Section 3 of this Chapter 1 by putting forward proposals to enhance the effectiveness of the legal protection in case of the composite procedures within the advanced shared administration that constitutes the SSM.

The Single Supervisory Mechanism

1 Introduction

Before analysing the legal protection in case of individual decisions adopted on the basis of a composite procedure within the Single Supervisory Mechanism, it is paramount to gain a clear picture of the SSM itself and the types of procedures in place. To do so, this chapter will elaborate on how supervision is set up within the SSM, its legal context, and all other aspects relevant for understanding the complexity of the shared administration in place.

In order to better understand the institutional set-up of today's prudential supervision, this chapter starts off by a concise explanation of how the EU's prudential banking supervision came into being.¹ Then it looks into the basic elements of prudential supervision within the SSM, such as the division of responsibilities between the European Central Bank and the national competent authorities, the ECB's tasks and the way in which the ECB and NCAs cooperate. The chapter continues by considering the different powers of the ECB and NCAs, as well as the requirements for a due process and the ECB's decision-making processes, after which it briefly discusses the substantive prudential banking rules as laid down in the Single Rulebook in order to better understand which rules the authorities have to supervise compliance with. The chapter ends by recapitulating everything discussed.

2 Genesis of prudential banking supervision in the European Union

The EU did not start to centralize its prudential banking supervision from one day to the next. For a long period of time now, the EU has focused on improving the rules for the banking sector and its supervision.

The first steps were taken in the Lamfalussy Report² on the regulation of the EU's security markets. Following this report, the Union's regulatory process in the financial sector has been divided into different levels. The first level pertains to laying down basic rules by means of regulations and directives. On the second level, the Commission adopts technical standards based on a draft of the relevant expert committee. The third level is where expert committees lay down their joint interpretation in recommendations, guidelines and standards, and the fourth level is where the Commission monitors whether the Member States comply with the EU's rules and takes action when this is not the case.³

¹ This section is based on the section about developments in the EU playing field ('Ontwikkelingen in het Europese speelveld') in Wissink 2015 (pp. 4-5).

² Lamfalussy Report 2001.

³ SEC(2004) 1459, p. 16; Joosen & Raas 2013, pp. 85-86; Ottow 2011, pp. 9-10.

In addition to this division in the regulatory process, the Lamfalussy Report led to the establishment of expert committees to draft the second-level technical standards. These committees were composed of representatives of all national supervisors, first for the security markets and later on for the banking sector and the insurance and occupational pensions sector as well. The expert committee for the banking sector was called the Committee of European Banking Supervisors (CEBS).⁴

A next step in shaping EU supervision was taken upon the publication of the De Larosière Report.⁵ The high-level group on financial supervision in the EU, chaired by Jacques de Larosière, was asked to advise on improving the Union's regulations for and the supervision of the financial sector,⁶ resulting in a new supervisory structure within the EU, the European System of Financial Supervision (ESFS).⁷

The ESFS consists of the European Systemic Risk Board (ESRB), the three European supervisory authorities (ESAs),⁸ the Joint Committee of the ESAs⁹ and the competent or supervisory authorities.¹⁰ The main objective of the ESFS is to ensure that the rules applicable to the financial sector are adequately implemented to preserve financial stability and to ensure confidence in the financial system as a whole and sufficient protection for the customers of financial services.¹¹

⁴ The other committees were the Committee of European Securities Regulators (CESR) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS), respectively. For more about the relevance and functioning of these committees, see: Ottow 2011.

⁵ De Larosière Report 2009.

⁶ http://europa.eu/rapid/press-release_IP-08-1679_en.htm (last visit on 14 July 2020).

⁷ The composition of the ESFS is laid down in Article 2 of the regulations establishing the supervisory authorities, being: Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), hereinafter the 'EBA Regulation'; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Security and Markets Authority); and in Article 1 of Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.

⁸ The European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA).

⁹ The Joint Committee of the European Supervisory Authorities.

¹⁰ Article 2(2) EBA Regulation.

¹¹ Article 2(1) EBA Regulation. For more about the (origins of) the ESFS and more specifically the EBA, see: Wymeersch 2011; Van Haersolte 2011; Van Praag 2011.

The European Banking Authority (EBA)¹² has contributed to a closer cooperation between the national supervisors and more convergence of supervisory practices within the EU. It turned out, however, that this form of cooperation was insufficient to adequately address the challenges during the crisis.¹³ The increased cross-border banking activities and interconnectedness of credit institutions, the vicious cycle between sovereign debt and bank debt, and the risk of fragmentation of EU banking markets required a shift from mere cooperation between national supervisors to actual EU banking supervision.¹⁴ This is the first pillar of the Banking Union within the EU. A common system for deposit guarantees¹⁵ and an integrated crisis management framework (the Single Resolution Mechanism, or SRM)¹⁶ are the other two pillars.¹⁷ The EBA continues to play a vital part in the banking union in order to ensure the banking rules are uniformly applied throughout the EU, and to build a common legal framework and supervisory culture throughout the EU.¹⁸

The creation of an EU banking supervision had to be done in such a way that it was possible to found it on the current Treaties¹⁹ and that the cooperation between supervisors would better connect to the characteristics of the financial sector. The solution was to establish the SSM, a mechanism consisting of the ECB and NCAs,²⁰ by means of the SSM Regulation and legally based on Article 127(6) of the TFEU.²¹ This provision is part of Title VIII, Chapter 2 TFEU, on monetary policy, which is an exclusive competence of the Union pursuant to Article 3(1)(c) TFEU.

Accordingly, the ECB is exclusively competent to carry out the prudential supervisory tasks listed in Article 4 of the SSM Regulation within the framework

¹² The EBA has been established by the EBA Regulation. Hereafter, reference to the EBA Regulation also includes the amendments to this regulation.

¹³ See Chapter 1, Section 1.

¹⁴ See Chapter 1, Section 1.

¹⁵ At the moment of writing this is still under negotiation.

¹⁶ The SRM is a European mechanism for resolving banks in the EU, established by Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund (the SRM Regulation).

¹⁷ COM (2012) 510 final, p. 6. For more about the banking union, see: Moloney 2014; Wymeersch 2012; Ferran 2014.

¹⁸ COM (2012) 510 final, p. 5.

¹⁹ When the politicians decided to establish the SSM, they explicitly indicated that this needed to be done within the existing treaties. See: <https://www.consilium.europa.eu/media/21400/20120629-euro-area-summit-statement-en.pdf> (last visit on 14 July 2020).

²⁰ Article 6(1) SSM Regulation.

²¹ For a discussion about the legal basis, see inter alia: Guaraccino 2013; Bovenschen et al. 2013.

of Article 6 SSM Regulation,²² which outlines how the ECB and NCAs should cooperate within the SSM and how tasks and responsibilities are divided between the ECB and NCAs. By means of Article 6 SSM Regulation, the NCAs are empowered to adopt legally binding acts with regard to the specific responsibilities pursuant to this provision.²³ The Court of Justice has emphasized that the NCAs assist the ECB in carrying out its supervisory tasks by a decentralized implementation of some of those tasks in relation to Less Significant Institutions (LSIs).²⁴

Early November 2013, the SSM Regulation entered into force and, consequently, the ECB became exclusively competent to carry out the banking supervisory tasks laid down in Articles 4 and 5 of that regulation within the euro area.²⁵ On 4 November 2014, the ECB actually assumed its responsibility for the banking supervision and the SSM really took off.²⁶

The SSM Regulation sets the general organizational principles, lays down which tasks, responsibilities and powers are specific to the ECB, as well as how tasks and responsibilities are generally divided between the ECB and NCAs and by which arrangements they cooperate. The cooperation between the ECB and NCAs is elaborated in detail in the ECB's SSM Framework Regulation, a regulation in which the ECB itself establishes the framework for its cooperation with the NCAs.²⁷ This chapter continues by discussing the aspects of the SSM relevant to this research.

3 Division of responsibilities within the SSM

The complex collaboration between the ECB and NCAs rests on the division of prudential supervisory responsibilities. The ECB is exclusively

²² Article 4(1) SSM Regulation. Cf. Case C-450/17 P, Landeskreditbank Baden-Württemberg v ECB, ECLI:EU:C:2019:372, paras 37-38.

²³ Article 2(1) TFEU states that when the Treaties confer exclusive competence in a specific area to the EU, only the EU may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the EU or for the implementation of EU acts.

²⁴ Case C-450/17 P, Landeskreditbank Baden-Württemberg v ECB, ECLI:EU:C:2019:372, paras 40-41.

²⁵ The SSM includes NCAs from what is called 'participating Member States'. These are Member States whose currency is the euro or Member States whose currency is not the euro but who have established a close cooperation in accordance with Article 7 SSM Regulation (Article 2(1) SSM Regulation).

²⁶ See: <https://www.banksupervision.europa.eu/press/pr/date/2014/html/sri41104.en.html> (last visit on 14 July 2020).

²⁷ Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17).

competent to carry out the prudential supervisory tasks listed in the SSM Regulation and is responsible for the effective and consistent functioning of the SSM.²⁸ The supervisory responsibilities are, subsequently, divided between both the ECB and NCAs.²⁹

These tasks and responsibilities are mainly covered by Articles 4 and 6 of the SSM Regulation. Article 4(1) reads that the ECB is exclusively competent to carry out the prudential supervisory tasks listed in that article within the framework of Article 6 of the SSM Regulation. Article 6 provides for general cooperation arrangements and a division of responsibilities between the ECB and NCAs.

The responsibilities for the prudential supervisory tasks are divided between the ECB and NCAs on the basis of the credit institutions' significance, which is determined by *inter alia* their size, their importance for the economy of the Union or any participating Member State, and the significance of their cross-border activities.³⁰ The ECB is the direct supervisor of credit institutions which meet the requirements for being significant, i.e. the 'significant credit institutions' (SIs). The NCAs have the lead in the supervision of credit institutions which do not meet these requirements, i.e. the 'less significant credit institutions' (LSIs).³¹

This division of responsibilities applies to all supervisory tasks allocated to the ECB through Article 4(1) of the SSM Regulation, except for the 'common procedures'. These comprise the procedures as regards granting or withdrawing authorizations and assessing notifications of acquisitions or disposals of qualifying holdings in credit institutions. The ECB is the competent authority in case of all common procedures, for both SIs and LSIs.³²

Given its overall responsibility for the effective and consistent functioning of the SSM, the ECB has certain responsibilities in light of LSI supervision as well. Pursuant to Article 6(5) of the SSM Regulation, the ECB may issue regulations, guidelines or general instructions to NCAs, according to which the NCAs have to perform their prudential supervisory tasks and adopt supervisory decisions.³³

²⁸ Articles 4(1) and 6(1) SSM Regulation.

²⁹ Article 6(4) SSM Regulation.

³⁰ Article 6(4) SSM Regulation. Part IV of the SSM Framework Regulation stipulates how the status of a supervised entity as significant or less significant is determined. It is also possible that particular circumstances lead to a supervised entity being classified as less significant although the criteria for classification as significant are fulfilled, see Article 6(4) of the SSM Regulation and Article 70 of the SSM Framework Regulation.

³¹ Article 6(5) and (6) SSM Regulation.

³² Article 6(4) SSM Regulation excludes the tasks defined in Article 4(1), points (a) and (c). See also: SSM Supervisory Manual 2018, pp. 49-55.

³³ Article 6(5)(a) SSM Regulation

Moreover, whenever necessary to ensure consistent application of high supervisory standards, the ECB may, as a last resort, on its own initiative after consulting with NCAs or upon request of an NCA, decide to directly exercise itself all the relevant powers vis-à-vis one or more LSIs.³⁴

Furthermore, the ECB exercises oversight over the functioning of the system, based on the responsibilities and procedures set out in Article 6.³⁵ In order to exercise such oversight, the ECB has certain powers which are discussed in the next section.

4 Prudential banking supervision in a nutshell

This section first explains what prudential supervision implies in general, then continues by discussing the prudential supervisory tasks covered by the SSM.³⁶ Lastly, it looks at how supervision is implemented within the SSM. As such, this section aims to provide an understanding about what prudential supervision actually means in practice.

Prudential supervision is an ongoing process with the aim to contribute to the safety and soundness of credit institutions and the stability of the financial system.³⁷ It starts off when an operator obtains an authorization to carry out the business of a bank and may end when its authorization is withdrawn. Once the bank has obtained its authorization, it is supervised by the competent authority, in this case either the ECB or the relevant NCA, on an ongoing basis so as to ensure its continuous compliance with the applicable banking rules.

If a credit institution does not comply with the applicable banking rules, the competent authority may take supervisory measures in order to address the situation at an early stage and to remedy the situation. If necessary, competent authorities may also impose sanctions. The measures and sanctions available to the ECB and NCAs are elaborated upon in Section 6 of this chapter.

³⁴ Article 6(5)(b) SSM Regulation. When the ECB decides to directly exercise itself all relevant powers, such a credit institution is considered to be a significant credit institution as of that moment (Article 2(17) and (18) SSM Framework Regulation).

³⁵ Article 6(5)(c) SSM Regulation.

³⁶ As listed in Articles 4(1), 4(2) and 5(2) SSM Regulation. The SSM Regulation sometimes refers to the ECB tasks as the tasks conferred on it by Articles 4(1), 4(2) and 5(2), or, more generally, the tasks conferred on the ECB by the SSM Regulation. In this research, the task laid down in these articles are also referred to as the ECB's prudential supervisory tasks.

³⁷ Cf. Article 1(1) SSM Regulation. The ECB points out at its website that its main aims are to ensure the safety and soundness of the European banking system, increase financial integration and stability and ensure consistent supervision (see: <https://www.banksupervision.europa.eu/banking/html/index.en.html>; last visit on 15 July 2020).

Furthermore, a competent authority grants approvals – or, when necessary, refuses them – in cases specifically addressed in the relevant Union law. These concern for example approving members acceding to the bank's management board³⁸ or granting a waiver for the application of prudential requirements on an individual basis.³⁹

An example of an ECB decision in ongoing supervision is the annual decision in light of the supervisory review and evaluation process for each bank (the 'SREP decision').⁴⁰ Pursuant to Article 97 CRD IV et seq., competent authorities review the arrangements, strategies, processes and mechanisms implemented by the institutions to comply with the Capital Requirements Regulation (CRR⁴¹) and the fourth Capital Requirements Directive (CRD IV⁴²) and evaluate (i) risks to which the institutions are or might be exposed, (ii) risks that an institution poses to the financial system in general, and (iii) risks revealed by stress testing.⁴³

When the ECB determines on the basis of this annual supervisory review that the arrangements, strategies, processes and mechanisms implemented by the bank, and the own funds and liquidity held by the bank, do not ensure a sound management and coverage of its risks, the ECB is allotted the powers included in Article 16(2) of the SSM Regulation to address the relevant problems at an early stage.⁴⁴

Such powers include the possibility to require the bank to hold additional own funds, to present a plan to restore compliance with supervisory requirements and set a deadline for its implementation, to restrict or limit the business operations or network of banks or to request the divestment of activities that pose excessive risks to the soundness of a bank, to limit variable remuneration or to remove at any time members from the management board who do not fulfil the requirements set out in Union law.⁴⁵

³⁸ Article 91 CRD IV (cf. Article 91 CRD V).

³⁹ Article 7 CRR (cf. Article 7 CRR II).

⁴⁰ Article 4(1)(f) SSM Regulation. Cf. Article 97 et seq. CRD IV (cf. Article 97 et seq. CRD V). The EBA website states that the key purpose of SREP is 'to ensure that institutions have adequate arrangements, strategies, processes and mechanisms as well as capital and liquidity to ensure a sound management and coverage of their risks, to which they are or might be exposed, including those revealed by stress testing and risks institution may pose to the financial system'. (<https://www.eba.europa.eu/regulation-and-policy/supervisory-review-and-evaluation-srep-and-pillar-2>; last visit on 15 July 2020)

⁴¹ The CRR is amended by CRR II. For the exact dates of entry into force and application of the specific CRR II provisions, see Article 3 CRR II.

⁴² The CRD IV is amended by CRD V. For the required dates of transposition in national laws by all Member States, see Article 2 CRD V; for the date of entry into force, see Article 3 CRD V.

⁴³ Cf. SSM Supervisory Manual 2018, pp. 80-87.

⁴⁴ Article 16(1)(c) in conjunction with 16(2) SSM Regulation.

⁴⁵ Cf. Article 16(2) SSM Regulation.

Another example of an ECB decision in ongoing supervision is the ‘fit and proper’ decision. The ECB has to ensure compliance with the requirements by which the persons responsible for managing SIs are deemed fit and proper to actually do so.⁴⁶ In this respect, the ECB approves *inter alia* new members acceding to the management board of large banks.⁴⁷

The EU legislator considers prior authorization for taking up the business of a bank a key prudential technique to ensure that only operators with a sound basis, adequate risk management and suitable managers carry out those activities.⁴⁸ Accordingly, it allocated the competence for authorizing credit institutions and withdrawing authorizations of credit institutions for both SIs and LSIs to the ECB.⁴⁹

The ECB is, furthermore, competent to assess notifications of the acquisition and disposal of qualifying holdings in both SIs and LSIs.⁵⁰ This assessment power is in line with the legislator’s view that assessing the suitability of any new owner prior to the purchase of a significant stake in a bank is an indispensable tool for ensuring the continuous suitability and financial soundness of bank owners.⁵¹

As mentioned previously, these procedures are called ‘common procedures’. Contrary to the other prudential supervision tasks, the responsibility for these procedures has not been divided between the ECB and NCAs, but has been allocated solely to the ECB. However, although the ECB will adopt the final decision with respect to common procedures, NCAs still have an important role to play in the decision-making due to their task to submit draft decisions to the ECB. The specific common procedures, as provided for by the SSM Regulation, are discussed in more detail in Chapter 4.

Besides the responsibility for common procedures, the ECB has been assigned the other prudential supervisory tasks listed in Article 4(1) of the SSM Regulation with respect to SIs.⁵² These are, *inter alia*, the competence to ensure

⁴⁶ Article 4(1)(e) in conjunction with 6(4) SSM Regulation. Only if appointments are part of a common procedure, the ECB takes decisions on appointments for both SIs and LSIs in line with it being solely competent in these procedures, as discussed after the indent (cf. SSM Supervisory Manual 2018, p. 77).

⁴⁷ Article 9(1) SSM Regulation in conjunction with Articles 93 and 94 SSM Framework Regulation. The exact procedural and substantive requirements may differ in each Member State, since the general fit and proper requirement is laid down in the CRD IV, i.e. a directive that needs to be implemented by Member States. Cf. SSM Supervisory Manual 2018, p. 73.

⁴⁸ Recital 20 SSM Regulation.

⁴⁹ Article 4(1)(a) SSM Regulation.

⁵⁰ Article 4(1)(c) SSM Regulation. In this article an exception is made for assessing notifications of the acquisition and disposal of qualifying holdings in case of bank resolution.

⁵¹ Recital 22 SSM Regulation.

⁵² Note that the NCAs remain competent for these tasks with regard to the supervision of LSIs (Article 6(4) and (6) SSM Regulation).

compliance with rules imposing prudential requirements on credit institutions and rules imposing requirements for credit institutions to have robust governance arrangements in place.⁵³ Furthermore, the ECB is competent to perform supervisory reviews, to carry out supervision on a consolidated basis over credit institutions' parents established in one of the participating Member States, and to fulfil supervisory tasks in relation to recovery plans and certain early intervention measures.⁵⁴

In addition to the tasks mentioned in Article 4(1) of the SSM Regulation, the ECB carries out the tasks of host authorities in case banks established in a non-participating Member State establish a branch or provide cross-border services in a participating Member State⁵⁵ and it has some macroprudential tasks and tools.⁵⁶ The research will only focus on the specific supervisory tasks listed in Article 4(1) of the SSM Regulation.

Within the SSM, three different types of supervisory and enforcement teams have been established to carry out the supervision of SIs, being Joint Supervisory Teams (JSTs), on-site inspection teams and an independent Investigating Unit.⁵⁷ The Joint Supervisory Teams and on-site inspection teams are composed of both ECB and NCA staff and will be discussed in Section 5 of this chapter. The Investigating Unit is an internal ECB unit established to ensure a separation between, on the one hand, ongoing supervision and, on the other hand, investigations of alleged breaches as a result of which administrative penalties may be imposed. This unit is therefore discussed separately, together with the ECB's powers to impose administrative penalties.

The results of day-to-day supervision and on-site inspections may either lead to the conclusion that no further supervisory action is required or that measures or sanctions may need to be imposed. In the latter case, sanctions may be of a criminal nature or not of a criminal nature. As discussed in Section 6.1 of this chapter, different legal safeguards apply depending on whether a sanction is or is not of a criminal nature. It is therefore important to know what kind of decision the supervisor adopts and to what kind of sanction that may lead. Depending on the kind of sanction, it may either be part of the supervisory phase or the investigatory phase, a distinction made for the purposes of this research.⁵⁸

Looking at the ECB's tasks and responsibilities in its day-to-day supervision and on-site inspection work, it may adopt decisions when carrying out

⁵³ Article 4(1)(d) and (e) SSM Regulation.

⁵⁴ Article 4(1)(f), (g) and (i) SSM Regulation.

⁵⁵ Article 4(2) SSM Regulation.

⁵⁶ Article 5(2) SSM Regulation.

⁵⁷ Note that the supervision of LSIs is the NCAs' responsibility and shall be carried out in accordance with the national supervisory structures.

⁵⁸ See Chapter 1, Section 4.2 for an explanation of both phases.

the powers laid down in Articles 10–13 of the SSM Regulation (see Section 6.3 of this chapter), or decisions imposing measures or sanctions, the sanctions being either of a criminal nature or not of a criminal nature. Additionally, as mentioned previously, the ECB adopts decisions in response to a request for approval when provided by law in its day-to-day supervision.

All decisions, and the preparatory procedures leading to such decisions, that do not impose sanctions of a criminal nature, are considered to be part of what this research refers to as the supervisory phase and are discussed in Chapters 4, 5 and 6. Only decisions, and the preparatory procedures leading to those decisions, imposing sanctions of a criminal nature are part of the phase this research refers to as the investigatory phase and are discussed in chapter 7.⁵⁹

5 Close cooperation between the ECB and NCAs

Given the complexity of the shared administration in place, close cooperation between the ECB and NCAs is essential for effective supervision. The importance of good cooperation between the ECB and NCAs is expressed in Article 6(2) of the SSM Regulation, which states that both the ECB and NCAs have the duty to cooperate in good faith, and an obligation to exchange information.⁶⁰ Additionally, NCAs are obliged to assist the ECB and to follow the instructions it gives when performing its supervisory tasks mentioned in Article 4 of the SSM Regulation.⁶¹

This general obligation for NCAs to follow the ECB's instruction implies that all ECB instructions are binding. However, although in general all ECB instructions are binding on NCAs, the specific context and wording of the instruction at hand has to be taken into account. The SSM Regulation refers to the ECB's use of instructions in several places, phrased differently each time,⁶² thus requiring an analysis of the NCAs' discretionary power for each different type of ECB decision. Moreover, the general obligation to follow all ECB instruction in Article 6(3) of the SSM Regulation is limited to instructions the ECB gives when performing the tasks mentioned in Article 4. This reference to Article 4 seems to imply that with regard to the supervision of LSIs the ECB may only give general instructions, whereas with regard to the supervision of SIs it may give both individual and general instructions.⁶³ The fact that the ECB may decide to

⁵⁹ For more about the division of phases, see Chapter 1, Section 4.2; for more about the qualification of sanctions not of a criminal nature and of a criminal nature, see Section 6.1.1 of this chapter.

⁶⁰ Cf. Article 20 SSM Framework Regulation.

⁶¹ Article 6(3) SSM Regulation.

⁶² E.g. Article 9(1), third subparagraph, and 18(5) SSM Regulation.

⁶³ The ECB has to perform its tasks mentioned in Article 4 within the framework of Article 6, i.e. within the framework by which responsibilities are divided between the ECB and NCAs. The ECB's

take over supervision of an LSI when an NCA does not follow the general ECB instructions reflects the obligation for NCAs to follow such a general instruction.⁶⁴ This is further discussed below in light of the ECB's powers with respect to LSIs.

The general obligations for NCAs to assist the ECB and to follow its instructions are developed in the SSM Framework Regulation. NCAs may in particular provide the ECB with draft decisions in respect of SIs established in their Member State, either on the ECB's request or on its own initiative.⁶⁵ Furthermore, NCAs assist the ECB in preparing and implementing any acts relating to the exercise of the ECB's supervisory tasks. This includes assisting in verification activities and the day-to-day assessment of the SI's situation.⁶⁶ Lastly, NCAs assist the ECB in enforcing its decisions, when necessary using their national powers in accordance with the SSM Regulation.⁶⁷ The SSM Framework Regulation reiterates that NCAs, when assisting the ECB, must follow the ECB's instruction in relation to SIs.⁶⁸

With regard to the exchange of information in respect of the supervision of SIs, the SSM Framework Regulation states that the ECB and NCAs shall, without undue delay, exchange information relating to SIs in specifically mentioned circumstances.⁶⁹ In practice, exchanging information is a continuous process in line with the applicable rules with regard to confidentiality as briefly pointed out in Sections 6.5 of this chapter.

The SSM Regulation also requires the ECB to establish, together with all NCAs, arrangements to ensure an appropriate exchange and secondment of staff with and among NCAs.⁷⁰ This requirement has *inter alia* been met by establishing Joint Supervisory Teams and on-site inspection teams.

responsibilities towards LSIs are limited to those included in Article 6(5). These responsibilities include only the possibility of issuing general instruction; it does not mention the possibility of giving individual instructions. So, the limited responsibilities of the ECB for LSIs may result in limited possibilities to give instruction in respect of the supervision of LSIs. In contrast, the ECB is fully responsible for the supervision of SIs, inferring that the ECB can give both general and individual instructions for the NCAs' assistance in respect of the ECB's supervision of SIs.

⁶⁴ Article 67(2)(d) SSM Framework Regulation.

⁶⁵ Articles 90(1)(a) and 91 SSM Framework Regulation.

⁶⁶ Article 90(1)(b) SSM Framework Regulation.

⁶⁷ Article 90(1)(c) SSM Framework Regulation. The use of national powers is referred to in Articles 9(1), third subparagraph, and 11(2) of the SSM Regulation.

⁶⁸ Article 90(2) SSM Framework Regulation.

⁶⁹ Article 92 SSM Framework Regulation.

⁷⁰ Article 31(1) SSM Regulation.

Joint Supervisory Teams are established for the day-to-day supervision of each SI. Such a JST is composed of both ECB and NCA staff members,⁷¹ with the NCA staff members being from all relevant NCAs, e.g. from the Member State hosting the bank or its subsidiaries. The team's size, overall composition and organization depends on the size, business model and risk profile of the bank it supervises.⁷²

A JST is coordinated by a designated ECB staff member (the JST coordinator) and one or more NCA sub-coordinators.⁷³ The ECB is in charge of establishing and composing the teams, but the respective NCAs appoint their own staff members to the teams.⁷⁴ Joint Supervisory Team members must follow the JST coordinator's instructions as regards their tasks in the team.⁷⁵

The tasks of a Joint Supervisory Team include performing the supervisory review and evaluation process (see the example of ongoing supervision in the indent in Section 4 of this chapter), participating in the preparation of a supervisory examination programme, and implementing the programme as well as any ECB supervisory decisions with respect to the SI it supervises.⁷⁶ Precisely as a result of their composition, organization and tasks, Joint Supervisory Teams are pivot to the close cooperation between the ECB and NCAs in the ongoing supervision of SIs .

In addition to the day-to-day supervision by Joint Supervisory teams, the ECB carries out 'on-site inspections', comprising in-depth investigations of risks, risk control and governance at the premises of a bank.⁷⁷ These inspections at the premises have a pre-defined scope, timeline and set of resources, are generally every 12 months and centrally planned by the ECB for each SI.⁷⁸ On-site inspections may also be carried out on an ad hoc basis in response to an event or incident emerged at a bank warranting immediate supervisory action. Contrary

⁷¹ Article 3(1) SSM Framework Regulation. For the functioning of the JSTs in the first years of the SSM, see also: SWD(2017) 336 Final, pp. 29-30; Special Report European Court of Auditors, pp 104-149.

⁷² <https://www.banksupervision.europa.eu/banking/approach/jst/html/index.en.html> (last visit on 15 July 2020); ECB Guide to Banking Supervision, November 2014, pp. 16-17.

⁷³ Article 3(1) SSM Framework Regulation. Each NCA appointing more than one staff member to the JST must designate one of them to be a sub-coordinator. This NCA sub-coordinator assists the JST coordinator as regards the organization and coordination of the tasks in the JST (article 6(2) SSM Framework Regulation).

⁷⁴ Article 4(1) SSM Framework Regulation.

⁷⁵ Article 6(1) SSM Framework Regulation.

⁷⁶ Article 3(2) SSM Framework Regulation.

⁷⁷ Note that, when JSTs have meetings at the bank's premises, or conduct supervisory visits as part of their overall supervisory function, that is not considered to be an on-site inspection (ECB Guide to on-site inspections 2018, p. 5). For the functioning of the on-site inspection teams in the first years of the SSM, see: SWD(2017) 336 Final, pp. 32-33; Special Report European Court of Auditors, pp. 150-183.

⁷⁸ ECB Guide to on-site inspections 2018, pp. 2, 3 and 5.

to the first type of on-site inspection, this second type is without prior notification to the bank.⁷⁹

To conduct these inspections, the ECB establishes on-site inspection teams.⁸⁰ While the ECB is in charge of establishing and composing these teams, it does so with involvement of the NCAs. The ECB designates the head of the team from among the ECB and NCA staff members⁸¹ and the staff carrying out the on-site inspections follow the instructions of the team's head.⁸² In case of on-site inspections at an SI, it is the head of the on-site inspection team who ensures coordination with the relevant Joint Supervisory Team.⁸³ Joint Supervisory Team members may participate in on-site inspections as inspectors, but not as heads of mission, thus ensuring on-site inspections are conducted independently.⁸⁴

Since the supervision of LSIs is carried out by the NCA, no specific teams composed of both ECB and NCA staff are in place. The ECB may, however, require an NCA to involve staff members of another NCA in the supervision of LSIs when the ECB determines that such involvement is appropriate.⁸⁵

Furthermore, specific information sharing obligations are in place to enable the ECB to fulfil its overall oversight function. NCAs must inform the ECB whenever the situation of any LSI deteriorates rapidly and significantly⁸⁶ and as soon as it becomes aware of the LSI's possible need for public financial assistance granted either directly by or indirectly from the European Stability Mechanism on the national level.⁸⁷

More particularly, NCAs have to notify the ECB of any material supervisory procedure and, on the request of the ECB, further assess specific aspects of the procedure.⁸⁸ For the so-called high-priority LSIs it is for the ECB to assess the NCAs' material supervisory procedures and material draft decisions.⁸⁹

⁷⁹ ECB Guide to on-site inspections 2018, p. 6.

⁸⁰ Article 143(1) SSM Framework Regulation.

⁸¹ Article 144(1) and (2) SSM Framework Regulation.

⁸² Article 146(1) SSM Framework Regulation.

⁸³ Article 146(2) SSM Framework Regulation.

⁸⁴ ECB Guide to on-site inspections 2018, p. 7.

⁸⁵ Article 7 SSM Framework Regulation. This is based on the general power of the ECB to require as appropriate that supervisory teams of NCAs taking supervisory actions regarding inter alia a bank located in one participating Member State also involve staff from NCAs of other participating Member States (Article 31(2) SSM Regulation).

⁸⁶ Article 96 SSM Framework Regulation.

⁸⁷ Article 62 SSM Framework Regulation.

⁸⁸ Article 6(7)(c) SSM Regulation.

⁸⁹ SSM Supervisory Manual 2018, p. 110. LSIs are classified into categories, based on their intrinsic riskiness and impact on the financial stability in order to adequately allocate supervisory resources. This ranking is calculated at least annually in a joint process between the ECB and NCAs (p. 109). Also: Report LSI Supervision 2017, p. 13.

The NCAs have to provide this information prior or, in duly justified cases of urgency, simultaneously to opening a procedure.⁹⁰ Material supervisory procedures include the removal of members from the management boards, the appointment of special managers to take over management, and procedures which have a significant impact on LSIs.⁹¹ NCAs must notify the ECB on their own initiative of any other NCA supervisory procedure which they consider material or may negatively affect the SSM's reputation.⁹²

NCAs also have to transmit to the ECB material draft supervisory decisions concerning LSIs about which the ECB considers that information must be notified to it.⁹³ These draft decisions, on all of which the ECB may express its views, are sent to the ECB prior to being addressed to the LSI if they relate to removing members from the management boards, appointing special managers or when having a significant impact on the LSI.⁹⁴

Additionally, NCAs have to transmit to the ECB any other draft supervisory decision on which the ECB's views are sought or which may negatively affect the reputation of the SSM.⁹⁵ Although the NCA has to send such draft decisions to the ECB at least ten days prior to the planned date of adoption, in cases of urgency it may define itself what time period for sending a draft decision to the ECB it deems reasonable. The ECB expresses its views on the draft decision within a reasonable time before the decision is planned to be adopted.⁹⁶

6 Powers and sanctions

The SSM Regulation provides the ECB with the powers to carry out its supervisory tasks, granting it the powers necessary for its day-to-day supervision and the planned on-site inspections as well as the powers to impose measures and sanctions. The NCAs use, in general, their national powers when assisting the ECB or carrying out their supervisory tasks regarding LSIs. The specific ECB and NCA powers are discussed below, after a brief explanation of the terminology used in this research for the subject matter at hand.

6.1 Terminology

The terminology used in the SSM Regulation and other relevant Union law is not always consistent nor does it accurately reflect the

⁹⁰ Article 97(1) SSM Framework Regulation.

⁹¹ Article 97(2) SSM Framework Regulation.

⁹² Article 97(4) SSM Framework Regulation.

⁹³ Article 6(7)(c) SSM Regulation and Article 98(1) SSM Framework Regulation.

⁹⁴ Article 98(2) SSM Framework Regulation.

⁹⁵ Article 98(3) SSM Framework Regulation.

⁹⁶ Article 98(4) SSM Framework Regulation

different stages of supervision.⁹⁷ Therefore, for the purposes of this research, some terminology choices have been made to resemble the different phases of supervision as discussed in Chapter 1. These choices are explained below so as to avoid any confusion.

The SSM Regulation refers to the powers laid down in Articles 10 up to and including 13 as ‘investigatory powers’, i.e. the powers to request information, to carry out general investigations and to carry out on-site inspections. These powers are available to the ECB in both the supervisory and investigatory phases of supervision, as distinguished in this research,⁹⁸ and will be referred to as ‘powers laid down in Articles 10-13 of the SSM Regulation’.

The ECB’s powers laid down in Articles 14 up to and including 18 of the SSM Regulation are framed as ‘specific supervisory powers’ in the SSM Regulation. This includes the ECB power to grant or withdraw authorizations, to assess acquisitions of qualifying holdings, to use the powers the SSM Regulation calls ‘supervisory powers’, and to impose administrative penalties. Particularly the use of the terms ‘supervisory powers’ and ‘administrative penalties’ may cause confusion, and for that reason they are briefly discussed in Sections 6.1.2 and 6.1.3 of this chapter.

6.1.1 Sanctions not of a criminal nature & sanctions of a criminal nature

The ECB has the possibility to impose different kinds of measures, penalties and sanctions. The different terms used are discussed below, and for the purposes of this research divided in two main categories, being ‘sanctions not of a criminal nature’ and ‘sanctions of a criminal nature’.⁹⁹ In the context of this research it is relevant to distinguish between the two because the applicable legal safeguards vary depending on the nature of the sanction imposed on a person.¹⁰⁰

The European Court of Human Rights (ECtHR) has ruled that the additional safeguards in Article 6 of the European Human Rights Convention (ECHR) apply in case somebody is charged with a criminal offence. Thus, in order to decide whether or not an imposed sanction is of a criminal nature, the scope of the notion ‘criminal charge’ has to be determined, and this is to be done

⁹⁷ This is probably because of differences in qualifications in national legal orders, cf. Recital 41 CRD IV.

For a more extensive discussion of the terminology used in the CRD IV, see: D’ Ambrosio 2013, pp. 11-16.

⁹⁸ See Chapter 1, Section 4.2.

⁹⁹ This terminology is based on the terminology used by the Court in its case law, cf. Case C-617/10, Åkerberg Fransson, ECLI:EU:C:2013:105.

¹⁰⁰ See Chapter 3, Section 4.2.

autonomously, without taking the categories used in national systems into account.¹⁰¹

However, it is not always easy to determine whether a sanction is of a criminal nature or not.¹⁰² The Court applies three criteria to determine whether a sanction classifies as being of a criminal nature, thus following the ECtHR case law concerning ‘criminal charge’ in the meaning of Article 6(1) ECHR¹⁰³ and abiding by Article 52(3) of the Charter in which coordination between the ECHR and the Charter is prescribed. These criteria are often referred to as the ‘*Engel* criteria’, after the relevant ECtHR case.

The first criterion is the legal classification of the offence under national law, the second criterion is the very nature of the offence, and the third criterion is the nature and degree of severity of the penalty the person concerned is liable to incur.¹⁰⁴ With respect to the first criterion, Union law is to be equated to ‘national law’.¹⁰⁵

While the first criterion only provides a starting point,¹⁰⁶ the second is of greater importance.¹⁰⁷ D’Ambrosio provides a helpful set of factors the ECtHR considers in respect of the second criterion, being (i) whether it is a general legal rule or a rule exclusively addressed to a specific group, (ii) whether the proceedings are initiated by a public body with statutory powers of enforcement, (iii) whether the legal rule has a punitive and deterrent purpose, (iv) whether imposing a penalty requires any finding of guilt, (v) how other Member States classify comparable procedures, (vi) whether an offence gives rise to a criminal record.¹⁰⁸

Although these factors have not all been relevant to the Court’s case law, they are so for the interpretation of the Court’s term ‘sanctions of a criminal nature’. One factor relevant for all measures and sanctions discussed hereafter is whether the

¹⁰¹ De Moor-van Vugt 2012, p. 11. Also: D’Ambrosio 2013, p. 19.

¹⁰² For a discussion about the distinction between the various terms used in the SSM context, see: D’ Ambrosio 2013, pp. 11-18. For an overview of administrative sanctions in various Member States, see: Jansen 2013. For a brief overview of definitions in EU law, see: De Moor-van Vugt 2012, pp. 12-13.

¹⁰³ See e.g. Case C-489/10, Bonda, ECCLI:EU:C:2012:319, paras 36-44. In order to determine whether a measure is of a criminal nature, the ECtHR looks at various elements they call the *Engel* criteria (cf. Engel and Others v the Netherlands, ECtHR Series A no. 22, 8 June 1976, paras 80-82). For a broader discussion about the development of the Court’s stance, see: De Moor-van Vugt & Widdershoven 2015, pp. 299-304; De Moor-van Vugt 2012, pp. 12-15.

¹⁰⁴ Case C-489/10, Bonda, ECCLI:EU:C:2012:319, para. 37 and the case law mentioned there. Also: Case C-617/10, Åkerberg Fransson, ECCLI:EU:C:2013:105, para. 35.

¹⁰⁵ Case C-489/10, Bonda, ECCLI:EU:C:2012:319, para. 38.

¹⁰⁶ Engel and Others v the Netherlands, ECtHR Series A no. 22, 8 June 1976, para. 82.

¹⁰⁷ Engel and Others v the Netherlands, ECtHR Series A no. 22, 8 June 1976, para. 82.

¹⁰⁸ D’Ambrosio 2013, p. 20 and the case law mentioned there. For more about the criteria, see: De Moor-van Vugt & Widdershoven 2015, pp. 300-304; De Moor-van Vugt 2012, p. 11.

rule at stake is a general rule, directed towards all citizens, or a rule addressed to a given group possessing a special status.¹⁰⁹

In the *Bonda* case, the Court of Justice ruled that sanctions imposed in case of subsidy fraud did not have a punitive nature since the rules breached were intended to apply to a specific group of persons who had voluntarily entered the subsidy schemes in question and the purpose of these sanctions was essentially to protect the management of the EU fund at issue.¹¹⁰

In case of ECB or NCA measures and sanctions, it is debatable whether they have a general character since they can only be applied to institutions which have been granted a licence. At the same time, one may argue that banking rules are in place to serve the general interest of society, i.e. a stable financial system within the EU and each Member State. In the *Grande Stevens and Others v Italy* case the ECtHR found that element to be relevant.¹¹¹ Allegrezza and Rodopoulos argue however that the group criterion is to distinguish between disciplinary and criminal sanctions rather than between administrative and criminal ones, and is therefore not relevant in this context.¹¹²

Although it remains to be seen how the Court will assess this criterion in the context of banking supervision, for the purposes of this research it is assumed that the criterion does not per se point against a criminal nature of ECB sanctions, and hence that certain ECB sanctions may still be of a criminal nature. Given that this argumentation applies to all measures and sanctions discussed hereafter, this line of reasoning is consequently not elaborated anymore for each measure or sanction separately.

The third and last criterion weighs the severity of the sanction, possibly supporting the conclusion that a very substantial sanction may be of a criminal nature.

¹⁰⁹ Cf. *Öztürk v Germany*, ECtHR App. no. 8544/79, 21 February 1984, para. 53.

¹¹⁰ The measures were to apply only to economic operators who had recourse to the aid scheme set up by the relevant regulation. Moreover, the measures were to protect the management of the EU funds involved, and could for instance become ineffective if the person would not apply for the fund's aid in the following year. These elements illustrated, according to the Court, the non-punitive nature of the measure (Case C-489/10, *Bonda*, ECCLI:EU:C:2012:319, paras 40-42).

¹¹¹ *Grande Stevens and Others v Italy*, ECtHR App. no. 18640/10, 4 March 2014 (final 07/07/2014), para. 96. For a brief discussion of the ECtHR case law, see: Van Bockel 2015, pp. 110-111. He points out that the ECtHR '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' (p. 111).

¹¹² Allegrezza & Rodopoulos 2017, p. 251. They refer to ECtHR case law in which the ECtHR indeed considers that '[i]t is a rule that is directed, not towards a given group possessing a special status —in the manner, for example, of disciplinary law—, but towards all citizens' (*Öztürk v Germany*, ECtHR App. no. 8544/79, 21 February 1984, para. 53). Also: Case of *Bendenoun v France*, ECtHR App. no. 12547/86, 24 February 1994, para. 47.

The amount of the fine, or the possibility to replace a fine by imprisonment, may be relevant for determining the sanction's severity.¹¹³

Some measures or sanctions clearly classify as criminal or not, while others may be subject to debate. In addition, the current requirements may result in an artificial split between sanctions not of a criminal nature and those of a criminal nature. Consequently, some sanctions classifying as being not of a criminal nature will in practice perhaps be deemed 'heavier' on the credit institution than a sanction of a criminal nature. Sections 6.4 through 6.7 of this chapter will discuss the various measures and sanctions and their nature.

6.1.2 Supervisory and enforcement measures

The 'supervisory powers'¹¹⁴ laid down in Article 16 of the SSM Regulation are often referred to as 'supervisory measures', a term also used in this research whenever necessary to maintain a clear distinction.¹¹⁵ Supervisory measures can be used to move institutions towards taking the necessary action in an early stage so as to ensure their compliance.¹¹⁶ They are generally considered to be remedial sanctions, not aiming at punishing the institution at issue, but to restore a situation in which the institution is compliant with applicable rules.¹¹⁷ This also applies to the measures the ECB calls 'enforcement measures'.¹¹⁸

Consequently, supervisory and enforcement measures are usually considered to be sanctions not of a criminal nature and related to the supervisory phase. These powers and their nature are described in more detail in Section 6.4 of this chapter.

6.1.3 Administrative penalties

In the SSM Regulation the term 'administrative penalties' refers to various terms used in its Article 18, i.e. to administrative pecuniary penalties (first paragraph), pecuniary penalties, administrative penalties, or

¹¹³ De Moor-van Vugt 2012, pp. 11-12.

¹¹⁴ Article 104 CRD IV (cf. Article 104 CRD V) also uses the term 'supervisory powers'.

¹¹⁵ On its website the ECB too refers to these powers as supervisory measures (see: <https://www.banksupervision.europa.eu/banking/tasks/measures/html/index.en.html>; last visit on 17 July 2020).

¹¹⁶ Cf. SSM Supervisory Manual 2018, pp. 98-99; ECB's explanation on supervisory measures (see: <https://www.banksupervision.europa.eu/banking/tasks/measures/html/index.en.html>; last visit on 17 July 2020); Kraaijveld & Ter Kuile 2015, p. 232.

¹¹⁷ Kraaijveld & Ter Kuile 2015, p. 232

¹¹⁸ See: <https://www.banksupervision.europa.eu/banking/tasks/enforcement/html/index.en.html> (last visit on 17 July 2020). This includes, for instance, periodic penalty payments and cease-and-desist orders.

administrative measures (all in the fifth paragraph). Article 18(7) refers to ‘sanctions’ in accordance with Regulation (EC) No 2532/98, a term which is defined in that regulation as ‘fines and periodic penalty payments’.¹¹⁹

The SSM Framework Regulation uses the term ‘administrative penalties’ for both administrative pecuniary penalties provided for and imposed under Article 18(1) of the SSM Regulation, and fines and periodic penalty payments provided for in Article 2 of Regulation (EC) No 2532/98 and imposed under Article 18(7) of the SSM Regulation.¹²⁰

The CRD IV refers to ‘administrative penalties and other administrative measures’, which cover a broad range of penalties and measures, as discussed below in Section 6.7.

If the aim of imposing an administrative penalty is to punish the institution or person involved and hence has a punitive character,¹²¹ this research refers to it as a ‘sanction of a criminal nature’. Contrary to sanctions not of a criminal nature, such sanctions are connected to the investigatory phase of supervision.

Given the variety of interpretations, this research will use the phrases ‘sanctions not of a criminal nature’ and ‘sanctions of a criminal nature’ depending on the nature of the administrative penalty at issue. Only when relevant, the term used in the applicable legislation will be referred to.

The classification of the administrative penalties which the ECB may impose indirectly via NCAs on the basis of Article 18(5) of the SSM Regulation may depend on the relevant national law. The ECB can only request an NCA to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed, and the NCA involved decides to actually impose a penalty. These penalties will therefore be imposed by means of an NCA decision, according to the NCA’s procedures and national laws, and be subject to national judicial review. It is also possible that cases are referred to the national prosecutor, in which case it will also be a national procedure.¹²² The NCAs’ sanctioning powers are discussed in Section 6.7 of this chapter.

¹¹⁹ Article 1(7) Regulation (EC) 2532/98. Fines are in turn defined as a single amount of money which a business is obliged to pay as a sanction (Article 1(5) Regulation (EC) 2532/98). Periodic penalty payments are defined as amounts of money which, in the case of a continued infringement, a business is obliged to pay either as a punishment, or with a view to forcing the persons concerned to comply with the ECB supervisory regulations and decisions (Article 1(6) Regulation (EC) 2532/98).

¹²⁰ Article 120 SSM Framework Regulation.

¹²¹ Kraaijeveld & Ter Kuile 2015, p. 232. Cf. Chapter 7, Section 1.3.

¹²² Article 136 SSM Framework Regulation.

6.2 Powers of the ECB as competent authority

Article 9(1) of the SSM Regulation states that, for the exclusive purpose of carrying out the tasks conferred on it by Articles 4(1), 4(2) and 5(2), the ECB shall be considered the competent authority¹²³ in the participating Member States as established by the relevant Union law. For this purpose, the ECB has all the powers and obligations set out in the SSM Regulation, which are discussed in the following sections.

The ECB also has all the powers and obligations which competent authorities have under the relevant Union law, unless otherwise provided for by the SSM Regulation.¹²⁴

Should the NCAs have powers when the SSM Regulation does not confer such powers to the ECB, the ECB may require by means of instructions that NCAs make use of their powers under and in accordance with the conditions set out in national law. The ECB may only use such instruction power to the extent necessary to carry out the tasks conferred on it by the SSM Regulation.¹²⁵

6.3 ECB powers laid down in Articles 10-13 of the SSM Regulation

The powers laid down in Articles 10-13 of the SSM Regulation consist of information requests, general investigations and on-site inspections.

The ECB may require the legal and natural persons listed in Article 10(1) of the SSM Regulation¹²⁶ to provide all information necessary to carry out the tasks conferred on the ECB by the SSM Regulation.¹²⁷ Before making such a request, the ECB shall verify whether the required information is already available to NCAs and upon receipt of the required information, the ECB shall make a copy of the information available to the relevant NCA.¹²⁸

The CRD IV provides rules covering professional secrecy and the exchange of information (see Section 6.5). To ensure the ECB is subject to a similar regime, the SSM Regulation states that the ECB is authorized, for the purpose of carrying out the tasks conferred to it by the SSM Regulation, to exchange information in certain cases, within the limits and under the conditions set in the relevant Union law. The ECB may exchange information with national or Union

¹²³ The SSM Regulation also refers to designated authorities in respect of macroprudential tasks.

¹²⁴ Article 9(1), second subparagraph, SSM Regulation

¹²⁵ Article 9(1), third subparagraph, SSM Regulation and Article 22 SSM Framework Regulation.

¹²⁶ Being credit institutions, financial holding companies, mixed financial holding companies and mixed-activity holding companies 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.

¹²⁷ Article 10 SSM Regulation. Cf. Articles 139-141 SSM Framework Regulation.

¹²⁸ Article 139 SSM Framework Regulation

authorities and bodies in the cases in which the relevant Union law allows NCAs to disclose information to those entities or in which Member States may provide for such disclosure under the relevant Union law.¹²⁹

The ECB may also conduct all necessary investigations of the persons listed in Article 10(1) of the SSM Regulation, to that end having the right – *inter alia* – to require them to submit documents, to examine the books and records and take copies or extracts from them, and to obtain written and oral explanations.¹³⁰ This is referred to as ‘general investigations’ in Article 11 of the SSM Regulation.

Such general investigation on the basis of Article 11 of the SSM Regulation shall be conducted on the basis of an ECB decision specifying the legal basis for the decision and its purpose, the intention to exercise the general investigation powers and the fact that any obstruction of the investigation constitutes a breach of an ECB decision within the meaning of Article 18(7) of the SSM Regulation.¹³¹

As obstruction of the investigation constitutes a breach of an ECB decision as meant in Article 18(7) of the SSM Regulation, the ECB may impose sanctions in accordance with Regulation (EC) No 2532/98 (see below).¹³² Moreover, when a person obstructs the investigation to be carried out, the relevant NCAs shall afford, in compliance with national law, the necessary assistance.¹³³

In addition, the ECB may conduct on-site inspections at the business premises of the legal persons listed in Article 10(1) and any other company included in supervision on a consolidated basis when the ECB is the consolidated supervisor.¹³⁴

On-site inspections shall be conducted on the basis of an ECB decision specifying at least the subject matter and the purpose of the on-site inspection and stating that any obstruction to the on-site inspection constitutes a breach of an ECB decision in the meaning of Article 18(7) of the SSM Regulation.¹³⁵ This again infers that the ECB may impose sanctions in accordance with Regulation (EC) No 2532/98, as explained below.

¹²⁹ Article 27(2) SSM Regulation. Additionally, Article 27(1) SSM Regulation ensures that the professional secrecy requirements set in Article 37 of the Statute of the ESCB and the ECB and in the relevant acts of EU law apply to members of the Supervisory Board, staff of the ECB and staff seconded by NCAs carrying out supervisory duties, even after their duties have ceased. Furthermore, the ECB must ensure that individuals who provide any service related to the discharge of supervisory duties are subject to equivalent professional secrecy requirements.

¹³⁰ Article 11(1) SSM Regulation.

¹³¹ Article 142 SSM Framework Regulation.

¹³² Article 18(7) SSM Regulation. See also: Kraaijeveld & Ter Kuile 2015, pp. 231-232.

¹³³ Article 11(2) SSM Regulation.

¹³⁴ Article 12(1) SSM Regulation.

¹³⁵ Article 143(1) and (2) SSM Framework Regulation. Note that the on-site inspection may be conducted on the basis of the same decision for a general investigation if the on-site inspection follows such investigation and has the same purpose and scope (Article 143(3) SSM Framework Regulation).

The ECB has to notify the legal person subject to the on-site inspection¹³⁶ of its decision to conduct an on-site inspection at least five working days before the on-site inspection starts.¹³⁷ The relevant NCA shall receive the ECB notification at least one week before the legal person subject to the on-site inspection does.¹³⁸

Where the proper carrying out and efficiency of the inspection so require, the ECB may conduct the on-site inspection without prior announcement to the legal person subject to it.¹³⁹ In such a case, the relevant NCA shall be notified as soon as possible before such an on-site inspection starts.¹⁴⁰

The ECB shall be in charge of, and the NCAs are involved in, establishing and composing the on-site inspection team.¹⁴¹ ECB officials and other persons who the ECB authorizes to conduct an on-site inspection may enter any business premises and land of the legal persons subject to an investigation decision adopted by the ECB. Furthermore, these officials and other authorized persons shall have all the general investigatory powers set in Article 11(1) of the SSM Regulation.¹⁴²

Officials and other accompanying persons authorized or appointed by the NCA of the Member State where the inspection takes place shall actively assist the officials and other persons authorized by the ECB, 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 authorized by the ECB. In addition, officials of the relevant NCAs have the right to participate in the on-site inspections.¹⁴³

When the ECB officials and other persons authorized by the ECB find that a person opposes an inspection, the relevant NCA shall afford them the necessary assistance in accordance with national law.¹⁴⁴ If an on-site inspection or assistance in case of opposition to such an inspection requires authorization by a judicial authority according to national rules, such authorization shall be applied for.¹⁴⁵

¹³⁶ Article 12(3) SSM Regulation.

¹³⁷ Article 145(1) SSM Framework Regulation.

¹³⁸ Article 12(1) SSM Regulation and Article 145(1) SSM Framework Regulation.

¹³⁹ Article 12(1) SSM Regulation.

¹⁴⁰ Article 12(1) SSM Regulation and Article 145(2) SSM Framework Regulation.

¹⁴¹ Article 144(1) SSM Framework Regulation.

¹⁴² Article 12(2) SSM Regulation.

¹⁴³ Article 12(4) SSM Regulation.

¹⁴⁴ Article 12(5) SSM Regulation.

¹⁴⁵ Article 13(1) SSM Regulation. Article 13(2) SSM Regulation includes the assessment criteria for national judicial authorities with whom authorization is applied for.

With regard to LSIs, the ECB may, in accordance with Article 6(5)(d) of the SSM Regulation, at any time make use of the above-mentioned powers as well.¹⁴⁶ In addition, the ECB may also request, on an ad hoc or continuous basis, information from the NCAs on the performance of their tasks with respect to LSIs,¹⁴⁷ thus enabling the ECB to exercise oversight over the functioning of the SSM.

6.4 ECB supervisory measures

The ECB is equipped with a set of supervisory measures listed in Article 16(2) of the SSM Regulation. The ECB has these powers for the purpose of its supervisory tasks,¹⁴⁸ and more particularly, for the purpose of its prudential supervisory tasks mentioned in Article 4(1) to take the necessary measures in an early stage so as to address relevant problems in case the bank does not meet the requirements of relevant Union law or in case the ECB has evidence that the bank is likely to breach such requirements within the next twelve months. Furthermore, it may use those powers in order to address relevant problems that have been determined on the basis of the annual supervisory review (see Section 4).¹⁴⁹

The measures stipulated in Article 16(2) of the SSM Regulation include inter alia the power to require banks to hold additional own funds, to require reinforcement of the arrangements, processes, mechanisms and strategies, to require the reduction of the risk inherent in the activities, products and systems of banks, to require banks to limit variable remuneration, and to require banks to use net profits to strengthen own funds.¹⁵⁰

These measures are similar to the powers that competent authorities at least shall have according to Article 104 of the CRD IV, as discussed in Section 6.5 of this chapter. In addition to the measures referred to in Article 104 of the CRD IV, the ECB also has the power to remove at any time members from the management board of banks who do not fulfil the requirements set out in relevant Union law.¹⁵¹

¹⁴⁶ The provisions laid down in Part XI of the SSM Framework Regulation with respect to access to information, reporting, investigations, and on-site inspections also apply to LSIs if the ECB decides, pursuant to Article 6(5)(d) SSM Regulation, to make use of its powers referred to in Articles 10-13 SSM Regulation with respect to an LSI (Article 138 SSM Framework Regulation).

¹⁴⁷ Article 6(5)(e) SSM Framework Regulation. Cf. Articles 99 and 100 SSM Framework Regulation, which provide for reporting requirements of the NCAs to the ECB.

¹⁴⁸ Article 16(2) of the SSM Regulation refers to the purposes of Article 9(1), which article refers to Articles 4(1), 4(2) and 5(2) of the SSM Regulation. Note that the reference to Article 4(1) also infers a reference to the applicable division of responsibilities as laid down in Article 6 SSM Regulation. This means that the ECB has such powers only towards SIs.

¹⁴⁹ Article 16(1) SSM Regulation.

¹⁵⁰ Article 16(2) SSM Regulation.

¹⁵¹ Article 16(2)(m) SSM Regulation.

Looking at the *Bonda* and *Engel* criteria for determining the nature of the measures, as discussed in Section 6.1.1 of this chapter, it is likely that most of the measures laid down in Article 16 of the SSM Regulation will be considered to be *not* of a criminal nature.

The first criterion requires us to look at the classification of the measure under EU law. However, EU law refers to ‘supervisory powers’ in general and does not classify these measures as being of a criminal nature.

The second criterion concerns the very nature of the offence. All measures included in Article 16(2) of the SSM Regulation are specifically allocated to the ECB in order to require banks to take measures in an early stage so as to address relevant problems in specific circumstances. This reflects the remedial nature of the measures.¹⁵² Other relevant factors could be, *inter alia*, that no finding of guilt is required for imposing these measures, and that presumably none of the measures will give rise to a criminal record under national law since they are not imposed by a criminal authority.

The last criterion concerns the nature and degree of severity of the penalty the person concerned is liable to incur. This could differ per measure available to the ECB in a specific context. One could, for instance, reason that being removed as a board member is a rather severe sanction, thus contributing to the reasoning that it would be a sanction of a criminal nature.¹⁵³ However, due to the clear wording in Article 16(1) of the SSM Regulation it seems most likely that these measures will be considered to be *not* of a criminal nature.

6.5 NCA powers

Although the SSM Regulation does not allocate any powers to NCAs, NCA staff members who participate in on-site inspections do enjoy certain powers allotted to them by the SSM Regulation, as pointed out previously. Apart from that exception, NCAs always use their national powers when assisting the ECB with the preparation and implementation of any acts relating to the ECB’s supervisory tasks or when carrying out the supervision of LSIs.

The greater part of the powers that NCAs have under national law stem from relevant Union law. The CRD IV lays down rules concerning ‘supervisory powers’ and ‘tools’ for the prudential supervision of banks by competent authorities.¹⁵⁴ It obliges Member States to ensure that NCAs have, *inter alia*, powers to carry out their functions relating to prudential supervision, investigations and penalties set out in the CRD IV and CRR.¹⁵⁵

¹⁵² Cf. Article 16(1), introduction, of the SSM Regulation. This has also been confirmed by the General Court, see: Case T-712/15, Crédit Mutuel Arkéa v ECB, ECLI:EU:T:2017:900, para. 212; Case T-203/18, VQ v ECB, ECLI:EU:T:2020:313, para. 66.

¹⁵³ Cf. De Moor-van Vugt 2012, p. 11; Van Bockel 2015, p. 112.

¹⁵⁴ Article 1(b) CRD IV (cf. Article 1(b) CRD V).

¹⁵⁵ Article 4(4) CRD IV (cf. Article 4(4) CRD V).

Article 64 of the CRD IV states that competent authorities ‘shall be given all supervisory powers to intervene in the activity of institutions that are necessary for the exercise of their function [...].’¹⁵⁶ These include, in particular, the right to withdraw an authorization in accordance with Article 18 of the CRD IV, and the powers laid down in Articles 102, 104 and 105 of the CRD IV.¹⁵⁷

This means, for instance, that NCAs are to have the powers laid down in Article 104 of the CRD IV for the purpose of the SREP (see Section 4) or to take the necessary measures in an early stage so as to address relevant problems if the institution does not meet, or is likely to breach within twelve months, the requirements of the CRD IV or CRR.¹⁵⁸ As mentioned previously, the powers listed in Article 104 of the CRD IV equal the ECB’s powers listed in Article 16(2) of the SSM Regulation.

The CRD IV also provides cases in which the additional own funds requirements – one of the powers listed in Article 104 of the CRD IV – at least shall be imposed.¹⁵⁹ Furthermore, elements are listed that the competent authorities have to take into account when assessing the necessity of imposing additional own funds requirements or specific liquidity requirements.¹⁶⁰

Pursuant to Article 65(3) of the CRD IV, NCAs have all information gathering and investigatory powers necessary for the exercise of their functions, at least including the powers laid down in that provision.¹⁶¹ The ECB’s powers laid down in Articles 10-13 of the SSM Regulation are comparable to those information gathering and investigatory powers.

The CRD IV also provides rules regarding on-the-spot checks and inspection of branches established in another Member State. Host Member States shall provide that, when a bank authorized in another Member State carries out its activities through a branch, NCAs of the home Member State may carry out on-the-spot checks of the information referred to in Article 50 of the CRD IV¹⁶² and inspections of such branches. Home competent authorities must inform the

¹⁵⁶ Cf. Article 64 CRD V.

¹⁵⁷ Cf. Articles 18, 102, 104 and 105 CRD V respectively (note that the scope of this article has been slightly amended in CRD V and also refers to the powers laid down in Article 21a(6) of that directive).

¹⁵⁸ Articles 102 and 104 CRD IV (cf. Articles 102 and 104 CRD V).

¹⁵⁹ Article 104(2) CRD IV (cf. Article 104a CRD V).

¹⁶⁰ Articles 104(3) and 105 CRD IV (cf. Articles 104a and 105 CRD V).

¹⁶¹ Cf. Article 65(3) CRD V.

¹⁶² This includes inter alia information concerning the management and ownership of such institutions that is likely to facilitate their supervision and examination of the conditions for their authorization, and all information likely to facilitate the monitoring of institutions, in particular with regard to liquidity, solvency, deposit guarantee, the limiting of large exposures, other factors that may influence the systemic risk posed by the institution, administrative and accounting procedures and internal control mechanisms (Article 50 CRD IV; cf. Article 50 CRD V).

host competent authorities beforehand and may carry out the inspections themselves or through the intermediary of persons they appointed for that purpose.¹⁶³

The host competent authority shall have the power to carry out, on a case-by-case basis, on-the-spot checks and inspections of the activities carried out by branches on their territory whenever they consider it relevant for reasons of stability of the financial system in their Member State. Before and after such checks and inspections, the host competent authority shall contact the home competent authority to consult and to share its findings.¹⁶⁴ The CRD IV explicitly states that the on-the-spot checks and inspections of branches shall be conducted in accordance with the law of the Member State where the check or inspection is carried out.¹⁶⁵

Furthermore, the CRD IV sets rules with respect to exchange of information and professional secrecy.¹⁶⁶ These rules impose professional secrecy requirements on competent authorities, on the one hand, and provide competent authorities with possibilities to exchange supervisory information, on the other hand.

As a starting point, Member States shall provide that all persons working for or having worked for the competent authorities are bound by the obligation of professional secrecy, entailing that the confidential information they receive in the course of their duties may be disclosed only in summary or aggregate form, in such a way that, except for the cases mentioned in the directive, individual institutions cannot be identified.¹⁶⁷

Subsequently, the CRD IV lists the possibilities for competent authorities to exchange information with other authorities. These include the possibility to exchange information with each other, the European Banking Authority (EBA), authorities entrusted with the public duty of supervising other financial sector entities and the authorities for the supervision of financial markets, or bodies involved in the liquidation and bankruptcy of institutions and in other similar procedures. The information sharing has to be subject to the above-mentioned professional secrecy requirements each time it occurs.¹⁶⁸

¹⁶³ Article 52(1) CRD IV (cf. Article 52(1) CRD V).

¹⁶⁴ Article 52(3) CRD IV (cf. Article 52(3) CRD V).

¹⁶⁵ Article 52(4) CRD IV (cf. Article 52(4) CRD V).

¹⁶⁶ Cf. Articles 53-62 CRD IV (cf. Articles 53-62 CRD V).

¹⁶⁷ Article 53 CRD IV (cf. Article 53 CRD V). The Court points out in the Baumeister case that these rules do not imply that all information relating to the supervised entity and communicated by it to the competent authority, and all statements of that authority in its supervision file, be deemed to be confidential. It applies to information which is not public and the disclosure of which is likely to adversely affect the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of investment firms that the EU legislature established in adopting Directive 2004/39 (Case C-15/16, Baumeister, ECLI:EU:C:2018:464, paras 34 and 35).

¹⁶⁸ Articles 53(2), 56 and 57 CRD IV (cf. Articles 53(2), 56 and 57 CRD V).

The CRD IV harmonizes most of the supervisory powers by listing the powers that competent authorities at least must have, and providing in certain cases lists of elements that have to be taken into account when assessing the necessity of imposing certain requirements to credit institutions. Since the CRD IV does not vary between SIs and LSIs, Member States must ensure that NCAs have the above-mentioned powers for their task to assist the ECB in the supervision of SIs as well as for their direct supervision of LSIs. Despite the achieved harmonization by the CRD IV, national additional powers are still possible and common.¹⁶⁹

6.6 ECB sanctioning powers

The ECB has been allotted various direct and indirect sanctioning powers.¹⁷⁰ As mentioned in Section 6.1.3 of this chapter, these are referred to as ‘administrative penalties’ in the SSM Regulation. The ECB’s powers to impose sanctions are laid down in Article 18 of the SSM Regulation and briefly discussed here.

In certain cases, the ECB may impose administrative pecuniary penalties directly under Article 18(1) of the SSM Regulation.¹⁷¹ This is the case if an SI intentionally or negligently breaches a requirement under relevant directly applicable Union law (i.e. the CRR) in relation to which such penalties are made available to competent authorities under the relevant Union law.¹⁷²

The ECB’s power to impose administrative pecuniary penalties is thus restricted to breaches of the CRR and to breaches by legal persons. Additionally, the ECB may only impose administrative penalties for the purpose of carrying out the tasks conferred on it by the SSM Regulation, which limits the ECB’s powers to impose administrative penalties to its supervisory tasks.¹⁷³

The administrative pecuniary penalties available to the ECB pursuant to Article 18(1) of the SSM Regulation, are (i) administrative pecuniary penalties up to twice the amount of the profits gained or losses avoided because of the breach if those can be determined, (ii) up to 10% of the total annual turnover, as defined

¹⁶⁹ Cf. Letter to banks from ECB of 31 March 2017, ‘Additional clarification regarding the ECB’s competence to exercise supervisory powers granted under national law’, SSM/2017/0140 (available at: https://www.bankingsupervision.europa.eu/press/letterstobanks/shared/pdf/2017/Letter_to_SI_Entry_point_information_letter.pdf?cbo801df81ba2db9d450ce4fb53065c8; last visit on 21 July 2020).

¹⁷⁰ For a more elaborate overview of the ECB’s sanctioning powers, see e.g.: Gortsos 2015; Magliveras 2018.

¹⁷¹ Although Article 18(1) SSM Regulation does not explicitly speak about ‘fines’, but instead uses the term ‘administrative pecuniary penalties’, it does seem to imply fines (i.e. punitive sanctions) (Kraaijeveld & Ter Kuile 2015, p. 233).

¹⁷² For a discussion on the allocation of the powers to impose administrative penalties, see: D’Ambrosio 2013, pp. 38-39.

¹⁷³ Cf. Kraaijeveld & Ter Kuile 2015, pp. 233-234.

in relevant Union law, of a legal person in the preceding business year, or (iii) such other pecuniary penalty as may be provided for in relevant Union law.

The administrative pecuniary penalties that the ECB may impose directly under Article 18(1) of the SSM Regulation¹⁷⁴ are considered to be administrative fines, which are usually considered to be of a criminal nature on the basis of the aforementioned *Engel* criteria.¹⁷⁵ The provision at issue refers to ‘penalties’, and requires that the relevant rules have been ‘intentionally or negligently’ breached. Moreover, the fine seems intended to be punitive and deterrent,¹⁷⁶ and does not provide for possible reductions in order to protect an EU fund, as was the situation in the *Bonda* case discussed previously. The amount of the penalties can, furthermore, be rather high. In the context of this research, these are consequently classified as sanctions of a criminal nature too.

The ECB shall publish such penalties, whether they have been appealed or not, in the cases and in accordance with the conditions set out in relevant Union law.¹⁷⁷ These are discussed in Section 6.7 of this chapter.

A subsequent question is whether or not publishing a penalty can be considered to be a sanction of a criminal nature.¹⁷⁸ The CRD IV, which lays down the rules for publication of penalties, reads that administrative penalties must be published in order to ensure their dissuasive effect.¹⁷⁹ However, in certain circumstances publication shall be anonymous.¹⁸⁰ Thus, it remains unclear whether publication is a punitive measure, nor can its punitive character be fully ruled out.

¹⁷⁴ Also covered by the definition of ‘administrative penalties’ in Article 120 SSM Framework Regulation.

¹⁷⁵ De Moor-van Vugt & Widdershoven 2015, pp. 303-304; De Moor-van Vugt 2012, pp. 12 and 15; D’Ambrosio 2013, p. 24. By way of example, a case in which the ECtHR determines an administrative fine to be of a criminal charge: Öztürk v Germany, ECtHR App. no. 8544/79, 21 February 1984, para. 53; see also the Court of Justice: Case C-524/15, Menci, ECLI:EU:C:2018:197, paras 26-33.

¹⁷⁶ On its website the ECB also explicitly mentions that sanctions are intended to punish misconduct by supervised banks (see: <https://www.banksupervision.europa.eu/banking/tasks/sanctions/html/index.en.html>; last visit on 21 July 2020).

¹⁷⁷ Article 18(6) SSM Regulation. In line with Article 68 CRD IV, Article 132 SSM Framework Regulation states that the ECB shall publish such penalties without undue delay after the decision has been notified to the credit institution concerned, including information on the type and nature of the breach and the identity of the credit institution involved. The ECB shall only refrain from publishing the penalty in case such a publication would jeopardize the stability of the financial markets or an on-going criminal investigation or if it would cause, insofar as can be determined, disproportionate damage to the credit institution concerned.

¹⁷⁸ This question remained unanswered in the first judgement regarding an ECB decision to publish a penalty without anonymization, see: Wissink 2021.

¹⁷⁹ Recital 38 CRD IV.

¹⁸⁰ Article 68(2) CRD IV (cf. Article 68(2) CRD V).

Looking at the nature of the offence, the second criterion, the opinions and Member States' approaches vary. Some scholars argue that publication of a penalty is of a punitive rather than a remedial nature, given the negative effects for the reputation of the person concerned,¹⁸¹ while others argue that its purpose is to inform and warn the public rather than punishing the person involved.¹⁸² The latter point of view was also taken by the General Court in the *Lombard Club* case in relation to publication of competition sanctions.¹⁸³

Lastly, publishing a penalty may of course be of a rather substantial severity, considering the negative impact on a person's reputation in such a case. This in turn could plead for the conclusion that it is of a criminal nature.

Although it is debatable, in this research, publication of penalties is assumed to solely have informative purposes and not have a punitive aim, and is considered accordingly as a sanction *not* of a criminal nature.

In the cases not covered by Article 18(1) of 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 and national laws. The ECB can only require this if such a request is necessary for the purpose of carrying out its supervisory tasks.¹⁸⁴ An NCA shall open such proceedings only on the request of the ECB, whereby it itself may ask the ECB for such a request.¹⁸⁵

Such requests can, for example, relate to non-pecuniary penalties for breaches of the CRR by both legal and natural persons, to pecuniary penalties for breaches of the CRR by natural persons, or to any penalty for a breach of national law transposing the CRD IV. The ECB may also make such a request if any penalty is applied that is to be imposed in accordance with relevant national law which confers specific powers on the NCAs that are currently not required by relevant Union law.¹⁸⁶ NCAs shall inform the ECB about the completion of such procedures and in particular about the penalties imposed, if any.¹⁸⁷

The ECB may, furthermore, impose sanctions if ECB regulations or decisions have been breached by SIs, or by LSIs and the relevant ECB regulations

¹⁸¹ D'Ambrosio 2013, p. 25.

¹⁸² For a brief discussion of the various views in the Netherlands, see: Tegelaar 2016. Both sides were emphasized by the EU legislator, see: Wissink 2021.

¹⁸³ Case T-198/03, *Bank Austria Creditanstalt v Commission*, ECLI:EU:T:2006:136, para. 57. It must be noted that this case was not about a possible conflict between publication without anonymization and the presumption of innocence, but about transparency and respect of business secrets (cf. Pfaltzer 2014, 141-142). Article 18(5) SSM Regulation.

¹⁸⁴ Article 18(5) SSM Regulation.

¹⁸⁵ Article 134(1) and (2) SSM Framework Regulation.

¹⁸⁶ Article 18(5) SSM Regulation in conjunction with Article 134(1) SSM Framework Regulation.

¹⁸⁷ Article 134(3) SSM Framework Regulation.

or decisions impose obligations on LSIs vis-à-vis the ECB.¹⁸⁸ Such sanctions include both fines and periodic penalty payments.¹⁸⁹

The penalties which the ECB may impose in case of a breach of an ECB regulation or decision under Article 18(7) of the SSM Regulation, may be imposed either as a punishment or with a view to forcing the bank concerned to comply with the ECB regulations and decisions.¹⁹⁰ Although EU law does not provide an explicit classification of the nature of these penalties, the nature of the offence seems thus to depend on which of those two objectives the ECB has when imposing the penalty.

The fines shall however have an upper limit of 500,000 euros,¹⁹¹ which may, as noted by D'Ambrosio, not be sufficiently severe for larger banks in order to meet the *Engel* criteria. This could nevertheless be different for smaller banks.¹⁹²

The ECB may impose periodic penalty payments in the event of a continuing breach of an ECB regulation or decision, thus compelling the persons concerned to comply with such a regulation or decision.¹⁹³ The ECB may again only use this power for the purpose of carrying out its supervisory tasks and the sanctions must be imposed in accordance with Regulation (EC) No 2532/98.¹⁹⁴

¹⁸⁸ Article 18(7) SSM Regulation in conjunction with Article 122 SSM Framework Regulation.

¹⁸⁹ Article 1(7) Regulation (EC) No 2532/98.

¹⁹⁰ Article 18(7) SSM Regulation reads: 'Without prejudice to paragraphs 1 to 6, for the purposes of carrying out the tasks conferred on it by this Regulation, in case of a breach of ECB regulations or decisions, the ECB may impose sanctions in accordance with Regulation (EC) No 2532/98.' Regulation (EC) No 2532/98 allots the ECB the power to both sanction as a punishment and with a view to forcing the persons concerned to comply with the ECB regulations and decisions (cf. Article 1(5), (6) and (7) Regulation (EC) No 2532/98).

¹⁹¹ Article 2(1)(a) Regulation (EC) No 2532/98.

¹⁹² D'Ambrosio 2013, p. 27.

¹⁹³ Article 129(1) SSM Framework Regulation. This provision states furthermore that the procedural rules of Article 22 SSM Regulation and Title 2, Part III SSM Framework Regulation apply.

¹⁹⁴ Article 18(7) SSM Regulation. For a brief discussion about the applicability of the provisions laid down in Regulation (EC) No 2532/98, see: Magliveras 2018, p. 15; Gortsos 2015, pp. 22-24; Riso 2014, pp. 2-3. 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) (2014/C 144/02), which reads that certain amendments should now be considered taking account of inter alia the fact that the scope of the ECB's powers to impose sanctions has been extended by the SSM Regulation. On 18 December 2014, the Commission published its opinion on this recommendation (The Commission Opinion of 18 December 2014 on the European Central Bank's 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) (2014/c 461/01)). The regulation has been amended by Council Regulation (EU) 2015/159 of 27 January 2015 amending Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions.

Periodic penalty payments may also be imposed either as a punishment or with a view to forcing the bank concerned to comply with the relevant ECB rules.

Article 1(6) of Regulation (EC) 2532/98 states that ‘periodic penalty payments’ ‘shall mean amounts of money which, in the case of a continued infringement, an undertaking is obliged to pay either as a punishment, or with a view to forcing the persons concerned to comply with the ECB supervisory regulations and decisions’. The objective of imposing the periodic penalty payment may thus determine its nature and, subsequently, the applicable regime.¹⁹⁵ Regulation (EC) 2532/98 provides for both possibilities.

The ECB seems to consider periodic penalty payments to be an instrument for compelling compliance,¹⁹⁶ and hence not of a criminal nature. This is confirmed by the fact that pperiodic penalty payments are excluded from the procedure via the Investigating Unit.¹⁹⁷

Lastly, with respect to the third *Engel* criterion, one has to keep in mind that it may depend on the size of the bank whether or not the amounts will be judged as a severe penalty.¹⁹⁸

When the ECB, in carrying out its supervisory tasks, considers there is reason to suspect that an SI having its head office in a Member State whose currency is the euro is breaching, or has been breaching, relevant directly applicable Union law (CRR), as referred to in Article 18(1) of the SSM Regulation, or an ECB regulation or decision, as referred to in Article 18(7) of the SSM Regulation, such matters shall be referred to the Investigating Unit.¹⁹⁹ For the investigation of such alleged breaches, the Investigating Unit may exercise the powers granted to the ECB under the SSM Regulation, i.e. the powers included in Articles 10–13 of the SSM Regulation.²⁰⁰

The Investigating Unit is an independent unit established by the ECB on the basis of Article 123 of the SSM Framework Regulation and composed of investigating officers designated by the ECB, who shall not be involved, nor have been involved for the two years preceding their position of investigating officer, in the direct or indirect supervision or authorization of the relevant bank. These investigating officers shall also perform their function independently of the

¹⁹⁵ Cf. D'Ambrosio 2013, p. 18; Ferran 2015, p. 140.

¹⁹⁶ See: <https://www.banksupervision.europa.eu/banking/tasks/enforcement/html/index.en.html> (last visit on 21 July 2020).

¹⁹⁷ Cf. Article 129 SSM Framework Regulation and the heading of Part X, Title 2 SSM Framework Regulation.

¹⁹⁸ D'Ambrosio 2013, p. 27.

¹⁹⁹ Article 124 SSM Framework Regulation. This article refers to directly applicable EU law as referred to in Article 18(1) SSM Regulation and an ECB regulation or decision as referred to in Article 18(7) SSM Regulation.

²⁰⁰ Article 125 SSM Framework Regulation.

Supervisory Board and the Governing Council.²⁰¹ Thus the Investigating Unit implements the idea of separation of supervision and investigation.²⁰²

Matters referred to the Investigating Unit are considered to be part of the investigatory phase, inferring that a stricter framework for legal protection is applicable (see Chapters 3 and 7). This contrasts with matters that are still coordinated by the Joint Supervisory Teams or on-site inspection teams, which are considered to be part of the normal supervisory phase.

6.7 NCA sanctioning powers

As mentioned previously, in respect of SIs the NCAs shall open proceedings only on the ECB's request and only in cases not covered by the ECB itself on the basis of Article 18(1) of the SSM Regulation. With respect to LSIs, NCAs are the direct supervisors and as such responsible for imposing sanctions when necessary to carry out their tasks. NCAs shall impose any administrative measure or sanction in accordance with their national laws and notify the ECB on a regular basis of all sanctions imposed on LSIs in connection with the exercise of their supervisory tasks.²⁰³

Below, the relevant EU provisions are briefly discussed to provide an insight into the powers that have to be allocated to competent authorities. In doing so, the terminology of the applicable rules is used, instead of the terminology otherwise used in the research and set forth in Section 6.1 of this chapter.

The CRD IV requires that national laws provide for administrative penalties and other administrative measures in order to remedy breaches of the CRR or of national provisions implementing the CRD IV.²⁰⁴

²⁰¹ Article 123 SSM Framework Regulation.

²⁰² This idea stems from the *Dubus S.A. v France* case (Dubus S.A. v France, ECtHR App. no. 5242/04, 11 September 2009), in which the ECtHR states that, while the combination of investigation and judicial functions is not, in itself, incompatible with the need for impartiality guaranteed by Article 6(1) ECHR, it is necessary to ascertain whether the supervisory authority at hand has decided on the disciplinary measure without 'prejudgment', in view of the steps it has taken during the proceedings. The procedure followed may have given the applicant the impression that it has been prosecuted and tried by the same people (see legal summary). In the *Menarini* case (A. Menarini Diagnostics S.R.l. v Italy, ECtHR App. no. 43509/08, 27 September 2011), the ECtHR states that separation of supervision and investigation is not necessary in case the decision imposing the penalty is subject to review by judicial bodies having full jurisdiction (see legal summary). Also: Riso 2014, p. 4; Ottow 2015, pp. 128-129. Kraaijeveld & Ter Kuile also refer to the approval by the General Court of the Commission's investigatory powers in the field of competition law, and its powers to impose pecuniary, non-punitive, sanctions (Kraaijeveld & Ter Kuile 2015, p. 227; Joined Cases T-56/09 and T-73/09, Saint-Gobain Glass France and Others v Commission, ECLI:EU:T:2014:160, paras 75 et seq.).

²⁰³ Article 135 SSM Framework Regulation.

²⁰⁴ Article 65(1) CRD IV (cf. Article 65(1) CRD V).

Articles 66 and 67 of the CRD IV set out the administrative penalties and other administrative measures NCAs at least must have at their disposal in the situations laid down in the respective articles. In the terminological wordings used in this research these include sanctions not of a criminal nature as well as sanctions of a criminal nature.

In this respect it is relevant to mention again that it is uncertain whether or not the Court would consider all national administrative sanctions in general to be not of a criminal nature due to the fact that the relevant rules are only applied to authorized institutions, as discussed in Section 6.4 of this chapter.

Furthermore, as a general observation it is noted that EU law does not provide for a qualification in any of these cases and so the second and third condition of the *Engel* criteria have to be looked at.²⁰⁵

These administrative penalties and other administrative measures include the power to impose specific administrative pecuniary penalties.²⁰⁶ Similar to the ECB's power to impose administrative pecuniary penalties, these penalties are likely to be considered 'sanctions of a criminal nature' insofar as they are fines. Also, the power to issue a public statement²⁰⁷ is comparable to the ECB's duty to publish sanctions. Reference is therefore made to the discussions about these sanctions in Section 6.6 of this chapter.

A cease and desist order²⁰⁸ must be made available to competent authorities so as to enable them to require a person to cease the conduct and to desist from a repetition of that conduct. As such, it seems to have a reparatory rather than a punitive aim, and could consequently be considered to be a sanction not of a criminal nature.²⁰⁹

How to qualify a withdrawal of an authorization is less certain. The cases in which this power may be used are mainly related to having obtained an authorization through false statements or other irregular means, not providing the required information or not providing it completely or accurately, or not meeting the requirements under relevant law.²¹⁰

One could argue that a withdrawal is to ensure the soundness and safety of the entire sector, i.e. the system a person can only be part of when having an authorization, and if that is the case, it would tend to be a sanction not of a criminal nature.

²⁰⁵ See Section 6.1.1 of this chapter.

²⁰⁶ Article 66(2)(c)-(e) and Article 67(2)(e)-(g) CRD IV (cf. Article 66(2)(c)-(e) and Article 67(2)(e)-(g) CRD V).

²⁰⁷ Article 66(2)(a) and Article 67(2)(a) CRD IV (cf. Article 66(2)(a) and Article 67(2)(a) CRD V).

²⁰⁸ Article 66(2)(b) and Article 67(2)(b) CRD IV (cf. Article 66(2)(b) and Article 67(2)(b) CRD V).

²⁰⁹ Cf. D'Ambrosio 2013, p. 25.

²¹⁰ For the specific cases, see Articles 67(1) and 18 CRD IV

At the same time, when an authorization is withdrawn because the rules have been breached or requirements have not been met, it may have a more punitive character, especially given the fact that it is a very severe sanction.²¹¹ In such a case, one could reason it qualifies as a sanction of a criminal nature.

With respect to the power to suspend voting rights of the shareholder(s) held responsible for the breaches,²¹² the reason for imposing the measure again seems determining for its qualification as being of a criminal nature or not:²¹³ depending on its aim it may either result in a sanction of a criminal nature or not of a criminal nature.

Lastly, the qualification of a temporary ban against a member of the institution's management body or any other natural person held responsible, from exercising functions in institutions²¹⁴ seems to reflect, because of its temporary character, the remedial nature of the measure, preventing the members at issue to cause more damage and providing time to restore a situation of compliance with the relevant rules.²¹⁵ Hence it will probably classify as a sanction not of a criminal nature.

The CRD IV lists, furthermore, the minimum circumstances that NCAs have to take into account when determining the type of administrative penalty or other administrative measure and the level of administrative pecuniary penalties.

Article 70 of the CRD IV states that NCAs have to take into account all the relevant circumstances, including, where appropriate, the circumstances laid down in that article. These include, for instance, the gravity and the duration of the breach, the degree of responsibility of the person responsible for the breach, the financial strength of the person responsible for the breach and any potential systemic consequences of the breach.²¹⁶

Moreover, the CRD IV requires that NCAs in any case publish any administrative penalties against which there is no appeal and which are imposed for breaches of the CRR or of a national provision transposing the CRD IV. This publication must include information on the type and nature of the breach and the identity of the person on whom the penalty is imposed, and must take place without undue delay after that person is informed of those penalties.

²¹¹ Cf. D'Ambrosio 2013, p. 25 (he qualifies a withdrawal of authorization as a sanction of a criminal nature); Van Bockel 2015, pp. 111-112.

²¹² Article 66(2)(f) CRD IV.

²¹³ For a useful clarification of both reasons, see: D'Ambrosio 2013, pp. 25-26.

²¹⁴ Article 67(2)(d) CRD IV.

²¹⁵ Cf. D'Ambrosio 2013, p. 25.

²¹⁶ Article 70(a)-(h) CRD IV.

Member States may also allow publication of penalties against which there is an appeal. In such a case, competent authorities shall, without undue delay, also publish information on the appeal status and outcome thereof.²¹⁷ Publication shall be on the basis of anonymity, when (a) the penalty is imposed on a natural person and, ensuing from an obligatory prior assessment, publication of personal data is found to be disproportionate; (b) publication would jeopardize the stability of financial markets or an ongoing criminal investigation; or (c) publication would cause, insofar as it can be determined, disproportionate damage to the institutions or natural persons involved.²¹⁸

The discussion about whether or not publication of a sanction is of a criminal nature equals the one with respect to the ECB's obligation to publish sanctions and so reference is made to Section 6.6 of this chapter.

7 Due process for adopting supervisory decisions

The SSM legislative framework emphasizes the importance of a due process, which is in this research referred to as rights of defence or good administration. Due process has been elaborated in both the SSM Regulation and the SSM Framework Regulation, which have however a slightly different scope.

Firstly, Article 22 of the SSM Regulation stipulates the due process obligations which are applicable to the ECB in case it takes supervisory decisions in accordance with Article 4 of the SSM Regulation (i.e. the ECB's tasks) and Section 2 of Chapter III. The latter section refers to decisions in the context of common procedures, supervisory measures laid down in Article 16 of the SSM Regulation, and decisions imposing administrative penalties.

The general due process provisions laid down in the SSM Regulation are elaborated in Title 2 of Part III of the SSM Framework Regulation.²¹⁹ The scope of the due process obligations laid down in the SSM Framework Regulation is broader than the scope of the Article 22 of the SSM Regulation. In contrast with the SSM Regulation, the SSM Framework Regulation also requires a due process in case of ECB decisions based on Article 9 of the SSM Regulation, and in case of decisions adopted in light of the use of investigatory powers, i.e. Articles 10-13 of the SSM Regulation.²²⁰ Such a broader scope for the obligation to respect the rights of defence seems more appropriate considering the Court's case law.

²¹⁷ Article 68(1) CRD IV.

²¹⁸ Article 68(2) CRD IV.

²¹⁹ I.e. Articles 25-35 SSM Framework Regulation.

²²⁰ Note that, as discussed in this section, Articles 10-13 SSM Regulation are explicitly excluded from the right to be heard (Article 31(r), last sentence, SSM Framework Regulation).

Article 22(1) of the SSM Regulation limits the right to be heard to supervisory decisions in accordance with Article 4 (i.e. the ECB's tasks) and Section 2 of Chapter III (i.e. 'specific supervisory powers' such as common procedures, 'supervisory powers' to address relevant problems at an early stage and 'administrative penalties') of that Regulation.

Article 25 of the SSM Framework Regulation refers to 'ECB supervisory procedures', which are defined in Article 2(24) of that Regulation as '[...] any ECB activity directed towards preparing the issue of an ECB supervisory decision,²²¹ [...]. All ECB supervisory procedures are subject to Part III. [...]' This encompasses a broader range of decisions than referred to in Article 22 of the SSM Regulation, and the definition of 'ECB supervisory procedures' ensures that they are all subject to the due process provisions laid down in Part III of the SSM Framework Regulation.

As a result, decisions based on Article 9 of the SSM Regulation and decisions adopted in light of the use of investigatory powers laid down in Articles 10-13 of the SSM Regulation are also subject to the due process obligations. The latter powers are, however, explicitly excluded from the right to be heard.²²²

The SSM Regulation requires the ECB to provide persons subject to the proceedings with the opportunity of being heard, and to base its decisions only on objections on which the parties concerned have been able to comment. Only in case urgent action is needed to prevent significant damage to the financial system, this obligation shall not apply. In such an event, the ECB may adopt a provisional decision and give the persons concerned the opportunity to be heard afterwards.²²³

Furthermore, Article 22 of the SSM Regulation requires that the rights of defence are fully respected in the proceedings. The persons concerned have the right of access to the ECB's file, unless other persons have a legitimate interest in their business secrets being protected, and not extending to confidential

²²¹ Defined in Article 2(26) as: 'a legal act adopted by the ECB in the exercise of the tasks and powers conferred on it by the SSM Regulation, which takes the form of an ECB decision, is addressed to one or more supervised entities or supervised groups or one or more other persons and is not a legal act of general application.'

²²² Article 31(i) of the SSM Framework Regulation explicitly states that the provisions on the right to be heard are not applicable to the ECB powers of requesting information, of general investigation and of on-site inspection as laid down in Articles 10-13 (i.e. Chapter III, Section 1 SSM Regulation). Should the decisions to exercise these powers be, however, subject to judicial review separately (see Chapter 5, Section 3.1), this is probably also too narrow an interpretation of the right to be heard. Lackhoff noted already that it is questionable to exempt the exercise of investigatory powers from the due process requirements in Article 22(i) SSM Regulation (Lackhoff 2016, p. 203).

²²³ Article 22(i), second subparagraph, SSM Regulation.

information.²²⁴ The ECB decisions shall also state the motivations on which they are based.²²⁵

The SSM Framework Regulation lays down more precise due process requirements in its Articles 25 up to and including 35. The ECB shall determine the facts which will be relevant for adopting its final decision in each ECB supervisory procedure ex officio, and shall take account of all relevant circumstances in its assessment.²²⁶ The parties, being those making an application or those to which the ECB intends to address or has addressed an ECB supervisory decision,²²⁷ are required to participate in an ECB supervisory procedure and to provide assistance to clarify the facts, subject to Union law.²²⁸ In order to ascertain the facts of the case, the ECB shall make use of such evidence as, after due consideration, it deems appropriate and the parties shall, subject to Union law, assist the ECB in this.²²⁹ The ECB may also hear witnesses and experts if it deems it necessary.²³⁰

Article 31 of the SSM Framework Regulation specifies the obligation for the ECB to respect the right to be heard, a core element of the rights of defence.²³¹ Before the ECB may adopt an ECB supervisory decision which adversely affects the rights of the party it is addressed to, that party must be given the opportunity of commenting in writing on the facts, objections and legal grounds relevant to the ECB supervisory decision.²³²

The notification sent to the party in order to enable it to provide comments shall include the decision's material content and the material facts, objections

²²⁴ Article 22(2), first subparagraph, SSM Regulation.

²²⁵ Article 22(2) SSM Regulation.

²²⁶ Article 28(1) and (2) SSM Framework Regulation.

²²⁷ Article 26 SSM Framework Regulation.

²²⁸ Article 28(3) SSM Framework Regulation. In case of an ECB supervisory procedure on a party's request, the ECB may limit its determination of the facts to requesting the party to provide the relevant factual information.

²²⁹ Article 29(1) and (2) SSM Framework Regulation. The parties shall also truthfully state the facts known to them, subject to the limits relating to sanctioning procedures under EU law.

²³⁰ Article 30(1) SSM Framework Regulation.

²³¹ Cf. Chapter 3, Section 4.2.1.

²³² Lackhoff points out that the scope of the right to be heard defined in the SSM Framework Regulation may be too narrow in light of the Court's case law. The relevant provision in the SSM Framework Regulation only provides for the right to be heard to addressees of an ECB supervisory decision, while this right tends to be extended to third parties who would not be the direct addressees of the intended measure (Lackhoff 2016, p. 205; Wojcik 2016, p. 215). A good example of such an indirectly concerned person is a manager in the case of a negative fit and proper decision; the decision is addressed to the credit institution at issue, but will likely adversely affect the person in question as well (Lackhoff 2016, p. 205).

and legal grounds. If the ECB deems it appropriate, it may give the party the possibility to provide comments in a meeting.²³³

The right to be heard is not applicable to Articles 10-13 of the SSM Regulation, i.e. the ECB's powers to request information and to carry out general investigations and on-site inspections.²³⁴ As a general rule, a party has to provide its comments within a time limit of two weeks following receipt of the ECB's statement setting out the facts, objections and legal grounds on which the ECB intends to base its decision. The ECB may extend this time limit on a party's request or, in particular circumstances, shorten it to three working days.²³⁵ In case of common procedures, the time limits are always shortened to three working days.²³⁶

In accordance with the SSM Regulation, the ECB may adopt a decision without giving a party adversely affected by that decision the opportunity to provide comments prior to adoption if an urgent decision appears necessary in order to prevent significant damage to the financial system. In such a case, the party shall be given the opportunity to provide comments without undue delay after the adoption of the ECB supervisory decision.²³⁷ However, in contrast with the SSM Regulation, the right to be heard may not be set aside in case of supervisory procedures relating to administrative penalties.²³⁸

Article 32 of the SSM Framework Regulation reiterates that the ECB shall fully respect the rights of defence and specifies the right of access to files. The files consist of all documents the ECB obtains, produces or assembles during its supervisory procedure, irrespective of the storage medium.²³⁹ Internal documents of the ECB and NCAs and correspondence between the ECB and an NCA or between NCAs may be considered to be confidential information and if so, the right of access to the file does not extend to such internal documents and correspondence.²⁴⁰

The obligation to state reasons is elaborated in Article 33 of the SSM Framework Regulation. It states that ECB supervisory decisions shall be accompanied by a statement of the reasons for that decision, containing the material facts and legal reasons on which the decision is based.²⁴¹ The ECB's supervisory deci-

²³³ Article 31(1) SSM Framework Regulation.

²³⁴ Article 31(1) SSM Framework Regulation in conjunction with Articles 10-13 SSM Regulation.

²³⁵ Article 31(3) SSM Framework Regulation.

²³⁶ Article 31(3) in conjunction with, respectively, Articles 77(1), 81(2), 82(3) and 87 SSM Framework Regulation.

²³⁷ Article 31(4) and (5) SSM Framework Regulation.

²³⁸ Article 31(6) SSM Framework Regulation. It concerns administrative penalties pursuant to Article 18 SSM Regulation and Part X SSM Framework Regulation.

²³⁹ Article 32(1) and (2) SSM Framework Regulation.

²⁴⁰ Article 32(5) SSM Framework Regulation.

²⁴¹ Article 33(1) and (2) SSM Framework Regulation.

sions shall only be based on facts and objections on which a party has been able to comment, unless an urgent decision appears necessary in order to prevent significant damage to the financial system.²⁴²

8 Governance of supervisory tasks within the ECB

The SSM Regulation requires a separation of the ECB's monetary and supervisory tasks.²⁴³ For that reason, the Supervisory Board has been established for the ECB's supervisory tasks, which is an internal body separated from the ECB's ultimate decision-making body, the Governing Council.²⁴⁴

Pursuant to Article 26 of the SSM Regulation, the planning and execution of the ECB's supervisory tasks are fully undertaken by the Supervisory Board, which is composed of its Chair and Vice-Chair, four representatives of the ECB, and one representative of each NCA.²⁴⁵ Decisions are taken by a simple majority of the Supervisory Board members, and each member has one vote.²⁴⁶ However, decisions on the adoption of regulations pursuant to Article 4(3) of the SSM Regulation shall be taken on the basis of a qualified majority of the Supervisory Board members, as specified in Article 26(7) of the SSM Regulation.

The Supervisory Board shall carry out preparatory work regarding the ECB's supervisory tasks and shall propose complete draft decisions to the Governing Council. The draft decisions shall include an explanatory note outlining the background to and the main reasons underlying the draft decision. Such draft decisions shall be deemed to be adopted unless the Governing Council objects within a period of ten working days.²⁴⁷ This is called the non-objection procedure.

²⁴² Article 33(3) SSM Framework Regulation in conjunction with Article 31(4) SSM Framework Regulation.

²⁴³ Article 25 SSM Regulation.

²⁴⁴ Article 129(1) TFEU and Article 9(3) of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank.

²⁴⁵ Article 26(1) SSM Regulation. The Chair and Vice-chair are appointed in accordance with Article 26(3).

The Chair shall be chosen on the basis of an open selection procedure and the Vice-Chair shall be chosen from among the members of the Executive Board of the ECB. The four ECB representatives are appointed in accordance with Article 26(5). Article 26(1) SSM Regulation points out that, when the NCA is not a central bank, the Supervisory Board member of the NCA may decide to bring a representative of the participating Member State's central bank. The representatives of the authorities of any one Member State shall together be considered as one member for the purposes of the voting procedure set out in Article 26(1).

²⁴⁶ Article 26(6) SSM Regulation.

²⁴⁷ Article 26(8) SSM Regulation in conjunction with Article 1(6) of the Decision of the European Central Bank of 22 January 2014 amending Decision ECB/2004/2 adopting the Rules of Procedure of the European Central Bank (ECB/2014/1)(2014/179/EU), which article amends Article 13.g.1 of the Rules of Procedure of the ECB. Note that in emergency situations the Supervisory Board shall define a reasonable time period, not exceeding 48 hours (Article 6(1) of the decision). Furthermore, Article 26(8) in

Without prejudice to the right to bring proceedings before the EU Courts in accordance with the Treaties, persons have the possibility to request an internal administrative review by the Administrative Board of Review (ABoR), which is composed of five independent individuals of high repute and a proven record of relevant knowledge and professional experience. Its members are not bound by any instructions.²⁴⁸ The ABoR reviews ECB decisions on their procedural and substantive conformity with the SSM Regulation.²⁴⁹ Although the protection provided by this internal review is not part of this research,²⁵⁰ it is relevant to mention this in order to provide a complete overview of the system.

Any natural or legal person may request such a review of a decision adopted by the ECB under the SSM Regulation, that is addressed to the person or is of a direct and individual concern to that person.²⁵¹ A request for review needs to be lodged at the ECB within one month of the notification date of the ECB decision, or, in the absence of such a date, of the day on which it came to the knowledge of the person requesting the review.²⁵²

When a request is admissible, the ABoR shall express an opinion no later than two months after receiving the request and remit the case for preparation of a new draft decision to the Supervisory Board, who shall take the ABoR opinion into account and submit a new draft decision to the Governing Council. The new draft decision shall abrogate the initial ECB decision, replace it with a decision of identical content or replace it with an amended decision. The new draft decision shall be adopted in accordance with the non-objection procedure, meaning it shall be deemed adopted unless the Governing Council objects within a maximum period of ten working days.²⁵³ A request for internal review against a new decision is not admissible anymore.²⁵⁴

A request for review does not have suspensory effect, unless the Governing Council follows the ABoR's proposal to suspend the application of the contested decision, or if it considers that circumstances so require.²⁵⁵ The ABoR opinion as well as the draft decision of the Supervisory Board and the final ECB

conjunction with Article 7(8) SSM Regulation provides for a procedure if a participating Member State whose currency is not the euro disagrees with a draft decision of the Supervisory Board.

²⁴⁸ Article 24(2) SSM Regulation. The ABoR members may not be current staff of the ECB nor current staff of NCAs or other national or EU institutions or bodies, offices and agencies who are involved in the carrying out of the tasks conferred on the ECB by the SSM Regulation.

²⁴⁹ Article 24(i) SSM Regulation.

²⁵⁰ See Chapter I, Section 4.4.

²⁵¹ Article 24(5) and (II) SSM Regulation.

²⁵² Article 24(6) SSM Regulation.

²⁵³ Article 24(7) SSM Regulation.

²⁵⁴ Article 24(5) SSM Regulation.

²⁵⁵ Article 24(8) SSM Regulation.

decision adopted by the Governing Council must be reasoned and notified to the parties.²⁵⁶

9 The Single Rulebook

In addition to the powers, rights of defence and applicable procedures set forth previously, it is imperative to briefly discuss the relevant substantive rules that the competent authorities have to ensure compliance with.

Pursuant to Article 4(3) of the SSM Regulation, the ECB shall apply all relevant Union law, and when this Union law is composed of Directives, the national legislation transposing those Directives. Furthermore, when the relevant Union law is composed of Regulations and these currently explicitly grant options for Member States, the ECB shall also apply the national legislation exercising those options. This means that the ECB, an EU institution, has to apply national substantive law, which is a novelty under Union law.

The relevant Union law consists in general of the CRR, CRD IV and the Financial Conglomerates Directive (FICOD). This EU legislation is based on the global banking rules implemented in the International Regulatory Framework for Banks. This regulatory framework, known as Basel III, has been developed by the Basel Committee on Banking Supervision of the Bank for International Settlements and aims at strengthening the regulation, supervision and risk management of the banking sector.²⁵⁷

In the EU, these rules are implemented by way of the Single Rulebook, a merely political term introduced in 2009²⁵⁸ to refer to its objective of being a unified regulatory framework,²⁵⁹ and thus clarifying that it is not a single law. The aim of the Single Rulebook is to provide a uniform set of prudential banking rules for the financial sector in the EU.²⁶⁰ A Single Rulebook is to eliminate legislative

²⁵⁶ Article 24(9) SSM Regulation.

²⁵⁷ For more information about Basel III, see: <http://www.bis.org/bcbs/basel3.htm> (last visit on 23 July 2020).

²⁵⁸ Cf. Brussels European Council 18/19 June 2009, Presidency Conclusions, 11225/2/09, p. 8 (available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/108622.pdf (last visit at 17 September 2020); <https://eba.europa.eu/regulation-and-policy/single-rulebook> (last visit on 23 July 2020). Note that the scope of the Single Rulebook is broader than the scope of relevant EU law in the context of the SSM.

²⁵⁹ <https://eba.europa.eu/regulation-and-policy/single-rulebook> (last visit on 23 July 2020).

²⁶⁰ Cf. [http://www.eba.europa.eu/regulation-and-policy/single-rulebook](https://eba.europa.eu/regulation-and-policy/single-rulebook) (last visit on 23 July 2020).

differences among Member States, ensure the same level of protection for consumers and a level playing field for banks across the EU.²⁶¹

According to the EBA, the Single Rulebook will lead to a more resilient, transparent and efficient banking sector.²⁶² First and foremost, it will ensure that prudential safeguards are applied across the EU and not just in one Member State. Furthermore, it ensures that, across the EU, institutions' financial situation is more transparent and comparable for supervisors, deposit-holders and investors, thus increasing the effectiveness of supervision as well as market and investor confidence. Lastly, it ensures a more efficient banking sector, since institutions do not have to comply with differing sets of rules.²⁶³

It is needless to say that a single set of prudential banking rules is a necessity in light of the SSM. Indeed, it would be unacceptable to have different rules for banks that are part of one and the same supervisory mechanism, if only because it would be questionable how effective a supervisor can be if it has to apply nineteen different national laws.

However, so far, the Single Rulebook is not completely 'single' as of yet. Part of it is still implemented in a Directive, which has to be transposed in national law and such transposition is never exactly the same in all Member States. In addition, the CRR and CRD IV too provide for several options and discretions for Member States, which also result in possible differences in national laws.²⁶⁴

These differences in national law do not only lead to inefficiencies in supervision or an unequal playing field for banks, but also give rise to debate about what national rules exactly fall under relevant Union law and what national rules do not. Since Union law is often transposed differently and Member States have several national additional rules, an answer to this question is unfortunately not that straightforward.

Subsequently, the lack of clarity about what is to be considered to be a transposition of relevant Union law leads to debate about the scope of the ECB's tasks and powers. As said previously, the ECB shall apply all relevant Union law for the

²⁶¹ Cf. <https://www.consilium.europa.eu/en/policies/banking-union/single-rulebook/> (last visit on 23 July 2020).

²⁶² <http://www.eba.europa.eu/regulation-and-policy/single-rulebook> (last visit on 23 July 2020).

²⁶³ <http://www.eba.europa.eu/regulation-and-policy/single-rulebook> (last visit on 23 July 2020).

²⁶⁴ For instance, Member States may exempt certain credit institutions from the required initial capital (Article 12(3) CRDIV; cf. Article 12(3) CRDV) and Member States may introduce a systemic risk buffer and possibly apply it to all exposures (Article 133 CRDIV; Article 133 CRDV). For an overview of the options and national discretions and of which Member States have exercised them, see: <https://eba.europa.eu/supervisory-convergence/supervisory-disclosure/options-and-national-discretions>). For a discussion of the challenges for the ECB due to the (lack of a) single rulebook and some examples, see e.g.: Brescia Morra 2014, pp. 12-13; Wyneersch 2012, pp. 4-5; Ferrarini & Chiarella 2013 (Section 3(a) 'A semi-strong framework, absence of a common rule-book'); Lefterov 2015; Wissink 2017, pp. 436-444.

Lehmann 2017, pp. 3-17.

purposes of its tasks. However, Article 1(5) of the SSM Regulation reads that the SSM Regulation is without prejudice to the responsibilities and related powers of the NCAs to carry out supervisory tasks not conferred on the ECB by the SSM Regulation. The scope of the ECB's tasks – and, accordingly, the scope of the remaining NCAs' tasks – thus depends on the question what exactly falls under relevant Union law and what does not. This is also discussed in Chapter 5.

10 Recapitulation

This chapter has provided a general picture of the SSM and its legal context, so as to be able to analyse the effectiveness of legal protection in the SSM hereafter.

Prudential banking supervision is an ongoing process in order to contribute to the safety and soundness of banks and the stability of the financial system. The tasks allocated to the ECB are listed in the SSM Regulation and cover, broadly brushed, ensuring compliance with the rules laid down in the CRR, CRD IV and FICOD.

One of the most important characteristics of the SSM is how the responsibilities are divided between the Union and national levels. The ECB is responsible for the SSM's effective and consistent functioning and for the direct supervision of SIs, whereas the NCAs are responsible for the direct supervision of LSIs. Additionally, the ECB is competent in case of common procedures (i.e. authorizations, withdrawal of authorizations and acquisitions of qualifying holdings in banks) for both SIs and LSIs. As a result, cooperation between the ECB and NCAs differs when dealing with SIs, LSIs and common procedures.

The ECB and NCAs have normal supervisory powers, such as requesting information, imposing measures to address banks' non-compliance as from an early stage, and imposing sanctions. The legal basis, however, varies and certain powers may only be exercised by the ECB through an NCA, i.e. indirectly.

For the purpose of this research, a distinction is made between the 'supervisory phase' and the 'investigatory phase'. The supervisory phase refers to the use of powers, the procedures and the decisions adopted in the context of ongoing supervision, e.g. decisions granting approval or imposing supervisory measures to address non-compliance in an early stage. The investigatory phase refers to the use of powers, the procedures and the decisions adopted in the context of investigating possible breaches of law which may lead to imposing administrative sanctions of a criminal nature. These being of a criminal nature implies their punitive character and, therefore, a stricter legal framework applies to the acting authorities. A clear distinction between both phases, and the decisions

ensuing from these phases, allows for a more accurate analysis of the effectiveness of legal protection against the respective decisions.

Given the far-reaching shared administration in place, close cooperation between the ECB and NCAs is essential for ensuring effective supervision. Apart from the different procedures stemming from the division of responsibilities, various cooperation arrangements are in place. However, because of the variety and complexity of the cooperation arrangements existing within the SSM, and described in this chapter, the mechanism also becomes quite intricate. The obligation for the NCAs to assist the ECB and to follow the ECB's instructions, the Joint Supervisory Teams, the on-site inspection teams and the ECB's independent Investigating Unit all illustrate the SSM's complexity. Additionally, with respect to the supervision of LSIs too several cooperation procedures have been established.

The complexity of the mechanism is increased by the decision-making procedures within the SSM. Due to the required separation of the ECB's monetary and supervisory tasks, an internal body has been established to prepare and exercise the supervisory tasks. This new body, the Supervisory Board, is separated from the ultimate decision-making body of the ECB, the Governing Council. Decision-making with respect to the ECB's supervisory tasks takes place, broadly speaking, by way of the non-objection procedure, which refers to the arrangement that draft supervisory decisions prepared by the Supervisory Board, are deemed to be adopted by the Governing Council unless the Governing Council objects within a period of ten working days.

This chapter, furthermore, has set forth the applicable rules in order to ensure a due process by the ECB. These include good administration, but also the possibility to have an ECB decision internally reviewed by the ABoR. The due process rules laid down in the SSM Framework Regulation have a broader scope than the rules laid down in the SSM Regulation. This broader scope seems to be better aligned with the EU legal framework.

Another important element for prudential banking supervision within the SSM is the Single Rulebook laying down the substantive rules, i.e. the basis for banking supervision. The Single Rulebook represents a major step towards harmonizing the applicable banking rules. Nevertheless, as discussed, the rules still leave room for a diverging national implementation and additional national rules. Although understandable and perhaps necessary from a rule-making point of view, this leads to quite some challenges for the effectiveness of supervision within the SSM and the accompanying legal protection.

Having set out the SSM's legal framework and challenges, Chapter 3 first elaborates the framework for assessing the legal protection within the SSM.

Subsequently, Part II of this research dives into the specific composite procedures in place and analyses the legal protection, and its effectiveness, for each of those procedures.

CHAPTER 3

Assessment Framework

I Introduction

Whereas Chapter 2 explains the design and context of the Single Supervisory Mechanism, this chapter focuses on the requirements for ensuring effective legal protection for decisions based on composite procedures.

The first – and larger – part of this chapter sets forth the requirements with respect to effective legal protection in general. As explained in Section 4.1, effective legal protection is interpreted broadly within the context of this research, meaning that a person's rights have to be protected effectively before court without hindering the objectives of the Union law at issue. Its 'effectiveness' is thus considered from both a safeguard and an instrumental perspective.

This first part focuses on legal protection in the case of individual decisions addressed to persons only. It consists of a brief introduction into the relevance of the rule of law for judicial control, which is part of the broader notion of legal protection, and into the relevant sources, then proceeds to discuss the requirements of effective legal protection both during the administrative procedure and before court. After explaining the broader interpretation of effective legal protection used in this research, the relevant laws, principles, and case law are addressed as an overview of the substantive requirements of effective legal protection.

The second part of this chapter elaborates on the complete system of legal remedies and procedures. The Court's competences are specified first, including a discussion on the standing requirements (i.e. when a person may lodge an appeal before the Court) and the conditions under which a decision may be subject to appeal before the Court. Looking into the Court's competences naturally touches upon the limitations of these competences and, consequently, on the role of the national courts, which is dealt with afterwards. Lastly, the main tool for collaboration, i.e. the preliminary ruling procedure, is discussed.

While the chapter's first part describes the substantive requirements for effective legal protection, the second part provides insight into the division of competences between the EU Courts and national courts and the ways in which they collaborate. These elements discussed in the second part are important given the research' focus on composite procedures, which as a matter of course involve both EU and national courts.

All of this results in an assessment framework for reviewing the effectiveness of legal protection in cases of individual decisions based on composite procedures in place in the SSM. Summarizing, this assessment framework consists of two parts. The first part covers the substantive requirements with regard to effective legal protection, including elements from a safeguard and an instrumental perspective. The second part covers the institutional set-up of

the judicial review, i.e. the complete system of legal remedies and procedures in place for the SSM.

2 Judicial control and the rule of law

The idea underlying judicial control is that governments' power should be subject to the law, for a government possesses many instruments with which it can violate the citizens' interests, even against the citizens' will. Indeed, the administrative body is a much stronger party than the individual, and so, in a state based on the rule of law, such power should not only be subject to the law, but citizens should also have the possibility to go to court in case the administrative body does not act in accordance with the law. This also infers that a person has to be able to bring objections against administrative actions to court.¹

Protection against government power has been acknowledged in the *Klass* case, in which the European Court of Human Rights (ECtHR) states that:

'The rule of law implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.'²

The Court has repeatedly confirmed that the EU is a union based on the rule of law,³ which has later been affirmed in Article 2 TEU.⁴

¹ Pennarts 1998, p. 1. Also: Damen et al. 2006, p. 53. Or, in Craig's words, 'The idea that administration should be procedurally and substantively accountable before the courts has been central to the rule of law' (Craig 2018, p. 269).

² *Klass and others v Germany*, ECtHR App. No. 5029/71, 6 September 1978, para. 55; see also Pennarts 1998, p. 1.

³ Case C-294/83, *Les Verts v Parliament*, ECLI:EU:C:1986:166, para. 23; Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, para. 38; Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 91; Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 30; Case C-619/18, *Commission v Poland (Indépendance de la Cour suprême)*, ECLI:EU:C:2019:531, para. 42; Case C-663/17 P, *ECB v Trasta Komercbanka and Others*, ECLI:EU:C:2019:923, para. 54. Cf. Lenaerts et al. 2014, p. 2; Jacobs 2012, p. 382; Schermers & Waelbroeck 2001, p. 310.

⁴ The importance of the rule of law is, furthermore, expressed in the Preamble to the Charter of Fundamental Rights of the European Union.

As pointed out by the Court of Justice, '[a]ccording to Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, *inter alia*, justice prevails'.⁵

The EU being founded on, *inter alia*, the value of the rule of law infers that the acts of the Union institutions are subject to review of their compatibility with, in particular, the Treaties, the general principles of law and the fundamental rights.⁶ To that end, the TFEU has established a complete system of legal remedies and procedures designed to allow the Court to review the legality of measures adopted by the institutions.⁷ This complete system of judicial protection is established by Articles 263 and 277 TFEU (the action for annulment), on the one hand, and Article 267 TFEU (the preliminary ruling), on the other.⁸

The Court has emphasized that both the Union and national courts are entrusted with the responsibility for ensuring judicial review in the EU legal order.⁹ It is for the Member States to establish a system of legal remedies and procedures in their state that suffices to ensure effective judicial protection for persons in the fields covered by EU law.¹⁰

The Court is only competent to rule on matters if it has a specific legal basis to do so in the Treaties.¹¹ This points to a general division of responsibilities aligned with the division of legislative and administrative powers, whereby the Court is responsible for reviewing acts of Union institutions and national courts

⁵ Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 30.

⁶ Case C-550/09, E and F, ECLI:EU:C:2010:382, para. 44; Case C-583/11 P, *Inuit Tapiriat Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 91.

⁷ Case C-294/83, *Les Verts v Parliament*, ECLI:EU:C:1986:166, para. 23; Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, para. 40; Case C-583/11 P, *Inuit Tapiriat Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 92; Case C-274/12 P, *Telefónica v Commission*; ECLI:EU:C:2013:852, para. 57. Lenaerts speaks of a complete and coherent system of legal remedies and procedures, complete in the sense that several legal remedies and procedures are in place to ensure the review of EU institutions' acts on their legality and coherent in the sense that the system defines the tasks of the EU Courts and national courts in accordance with the allocation of jurisdiction as laid down in the Treaties. (Lenaerts 2007, p. 1626; also: Lenaerts et al. 2014, p. 1). Schermers and Waelbroeck point out that the Court sometimes uses a strict interpretation, but also sometimes widens the limits of its jurisdiction in order to ensure a complete system of legal remedies and procedures (Schermers & Waelbroeck 2001, p. 310 and the case law mentioned there).

⁸ See Section 5 of this chapter for a more detailed explanation.

⁹ Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 32.

¹⁰ Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 34.

¹¹ Pursuant to Articles 13(2) and 5(2) TEU, EU institutions, including the CJEU, shall act within the powers conferred on them in the Treaties. Cf. Lenaerts et al. 2014, p. 3; Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, paras 44-45; Case C-169/09, *Miles and Others*, ECLI:EU:C:2011:388, para. 45.

are responsible for reviewing national legislative and administrative acts.¹² However, as discussed in the introduction to Chapter 1 and analysed in more detail in Chapters 4-7, this division between courts is not as straightforward if it concerns composite procedures.

A last consequence of the rule of law worth mentioning here is that the above-mentioned complete system of legal remedies and procedures has to be interpreted in light of the fundamental right of effective judicial protection.¹³

The Court has stated that the fact the EU is based on the rule of law means that the procedural rules governing actions brought before the Court have to be interpreted in a way ensuring that these procedural rules are implemented so as to contribute to achieving effective judicial protection of an individual's right under Union law.¹⁴ However, such an interpretation cannot set aside the conditions laid down in the Treaties.¹⁵ The meaning of this interpretation will become clear when discussing the complete system of legal remedies and procedures in Section 5 below and in Chapters 4-7.

3 Sources

Union institutions are subject to the provisions of the Charter of Fundamental Rights of the European Union¹⁶ (the Charter) and general principles of EU law.¹⁷ As an EU institution, the European Central Bank must thus apply these rules.

¹² Pernice 2013, p. 389.

¹³ Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, para. 44; Case C-583/11 P, *Inuit Tapiruit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 98; Case C-263/02 P, *Commission v Jégo-Quéré*, ECLI:EU:C:2004:210, para. 36.

¹⁴ Case C-432/05, *Unibet*, ECLI:EU:C:2007:163, para. 44; Case C-521/06 P, *Athinaiki Techniki v Commission*, ECLI:EU:C:2008:422, para. 45.

¹⁵ Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, para. 44; Case C-583/11 P, *Inuit Tapiruit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 98; Case C-263/02 P, *Commission v Jégo-Quéré*, ECLI:EU:C:2004:210, para. 36.

¹⁶ Article 51(i) Charter. The Charter is binding within the EU since the Lisbon Treaty entered into force on 1 December 2009, as Article 6(i) TEU stipulates that the Charter has the same legal status as the Treaties. Before the entry into force of the Lisbon Treaty, the Charter was not legally binding, but only solemnly proclaimed by the European Parliament, the Council and the Commission in 2000. With respect to legal protection, especially Charter Articles 41 (the right of good administration), 47 (right to an effective remedy and to a fair trial) and 48(2) (right of defence) are relevant.

¹⁷ General principles can be grounds for review under Articles 263 and 267 TFEU and, consequently, be a ground for invalidation of an act of a EU institution (cf. Craig & De Búrca 2011, p. 109; Tridimas 2006, p. 31). As such, general principles always apply to EU institutions.

Member States are only subject to both the Charter and general principles of EU law when implementing Union law,¹⁸ or, worded differently, acting within the scope of Union law.¹⁹ They are also responsible for all national authorities carrying out tasks of public authority, such as National Competent Authorities.²⁰ So, when Member States are subject to the Charter and general principles of EU law, the NCAs are equally so.

Moreover, since the subject matter of this research (EU banking supervision) is laid down in an EU Regulation (the SSM Regulation) and the relevant substantive laws are laid down in EU laws too (the CRR and CRD IV), NCAs act within the scope of Union law when carrying out their tasks within the SSM and are thus also subject to the Charter and the general principles of EU law.²¹ Accordingly, the Charter and general principles of EU law must be applied when interpreting the right of effective legal protection.

The Charter reaffirms the rights as resulting from *inter alia* the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the case law of the CJEU and of the ECtHR.²²

The EU Courts interpret the Charter in conformity with the ECHR. After all, Article 52(3) of the Charter²³ stipulates that the meaning and scope of the rights in the Charter corresponding to rights guaranteed by the ECHR shall be the same as laid down in the ECHR, which is supposed to set the minimum

¹⁸ Article 51(i) Charter. With respect to general principles of law, see e.g.: Case C-349/07, *Sopropé*, ECLI:EU:C:2008:746, para. 38.

¹⁹ Cf. Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, paras 17-23. The wording in the Charter, ‘to the Member States only when they are implementing Union law’, has the same scope as the Court’s wording in its earlier case law, ‘only binding on the Member States when they act within the scope of Union law’, meaning that the Charter applies only if another provision of EU law is arguably applicable (Prechal 2016, p. 146 and the case law mentioned there). For a more extensive discussion of the scope of the Charter, see: Sarmiento 2013, pp. 1272-1287; Van den Brink et al. 2015, pp. 148-155. With respect to general principles of law, a similar scope applies. Member States, including authorities that may be considered to be extensions of the state like constitutionally independent public authorities (Tridimas 2006, pp. 44-47), are only bound to EU general principles of law when implementing EU law or when acting within the scope of EU law (Tridimas 2006, pp. 36-42; Van den Brink et al. 2015, p. 140).

²⁰ Jans & Duijkersloot 2015, p. 465. Cf. Lenaerts 2012, p. 378.

²¹ For a more extensive analysis in this respect, see: Lamandini et al. 2017, pp. 204-206.

²² See Preamble to the Charter. For more about the relation between the Charter and respectively the ECHR and the constitutional traditions common to the Member States, see: Lenaerts 2012, pp. 394-399.

²³ Article 6(i) TEU states that the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter – which includes Article 52 - governing its interpretation and application and with due regard to the explanations referred to in the Charter that set forth the sources of those provisions.

standards.²⁴ Thus, although the EU has not acceded to the ECHR yet,²⁵ the case law of the ECtHR is also relevant in the context of this research.²⁶

Furthermore, insofar as the Charter recognizes fundamental rights as resulting from the constitutional traditions common to the Member States, it interprets those rights in harmony with these traditions.²⁷ Yet, the Charter does not extend in any way the competences of the Union as defined in the Treaties.²⁸

The starting point for discussing the legal safeguards in this research is the Charter, being the applicable EU law, and the accompanying case law of the EU Courts, which will be completed where necessary with case law of the ECtHR.

General principles of EU law are also an important source for the analysis of legal protection.²⁹ In order to determine and develop general principles of law, the Court uses constitutional traditions common to the Member States.³⁰

²⁴ Article 52(3) Charter states that EU law can still provide more extensive protection. The ECHR is supposed to be a ‘floor’ rather than a ‘ceiling’ for EU human rights (Craig & De Búrca 2011, p. 367). See also: Widdershoven & Craig 2017, p. 332.

²⁵ Article 6(2) TEU states that the EU shall accede to the ECHR. In 2014, the Court gave a negative opinion about the negotiated agreement for accession (Opinion 2/13, ECLI:EU:C:2014:2454). At the moment of writing this research, a new agreement is being negotiated (see: <http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-completion-of-eu-accession-to-the-echr; last visit on 24 July 2020>). See also: Van den Brink et al. 2015, pp. 157-159.

²⁶ For more about the relation between the ECHR and the Charter, see *inter alia*: Bratza 2013; Craig & De Búrca 2011, pp. 397-398; Van den Brink et al. 2015, pp. 155-159.

²⁷ Article 52(4) Charter.

²⁸ Article 51(2) Charter and Article 6(1) TEU. Cf. Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 97, where the Court explicitly states that the Charter is drawn up with due regard for the powers and tasks of the EU and for the principle of subsidiarity. This shows the sensitivity in the discussion about competences, cf. Van den Brink et al. 2015, p. 148.

²⁹ The use of general principles by the EU Courts is based on the general wording of Article 19(1) TEU, stating that the CJEU has to ensure observance of the law in interpreting and applying the Treaties. The word ‘law’ allows the Court to give a broad interpretation to its duty and is used by the Court to create a system of general principles of law against which EU institutions’ or Member States’ actions can be reviewed (Craig & De Búrca 2011, p. 110. Also: Tridimas 2006, p. 19-20; Van den Brink et al. 2015, pp. 136-137; Craig 2018, p. 269.). Furthermore, Article 263, second subparagraph, TFEU states that judicial review of EU institutions’ actions shall be available for *inter alia* infringement of the EU Treaties or of any rule of law relating to their application or misuse of powers. The ambiguity of the wording ‘any rule of law’ provides the Court with a basis to justify the imposition of administrative law principles as a ground for review (Craig & De Búrca 2011, pp. 109-110).

³⁰ Craig & De Búrca 2011, p. 110; Tridimas 2006, pp. 23-25; Van den Brink et al. 2015, p. 137. Furthermore, Article 6(3) TEU states that fundamental rights as, *inter alia*, result from the constitutional traditions common to the Member States shall constitute general principles of EU law. In developing the general principles, the Court has looked at existing principles in the major legal systems of the Member States, used the ones that seemed to be best developed and transformed them into the EU legal concept (Craig

General principles of law are, furthermore, developed by a combination of written EU law, the interpretation of the Court thereof and international law,³¹ the latter particularly referring to the ECHR.

The Court has held that fundamental rights set out in the ECHR form an integral part of the general principles of law, of which the Court ensures the observance.³² This has been reaffirmed in Article 6(3) TEU, which states that fundamental rights as guaranteed by the ECHR shall constitute general principles of the Union's law. The Court uses *inter alia* the jurisprudence of the ECtHR to determine the content of the general principles of law.³³

General principles of law have several functions, five of which are relevant to this research. First, general principles of law can be used, in accordance with the hierarchy of Union law, to interpret written legislation.³⁴ Second, they can be grounds for review under Articles 263 and 267 TFEU³⁵ and, consequently, be a ground to invalidate an act of a Union institution.³⁶ Third, general principles of law are especially relevant for the EU, since the EU is a relatively young legal order and, consequently, has to deal with the inevitable gaps and inconsistencies that come with it.³⁷ Moreover, general principles are all the more useful, since they give the Court the flexibility to be responsive to developments with respect to the continuously changing and increasingly integrating Union.³⁸ It goes without saying that the SSM illustrates just that remarkably well. Lastly, general principles can easily form a bridge between different legal systems due to their open-ended character.³⁹ For all these reasons they may have an important role to play as a source for ensuring legal protection.

³¹ & De Búrca 2011, p. 110; also: Craig 2018, p. 270). Or, as Tridimas puts it, the Court is 'selective and creative' when recognizing legal proposition as a general principle of law (Tridimas 2006, pp. 25-26).

³² Van den Brink et al. 2015, p. 138.

³³ Case C-260/89, ERT v DEP, ECLI:EU:C:1991:254, para. 41; Case C-49/88, Al-Jubail Fertilizer Company and Others v Council, ECLI:EU:C:1991:276, para. 15. Particularly ECHR Articles 6 (right to a fair trial), 7 (no punishment without law), 8 (right of respect for private and family life), and 13 ECHR (right to an effective remedy) are relevant with respect to legal protection. Given the overlap between fundamental rights and general principles of EU law, I will not make a fundamental distinction between both sources in this research.

³⁴ Case C-260/89, ERT v DEP, ECLI:EU:C:1991:254, para. 41. Cf. Ravo 2012, pp. 104-105.

³⁵ General principles of law are below (Craig & De Búrca) or equal to (Tridimas) the Treaties and may be used to interpret Treaty provisions. They are above secondary EU law and may be used to interpret secondary law or to declare it invalid. (Tridimas 2006, pp. 29 and 50-51; Craig & De Búrca 2011, p. 109; Wojcik 2016, p. 214.).

³⁶ See footnote 17.

³⁷ Craig & De Búrca 2011, p. 109; Tridimas 2006, p. 31.

³⁸ Van den Brink et al. 2015, p. 137; Tridimas 2006, pp. 17-18.

³⁹ Tridimas 2006, p. 18. Tridimas refers to the EU as being a 'dynamic entity'.

⁴⁰ Van den Brink et al. 2015, p. 135. Although different legal systems may differ widely in how a specific problem should be resolved, they often can agree on the general principles that underlie their chosen

4 Effective legal protection

4.1 Defining effective legal protection

When assessing legal protection within the SSM, it is looked at from a safeguard and an instrumental perspective. As explained in Chapter 1, this broad interpretation allows us to consider both the legal protection in place to protect a person's rights (the safeguard perspective) and the extent to which legal protection strengthens or hampers the effectiveness of Union law (the instrumental perspective).⁴⁰ Thus, legal protection must not only adequately ensure legal safeguards, but also allow for an effective application and enforcement of the EU rules in the area concerned.

The safeguard dimension refers to ensuring protection for persons against individual administrative decisions, covering such elements as good administration (e.g. the right to be heard) and the right of effective judicial protection (e.g. requirements relating to access to courts, and to procedures and remedies). These issues are the subject matter of Section 4.2 of this chapter.

The instrumental dimension deals with general principles of Union law related to the EU law's effectiveness, such as the principles of effectiveness and legal certainty. It also includes elements based on common sense, for instance that judicial power has to be organized coherently and orderly. Put differently, the kind of elements one simply would expect from legal protection for it to be effective and, consequently, ensure the effectiveness of Union law.

In this research, the instrumental perspective is thus no verbatim application of the general principle of effectiveness in Union law. For the sake of this research, the term 'effectiveness' refers to the broader meaning of the word:

solutions. Therefore, general principles are a useful tool for mutual coordination and harmonization of legal systems within the EU's legal order (Van den Brink et al. 2015, pp. 135-136).

⁴⁰ Cf. Chapter 1, Section 4.1. This broad interpretation of the effective legal protection resembles the different rationales of administrative rules. Scholars distinguish between two rationales of administrative law, being the instrumental and the protective functions. The latter refers to the individual legal protection against an administrative decision, while the former alludes to an efficient administrative process (Nehl 2009, pp. 349-351). See also: Ottow 2015, pp. 49-50; Aelen 2014, pp. 13-15; Lachnit 2016, pp. 61-62. An example can be found in Tridimas' discussion of the right to be heard. He mentions that, according to the Court, there are two rationales, being the instrumental rationale (i.e. promoting the quality of administration since the information supplied and the views expressed by the parties may contribute to better decision-making) and the non-instrumental rationale (i.e. sound justice) (Tridimas 2006, pp. 370-371). He refers to the Alvis v Council case, in which the Court states that administrative authorities must provide for the opportunity to reply to allegations before any disciplinary decision is taken and that 'this rule, *which meets the requirements of sound justice and good administration*, must be followed by Community institutions' (italics added, Case C-32/62, Alvis v Council of the EEC, ECLI:EU:C:1963:15, p. 55).

while it relates to the more technical legal interpretation of the principle of effectiveness in the context of the principle of national procedural autonomy, it also includes an effective implementation of Union law in general. On the other hand, it is limited to the way in which legal protection may affect the effectiveness of EU law, and so the supervisors' effectiveness in general and the way in which they have to ensure an effective implementation of EU law are left aside. The instrumental perspective is the subject matter of Section 4.3 of this chapter.

This broader interpretation of 'effective legal protection' allows for choices with respect to the organization of legal protection, and allows to focus particularly on the effective application and enforcement of Union law in the area concerned, within this concept. Of these choices, some may entail a restriction of the right to effective judicial protection, while others are simply choices, without limiting this right. This is elaborated on below.

When the right of effective judicial protection would be restricted, such a restriction has to be justified within the framework of Article 52(1) of the Charter. This article generically regulates the possibility to limit the exercise of rights and freedoms recognized by the Charter.⁴¹ It reads:

‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’

A good example of the way in which the Court applies Article 52(1) of the Charter can be found in the *Puškár* case,⁴² in which it has concluded that the national provision at issue contains an additional step for access to the court, since it entails a delay in access to a judicial remedy and possible additional costs. Such a limitation of the right to an effective remedy under Article 47 of the Charter can only be justified in accordance with Article 52(1) of the Charter.⁴³

⁴¹ Cf. Case C-562/12, Liivimaa Lihaveis, ECLI:EU:C:2014:2229, in which the Court applies Article 52(1) Charter and concludes that the limitations to the right of effective judicial protection are not provided for by law and therefore not in line with the Charter (paras 72-74). For a general discussion on the limitations to the exercise of the rights and freedoms recognized by the Charter on the basis of its Article 52(1), see: Lenaerts 2012, pp. 388-393.

⁴² Case C-73/16, *Puškár*, ECLI:EU:C:2017:725.

⁴³ Case C-73/16, *Puškár*, ECLI:EU:C:2017:725, paras 61-62. Cf. Case C-439/14, *Star Storage*, ECLI:EU:C:2016:688, para. 49. In respect of limitations to the exercise of the rights and freedoms recognized by the Charter in accordance with its Article 52(1), see: Case C-477/14, *Pillbox 38*, ECLI:EU:C:2016:324, para. 160; Case C-283/11, *Sky Österreich*, ECLI:EU:C:2013:28, para. 48.

The *Puškár* case concerns a preliminary ruling procedure, in which the Court of Justice has been asked whether Article 47 of the Charter precludes a national provision which subjects the exercise of a judicial remedy by a person to prior exhaustion of the remedies available before the national administrative authorities.⁴⁴ The Court recalls that such a limitation of the right to an effective remedy is only justified in case it meets the requirements of Article 52(1) of the Charter.

Firstly, the Court finds that, since the legal basis of the obligation to exhaust available administrative remedies has been laid down in the Code of Civil Procedure, it is considered to be provided for by national law. Secondly, imposing an additional procedural step to exercise the right to effective judicial protection does, according to the Court, not call into question the right itself. As such, it respects the ‘essential content of the fundamental right’.⁴⁵ Thirdly, the Court argues that the obligation also pursues legitimate general interest objectives, since it is intended to relieve the courts and increase the efficiency of judicial proceedings in the specific cases addressed by the obligation.⁴⁶ Although not literally mentioned, the Court clearly considers the effectiveness of judicial protection. Lastly, the Court considers that the obligation appears to be appropriate for achieving the general interest objectives, and that any disadvantages caused by the obligation are clearly disproportions to these objectives. It is, however, for the national court to examine whether the practical arrangements for the exercise of administrative remedies under the relevant national law do not disproportionately affect the right to an effective remedy.⁴⁷

The Court has applied other tests as well to accept a restriction of the right to effective judicial protection for reasons of effectiveness.⁴⁸ A good example of such other tests can be found in the *Alassini* case, in which the Court has ruled that fundamental rights do not constitute ‘unfettered prerogatives’ and may be restricted. Such restrictions have to ‘correspond to objectives of general interest pursued by the measure in question’ and ‘not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed’.⁴⁹ Nevertheless, Article 52(1)

⁴⁴ Case C-73/16, *Puškár*, ECLI:EU:C:2017:725, para. 45.

⁴⁵ Case C-73/16, *Puškár*, ECLI:EU:C:2017:725, para. 64.

⁴⁶ Case C-73/16, *Puškár*, ECLI:EU:C:2017:725, para. 67.

⁴⁷ Case C-73/16, *Puškár*, ECLI:EU:C:2017:725, paras 68-72. With respect to the principle of proportionality, the Court refers to its judgment in the *Alassini and Others* case (Joined cases C-317/08 – C-320/08, *Alassini and Others*, ECLI:EU:C:2010:146), in which the issue is similar to the *Puškár* case, but the Court applies a different test.

⁴⁸ Prechal 2016, pp. 151-152; Craig 2018, p. 517.

⁴⁹ Joined cases C-317/08 – C-320/08, *Alassini and Others*, ECLI:EU:C:2010:146, para. 63. Also: Case C-28/05, *Dokter and Others*, ECLI:EU:C:2006:408, para. 75; Case C-358/16, *UBS Europe and Others*, ECLI:EU:C:2018:715, para. 62. See also: Van den Brink et al. 2015, pp. 239-240; Prechal 2016, p. 152. In the *Alassini* case the issue is whether national law can make the admissibility of judicial proceedings

of the Charter is increasingly applied by the Court in cases governed by the Charter.⁵⁰

The relationship between Article 52(1) of the Charter and other ‘tests’ used in case law is not defined precisely and hard to capture in just one sentence. Prechal provides an insightful analysis in this respect.⁵¹

Some elements of Article 52(1) of the Charter have barely been addressed previously, while others may be rather similar to the ones used in tests previously applied by the Court. The proportionality and grounds of general interests tests seem, for instance, not to entail important changes.⁵² The requirements that the limitation must be provided for by law, and the essence of the rights and freedoms must be respected are, on the other hand, rather new.⁵³

Compared to the pre-Charter era, Article 52(1) of the Charter structures, in Prechal’s view, the review of limitations to the principle of effective judicial protection in a more compelling way. In particular, adding the requirements that the limitation must be provided for by law and the essence of the rights and freedoms must be respected has contributed to a more structured review.⁵⁴

A choice regarding the organization of judicial protection (without limiting the right to it) in which the effectiveness of EU law plays an important role can be

concerning Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on Universal Service and users’ rights relating to electronic communications networks and services (Universal Service Directive) subject to a mandatory attempt to reach an out-of-court settlement (para. 62). The Court concluded that the national provisions at stake were aimed at a quicker and less expensive settlement of disputes related to the topic at issue (i.e. electronic communications), and at reducing the burden on the court system, which pertained to legitimate objectives in the general interest (para. 64). The national procedure also did not seem, in light of the rules for the operation of that procedure, disproportionate in relation to the objectives pursued. The rules stated for instance that the outcome of such settlement procedure was not binding on the parties, and the procedure did not cause a substantial delay for the judicial proceedings before court (paras 64-67). Therefore, the Court ruled that the national procedure at issue, subject to the specific procedural rules at issue, complied with the principle of effective judicial protection (para. 66). For a more extensive discussion of the tests the Court applies in this case, see: Ravo 2012, pp. 112-113.

⁵⁰ Prechal 2016, p. 152.

⁵¹ See Prechal 2016, pp. 151-154.

⁵² Prechal notes, however, that the intensity of the review may be stricter in case of a serious interference with a fundamental right such as effective judicial protection. Also, a review of a limitation to a fundamental right for reasons of an objective of general interest and a review of a limitation to a fundamental right in order to protect the rights and freedoms of others may require different tests to find a fair balance (Prechal 2016, p. 153).

⁵³ Prechal 2016, pp. 152-153.

⁵⁴ Prechal 2016, p. 154. For more about the limitations of fundamental rights and about the differences between the prior jurisprudence of the Court and ECtHR and the limitations based on the Charter, see: Craig 2018, pp. 517-522.

found in the *Berlusconi and Fininvest* case. In this case, a national draft decision preceding a final ECB decision has been challenged before the Italian court, resulting in a request for a preliminary ruling about the national court's competences in this respect.⁵⁵

The Court concludes that a single judicial review by the EU Courts alone is needed if the decision-making process at issue, in which national authorities adopt acts preparatory to a final EU decision based on the exclusive decision-making power of the EU institution, is to be effective.⁵⁶ If national remedies against such national measures were to exist beside the action for annulment of the ECB decision pursuant to Article 263 TFEU, there could be a risk of divergent assessments in one and the same procedure and the Court's exclusive competence to rule on the legality of the ECB final decision could be compromised.⁵⁷ The Court therefore explicitly precludes national courts to rule on such national preparatory measures.⁵⁸

Thus, the Court has put the effectiveness of the decision-making process centre stage when ruling on the type of judicial review applicable in the case. This illustrates the same idea that legal protection and effective implementation of EU law function as communicating vessels as captured by the broad interpretation of 'effective legal protection' in this research.

To conclude these notes defining effective legal protection, it is also relevant to briefly mention the ongoing debate on how to construe the relationship between the principle of effectiveness and the principle of effective judicial protection. Some scholars argue that the principle of effective judicial protection is part of the principle of effectiveness,⁵⁹ whereas others have more recently argued that a separate application of both principles is desirable since they serve different

⁵⁵ The case is discussed in more detail in Chapter 4, Section 3.1.

⁵⁶ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, paras 48-49. Also: Case C-414/18, *Iccrea Banca*, ECLI:EU:C:2019:1036, paras 41-42. A similar assessment of ensuring effective judicial protection in comparison to an effective administration can be found in an earlier case of the General Court: Case T-134/94, *NMH Stahlwerke v Commission*, ECLI:EU:T:1996:85. In this case, the General Court concludes that '[i]n assessing such a possibility, the Court has to resolve a conflict between, on the one hand, the principle of the effectiveness of administrative action and, on the other, the principle of judicial supervision of administrative acts, while respecting the rights of the defence and the principle *audi alteram partem*' (para. 74). Cf. Nehl 2009, p. 349. Nehl states that the Court still is primarily concerned about individual judicial protection when assessing administrative decisions (Nehl 2009, p. 349). The Court bases itself almost exclusively on the rule of law when discussing the effects of process rules (Nehl 2009, p. 351).

⁵⁷ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, para. 50. Also: Case C-414/18, *Iccrea Banca*, ECLI:EU:C:2019:1036, para. 53.

⁵⁸ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, para. 59. Cf.: Case C-414/18, *Iccrea Banca*, ECLI:EU:C:2019:1036, para. 54.

⁵⁹ Cf. Tridimas 2006, pp. 418-476 (he discusses effective judicial protection under the umbrella of the principle of effectiveness); Ottow 2006, p. 72 (she states that the principle of effectiveness has been

purposes and are driven by different rationales.⁶⁰ These scholars do acknowledge the overlap between the principles, but point out that this overlap is only partial and that there is a number of differences⁶¹ that would justify a separate application and a test of national procedural and remedial provisions against both principles.⁶²

Below, I discuss the principles separately to provide a better overview of their different purposes and rationales, but in this research the principle of effectiveness is considered part of (the instrumental perspective of) the principle of effective judicial protection, and is thus considered only insofar as it is relevant to the effectiveness of judicial protection. Section 4.2 starts off by discussing the safeguard perspective of effective judicial protection, followed by the instrumental perspective in Section 4.3.

4.2 Effective legal protection from a safeguard perspective

To set the standard for effective legal protection from a safeguard perspective, this research encompasses legal safeguards in place both during the administrative phase and before court. The legal safeguards relevant to this research are looked at on the basis of the Charter and CJEU case law, given that the EU legal framework is firstly applicable in case of the SSM, as discussed in Section 3 of this chapter. Where necessary, this will be completed

elaborated in the context of the principle of effective judicial protection). See also: Accetto & Zlepnić 2005, p. 385 and the literature mentioned there.

⁶⁰ Prechal & Widdershoven 2011, p. 50; Van den Broek 2015, p. 34; Widdershoven 2016, pp. 86-87; Accetto & Zlepnić 2005, p. 388; Ravo 2012, pp. 122-124. Accetto and Zlepnić see the principle of effective judicial protection as only one feature of the overarching obligation stemming from the principle of effectiveness (Accetto & Zlepnić 2005, p. 388). Ravo observes a certain evolution in the Court's judicial tendency towards an approach more explicitly based on human rights, thus turning effective judicial protection into a peculiar source of self-standing rights that needs to be protected and granted effectiveness by the Court itself and by national courts within the field of application of EU law. Although this brings about certain challenges, she concludes that this would be a coherent solution (Ravo 2012, pp. 122-124).

⁶¹ Prechal and Widdershoven conclude, *inter alia*, that (i) testing the principle of effectiveness seems less demanding than testing the principle of effective judicial protection, (ii) the principle of effectiveness is essentially negatively formulated, whereas the principle of effective judicial protection seems to develop into a positive standard, and (iii) the scope of the principle of effectiveness is broader than the scope of the principle of effective judicial protection (Prechal & Widdershoven 2011, pp. 39-42). Widdershoven also points out that the principle of effective judicial protection can have more far-reaching interferences with national law than the principle of effectiveness does (Widdershoven 2019(c), p. 21). He argues that the Court more recently seems to assess procedural issues primarily on the basis of Article 47 Charter when they relate in some way to effective judicial protection (Widdershoven 2019(c), p. 22; for examples see pp. 21-24).

⁶² Prechal & Widdershoven 2011, p. 46.

by the relevant ECHR provisions and case law. The safeguards are relevant for both natural and legal persons.⁶³

The safeguards laid down in the Charter's Articles 41 (the right of good administration) and 7 (respect for private and family life)⁶⁴ are especially relevant in the administrative procedure, while the legal safeguards laid down in its Article 47 (right to an effective remedy and to a fair trial)⁶⁵ apply to the legal protection before a court and implement the general principle of effective judicial protection.

When administrative sanctions are considered to be of a criminal nature,⁶⁶ additional legal safeguards apply. This concerns the phase this research refers to as the investigatory phase.⁶⁷ The safeguards applicable in this phase are set out in the Charter's Articles 48 (presumption of innocence and right of defence), 49 (principles of legality and proportionality of criminal offences and penalties), and 50 (right not to be tried or punished twice in criminal proceedings for the same criminal offence).⁶⁸

Only the right not to incriminate oneself, which is part of the rights of defence of Article 48(2) of the Charter, is discussed more extensively below. The principle of legality is interpreted more broadly in this research than the criminal law legality principle of Article 49(1) of the Charter and is therefore discussed separately in Section 4.4. The remaining safeguards seem not specifically affected by the composite procedures in place.⁶⁹

⁶³ In the DEB case, the Court confirms that it is not impossible for legal persons to rely on rights laid down in the Charter as well (Case C-279/09, DEB, ECLI:EU:C:2010:811, para. 59). De Moor-van Vugt & Widdershoven argue that, although this case only relates to the right to legal aid, the Court's reasoning in this respect makes it plausible to conclude that procedural rights in the Charter are also applicable to legal persons (De Moor-van Vugt & Widdershoven 2015, p. 308).

⁶⁴ The right of respect for private and family life is a general fundamental right. Article 7 Charter corresponds to Article 8 ECHR.

⁶⁵ This article corresponds to Articles 6(1) and 13 ECHR. Cf. Explanations to the Charter regarding Article 47. The protection provided by Articles 6 and 7 ECHR only applies to 'criminal charges', except for Article 6(1). Due to the wording 'determination of his civil rights and obligations' the scope of paragraph 1 of Article 6 ECHR is much broader than the second and third paragraphs. The first paragraph, therefore, applies inter alia to large parts of administrative law. If the outcome of the dispute is determining for a persons' civil rights or obligations, the dispute falls under this article (Pennarts 1998, p. 6). Article 13 ECHR is only applicable in case the rights and freedoms as set out in the ECHR itself are violated.

⁶⁶ See Chapter 2, Section 6.1.

⁶⁷ See Chapter 1, Section 4.2.

⁶⁸ These safeguards correspond with Articles 6 and 7 ECHR.

⁶⁹ Presumption of innocence means that everybody who has been charged shall be presumed innocent until proven guilty according to law (Article 48 Charter, and Article 6(2) and (3) ECHR). The composite procedures in place do not affect the way in which this is to be ensured. The principle of proportionality means that the severity of penalties may not be disproportionate to the criminal offence (Article 49(3) Charter). Again, this requirement is not particularly affected by the composite procedures in place in

To end this Section 4.2, the principle of effective judicial protection is discussed, which shapes, together with the safeguards relevant to the decision-making procedure, the assessment framework for the safeguard perspective of effective legal protection.

4.2.1 Good administration

The rights that are already applicable in the preparatory phase of a supervisory decision are often generically referred to as rights of defence.⁷⁰ These rights, with the right to be heard at their core, have been developed by the Court in its case law⁷¹ and later been implemented in Article 41 of the Charter,⁷² which refers to them as the right of good administration. Both terms are used interchangeably hereafter.

Whereas other provisions of the Charter are addressed to both the Union administration and Member States when implementing Union law, Article 41 of the Charter is solely addressed to institutions, bodies, offices and agencies of the Union. Persons are nonetheless protected in case of Member State actions

the SSM. The *ne bis in idem* principle concerns the right to not be tried or punished twice in criminal proceedings for the same criminal offence (Article 50 Charter). It prohibits cumulation of two penalties of the same kind, i.e. sanctions of a criminal nature, but does not prevent authorities from imposing a sanction not of a criminal nature in addition to sanctions of a criminal nature (De Moor-van Vugt & Widdershoven 2015, p. 311). Application of this principle is not limited to one Member State, but applies to the EU, so also between the jurisdictions of several Member States (cf. Explanations to the Charter regarding Article 50, p. 45; also: De Moor-van Vugt & Widdershoven 2015, pp. 311-313; De Moor-van Vugt 2012, pp. 37-40.). Although this is thus also relevant within the SSM, this safeguard is not particularly affected by the composite procedures in place. The main questions in this respect particularly arise when EU (composite) administrative procedures are combined with national criminal law, which is outside the scope of this research (see Chapter 1, Section 4.4). For more about this principle in the context of the SSM, see: Van Bockel 2015; Ferran 2015; D'Ambrosio 2013, pp. 79-82; Lamandini et al. 2017, pp. 239-240; Luchtmans et al. 2019, pp. 39-40.

⁷⁰ For more information about the rights of defence in general, see *inter alia*: Tridimas 2006, Chapter 8; Van den Brink et al. 2015, pp. 235-250.

⁷¹ E.g. Case C-32/62, *Alvis v Council of the EEC*, ECLI:EU:C:1963:15, p. 119; Case C-17/74, *Transocean Marine Paint Association v Commission*, ECLI:EU:C:1974:106, para. 15. The Court confirms that the right of defence should be considered a fundamental right (Case C-28/05, *Dokter and Others*, ECLI:EU:C:2006:408, para. 74; Case C-141/08 P, *Foshan Shunde Yongjian Housewares & Hardware v Council*, ECLI:EU:C:2009:598, para. 83; Case T-410/06, *Foshan City Nanhai Golden Step Industrial v Council*, ECLI:EU:T:2010:70, para. 109; cf. Craig & De Búrca 2011, p. 520).

⁷² Cf. Tridimas 2006, p. 370. The Charter speaks of 'the right to good administration'. Van den Broek points out that scholars consider this an innovation and retrograde step at the same time: although it is the first time this right has been laid down in a charter, it is more limited than the Court's case law on good administration (Van den Broek 2015, p. 26).

as well, since the general principles of law, including the rights of defence,⁷³ are still applicable to Member States when acting within the scope of EU law.⁷⁴

The right to good administration pertains to the right to have affairs handled impartially, fairly and within a reasonable time, as well as the right to be heard, the right to have access to files and the duty for the administrative authority to provide reasons for its decision.⁷⁵

It is settled case law that these rights should be guaranteed in all procedures initiated against a person which may result in a measure adversely affecting the person, even in the absence of any rules governing the procedures in question.⁷⁶ They are thus already to be guaranteed in the phase this research refers to as the supervisory phase, since all procedures may result in a measure adversely affecting a person. Guaranteeing these rights only in an actual court proceeding or if sanctions are imposed is not sufficient.⁷⁷

The Court has emphasized repeatedly that, in order to ensure adequate judicial protection, respect of the rights of defence is of even greater importance when

⁷³ Case C-166/13, Mukarubega, ECLI:EU:C:2014:2336, para. 45. Cf. Prechal 2016, pp. 150-151.

⁷⁴ Cf. Prechal 2016, pp. 150-151. Prechal also mentions that under certain circumstances the safeguards laid down in Article 41 Charter may also fall within the scope of Article 47 Charter, and thus be applicable to Member States when acting within the scope of EU law (Prechal 2016, p. 151). See also: Widdershoven & Craig 2017, p. 337. For examples, see: Case C-604/12, N., ECLI:EU:C:2014:302, paras 49-50; Case C-419/14, WebMindLicenses, ECLI:EU:C:2015:832, paras 83-84.

⁷⁵ Article 41(1) and (-2) Charter. Nehl notes there is a lot of terminological and conceptual confusion about the principle of good administration (Nehl 2009, pp. 326-327 and 350). Furthermore, he points out that in the context of Article 41 Charter this principle mainly covers procedural rather than substantive aspects (Nehl 2009, pp. 223 and 350).

⁷⁶ Case C-28/05, Dokter and Others, ECLI:EU:C:2006:408, para. 74; Case C-32/95 P, Commission v Lisrestal and Others, ECLI:EU:C:1996:402, para. 21; Case C-462/98 P, Mediocurso v Commission, ECLI:EU:C:2000:480, para. 36; Case C-287/02, Spain v Commission, ECLI:EU:C:2005:368, para. 37; Case C-349/07, Sopropé, ECLI:EU:C:2008:746, paras 36-37; Case C-141/08 P, Foshan Shunde Yongjian Housewares & Hardware v Council, ECLI:EU:C:2009:598, para. 83; Case T-410/06, Foshan City Nanhai Golden Step Industrial v Council, ECLI:EU:T:2010:70, paras 109-111; Case T-50/96, Primex Produkte Import-Export and Others v Commission, ECLI:EU:T:1998:223, para. 59; Case T-42/96, Eyckeler & Malt v Commission, ECLI:EU:T:1998:40, para. 76; Case T-290/97, Mehibus Dordtselaan v Commission, ECLI:EU:T:2000:8, para. 46; Case C-135/92, Fiskano v Commission, ECLI:EU:C:1994:267, para. 39; Case T-102/00, Vlaams Fonds voor Sociale Integratie van Personen met een Handicap v Commission, ECLI:EU:T:2003:192, para. 59. The Court has even accepted the right to be heard in a case in which there was no decision directly affecting the rights of the applicants, but in which adopting and publishing a report of the Court of Auditors could have consequences for the persons mentioned therein to such a degree that these persons had to be enabled to make observations on those points in the report referring to them by name before such reports were made final (Case C-315/99 P, Ismeri Europa v Court of Auditors, ECLI:EU:C:2001:391, para. 29; cf. Tridimas 2006, pp. 382-383).

⁷⁷ Van den Brink et al. 2015, p. 236; Craig & De Búrca 2011, p. 520.

an administrative authority has discretionary powers.⁷⁸ In case of discretion, the Court applies a deferential review with respect to the substance of the case, which is to some extent compensated by a strict review of the procedural requirements.⁷⁹ The Court has determined that in such cases an institution must satisfy itself whether it has been provided with all relevant information to be able to make a well-considered decision and, if not, verify which party has the knowledge or information needed to carefully examine the case and make a well-considered decision. The party that can deliver the necessary knowledge or information must be heard by the institution in question.⁸⁰

In *Technische Universität München*,⁸¹ the Court of Justice states that, if an EU institution has a certain power of appraisal, it is of even more fundamental importance to respect the rights guaranteed by the EU legal order in administrative procedures, such as the duty to carefully and impartially examine all the relevant aspects of the individual case, as well as the right to be heard and the duty to adequately justify a decision. Only if the (at the time) Community institution respects such rights, the Court can verify the presence of the factual and legal elements upon which the exercise of the power of appraisal depends.⁸²

The case concerned an administrative procedure consisting of complex technical evaluations, which required the Commission to exercise a power of appraisal so as to assess whether the apparatus at issue could be imported free of Common Customs Tariff duties because apparatus of equivalent scientific value were not being manufactured in the Community.⁸³

The applicable procedures provided for the Commission to consult the Member State and, if necessary, a group of experts. The Court pointed out it had not been shown that members of the group of experts themselves had the knowledge needed to address the technical problems raised by the required examination. The Commission would therefore have infringed upon its duty to carefully and impartially examine all the relevant aspects of the case.

⁷⁸ Case C-269/90, Technische Universität München/Hauptzollamt München-Mitte, ECLI:EU:C:1991:438, para. 14. For cases particularly related to the right to be heard, see: Case T-346/94, France-Aviation v Commission, ECLI:EU:T:1995:187, paras 30-34; Case T-50/96, Primex Produkte Import-Export and Others v Commission, ECLI:EU:T:1998:223, para. 60; Case T-42/96, Eyckeler & Malt v Commission, ECLI:EU:T:1998:40, para. 77; Case T-290/97, Mehibus Dordtselaan v Commission, ECLI:EU:T:2000:8, para. 46.

⁷⁹ Prechal & Widdershoven 2020, p. 85-86. See also Section 4.2.4 of this chapter.

⁸⁰ Case C-269/90, Technische Universität München/Hauptzollamt München-Mitte, ECLI:EU:C:1991:438; paras 20-25.

⁸¹ Case C-269/90, Technische Universität München/Hauptzollamt München-Mitte, ECLI:EU:C:1991:438.

⁸² Case C-269/90, Technische Universität München/Hauptzollamt München-Mitte, ECLI:EU:C:1991:438, paras 13-14.

⁸³ Case C-269/90, Technische Universität München/Hauptzollamt München-Mitte, ECLI:EU:C:1991:438, para. 7.

The Court of Justice ruled furthermore that, although the applicable procedure did not provide any opportunity for the applicant to give input, the applicant should have been heard during the actual procedure before the Commission, since in this case it was the applicant who was best aware of the relevant technical details.⁸⁴

Although this case does not concern a typical composite procedure but only a consultation at different levels, the Court has affirmed this reasoning in cases that do concern composite procedures⁸⁵ or in which national authorities enjoy a wide discretion in assessing the facts.⁸⁶

As mentioned, the right to be heard is the core element of the rights of defence. It entails that the addressees of a decision significantly affecting their interests should have the possibility to effectively provide their views on the evidence on which the contested decision is based.⁸⁷ Furthermore, the right to be heard requires that persons are informed clearly and in good time of the essence of the relevant decision and that they have the possibility to submit their observations to the public authority involved.⁸⁸

The right to have access to the file is an important element of the rights of defence as well. This right can be considered to be part of the right to be informed.⁸⁹ In this respect, the Court has stated that '[t]he parties to a case must have the right to examine all the documents or observations submitted to

⁸⁴ Case C-269/90, Technische Universität München/Hauptzollamt München-Mitte, ECLI:EU:C:1991:438, paras 20–25.

⁸⁵ In these composite procedures, the right to be heard of the person concerned has to be secured in the first place within the relation between the person concerned and the national administration, in line with the applicable legal framework. However, although the legal framework does not provide for direct contact between the person concerned and the Commission, the Commission still has to ascertain that the right to be heard has been guaranteed. Case T-346/94, France-Aviation v Commission, ECLI:EU:T:1995:187, paras 30 and 32–34; Case T-50/96, Primex Produkte Import-Export and Others v Commission, ECLI:EU:T:1998:223, paras 58–60; Case T-42/96, Eyckeler & Malt v Commission, ECLI:EU:T:1998:40, paras 75–77.

⁸⁶ Case C-544/15, Fahimian, ECLI:EU:C:2017:255, para. 46. Cf. Prechal & Widdershoven 2020, p. 86.

⁸⁷ Case C-28/05, Dokter and Others, ECLI:EU:C:2006:408, para. 74. In an earlier case, the Court speaks of 'a person whose interests are perceptibly affected by a decision taken by a public authority' (Case C-17/74, Transocean Marine Paint Association v Commission, ECLI:EU:C:1974:106, para. 15).

⁸⁸ Case C-17/74, Transocean Marine Paint Association v Commission, ECLI:EU:C:1974:106, para. 15. The Court clarifies that when the EU legislation does not expressly fix the periods within which the rights of defence have to be exercised, the periods to be complied with by national authorities are governed by national law subject to the principles of equivalence and effectiveness (Case C-349/07, Sopropé, ECLI:EU:C:2008:746, para. 38). (For the principles of equivalence and effectiveness, see Section 4.3.1 of this chapter.)

⁸⁹ Van den Brink et al. 2015, p. 240.

the court for the purpose of influencing its decision, and to comment on them. [...] The fundamental right to an effective legal remedy would be infringed if a judicial decision were founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views'.⁹⁰

However, also the right to have access to the file is not an unlimited right and may be restricted in certain cases.⁹¹ Restrictions to this right may be justified in order to protect requirements of confidentiality or professional secrecy.⁹²

The documents provided to the parties to a case comprise all documents, both incriminating evidence and exculpatory evidence. The Court excludes, however, business secrets of other companies, internal documents of the Union institution involved and other confidential information from the right to have access to the file.⁹³

Another significant feature of the right to good administration is the administration's obligation to give reasons for its decision⁹⁴ or, from the perspective of the person concerned, the right to a reasoned decision.⁹⁵ With respect to legal acts of Union institutions, this requirement to give reason is incorporated in Article 296 TFEU,⁹⁶ which requires that the statement of reasons discloses in a clear and unequivocal way the reasoning followed by the Union institution that

⁹⁰ Case C-300/11, ZZ, ECLI:EU:C:2013:363, paras 55-56. Cf. Case C-450/06, Varec, ECLI:EU:C:2008:91, para. 47; Case C-89/08 P, Commission v Ireland and Others, ECLI:EU:C:2009:742, para. 52; Case C-437/13, Unitrading, ECLI:EU:C:2014:2318, para. 21.

⁹¹ See the discussion on the possible restrictions to fundamental rights in Section 4.1 of this chapter.

⁹² In the context of Directive 2004/39 on markets in financial instruments (Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC; this directive is no longer in force and has been replaced by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU), the Court has ruled that the obligation of professional secrecy on the competent authorities is designed to protect not only the specific interests of the relevant firms but also the public interest in the normal functioning of the markets in financial instruments of the EU (Case C-358/16, UBS Europe and Others, ECLI:EU:C:2018:715, paras 62-64; cf. Case C-298/16, Ispas, ECLI:EU:C:2017:843, paras 35-37; Case C-15/16, Baumeister, ECLI:EU:C:2018:464, para. 35).

⁹³ Case C-110/10 P, Solvay v Commission, ECLI:EU:C:2011:687, para. 49; Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland and Others v Commission, ECLI:EU:C:2004:6, para. 68. Cf. Van den Brink et al. 2015, pp. 241-242.

⁹⁴ Article 296, second subparagraph, TFEU and Article 41(2)(c) Charter.

⁹⁵ Cf. Van den Brink et al. 2015, p. 245. For more about the obligation to state reasons in general, see inter alia: Lenaerts et al. 2014, pp. 112-113; Craig & De Búrca 2011, pp. 522-524.

⁹⁶ Article 296, second subparagraph, TFEU reads: 'Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.' According to Article 288 TFEU, legal acts include individual decisions.

adopted the measure.⁹⁷ This requirement to give reason also infers that a court may require a competent authority to notify its reasons so it can review the legality of the reasons for the decision.

This principle, however, also is to ensure an effective protection of persons' rights under Union law, meaning that the persons involved must be able to defend that right under the best possible conditions and to decide, with full knowledge of the facts, whether there is any point in challenging the decision before court. This requires the competent authority to inform the persons involved of the reasons on which it has based its decision, either in the decision itself or in a subsequent communication made at their request.⁹⁸

A useful side-effect of this obligation to reason a decision is that it may improve the quality of the process of forming an opinion, for this obligation requires the arguments on which the decision is to be based to be well-considered.⁹⁹

It is settled case law that the statement of reasons has to be appropriate to the act at issue and the context in which it has been adopted. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given, and the interest that the relevant persons may have in obtaining explanations.

It is not necessary for the reasoning to address all the relevant facts and points of law, since the content and all the legal rules governing the matter at issue also have to be considered to answer the question whether the reasoning meets the above-mentioned requirements. The Court does thus not only look at the wording of the decision at stake, but takes the broader context into account.¹⁰⁰ In the context of the SSM, the Court has decided accordingly that an ECB decision can be examined in light of the opinion of the Administrative Board of Appeal.¹⁰¹

In the joined cases *Hoechst v Commission*, the Court has stressed the importance of the statement of reasons by pointing out that it is a fundamental

⁹⁷ Case C-417/11 P, Council v Bamba, ECLI:EU:C:2012:718, para. 50; Case C-439/11 P, Ziegler v Commission, ECLI:EU:C:2013:513, para. 115; Case C-450/17 P, Landeskreditbank Baden-Württemberg v ECB, ECLI:EU:C:2019:372, para. 85; Case T-411/17, Landesbank Baden-Württemberg v SRB, ECLI:EU:T:2020:435, para. 83.

⁹⁸ Case C-222/86, *Unectef v Heylens*, ECLI:EU:C:1987:442, para. 15; Case C-417/11 P, Council v Bamba, ECLI:EU:C:2012:718, para. 49; Case C-75/08, Mellor, ECLI:EU:C:2009:279, para. 59; Case T-411/17, Landesbank Baden-Württemberg v SRB, ECLI:EU:T:2020:435, para. 87.

⁹⁹ De Waard 1987, pp. 371-373

¹⁰⁰ Case C-450/17 P, Landeskreditbank Baden-Württemberg v ECB, ECLI:EU:C:2019:372, para. 87; Case C-417/11 P, Council v Bamba, ECLI:EU:C:2012:718, para. 53; Case C-439/11 P, Ziegler v Commission, ECLI:EU:C:2013:513, para. 116; Case T-411/17, Landesbank Baden-Württemberg v SRB, ECLI:EU:T:2020:435, para. 84.

¹⁰¹ Case C-450/17 P, Landeskreditbank Baden-Württemberg v ECB, ECLI:EU:C:2019:372, para. 93.

guarantee of the rights of defence and that its scope cannot be restricted based on considerations concerning the effectiveness of the investigation.¹⁰²

Another element of the rights of defence is the principle of legal privilege, which refers to the protection of written communications between clients and their independent lawyers.¹⁰³ It is applicable in any procedure that may lead to a decision adversely affecting a person (i.e. as from the phase this research refers to as the supervisory phase).¹⁰⁴

Although a Union institution may have broad powers to request any information necessary for carrying out its tasks, the confidential nature of certain information may under certain circumstances still be recognized.¹⁰⁵

As the Court of Justice has stated in the AM&S case, such confidentiality serves the requirement that 'any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it'.¹⁰⁶

The Court concludes that the laws of the Member States generally recognize a requirement of the sort, but that the scope and criteria for applying it vary.¹⁰⁷ Nevertheless, in the national laws of the Member States, two common criteria for protecting written communications between lawyers and clients can be found, which also have been adopted by the Court. Firstly, written communications between lawyers and clients are protected when they are made for the purpose and in the interests of the client's rights of defence. If relevant, the protection covers all written communications exchanged after the initiation of an administrative procedure, but also possibly covers earlier written communications relating to the subject matter of such a procedure.¹⁰⁸ Secondly, the communication must emanate from independent lawyers (i.e. lawyers not

¹⁰² Case C-46/87, *Hoechst v Commission*, ECLI:EU:C:1989:337, para. 41. At the same time, the Commission is not required to communicate all the information it has concerning the presumed infringements to the addressee of the decision ordering an investigation, or to make a precise legal analysis of those infringements, but the Commission does need to clearly indicate the presumed facts which it intends to investigate (para. 41).

¹⁰³ For more about the principle of legal privilege, see *inter alia*: Van den Brink et al. 2015, pp. 243-244; Widdershoven & Craig 2017, pp. 338-339.

¹⁰⁴ Widdershoven & Craig 2017, p. 338.

¹⁰⁵ Case C-155/79, *AM & S v Commission*, ECLI:EU:C:1982:157, paras 17-18.

¹⁰⁶ Case C-155/79, *AM & S v Commission*, ECLI:EU:C:1982:157, para. 18.

¹⁰⁷ Case C-155/79, *AM & S v Commission*, ECLI:EU:C:1982:157, para. 19.

¹⁰⁸ Case C-155/79, *AM & S v Commission*, ECLI:EU:C:1982:157, paras 21-23; Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:512, paras 40-41. The documents covered by the principle of legal privilege are discussed in detail in, e.g.: Case T-30/89, *Hilti v Commission*, Order of the Court of First Instance, ECLI:EU:T:1990:27, paras 14-23; Joined

bound to the client by a relationship of employment).¹⁰⁹ The Court points out that this condition stems from the idea of ‘the lawyer’s role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs’.¹¹⁰ The principle of legal privilege does not prevent persons to provide any written communications with their lawyers if they consider that to be in their own interest.¹¹¹

If persons refer to the principle of legal privilege when they refuse to provide the requested information, they still have to demonstrate the relevant administrative body that the requested information fulfils the conditions for being granted legal protection. This can be done by relevant materials, without revealing the content of the information at issue.

If the relevant administrative body is not convinced of the applicability of legal privilege, it may reject a request for protection of a specific document under legal privilege and, if necessary, order to submit the information at issue, stating in the order that it may impose fines or periodic penalty payments if the order has not been met. According to the Court, this does not affect the administration’s effectiveness due to the fact that any action brought before the Court against such an order does not have suspensory effect.

The persons’ interests are, however, also protected since they may obtain an order suspending the application of such a decision or any other interim measure. Meanwhile, to ensure confidentiality, the documents are put in a sealed envelope which will be opened after expiry of the time-limit for bringing an action against the rejection.¹¹²

The Court points out furthermore that the principle of legal privilege has already been breached when a protected document is seized by one of the administration’s officials. Thus, a possible breach takes place before the administration relies on a privileged document in a decision on the merits.¹¹³

cases T-125/03 and T-253/03, Akzo Nobel Chemicals and Akcros Chemicals v Commission, ECLI:EU:T:2007:287, para. 123.

¹⁰⁹ Case C-155/79, AM & S v Commission, ECLI:EU:C:1982:157, para. 24; Case C-550/07 P, Akzo Nobel Chemicals and Akcros Chemicals v Commission, ECLI:EU:C:2010:512, para. 41.

¹¹⁰ Case C-155/79, AM & S v Commission, ECLI:EU:C:1982:157, paras 24. This criterion has been elaborated in the Akzo case (cf. Case C-550/07 P, Akzo Nobel Chemicals and Akcros Chemicals v Commission, ECLI:EU:C:2010:512, paras 42-49).

¹¹¹ Case C-155/79, AM & S v Commission, ECLI:EU:C:1982:157, para. 28.

¹¹² Case C-155/79, AM & S v Commission, ECLI:EU:C:1982:157, paras 29-32; Joined cases T-125/03 and T-253/03, Akzo Nobel Chemicals and Akcros Chemicals v Commission, ECLI:EU:T:2007:287, paras 79-89. Cf. Van den Brink et al. 2015, p. 244.

¹¹³ Case C-550/07 P, Akzo Nobel Chemicals and Akcros Chemicals v Commission, ECLI:EU:C:2010:512, para. 25. In the AM&S case, the Court explicitly mentions that disputes with respect to the application of legal privilege in case of a Commission request for information may be dealt with only at a (at the time) Community level. As such dispute concerns an appraisal and decision affecting the conditions

In addition to the above-mentioned obligations, the principle of good administration also includes a general obligation of due care for the administrative authority. Due care includes, for instance, the obligation for an administration to act with due diligence when preparing decisions and, when taking a decision, to consider all the factors which may adversely impact the interests of the persons affected by that decision. Furthermore, an administration must take a decision on the basis of accurate data and a thorough investigation of the file, rectify a manifest error in a reasonable time and comply with the duty to not mislead.¹¹⁴

Lastly, it is worth mentioning that, in order to ensure respect of the rights of defence, supervisors are not allowed to rely on evidence against persons which has been obtained during an investigation that is not related to the subject matter or purpose of the investigation at hand. The Court has indicated that the rights of defence would be seriously endangered if the Commission could rely on such evidence.¹¹⁵ Note that this does not prohibit authorities from opening a new investigation on the basis of information found in another investigation, as long as the rights of defence can be exercised.¹¹⁶

4.2.2 The right of respect for private and family life

Another right already applicable in the preparatory phase of a decision is the right of respect for private and family life laid down in Article 7 of the Charter.¹¹⁷ It protects natural and legal persons from arbitrary or disproportionate interventions by public authorities in the sphere of their private lives¹¹⁸ and also applies to companies and their business premises.¹¹⁹

under which the Commission may act ‘in a field as vital to the functioning of the common market as that of compliance with the rules on competition’, it is not a matter that may be left to an arbitrator or to a national authority (Case C-155/79, AM & S v Commission, ECLI:EU:C:1982:157, para. 30).

¹¹⁴ Tridimas 2006, p. 412 and the case law mentioned there.

¹¹⁵ Case C-85/87, Dow Benelux v Commission, ECLI:EU:C:1989:379, para. 18; Case C-46/87, Hoechst v Commission, ECLI:EU:C:1989:337, para. 29; Case C-94/00, Roquette Frères, ECLI:EU:C:2002:603, paras 47-48. Cf. De Moor-van Vugt & Widdershoven 2015, p. 307; Luchtmans et al. 2019, pp. 16-17. Note that these are all cases in the field of competition law. The relevant rules determine that the Commission has to indicate the subject matter and purpose of the investigation (Article 20(4) 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). The SSM Framework Regulation includes a similar obligation for the ECB in case of investigations.

¹¹⁶ De Moor-van Vugt & Widdershoven 2015, p. 307.

¹¹⁷ Article 8 ECHR is the equivalent of Article 7 Charter.

¹¹⁸ Wissink et al. 2014, p. 108. See: Article 7 Charter and Article 8(1) ECHR.

¹¹⁹ Cf. Société Colas Est and Others v France, ECtHR App. no. 37971/97, 16 April 2002, para. 41; Case C-94/00, Roquette Frères, ECLI:EU:C:2002:603, para. 29; Case C-583/13 P, Deutsche Bahn and Others v Commission, ECLI:EU:C:2015:404, para. 20.

Public authorities may only interfere with this right – e.g. by means of an on-site inspection – if they do so in accordance with the law, with legitimate aim and if it is necessary for serving a democratic society's interest of *inter alia* its economic wellbeing.¹²⁰ Furthermore, interfering with this right to respect private and family life infers a limitation of that same right as recognized by the Charter and so the intervention must also meet the conditions under Article 52(1) of the Charter. Thus, limitations to the right of respect for private and family life are subject to the principle of proportionality, and must be necessary and genuinely meet objectives of general interest recognized by the Union.¹²¹

Looking at on-site inspections, which in this context is the relevant limitation to the right of respect for private and family life, the judicial review will in practice mainly concern the necessity and proportionality of the inspection and also entail an assessment of its arbitrariness and excessiveness. On-site inspections by the ECB are based on Article 12 of the SSM Regulation and are thus in accordance with the law, and their aim is legitimate as they enable the ECB to carry out its supervisory tasks.¹²² Nevertheless, the necessity of on-site inspections still has to be considered in each case, as well as its proportionality.¹²³ In practice, the judicial review focuses therefore on the necessity of an on-site inspection and the proportionality of the inspection in relation to its legitimate aim.¹²⁴

¹²⁰ Article 8(2) ECHR; Société Colas Est and Others v France, ECtHR App. no. 37971/97, 16 April 2002, paras 43–50; Wieser and Bicos Beteiligungen GmbH v. Austria, ECtHR App. no. 74336/01, 16 October 2007, paras 53–68.

¹²¹ This is generically applicable to any limitation of the exercise of rights and freedoms recognized by the Charter (Article 52(1) Charter). Cf. Case C-94/00, Roquette Frères, ECLI:EU:C:2002:603. For a discussion on the relevant case law of the ECtHR in this respect, see: Veenbrink 2016.

¹²² Article 12(1) SSM Regulation. In line with this, the condition of Article 52(1) Charter requiring that a right may only be limited if this genuinely meets objectives of general interest recognized by the EU has also been met. After all, the ECB has been allotted the supervisory tasks laid down in the SSM Regulation with a view to contributing to the safety and soundness of credit institutions and to the stability of the financial system within the EU and each Member State (Article 1 SSM Regulation).

¹²³ Note that these assessments sometimes overlap. The ECtHR has clarified that the necessity assessment considers whether the interference corresponds to a pressing social need and, in particular, whether it is proportionate to the legitimate aim pursued (ECtHR Guide on Article 8 ECHR 2020, p. 12, para. 29). The Court considers the protection against arbitrary or disproportionate interventions to be a general principle of EU law and necessary in this respect to determine whether such an investigation is excessive. It is for the national bodies to assess the arbitrariness and excessiveness of the inspection within this context. (Joined cases C-46/87 and C-227/88, Hoechst v Commission, ECLI:EU:C:1989:337, paras 19 and 35; Case C-94/00, Roquette Frères, ECLI:EU:C:2002:603, paras 27 and 36).

¹²⁴ Cf. Wissink et al. 2014, p. 108 and the literature mentioned there. As discussed in more detail in Chapter 5, Section 3.1, the Court will assess the necessity of the inspection, whereas the national courts may, if national law provides for an ex ante judicial authorization, assess the on-site inspection's proportionality (i.e. the arbitrariness and excessiveness of the use of the 'tool').

4.2.3 The right not to incriminate oneself

The Court considers the right not to incriminate oneself to be part of the rights of defence as well.¹²⁵ In the *Orkem* case, the Court has ruled that the Commission may not oblige a company to answer in such a way that it may admit to an infringement that is for the Commission to prove.¹²⁶ The Court points out that, although the Commission has far-reaching investigating powers, it may not undermine the rights of defence of the undertaking concerned.¹²⁷

In the *Orkem* case, Orkem SA brought an action for annulment of a Commission decision requesting information under the relevant competition regulation at the time.¹²⁸ Orkem claimed, *inter alia*, that the Commission compelled the company to incriminate itself by confessing to an infringement of the competition rules.¹²⁹

The Court of Justice considers that the Commission has wide powers of investigation in order to obtain the information and documentation necessary to check the actual existence and scope of a specific factual and legal situation, and that undertakings are obligated to cooperate in the investigative measures under the relevant EU law.¹³⁰

The relevant EU law does not give an undertaking under investigation any right to evade the investigation on the ground that the results may evidence an infringement of the applicable rules. More to the contrary, an undertaking must make available to the Commission all information relating to the subject matter of the investigation.¹³¹

¹²⁵ Widdershoven & Craig 2017, p. 340; De Moor-van Vugt & Widdershoven 2015, p. 310.

¹²⁶ Case C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, para. 35. With respect to the right not to incriminate oneself, see also, e.g.: Case C-301/04 P, *Commission v SGL Carbon AG*, ECLI:EU:C:2006:432; Case T-112/98, *Mannesmannröhren-Werke v Commission*, ECLI:EU:T:2001:61; Case C-238/99 P, *Limburgse Vinyl Maatschappij and Others v Commission*, ECLI:EU:C:2002:582.

¹²⁷ Case C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, para. 34. In his opinion to the *Commission v SGL Carbon AG* case, Advocate General Geelhoed points out that the interplay between ensuring the fundamental rights of legal persons on the one hand and effective enforcement on the other hand remains a balancing exercise. Not providing the Commission with the necessary investigating powers would undermine an effective enforcement, which is as obvious as that the rights of defence should be respected too. (Opinion of Advocate General Geelhoed in Case C-301/04 P, *Commission v SGL Carbon AG*, ECLI:EU:C:2006:53, para. 67; on striking the balance between the need to ensure effective supervision and the obligation to guarantee persons' rights of defence, see also: D'Ambrosio 2013, pp. 72-73.)

¹²⁸ Case C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, paras 1-2;

¹²⁹ Case C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, para. 18.

¹³⁰ Case C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, paras 21-22.

¹³¹ Case C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, para. 27. In the *Commission v SGL Carbon* case, the Court recalls that an undertaking is obliged to cooperate. The Court follows the Advocate General's opinion in this case, stating that, while it is evident that the rights of defence must be respected, 'the undertaking concerned is still able, either during the administrative procedure or in the

The Court continues, however, by stating that the Commission may not undermine the rights of defence of the undertaking concerned by means of a decision calling for information.¹³² Consequently, 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’.¹³³

This right is also guaranteed by Article 6 of the ECHR in case of a criminal charge (i.e. a sanction of a criminal nature).¹³⁴ The ECtHR has ruled that persons accused of a criminal offence have the right not to incriminate themselves as this is to be considered to be part of the notion of a fair procedure under Article 6 of the ECHR.¹³⁵ This is thus applicable in the phase this research refers to as the investigatory phase.

Since the Court of Justice considers the right not to incriminate oneself part of the rights of defence, the scope of this right seems to be broader under EU law than under Article 6 of the ECHR. As discussed in Section 4.2.1 of this chapter, the rights of defence must, after all, be guaranteed in all procedures initiated against a person which may result in a measure adversely affecting the person. Therefore, this already applies to the phase this research refers to as the supervisory phase.

Note that the *Orkem* case concerns competition law¹³⁶ and that competition law procedures generally end in sanctions of a criminal nature. It remains to be seen whether the Court considers this right to be applicable in an early stage of the procedure as well, when there is no possibility of imposing a sanction of a criminal nature. It cannot be ruled out that the Court will, similar to the ECtHR, apply this

proceedings before the Community Courts, to content that the documents produced have a different meaning from that ascribed to them by the Commission’ (Case C-301/04 P, Commission v SGL Carbon AG, ECLI:EU:C:2006:432, para. 49).

¹³² Case C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, para. 34.

¹³³ Case C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, para. 35.

¹³⁴ *Saunders v United Kingdom*, ECtHR App. no. 19187/91, 17 December 1996, para. 67. Cf. Widdershoven and Craig 2017, p. 340. The right not to incriminate oneself is closely related to the right to silence and the presumption of innocence. In the *Saunders* case, the ECtHR points out that the rationale of the right not to incriminate oneself lies, inter alia, in the protection of the accused against improper compulsion by the authorities, and contributes as such to the avoidance of miscarriages of justice and to meeting the aims of Article 6 ECHR. In a criminal case, the prosecution is supposed to seek to prove the case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. (*Saunders v United Kingdom*, ECtHR App. no. 19187/91, 17 December 1996, para. 68).

¹³⁵ *Funke v France*, ECtHR App. no. 10828/84, 25 February 1993, para. 44; *Saunders v United Kingdom*, ECtHR App. no. 19187/91, 17 December 1996, para. 68; *J.B. v Switzerland*, ECtHR App. no. 31827/96, 3 May 2001, paras 64.

¹³⁶ For examples in other fields of law in which the Court has applied the right not to incriminate oneself and which also have a certain connection with the criminal matter, see: Lasagni 2019, pp. 237-238.

right in case of sanctions of a criminal nature only.¹³⁷ In this research, the right not to incriminate oneself is discussed in more detail within the context of sanctions of a criminal nature, i.e. in the investigatory phase (Chapter 7).¹³⁸

The right not to incriminate oneself is related to materials the existence of which depends on the will of the person involved, such as oral explanations. It does not extend to materials which exist independently of the suspect's will, such as, for instance, documents acquired pursuant to a warrant, or breath, blood and urine samples.¹³⁹ However, documents acquired pursuant to a warrant, even when possibly existing independently of the person's will, may be protected by the right not to incriminate oneself if the authorities have used excessive coercion in order to obtain such documents.¹⁴⁰ This limits the possibility of fishing expeditions and illustrates the fine line dividing documents that may or may not be protected under this right.

The Court has elucidated that questions seeking factual clarifications as to the subject matter and requests to disclose documents relating to the subject matter which the persons involved have in their possession do not give rise to any legal issues.¹⁴¹ Questions related to the purpose of actions taken and the objective pursued by certain measures, on the other hand, could undermine the rights of defence of the persons involved and may compel such persons to acknowledge their participation in an infringement or their intent to commit such an infringement.¹⁴²

With respect to banking supervision, particularly the documents acquired pursuant to a warrant, such as books and records (including computer data), will be relevant.¹⁴³ Following from the above reasoning, these documents do not fall under the right not to incriminate oneself.

However, the right may become relevant in case it is unclear whether the mere existence of certain documents depends on the will of the person involved or not, which is particularly relevant for obtaining oral and written explanations. If such explanations would compel a person to acknowledge infringements, the question is not allowed. Whether it comes to that depends on the circumstances of the case.

¹³⁷ In such cases the Court will probably use Article 48(2) Charter, which provides that respect for the rights of defence of anyone who has been charged must be guaranteed.

¹³⁸ For a discussion on the scope of the right not to incriminate oneself, see also: Lasagni 2019, pp. 246-247.

¹³⁹ Saunders v United Kingdom, ECtHR App. no. 19187/91, 17 December 1996, para. 69.

¹⁴⁰ Widdershoven & Craig 2017, p. 340; Lamberigts 2016, p. 39; Lasagni 2019, p. 251.

¹⁴¹ Case C-374/87, Orkem v Commission, ECLI:EU:C:1989:387, paras 37-38 and 41

¹⁴² Case C-374/87, Orkem v Commission, ECLI:EU:C:1989:387, paras 37-38 and 41.

¹⁴³ Cf. Widdershoven & Craig 2017, p. 340.

Both the EU Courts and the ECtHR apply the right not to incriminate oneself only in cases in which the information has been obtained by exercising coercion against the suspect.¹⁴⁴ Under other circumstances they both consider the information to have been given in voluntary collaboration.

Although, as mentioned before, the right not to incriminate oneself is under both the ECHR and EU law likely to be applied only in case of sanctions of a criminal nature, it may be relevant in an earlier stage of supervision as well. While it will probably not yet be applicable in the supervisory phase because in this phase the duty to cooperate with the supervisor still prevails, information that would be protected by the right not to incriminate oneself gathered under compulsion during that phase may not be used for imposing a sanction of a criminal nature later on.¹⁴⁵ Nevertheless, such information can be used for sanctions not of a criminal nature.

4.2.4 The principle of effective judicial protection

The principle of effective judicial protection has been developed by the Court in its case law, and generally infers that persons have the opportunity to enforce all rights conferred on them by Union law before a court.¹⁴⁶ The requirement of judicial control has been recognized by the Court as a general principle of law in the *Johnson* case, in which the Court concludes that this requirement underlies the constitutional traditions common to the Member States, and that it is laid down in Articles 6 and 13 of the ECHR and therefore has to be taken into consideration in Union law.¹⁴⁷ Since then, the principle has increasingly been incorporated in secondary law and, ultimately, the principle

¹⁴⁴ Case C-238/99 P, *Limburgse Vinyl Maatschappij and Others v Commission*, ECLI:EU:C:2002:582, para. 275; *Saunders v United Kingdom*, ECtHR App. no. 19187/91, 17 December 1996, para. 68; *J.B. v Switzerland*, ECtHR App. no. 31827/96, 3 May 2001, para. 64. Cf. *De Moor-van Vugt & Widdershoven 2015*, p. 311.

¹⁴⁵ *Saunders v United Kingdom*, ECtHR App. no. 19187/91, 17 December 1996, para. 74. Cf. *Chambaz v Switzerland*, ECtHR App. no. 11663/04, 5 April 2012, in which the ECtHR concludes that the rights not to incriminate oneself and to remain silent have been breached, since fines have been upheld to the person involved for refusing to produce all the items requested, while an investigation was ongoing in relation to criminal matters in which such documents could serve as incriminating evidence. Cf. *Widdershoven & Craig 2017*, p. 340; *Lasagni 2019*, p. 254; *Lamberigts 2016*, p. 37.

¹⁴⁶ *Prechal 2015*, p. 53.

¹⁴⁷ Case C-222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, para. 18; Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, para. 39; Case C-263/02 P, *Commission v Jégo-Quéré*, ECLI:EU:C:2004:210, para. 29.

has been reaffirmed in primary Union law by way of Article 47 of the Charter,¹⁴⁸ which has the same legal value as the Treaties.¹⁴⁹ Article 47 reads:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. [...]’

The right to effective judicial protection is thus applicable in case of any violation of rights and freedoms guaranteed by Union law in general.

As mentioned in Section 3 of this chapter, Union institutions are subject to the Charter and the general principles of EU law, as are Member States when they are implementing Union law or acting within the scope of Union law, and so both Union institutions and Member States are subject as well to the requirements laid down in Article 47 of the Charter and the general EU principle of effective judicial protection. This further implies that Member States’ autonomy may be restricted by their obligation to ensure compliance with the rights following from Article 47 Charter: the Court increasingly uses this article to review the application of national procedural laws in order to uphold the right to effective judicial protection.¹⁵⁰

¹⁴⁸ The article’s equivalent in the ECHR, Articles 6 and 13, have different scopes. Article 6 ECHR is applicable in determining a person’s civil rights and obligations or any criminal charge against a person (Article 6(t) ECHR). It requires a ‘fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. Article 13 ECHR, on the other hand, is only applicable in case anyone’s rights and freedoms as set out in the ECHR have been violated and, if such is the case, requires that an effective remedy before a national court is in place.

¹⁴⁹ Cf. Prechal 2016, p. 145; Prechal & Widdershoven 2011, p. 37. For an overview of the development of effective judicial protection in the EU legal order, see also: Ravo 2012, pp. 102–106; Bonelli 2019, pp. 37–42.

¹⁵⁰ Widdershoven 2019(c), p. 33. For an example, see: Case C-663/17 P, ECB v Trasta Komercbanka and Others, ECLI:EU:C:2019:923. In this case, the Court emphasizes that the autonomy enjoyed by Member States to determine which bodies of a credit institution, constituted in the form of a legal person, are entitled to take decisions in order to bring actions before a court is restricted by their obligation to ensure compliance with the right to an effective remedy and to a fair hearing enshrined in Article 47 Charter (paras 58 and 59 and the case law mentioned there). The Court has ruled that a revocation of a power of attorney under Latvian law infringed the applicant’s right to effective judicial protection as enshrined in Article 47 Charter (para. 78). For an elaborate review of this case, see: Rudzitis 2020, particularly pp. 205–208 on how the relevant national law infringes the right to effective judicial protection.

In *Associação Sindical dos Juízes Portugueses*, the Court has furthermore ruled that Member States must, in accordance with Article 19(1) TEU and the principle of sincere cooperation laid down in Article 4(3) TEU, provide for remedies to ensure effective judicial protection for persons in the fields covered by EU law.¹⁵¹ The Court points out that the scope of this obligation under Article 19(1) TEU, which refers to ‘the fields covered by EU law’, is irrespective of whether or not the Member States are implementing Union law in the case at hand,¹⁵² and that the obligation applies to every national court or tribunal which may potentially be called upon to apply or interpret Union law.¹⁵³ Since most and possibly even every national court is potentially called upon to apply Union law, the scope of application of the principle of effective judicial protection is much broader under Article 19(1) TEU than under Article 47 of the Charter.¹⁵⁴

The implementation of the principle in Article 47 of the Charter does not infer, however, that the general principle of effective judicial protection is no longer relevant. Also, the wider scope given to the principle under Article 19(1) TEU does not render the general principle redundant and so it may still be necessary to use it in order to fill possible gaps of effective judicial protection in provisions of the Charter or any secondary law.¹⁵⁵

The principle of effective judicial protection encompasses requirements with respect to the court, the process, and the remedies the court has to have at its disposal.¹⁵⁶ The principle entails that persons should have access to court, that the procedures should meet the requirements of fair trial as set forth by Article 47 of the Charter and its equivalent Article 6 of the ECHR (i.e. due process, independence and impartiality, reasonable period of time, public access), and that courts should have effective remedies in order to repair breaches of Union

¹⁵¹ Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 34.

¹⁵² Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 29.

¹⁵³ Cf. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 37.

¹⁵⁴ Pech & Platon 2018, p. 3. Cf. Bonelli 2019, pp. 47-51.

¹⁵⁵ Prechal points out that, although the principle of effective judicial protection has been included in several articles of the Charter, the general principle of effective judicial protection should still apply in case the relevant articles of the Charter do not provide for the same protection as the general principle. Her conclusion is that the Charter does not provide a watertight system, since provisions sometimes overlap and sometimes lead to a lacuna. Therefore, the Charter is the first point of reference for the protection of fundamental rights, but it is without prejudice to using other possible sources such as the general principles of law (Prechal 2016, p. 157).

¹⁵⁶ Ortlep & Widdershoven 2015, p. 333; Prechal & Widdershoven 2011, p. 36; Ravo 2012, p. 102.

law.¹⁵⁷ It also includes the requirement that courts must be able to review both the fact and the law, and the standards for the intensity of the judicial review.¹⁵⁸

When discussing the requirements relating to the principle of effective judicial protection in this research, Article 47 of the Charter and the general Union law principle of effective judicial protection constitute the starting point, completed, where necessary, by case law related to Articles 6 and 13 of the ECHR.¹⁵⁹ The focus is on the elements relevant in the context of this research, i.e. the ones that may be affected by having in place composite procedures.

The requirement that a person should have access to a court imposes minimum requirements to that court. It must be established by law, it must be permanent, and its jurisdiction must be compulsory. Furthermore, it must apply rules of law and be independent and impartial.¹⁶⁰

This requirement of access to a court is obviously relevant for the standing criteria as well.¹⁶¹ The standing requirements are discussed in Section 5.3 of this chapter, so for now it suffices to note that, although standing criteria have to be

¹⁵⁷ Van den Brink et al. 2011, p. 253. Tridimas states that, in general, the principle includes the right of access to the courts and the right to obtain effective judicial review before the EU Courts and national courts (Tridimas 2006, p. 443). Van Gerven points out that effective judicial protection does not go as far as requiring that individual EU rights have to be fully secured in a uniform manner throughout the EU. Thus, the remedy to enforce EU rights does not have to be identical in all Member States. The EU depends on the national legal orders for enforcing EU law and this political and legal reality does not correspond with the ideal situation of an identical enforcement of EU law throughout the EU. According to Van Gerven, this shows that the objective of a uniform enforcement of EU law throughout the EU has to be pursued as much as possible, but that it is not of the same nature as direct effect, supremacy or access to a court. (Van Gerven 2000, pp. 521-522.)

¹⁵⁸ Prechal & Widdershoven 2020, p. 83.

¹⁵⁹ See Section 3 of this chapter for the relevance of the various sources of law and the relations between them.

¹⁶⁰ Case C-506/04, Wilson, ECLI:EU:C:2006:587, para. 48 and the case law mentioned there. Particularly with respect to the requirement of an independent and impartial court, see: Case C-64/16, Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117; Case C-585/18, A.K. (Indépendance de la chambre disciplinaire de la Cour suprême), ECLI:EU:C:2019:982. For a discussion about the specific requirements for the protection of the independence of the court following *inter alia* from these cases, see: Prechal 2020, pp. 183-188. Particularly with respect to the requirement of being established by law, see: Joined cases C-542/18 RX-II and C-543/18 RX-II, Réexamen Simpson v Council, ECLI:EU:C:2020:232, in which the Court emphasizes that 'the guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed' are the cornerstone of the right to a fair trial and must be verified at the court's own accord (para. 57). For a review of these cases, see: Leloup 2020.

¹⁶¹ Note that the right of access to court also affects any pre-trial obligations; see: Prechal & Widdershoven 2011, p. 36. Pre-trial obligations can be in line with the principle of effectiveness as long as they *inter alia* have no binding outcome, do not prejudice the right to bring judicial proceedings, do not result

interpreted in light of the principle of effective judicial protection, this does not entail an unconditional entitlement to bring an action before the Court. The Court has stated repeatedly that standing criteria may not be interpreted so as to set aside the conditions with regard to standing as laid down in the Treaty.¹⁶²

One has to keep in mind that access to court may already be relevant in the preparatory phase of supervision. The court may need to assess decisions regarding the use of investigatory powers, which a party may, in accordance with Article 263 TFEU, contest if such a decision intends to produce legal effects vis-à-vis that party.¹⁶³ The ECB's notification of its decision to launch an on-site inspection is an important example in this respect.¹⁶⁴ As mentioned in Section 4.2.2 of this chapter, Article 7 of the Charter provides for the right to respect private and family life and interference by a public authority with this right – e.g. by means of an on-site inspection – is only possible under strict conditions.¹⁶⁵ Therefore, access to court must already be available to the parties concerned in that early stage so as to enable them to let a court assess whether the inspection meets the conditions.

The Charter and the ECHR also set standards for the intensity of a court's judicial review. Article 6(1) of the ECHR requires a court to have full jurisdiction, which means that a court must have the 'jurisdiction to examine all questions of fact and law relevant to the dispute before it'.¹⁶⁶

The ECtHR has emphasized that Article 6 of the ECHR does not require a court to always substitute its own assessment or opinion for that of the administrative authorities. This particularly concerns administrative procedures in specialized areas of law, and is thus relevant in the context of this research.

in a substantial delay, and there are no fees for the settlement procedure (Case C-317/08, Alassini and Others, ECLI:EU:C:2010:146, paras 54–60). This is discussed in Section 4.1 of this chapter.

¹⁶² Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, para. 44; Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 105. For a discussion of the stance the Court takes in relation to its recognition of a complete system of legal remedies and procedures, see: Alemanno 2010.

¹⁶³ Which measures may be appealed is discussed in Section 5.2 of this chapter. For an analysis of the possibilities to challenge ECB and NCA preparatory measures, see Chapter 5, Sections 3.1 and 3.2.

¹⁶⁴ Cf. ECB Guide to on-site inspections 2018, p. 10.

¹⁶⁵ These conditions are discussed in Section 4.2.2 of this chapter.

¹⁶⁶ Ramos Nunes de Carvalho E Sá v Portugal, ECtHR App. nos. 55391/13, 57728/13 and 74041/13, 6 November 2018, para. 176 and the case law mentioned there. Cf. ECtHR Guide on Article 6 ECHR (civil limb) 2020, p. 36, para. 154. This entails that the relevant court must have exercised 'sufficient jurisdiction' or provided 'sufficient review' in the proceedings before it, which has to be interpreted in light of the object and purpose of the ECHR (Ramos Nunes de Carvalho E Sá v Portugal, ECtHR App. nos. 55391/13, 57728/13 and 74041/13, 6 November 2018, para. 177 and the case law mentioned there). The legal characterization of the requirement of full jurisdiction in domestic law is not necessarily determining for the interpretation of this requirement under the ECHR.

In case of judicial review of decisions taken by administrative authorities in specialized areas of law that require particular professional experience or specialist knowledge and in which the administrative authorities are granted discretion, the ECtHR has ruled that other factors may need to be considered when determining whether the judicial review is sufficient.¹⁶⁷ Firstly, the subject matter of the decision appealed against is relevant. In case of an administrative decision concerning a simple question of fact, the judicial review has to be more intense than in case the decision concerns a specialized field requiring technical knowledge.¹⁶⁸ Secondly, the way in which the decision was arrived at is to be considered. A lighter form of judicial control may be justified if the procedural safeguards provided for during the administrative procedure meet many of the requirements in Article 6 of the ECHR.¹⁶⁹ Lastly, the content of the dispute has to be taken into account. A court has to be able to examine all the complainant's submissions on their merits, and to re-examine all the facts that are central to the case.¹⁷⁰

Article 47 of the Charter does not set any standard of judicial review. The required intensity of the judicial review depends on the EU rules at issue¹⁷¹ and varies according to the judicial review being of fact, law, or discretion.¹⁷² With respect to questions of law, the Court will generally determine the meaning

¹⁶⁷ Ramos Nunes de Carvalho E Sá v Portugal, ECtHR App. nos. 55391/13, 57728/13 and 74041/13, 6 November 2018, paras 178-179. Also: Bryan v The United Kingdom, ECtHR App. no. 19178/91, 22 November 1995, para. 45. Cf. ECtHR Guide on Article 6 ECHR (civil limb) 2020, p. 37, para. 161.

¹⁶⁸ ECtHR Guide on Article 6 ECHR (civil limb) 2020, p. 37, para. 161.

¹⁶⁹ ECtHR Guide on Article 6 ECHR (civil limb) 2020, p. 37, para. 161. Cf. ECtHR, Bryan v The United Kingdom, ECtHR App. no. 19178/91, 22 November 1995. In this case, the ECtHR states that, especially in specialized areas of law, and even if the court cannot substitute its own findings of fact for those of the inspector, the scope of review by an appeal court may be sufficient if the court has the power to satisfy itself that the inspector's findings or the inferences based on them were neither perverse nor irrational. The ECtHR states: 'Furthermore, [...] the Court notes that, while the High Court could not have substituted its own findings of fact for those of the inspector, it would have had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse nor irrational [...]. Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6 para. 1 (art. 6-1). It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member States. Indeed, in the instant case, the subject matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgment in the regulation of citizens' conduct in the sphere of town and country planning. The scope of review of the High Court was therefore sufficient to comply with Article 6 para. 1 (art. 6-1).' (Bryan v The United Kingdom, ECtHR App. no. 19178/91, 22 November 1995, para. 47).

¹⁷⁰ ECtHR Guide on Article 6 ECHR (civil limb) 2020, p. 37, para. 161.

¹⁷¹ Prechal & Widdershoven 2020, p. 85; Widdershoven 2019(a), p. 49.

¹⁷² Craig 2018, p. 436. For a further explanation of the three elements, see: Craig 2018, pp. 437-441.

of the relevant term, and annul the interpretation given by the administrative authority if it is not in line with the Court's interpretation.¹⁷³ The Court's assessment of questions of fact and in case of discretions is more reserved. The general idea is that the Court does not substitute its judgment for the administrative authority's assessment, since it is the administrative authority who is primarily responsible for deciding upon the questions of facts and discretion.¹⁷⁴ The interpretation of the test applied in such cases, more particularly the intensity of the review, has changed with time.¹⁷⁵

Within the EU law context, it is settled case law that, when reviewing the legality of an administrative decision, authorities have a margin of discretion in areas involving complex economic assessments.¹⁷⁶ In line with the ECtHR case law discussed above, the Court carries out a more limited review in cases in which the administrative authority is granted discretion or which concern technical, scientific, economic or factual complex matters.¹⁷⁷ In such cases, the Court's review with respect to the appraisal of the facts focuses on whether the act is 'not vitiated by a manifest error or a misuse of power, or that the institution did clearly exceed the bounds of its discretion'.¹⁷⁸ However, its review of the EU institution's interpretation of the information, i.e. the establishment of the facts, is stricter:¹⁷⁹ the Court has determined that in such cases it must establish 'whether the evidence relied on is factually accurate, reliable and consistent' and 'whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it'.¹⁸⁰ Furthermore, the judicial defer-

¹⁷³ Craig 2018, p. 441. Craig notes that the EU Courts limit such a substitution of judgment of questions of law by characterizing certain conditions laid down in the relevant laws as involving discretion, instead of pure questions of law. He points out that the EU Courts tend to do so in case of complex economic and social assessments that lie within the administrative authority's competence. Accordingly, the test applied by the EU Courts is more limited, inferring a review which comprises a test of manifest error instead of correctness (Craig 2018, p. 444).

¹⁷⁴ Craig 2018, p. 444.

¹⁷⁵ Craig 2018, p. 445. For a discussion on the development of the formal test applied by the EU Courts in case of questions of fact or discretion, see: Craig 2018, pp. 445-467. For a discussion on the various standards of judicial review by the EU Courts, see: Widdershoven 2019(a).

¹⁷⁶ Case C-389/10 P, KME Germany and Others v Commission, ECLI:EU:C:2011:816, para. 121; Case C-12/03 P, Commission v Tetra Laval, ECLI:EU:C:2005:87, para. 38; Case C-525/04 P, Spain v Lenzing, ECLI:EU:C:2007:698, para. 56. See also: Widdershoven 2019(a), pp. 53-56.

¹⁷⁷ Prechal & Widdershoven 2020, p. 85; Widdershoven 2019(a), p. 53; Ottow 2015, p. 218. Such reviews are often referred to as 'marginal review', 'light-touch review', 'limited review' or 'deferential review' (Ottow 2015, p. 218).

¹⁷⁸ Widdershoven 2019(a), pp. 54-55 and the case law mentioned there.

¹⁷⁹ Cf. Widdershoven 2019(a), p. 56.

¹⁸⁰ Case C-389/10 P, KME Germany and Others v Commission, ECLI:EU:C:2011:816, para. 121; Case C-12/03 P, Commission v Tetra Laval, ECLI:EU:C:2005:87, para. 39; Case C-525/04 P, Spain v Lenzing,

ence with respect to the substance of the case is to a certain extent compensated by a strict procedural review.¹⁸¹

In addition to the above-mentioned legality review, the Court applies an ‘unlimited’ judicial review to the amount of the fine or penalty payment in case of sanctions of a criminal nature.¹⁸² This means that the Court is competent, in addition to carrying out a mere review of the penalty’s lawfulness, to substitute their own appraisal for that of the authority involved and to cancel, reduce or increase the fine or penalty payment imposed.¹⁸³

The Court has applied such an unlimited judicial review to the amount of the fine only, when considering competition law cases. With respect to the question whether or not the applicant has breached the competition rules, it carries out a legality review on the basis of Article 263 TFEU, as discussed earlier in this section.¹⁸⁴ The Court has concluded that the legality review provided for under Article 263 TFEU, on the one hand, and the unlimited jurisdiction, under the relevant competition regulation, concerning the amount of the fine, on the other hand, together meet the requirements under Article 47 of the Charter.¹⁸⁵

Thus, it distinguishes between the judicial review of the decision imposing the sanction and the judicial review of the amount of the fine. A less intense judicial review of the decision is considered to be sufficient when complemented by an unlimited judicial review of the amount of the fine.¹⁸⁶

4.3 Effective legal protection from an instrumental perspective

After having elaborated on the standards for effective legal protection from a safeguard point of view in Section 4.2, this section discusses the instrumental perspective. This perspective contains the elements relevant to ensure a legal protection for decisions based on composite procedures that does not hamper achieving the purpose of the relevant Union legislation, in this

¹⁸¹ ECLI:EU:C:2007:698, para. 57.

¹⁸² Widdershoven 2019(a), p. 54; Prechal & Widdershoven 2020, p. 86; Ottow 2015, p. 218. The importance of respecting the rights of defence in such a case has also been discussed in Section 4.2.1 of this chapter.

¹⁸³ Also referred to as an ‘intense review’, ‘comprehensive review’ or ‘full jurisdiction’ (cf. Ottow 2015, p. 218).

¹⁸⁴ Case C-389/10 P, KME Germany and Others v Commission, ECLI:EU:C:2011:816, para. 130. Cf. Widdershoven 2019(a), pp. 44-45.

¹⁸⁵ Widdershoven 2019(a), pp. 44-45; Case C-389/10 P, KME Germany and Others v Commission, ECLI:EU:C:2011:816, paras 121-122.

¹⁸⁶ Case C-389/10 P, KME Germany and Others v Commission, ECLI:EU:C:2011:816, para. 133.

¹⁸⁶ Also: De Moor-van Vugt 2012, pp. 32-34.

case banking regulation.¹⁸⁷ Positively formulated, it includes elements that are relevant to ensure an effective implementation of Union law.

The way in which the effectiveness of Union law can and must be ensured has often been addressed by the Court. In its case law, it has provided national courts with a set of guiding principles on the hierarchy of laws, so as to enable them to ensure the effectiveness of Union law in general. These include, for instance, the direct effect of Union law,¹⁸⁸ the primacy of Union law over any conflicting national provision,¹⁸⁹ the obligation to interpret national law implementing Union law in conformity with Union law,¹⁹⁰ and the duty for national courts to apply Union law of their own accord.¹⁹¹

Besides these guiding principles regarding the hierarchy of applicable rules for national courts, Member States are obliged to ensure an effective implementation of Union law through the principles of loyal cooperation and effectiveness. These are the leading principles to set the framework for the instrumental perspective of effective legal protection in this research. They are general principles to ensure the Union law's effectiveness, and used by the Court to consider the balance between effective legal protection and the effectiveness of Union law.¹⁹² In addition to these general principles of effectiveness and loyal cooperation, this framework also includes more general elements which may be expected from legal protection to be effective. The principles and general elements are discussed below.

4.3.1 The principle of effectiveness

The principle of effectiveness is a difficult concept to grasp and define.¹⁹³ In general, this principle aims at ensuring an effective application of substantive EU law.¹⁹⁴ It is closely related to other principles, and its meaning

¹⁸⁷ See Chapter 1, Section 1 for the SSM's objectives.

¹⁸⁸ Case C-26/62, *Van Gend en Loos v Administratie der Belastingen*, ECLI:EU:C:1963:1. Cf. Arnulf 2006, pp. 161-179.

¹⁸⁹ E.g. Case C-106/77, *Amministrazione delle finanze dello Stato v Simmenthal*, ECLI:EU:C:1978:49, para. 24. Cf. Lenaerts et al. 2014, p. 130; Fennelly 2013, pp. 66-67; Arnulf 2006, pp. 179-183.

¹⁹⁰ E.g. Case C-397/01, *Pfeiffer and Others*, ECLI:EU:C:2004:584, paras 107-117. Cf. Lenaerts et al. 2014, pp. 130-131; Fennelly 2013, p. 68; Arnulf 2006, pp. 209-225.

¹⁹¹ E.g. Case C-87/90, *Verholen and Others v Sociale Verzekeringsbank Amsterdam*, ECLI:EU:C:1991:314, paras 11-16. This is only a duty in specific circumstances; see: Lenaerts et al. 2014, pp. 131-134. Cf. Fennelly 2013, pp. 70-71.

¹⁹² See Section 4.1 of this chapter.

¹⁹³ About the principle of effectiveness in general, see inter alia: Tridimas 2006, Chapter 9; Accetto and Zlepnić 2005.

¹⁹⁴ Prechal & Widdershoven 2011, p. 50.

and interaction with other principles has been extensively debated. This is briefly discussed below.

Firstly, the principle of effectiveness is related to the principle of loyal cooperation laid down in Article 4(3) TEU. This provision sets out the positive obligation for Member States to take any appropriate measure in order to ensure fulfilment of the obligations arising from the Treaties or resulting from the acts of Union institutions. Furthermore, it provides for the negative obligation that Member States have to refrain from any measure that may jeopardize the attainment of the Union's objectives.¹⁹⁵ The principle of effectiveness can be considered to be grounded on this principle.¹⁹⁶

As an important obligation based on the principle of loyal cooperation, Member States have to ensure that enforcement of Union law at a national level meets the requirements of equivalence, effectiveness, proportionality, and dissuasiveness.¹⁹⁷

In *Commission v Greece*, the Court of Justice emphasizes that, if EU law does not specifically provide any penalties for infringement or refer to national laws in that respect, the principle of loyal cooperation requires Member States to take all measures necessary to guarantee the application and effectiveness of EU law.¹⁹⁸ The Court concludes that, although it is in the Member States' discretion to choose the penalties, they have to ensure that breaches of EU law are penalized under similar procedural and substantive conditions to those applicable to breaches of national law of a similar nature and importance and, in any event, make the penalty 'effective, proportionate and dissuasive'.¹⁹⁹

This obligation applies to all national authorities involved in the enforcement of Union law, including the judicial authorities, and entails that courts have to assess whether the measures and sanctions used with respect to enforcement of Union law meet these requirements.²⁰⁰

The principles of loyalty and effectiveness seem crucial for the functioning of the Union, especially because, as pointed out by Accetto and Zlepnić, Member States' loyalty towards the EU may be challenged due to their own

¹⁹⁵ Cf. De Moor-van Vugt & Widdershoven 2015, p. 269; Van den Broek 2015, p. 31; Ottow 2006, pp. 67-77.

¹⁹⁶ Accetto & Zlepnić 2005, p. 382.

¹⁹⁷ Case C-68/88, Commission v Greece, ECLI:EU:C:1989:339, paras 23-25; Case C-354/99, Commission v Ireland, ECLI:EU:C:2001:550, para. 46; Case C-213/99, De Andrade, ECLI:EU:C:2000:678 paras 19-20; cf. De Moor-van Vugt & Widdershoven 2015, pp. 270-277; Van den Broek 2015, pp. 34-38; Lenaerts et al. 2014, pp. 137-138; De Moor-van Vugt 2012, pp. 7-8.

¹⁹⁸ Case C-68/88, Commission v Greece, ECLI:EU:C:1989:339, para. 23.

¹⁹⁹ Case C-68/88, Commission v Greece, ECLI:EU:C:1989:339, para. 24.

²⁰⁰ De Moor-van Vugt & Widdershoven 2015, p. 271.

national interests when implementing Union law. These principles, though, ensure their loyalty to the Union.²⁰¹

At the same time, the principle of effectiveness is closely related to the principle of procedural autonomy.²⁰² Scholars hold different views on the character of this principle, varying from concerns that it may illegitimately and unnecessarily intrude into national procedures to arguing that national autonomy does not exist in relation to procedural law.²⁰³

The Court has stated in this respect that the principle of national procedural autonomy requires the domestic legal system of each Member State, in the absence of Union rules governing the matter, to designate the courts having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights that persons derive from Union law.²⁰⁴ This is subject to the principle of equivalence and effectiveness, as discussed below.²⁰⁵

Union law is thus in principle implemented, applied and enforced within the framework of national law,²⁰⁶ inferring that it is up to the Member States themselves to decide on the ways to fulfil their Union obligations, the bodies to be made responsible for the implementation and application of EU law, and the procedures that are to be followed.²⁰⁷ However, this is only the case if there are no Union rules governing the matter and is, as mentioned, subject to the principle of equivalence and effectiveness.

Summarizing, the principle of procedural autonomy refers to the idea²⁰⁸ that the Court considers, in the absence of Union rules governing the matter, the procedural autonomy of Member States to be the guiding principle, provided that the national procedural rules are in line with the principle of equivalence and the principle of effectiveness.²⁰⁹

²⁰¹ Accetto & Zlepnić 2005, p. 382.

²⁰² Van den Broek 2015, p. 32. Cf. Lenaerts et al. 2014, p. 107.

²⁰³ For an overview of this discussion, see: Accetto & Zlepnić 2005, pp. 396-397. Cf. Prechal 2015, p. 44.

²⁰⁴ E.g. Case C-550/07 P, Akzo Nobel Chemicals and Akros Chemicals v Commission,

ECLI:EU:C:2010:512, para. 113.

²⁰⁵ Case C-317/08, Alassini and Others, ECLI:EU:C:2010:146, paras 47-48. Cf. Lenaerts et al. 2014, p. 107 and the case law mentioned there.

²⁰⁶ Prechal 2015, p. 43. Also: Tridimas 2006, p. 420; Lenaerts 2007, p. 1645; Lenaerts et al. 2014, p. 108.

²⁰⁷ Prechal 2015, pp. 43-44.

²⁰⁸ As discussed by Widdershoven, procedural autonomy is not an EU legal principle, since it does not have the status of primary EU law and does not prevail over secondary EU rules, like general principles of EU law do (Widdershoven 2019(c), p. 13). He describes it as a mere point of departure from which the EU legislator may deviate.

²⁰⁹ Cf. Barkhuysen 2006, p. 12; Prechal 2015, p. 46; Craig & De Búrca 2011, p. 220; Vermeulen 2001, pp. 89-92; Tridimas 2006, pp. 423-427; Fernandez Esteban 1999, p. 172; Lenaerts 2007, p. 1645; Van den Broek 2015, p. 35; Lenaerts et al. 2014, pp. 118-119; Schermers & Waelbroeck 2001, pp. 200-203. Tridimas points out that it is difficult to pin down the scope of the principle of autonomy and that it more easily can be defined negatively: the procedural autonomy is the discretion left to national

The principles of equivalence and effectiveness have been developed in the well-known *Rewe* and *Comet* case law.²¹⁰ The principle of equivalence infers that the procedural conditions governing an action regarding Union law may not be less favourable than those relating to similar actions of a domestic nature. The principle of effectiveness infers that national procedural rules may not render the exercise of rights conferred by Union law virtually impossible or excessively difficult.²¹¹ Together, these principles oblige national courts to ensure the effectiveness of Union law and they relate to the effective protection of Union rights, as well as an effective enforcement of Union law in national courts.²¹²

It is difficult to predict what approach the Court will take with respect to the principle of effectiveness. Some scholars hold that the Court's approach has developed over time and in different stages,²¹³ while others point out that the differences in approach are difficult to grasp and the Court's approach in a specific case seems unpredictable.²¹⁴

Be that as it may, it does not alter the fact that the principle of effectiveness has become a powerful tool to get national courts to assess national remedies and procedures on a case-by-case basis and to not apply national provisions if they are an obstacle for giving effect to Union law.²¹⁵ In general, it can be stated that national procedural law has to meet both requirements of equivalence and effectiveness, but in case of a conflict the principle of effectiveness prevails.²¹⁶

Because the principle of national procedural autonomy only applies in the absence of Union rules governing that matter and is limited by the principles of

courts after the obligation has been met to apply the dual safeguards of equivalence and effectiveness (Tridimas 2006, p. 424).

²¹⁰ Respectively: Case C-33/76, *Rewe v Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188; and Case C-45/76, *Comet BV v Produktschap voor Siergewassen*, ECLI:EU:C:1976:191.

²¹¹ Case C-33/76, *Rewe v Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188, para. 5; Case C-45/76, *Comet BV v Produktschap voor Siergewassen*, ECLI:EU:C:1976:191, paras 12-16; Case C-231/96, *Edilizia Industriale Siderurgica v Ministero delle Finanze (Edis)*, ECLI:EU:C:1998:401, paras 19 and 34; Case C-234/04, *Kapferer*, ECLI:EU:C:2006:178, para. 22; Case C-2/08, *Fallimento Olimpiclub*, ECLI:EU:C:2009:506, para. 24; Case C-317/08, *Alassini and Others*, ECLI:EU:C:2010:146, para. 48; Case C-268/06, *Impact*, ECLI:EU:C:2008:223, para. 46; Case C-432/05, *Unibet*, ECLI:EU:C:2007:163, para. 43. For an extensive discussion of different cases in which the Court applies the principles of equivalence and effectiveness, see: Lenaerts et al. 2014, pp. 119-150.

²¹² Tridimas 2006, p. 418. Also: Craig & De Búrca 2011, p. 218; Accetto & Zlepniq 2005, p. 389.

²¹³ Cf. Craig & De Búrca 2011, pp. 219-241; Prechal 2015, pp. 46-52; Tridimas 2006, pp. 420-422.

²¹⁴ Prechal & Widdershoven 2011, pp. 32 and 39.

²¹⁵ Craig & De Búrca 2011, p. 219.

²¹⁶ Case C-199/82, *Amministrazione delle finanze dello Stato/San Giorgio*, ECLI:EU:C:1983:318, para. 17. See: Vermeulen 2001, p. 92; Van den Broek 2015, p. 35; Prechal 2015, p. 48; Van den Brink et al. 2015 p. 212. Tridimas states that, arguably, Article I-29(1) of the draft EU Constitution – the new Article 19 TFEU – confirms that the principle of effectiveness takes precedence over the principle of equivalence (Tridimas 2006, pp. 419-420).

equivalence and effectiveness, the procedural autonomy principle seems more of a general idea to be applied whenever possible than a principle of equal weight in relation to the general EU principle of effectiveness discussed in this section. A general position on the relation between both principles has not been developed yet and so a case-by-case approach is required.²¹⁷

The general EU principle of effectiveness is the foundation of the instrumental perspective in this research. The discussion of the principle in this section reflects what is expected from Member States in order to ensure the effectiveness of Union law, and when they may still have autonomy to decide upon the national procedures. The research applies effectiveness not only to the national level, but to the EU level as well and thus also explores to what extent the legal protection at the EU level may hamper the effectiveness of the relevant Union law.

4.3.2 Other elements of the instrumental perspective

As mentioned in Section 4.1, the instrumental perspective of effective legal protection means that legal protection may not hamper the effectiveness of Union law. While Section 4.3.1 discussed the elements stemming from general principles of Union law that are to ensure its effectiveness, this section considers more general elements that may affect the effectiveness of Union law.

The first element defines the required effective implementation of Union law by looking at the legislator's intentions and whether they are lived up to. From the instrumental point of view taken in this research, legal protection should not hamper the implementation of Union law as it is intended by the legislator. This infers that legal protection should not only be kept from hindering the general objectives of the SSM, but also reflect the demarcation of the administrative authorities' tasks and responsibilities as the legislator has divided them in the administrative procedures in the relevant laws. Ideally, this is reflected in practice, and thus in line with the level at which the information is established, the interests are weighed and the discretion is used.²¹⁸

Furthermore, the system of legal protection has to be effectively organized, thus avoiding double procedures, and insuring speedy and efficient procedures so as to also ensure the administrative authorities' effectiveness, which is crucial to the effectiveness of Union law.²¹⁹

²¹⁷ Accetto & Zleptnig 2005, p. 400-401. For a discussion of case law examples, see *inter alia*: Accetto & Zleptnig 2005, pp. 399-400; Lenaerts 2007, pp. 1645-1650.

²¹⁸ Alonso de León concludes that the only way to sufficiently ensure the right to be heard is to give persons the opportunity to express their views at the level of administration that enjoys the discretion to formulate a decision (Alonso de León 2017, p. 230).

²¹⁹ Ottow 2015, pp. 88-89. Ottow discusses a Dutch example in the telecommunications sector, where, for a while, all administrative decisions were open to objection and review at two instances. This negatively

Lastly, it is important that the system of legal protection remains coherent in its entirety. It has to be avoided that a solution found for a specific issue at the same time disrupts the logic behind the complete system of legal remedies and procedures within the EU.

4.4 Legal certainty and legality

In order to establish a complete framework, the principles of legal certainty and legality also need to be considered. These principles support effective legal protection from both a safeguard and an instrumental perspective and can, therefore, not be allocated to one perspective. The principle of legal certainty is relevant for the framework since the Court often refers to it to substantiate its decisions. The principle of legality has to be considered because of the rather complex procedures that the relevant Union legislation often uses to address the complex composite administrative structure.²²⁰ Both the principle of legality and that of legal certainty are briefly discussed below so as to be able to take them into account, when relevant, in assessing the degree of effective legal protection within the SSM.

The principle of legal certainty assumes that persons are to know the law they are subjected to so as to be able to anticipate its consequences.²²¹ The rules involving negative consequences for persons have to be clear and precise and their application predictable for those subject to them.²²² It is a principle with a broad scope,²²³ which the Court refers to, *inter alia*, in order to safeguard the integrity of the Union's legal order and to justify rules providing for procedural exclusivity.²²⁴

affected the authority's efficiency, created legal uncertainty and resulted in judgments that were often given too late. See Ottow 2015, p. 89.

²²⁰ For a more general discussion on the principle of legality in a shared legal order, see: Prechal et al. 2015, pp. 24-31.

²²¹ Tridimas 2006, p. 242. The principle of protecting legitimate expectations can be seen as a corollary of legal certainty. Tridimas indicates that the Court does not always distinguish between both principles (Tridimas 2006, p. 242). Protection of legitimate expectations is *inter alia* relevant in the context of retroactive application of laws and of legitimate expectations created by the EU (e.g. through previous legislation or out of conduct). It may only be invoked if the legislation or conduct of an EU institution has created expectations that and have been frustrated by the EU or its agents as well (Tridimas 2006, pp. 251-252. Cf. Schermers & Waelbroeck 2001, pp. 148-153.). Since it is not relevant in the context of this research, it is not separately discussed.

²²² Case C-550/07 P, Akzo Nobel Chemicals and Akcros Chemicals v Commission, ECLI:EU:C:2010:512, para. 100 and the case law mentioned there.

²²³ See: Tridimas 2006, pp. 242-297; Raitio 2003, p. 125; Schermers & Waelbroeck 2001, pp. 116-117.

²²⁴ Tridimas 2006, pp. 248-249.

For example in the *Foto-Frost* case,²²⁵ the Court of Justice emphasizes that national courts do not have the power to declare acts of EU institutions invalid, since divergences between courts in the Member States as to the validity of such acts would endanger the very unity of the EU legal order, and detract from the fundamental requirement of legal certainty.

In the *TWD* case, the Court concludes that a person cannot question a decision's lawfulness before the national courts if that person could have challenged that decision before the EU Courts and allowed the mandatory time limit to expire. The Court states that the periods within which applications have to be lodged are intended to safeguard legal certainty because they prevent EU measures involving legal effects from being called into question indefinitely.²²⁶

In line with this reasoning, the Court states in the *AssiDomän* case²²⁷ that, if a number of similar individual decisions imposing fines have been adopted pursuant to a common procedure, and only some of the addressees have taken a successful legal action against those decisions, the principle of legal certainty precludes any necessity for the institution who adopted the decisions to re-examine the legality of unchallenged decisions.²²⁸ The Court emphasizes the importance of establishing time limits for bringing judicial proceedings so as to ensure legal certainty by preventing that measures can be challenged indefinitely. Furthermore, it refers to the importance of good administration of justice and procedural economy to further emphasize the importance of time limits.²²⁹

Legal certainty does not infer that Union and national procedures use identical criteria with respect to the same legal safeguard at all times.

In *Akzo Nobel Chemicals and Akcros Chemicals v Commission* (referred to as the *Akzo* case),²³⁰ the Court of Justice has ruled that the Commission's powers under the relevant EU law may be distinguished from those in inquiries carried out by national authorities at a national level. In the case at issue, the EU and national procedures were based on a division of powers between the respective competent authorities and, accordingly, the rules on legal professional privilege could vary.

²²⁵ Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452; cf. Section 5.1 (footnote 264) of this chapter.

²²⁶ Case C-188/92, *TWD/Bundesrepublik Deutschland*, ECLI:EU:C:1994:90, paras 16-17. Cf. Section 5.1 of this chapter. For a discussion of the Court's reasoning in this case, see: Tridimas 2006, pp. 249-250. On time limits as a safeguard of legal certainty, see: Schermers & Waelbroeck 2001, pp. 119-129.

²²⁷ Case C-310/97P, *Commission v AssiDomän Kraft Products and Others*, ECLI:EU:C:1999:407.

²²⁸ Case C-310/97P, *Commission v AssiDomän Kraft Products and Others*, ECLI:EU:C:1999:407, para. 63.

²²⁹ Case C-310/97P, *Commission v AssiDomän Kraft Products and Others*, ECLI:EU:C:1999:407, para. 59.

²³⁰ Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:512.

The Court concludes in its judgment that this has enabled the persons involved to determine their rights and obligations vis-à-vis the relevant authority.²³¹

In this research, the principle of legality is interpreted more broadly than the criminal law legality principle in Article 49(i) of the Charter. In the context of the Charter, it is important that no sanctions, be they of a criminal or not of a criminal nature, can be imposed unless there is a ‘clear and unambiguous basis’ for imposing such a sanction.²³² This research also looks at the principle of legality as a constitutional principle being part of the rule of law, inferring that it limits and regulates the acts of an administrative authority.²³³

As a constitutional principle, legality requires that government acts, including those of an administrative authority, have a legal basis²³⁴ and that acts of administrative bodies are limited and regulated by law.²³⁵ The underlying idea is that administrative authorities must be allotted by law the powers and instruments to carry out the tasks conferred on them. Without legal powers and instruments, administrative authorities are – in Ottow’s words – toothless.²³⁶ The law must allocate these powers and instruments to them and will immediately limit their powers and provide for the regulatory framework within which they can exercise these powers.²³⁷

²³¹ Case C-550/07 P, Akzo Nobel Chemicals and Akcros Chemicals v Commission, ECLI:EU:C:2010:512, paras 102-105. Also: Luchtman & Vervaele 2017(a), pp. 254-255.

²³² Case C-117/83, Könecke v Balm, ECLI:EU:C:1984:288, paras 16-17. A strict interpretation refers to Article 49(i) Charter and Article 7 ECHR, in which the principle says that no one can be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. In the Könecke v Balm case, the Court has clarified that even in case of sanctions not of a criminal nature, a clear and unambiguous legal basis is required to be able to impose such sanctions (Case C-117/83, Könecke v Balm, ECLI:EU:C:1984:288, paras 16-17). Cf. De Moor-van Vugt & Widdershoven 2015, pp. 304-305 and the case law mentioned there. They conclude that Article 49 Charter may well be applicable only in case of sanctions of a criminal nature, but that the principle of legality as a general principle of EU law also applies to sanctions not of a criminal nature.

²³³ Besselink et al. 2011, p. 5.

²³⁴ Burkens et al. 2017, p. 17; Prechal et al. 2015, p. 24.

²³⁵ Besselink et al. 2011, pp. 5-6.

²³⁶ Ottow 2015, p. 70.

²³⁷ As stated by Van den Brink et al., these powers and instruments provide a standard against which the administrative actions can be reviewed (Van den Brink et al. 2015, p. 135). Besselink et al. distinguish three types of functions of the concept of legality: ‘the democratic function of *legitimating* the existence of public authorities, their powers and the exercise thereof within the limits of the set legal rules; the instrumental function of *attributing* public authorities with powers and responsibilities in line with preferences and the local situation, and in accordance with a prevalent distribution of powers; the normative function of *regulating* the use public authorities can make of such powers.’ (Besselink et al. 2011, pp. 5-6).

Although on a Union level the interpretation of the principle of legality is not yet fully clear,²³⁸ the issues relating to this principle still have to be explored as well. After all, a judicial review can hardly ensure efficient legal protection if the limits to the powers, and under what conditions they may be exercised, are uncertain to begin with.

5 A complete system of legal remedies and procedures

The TFEU has established, by Articles 263 and 277 TFEU on the one hand, and 267 TFEU on the other, a complete system of legal remedies and procedures so as to ensure the Court is allowed to review the legality of Union institutions' measures.²³⁹ This system is complemented by Article 19(1) TEU which reaffirms that Member States have to provide sufficient remedies to ensure effective legal protection in the fields covered by Union law.²⁴⁰ Both the national courts and the EU Courts have an important role to play within the system, since they are, as the Court puts it, the 'guardians' of the Union's legal order.²⁴¹

²³⁸ It is, for instance, not clear what legal basis is sufficient or what scope the principle exactly has (i.e. what can the legislator delegate to an administrative authority) (Ottow 2015, pp. 70-73). In answer to the first issue of sufficient legal basis Ottow suggests in conclusion that at least the most essential elements of law must be regulated by the legislator. (Ottow 2015, p. 70).

²³⁹ E.g.: Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, para. 40; Opinion 1/09, *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets*, ECLI:EU:C:2011:123, para. 70; Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 92. In this section, only Articles 263 and 267 TFEU will be discussed in more detail. Article 277 TFEU lays down the possibility to plead the inapplicability of an EU act of general application in an action before the CJEU, and does not constitute an independent right to action (see Lenaerts et al. 2014, p. 441). Although it is part of the complete system of legal remedies and procedures, it is not directly relevant for the legal protection in case of composite procedures and will therefore not be discussed separately.

²⁴⁰ See Section 5.4 of this chapter, footnote 333.

²⁴¹ Opinion 1/09, *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets*, ECLI:EU:C:2011:123, para. 66. The judgment of the German Constitutional Court, the Bundesverfassungsgericht, of 5 May 2020 (BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15) regarding the ECB's Public Sector Asset Purchase Programme (PSPP decision), in which the BVerfG declares the Court's decision in the Weiss case (Case C-493/17, Weiss and Others, ECLI:EU:C:2018:1000) *ultra vires*, has given rise to a major debate about the relationship between the CJEU and national constitutional courts. Although the actual impact of this decision still is to be awaited, it may have consequences for the future relationship between the CJEU and national constitutional courts, but it may also quiet down. As yet, the debate does not change the current relationship as described in this section. For more about this decision and its consequences, see e.g.: Marzal 2020; Sarmiento 2020; Nguyen & Chamon 2020.

In principle, it is the competence of the Court to review acts of Union institutions and that of national courts to review acts of national authorities. This system has been further refined and applied to less straightforward situations by the Court in its case law and in doing so it has taken as a guiding principle that the complete system of legal remedies and procedures is to be interpreted in light of the right of effective judicial protection.²⁴² This infers, briefly stated, that its interpretation has to ensure that applicable procedural rules are implemented in such a way so as to contribute to achieving effective judicial protection. The Court may, however, not interpret in such a way so as to set aside the Treaty conditions.²⁴³

This section elaborates on the aspects of the complete system of legal remedies and procedures that are particularly relevant to the division of competences between the Union and national courts, starting with the CJEU's competence. This is followed by an overview of the acts that may be contested before the Court and the persons who may contest them. Then the section looks at the role of the national courts and ends by extensively discussing the main tool for cooperation, which is the preliminary ruling procedure.

5.I The Court's competence

The EU Courts may be asked to review the legality of Union acts directly on the basis of Article 263 TFEU, or to review these acts' validity indirectly, by way of a preliminary ruling, on the basis of Article 267 TFEU.

Pursuant to Article 263 TFEU, the Court may review the legality of – *inter alia* – ECB acts, other than recommendations and opinions, intended to produce legal effect vis-à-vis third parties.²⁴⁴ This includes but is not limited to the acts referred to in Article 288 TFEU, i.e. regulations, directives and decisions.²⁴⁵ It is settled case law that all measures adopted by Union institutions, whatever their nature or form, which are intended to have legal effect, can be subject to review by the Court.²⁴⁶

²⁴² See Section 2 of this chapter.

²⁴³ See Section 2 of this chapter.

²⁴⁴ Pursuant to Article 256(1) TFEU, the General Court has jurisdiction to hear and determine at first instance the actions or proceedings referred to in, *inter alia*, Article 263 TFEU. The General Court's decisions may be subject to a right of appeal to the Court of Justice on points of law only.

²⁴⁵ For a general overview of which acts are subject to review, see *inter alia*: Craig & De Búrca 2011, pp. 486–489; Lenaerts et al. 2014, pp. 257–274.

²⁴⁶ Case C-22/70, Commission v Council, ECLI:EU:C:1971:32, para. 42; Case C-57/95, France v Commission, ECLI:EU:C:1997:164, para. 7; Case C-370/07, Commission v Council, ECLI:EU:C:2009:590, para. 42; Case C-521/06 P, Athinaiki Techniki v Commission, ECLI:EU:C:2008:422, para. 42; Case C-60/81, IBM v Commission, ECLI:EU:C:1981:264, para. 9.

If the decision-making power remains at the EU level, the Court is competent, despite the involvement of national authorities in the preparatory phase of the decision-making process, to review the final EU decision and the entire preparatory phase.²⁴⁷ In such cases, the Court accepts contamination of the EU decision by any defects vitiating the national preparatory measure.²⁴⁸

In the *Berlusconi and Fininvest* case, the Court has stated: ‘it falls to the EU Courts, by virtue of their exclusive jurisdiction to review the legality of EU acts on the basis of Article 263 TFEU [...], to rule on the legality of the final decision adopted by the EU institution at issue and to examine, in order to ensure effective judicial protection of the persons concerned, any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision.’²⁴⁹

The Court has reduced the contamination risks²⁵⁰ in composite procedures whereby national decisions determine the terms for Union decisions to be adopted following such national decisions and are thus binding measures themselves. The Court has stated that any irregularity possibly impacting the national binding opinion cannot affect the validity of the Union decision following such an opinion.²⁵¹

Any binding national preparatory measure, even when part of an EU decision-making procedure, should be contested before a national court. The complete system of legal remedies and procedures entails that, in an action brought under Article 263 TFEU, the Court has no jurisdiction to rule on the lawfulness of a binding measure adopted by a national authority.²⁵²

This has been determined in the well-known *Borelli* case.²⁵³ In this case, the Court of Justice attributes a strict interpretation to the national courts’ competence to

²⁴⁷ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, paras 43-44; Case C-414/18, *Iccrea Banca*, ECLI:EU:C:2019:1036, paras 38-39. For more examples of cases in which the EU authority remains the final decision-making authority, see: Opinion of Advocate General Campos Sánchez-Bordona in Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:502, paras 73-79.

²⁴⁸ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, para. 44. For a more extensive discussion of this case, see *inter alia*: Brito Bastos 2019; Demková 2019; Wissink 2019.

²⁴⁹ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, para. 44.

²⁵⁰ Term used by Brito Bastos. He also refers to it as ‘derivative illegality’ (Brito Bastos 2015; Brito Bastos 2018).

²⁵¹ Case C-97/91, *Oleificio Borelli v Commission*, ECLI:EU:C:1992:491, para. 12.

²⁵² Case C-97/91, *Oleificio Borelli v Commission*, ECLI:EU:C:1992:491, para. 9; Case C-562/12, *Liivimaa Lihaveis*, ECLI:EU:C:2014:2229, para. 48; Case 46/81, *Benvenuto*, ECLI:EU:C:1981:64, para. 4; Case 142/83, *Nevas v Caisse des juristes à Athènes*, ECLI:EU:C:1983:267, para. 4; Case C-785/18, *GAEC Jeanningros*, ECLI:EU:C:2020:46, paras 25-27.

²⁵³ Case C-97/91, *Oleificio Borelli v Commission*, ECLI:EU:C:1992:491.

review the legality of national authorities' measures. It states that, if a national decision is clearly binding on the EU decision-making authority, the division of competences between the Union and national administrative authorities cannot be altered by the fact that a measure forms part of an EU decision-making procedure. In such cases, the national decision determines the terms of the EU decision to be adopted.²⁵⁴

In such cases, the national court, where appropriate after obtaining a preliminary ruling from the Court of Justice, has to rule on the lawfulness of the national measure at issue. It even has to consider admissible actions brought before it concerning such national measures if the domestic rules of procedure do not provide for opening such cases.²⁵⁵ Depending on the specific administrative procedure at issue, a possible annulment of the national decision may deprive the EU institution's decision of any basis and entail a review of the case at the EU level.²⁵⁶

On the basis of Article 267 TFEU, the Court of Justice is furthermore competent to give preliminary rulings, on request of a national court, concerning the interpretation of the Treaties and the validity and interpretation of Union acts.²⁵⁷ In a procedure under national law, a person can challenge the validity of a Union act on which a national act is based, and the national court may submit a request for a preliminary ruling to the Court. This way, an answer about the validity of the relevant Union act can be obtained indirectly from the Court.²⁵⁸

²⁵⁴ Case C-97/91, *Oleificio Borelli v Commission*, ECLI:EU:C:1992:491, para. 10. See also: Case T-114/99, *CSR PAMPRYL v Commission*, ECLI:EU:T:1999:281, para. 57; Case C-269/99, *Carl Kühne and Others*, ECLI:EU:C:2001:659, para. 57 (in this case, the Court speaks of 'only a limited or non-existent discretion with regard to that [national] measure'). Case C-64/05 P, *Sweden v Commission*, ECLI:EU:C:2007:802, paras 91-92 (in this case, the Court concluded that there was no such division between the national and EU authority and the Court therefore was competent to rule in the question at hand, paras 93-94); Case C-562/12, *Liivimaa Lihaveis*, ECLI:EU:C:2014:2229, para. 48; Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, paras 45-46.

²⁵⁵ Case C-97/91, *Oleificio Borelli v Commission*, ECLI:EU:C:1992:491, para. 13; Case C-269/99, *Carl Kühne and Others*, ECLI:EU:C:2001:659, para. 58; Cf. Case C-562/12, *Liivimaa Lihaveis*, ECLI:EU:C:2014:2229, para. 75.

²⁵⁶ In the GAEC Jeanningros case (Case C-785/18, *GAEC Jeanningros*, ECLI:EU:C:2020:46), the national measure fell outside the Court's jurisdiction as it was an autonomous act necessary to enable the Commission subsequently to give a decision on the measure (para. 35). The Court emphasized that the Commission had limited discretion and the actual decision-making took place at the national level. It concluded that the judicial protection had to be provided at the national level and any possible annulment of the national decision would deprive the Commission's decision of any basis and entail a review of the case by the Commission (paras 36-39).

²⁵⁷ Section 5.5 of this chapter discusses the preliminary ruling procedure in more detail.

²⁵⁸ Case C-343/07, *Bavaria and Bavaria Italia*, ECLI:EU:C:2009:415, para. 38.

However, persons have to challenge a Union act directly before the Court if they are fully aware of the Union act and of the fact they can without any doubt challenge the act before the Court. This cannot be evaded by way of an indirect challenge before a national court.²⁵⁹ The Union measure at issue becomes definite if it has not been challenged within the set time limits.²⁶⁰ When ruling on the implementing decision, national courts must assume the lawfulness of the Union decision, even if the possibility of going to Court has not been used.²⁶¹

If it is not beyond any doubt that a case would be admissible, it is for the national courts to provide for judicial protection, with the possibility to submit a preliminary ruling to the Court about the legality of the act.²⁶² In order to ensure the unity of Union law, national courts are not allowed to declare Union measures invalid;²⁶³ they have to submit a preliminary question regarding the lawfulness of the Union measures at issue to the Court.²⁶⁴

²⁵⁹ Case C-343/07, Bavaria and Bavaria Italia, ECLI:EU:C:2009:415, para. 39; Case C-239/99, Nachi Europe, ECLI:EU:C:2001:101, para. 37; Case C-188/92, TWD v Bundesrepublik Deutschland, ECLI:EU:C:1994:90, paras 17 and 24-25; Case C-414/18, Iccrea Banca, ECLI:EU:C:2019:1036, paras 70-74. Cf. Chapter 6, Section 3.1.

²⁶⁰ Case C-343/07, Bavaria and Bavaria Italia, ECLI:EU:C:2009:415, para. 39.

²⁶¹ Cf. Ortlep & Widdershoven 2015, p. 346. A person cannot plead the invalidity of a Union act on a national level anymore, regardless of having used the route via the EU Courts or not. The Court considers that it would undermine the idea underlying the time limits laid down in Article 263 TFEU, which is to safeguard legal certainty, if a party were allowed to challenge the lawfulness of an EU institution's decision before a national court when it had been informed of the EU institution's decision and undoubtedly could have brought an action under Article 263 TFEU before the EU Courts (Case C-188/92, TWD v Bundesrepublik Deutschland, ECLI:EU:C:1994:90, paras 16-18).

²⁶² Ortlep & Widdershoven 2015, pp. 346-347; Lenaerts et al. 2014, p. 318. For examples of cases in which the lawfulness of an EU act has been at issue in a national procedure because it was not clear whether the decision of the EU institution could be challenged before the EU Courts, see: Case C-408/95, Eurotunnel and Others v SeaFrance, ECLI:EU:C:1997:532 (in this case national proceedings have been allowed even though another Member State had already given judgment in separate proceedings; see paras 26-32); Case C-241/95, The Queen v Intervention Board for Agricultural Produce, ex parte Accrington Beef, ECLI:EU:C:1996:496, paras 14-16; Case C-346/03, Atzeni and Others, ECLI:EU:C:2006:130, paras 33-34; Case C-343/07, Bavaria and Bavaria Italia, ECLI:EU:C:2009:415, paras 37-46; Case C-212/19, Compagnie des pêches de Saint-Malo, ECLI:EU:C:2020:726, paras 31-36.

²⁶³ Note that this has been called into question by the Bundesverfassungsgericht, as explained in footnote 241.

²⁶⁴ In the Foto-Frost case, the Court has stated that, on the one hand, national courts may consider the validity of a (at the time) Community act. If they consider that the grounds the parties have put forward to them in support of invalidity are unfounded, they may reject these grounds, in which case, the national court concludes a measure to be completely valid; it is not calling into question the existence of a Community measure. On the other hand, the Court has stated in the Foto-Frost case that national courts do not have the power to declare acts of Community institutions invalid. The Court has emphasized that the main purpose of the powers that Article 267 TFEU confers on the CJEU with regard to preliminary questions is 'to ensure that Community law is applied uniformly by national courts. That

Any proceeding needs to be instituted within the time limits indicated in Article 263, sixth subparagraph, TFEU, being within two months after the measure has been published or notified to the person involved, or, if not published or notified, after the day on which it came to the knowledge of that person, as the case may be.²⁶⁵ However, in proceedings in which an act of general application adopted by a Union institution is at issue, any party may invoke the inapplicability of that act, even if the time limit has elapsed.²⁶⁶

The Court has jurisdiction in actions brought by persons on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. If the action is well founded, the Court will declare the act concerned to be void,²⁶⁷ requiring the institution in question to take the measures necessary to comply with the Court's judgment.²⁶⁸

Bringing an action before the Court does not have suspensory effect, unless the Court orders that application of the contested act be suspended.²⁶⁹ Furthermore, the Court may prescribe any necessary interim measures in any cases brought before it.²⁷⁰

5.2 Appealable decisions

A decision may be appealed before the Court if it is intended to produce legal effect vis-à-vis third parties. Measures are considered to create legal effect vis-à-vis a party when these ‘are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position’.²⁷¹ In order to determine whether an act has binding effect, the Court

requirement is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of Community Acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.’ (Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452.)

²⁶⁵ This may cause problems in case of composite procedures, as illustrated by Case C-69/19 P, *Credito Fondiario v CRU*, ECLI:EU:C:2020:178, in which an action based on Article 263 TFEU for annulment of decisions of the Single Resolution Board regarding ex ante contributions to the Single Resolution Fund has been dismissed as inadmissible since the action was manifestly out of time.

²⁶⁶ Article 277 TFEU.

²⁶⁷ Article 264 TFEU.

²⁶⁸ Article 266 TFEU.

²⁶⁹ Article 278 TFEU.

²⁷⁰ Article 279 TFEU.

²⁷¹ Case C-60/81, *IBM v Commission*, ECLI:EU:C:1981:264, para. 9; Case C-131/03 P, *Reynolds Tobacco and Others v Commission*, ECLI:EU:C:2006:541, para. 54; Case C-362/08 P, *Internationaler Hilfsfonds v Commission*, ECLI:EU:C:2010:40, para. 51; Case C-521/06 P, *Athinaiki Techniki v Commission*, ECLI:EU:C:2008:422, para. 29; Case C-322/09 P, *NDSHT v Commission*, ECLI:EU:C:2010:701, para. 45; Case C-463/10 P, *Deutsche Post and Germany v Commission*, ECLI:EU:C:2011:656, para. 37; Case

classifies it by looking at the substance of the contested act as well as the intention of those who drafted it. The wording of the document and the context in which it has been presented can also be important in considering whether or not it has legal effect.²⁷²

The form of a decision or act is in principle irrelevant to the right to challenge such acts or decisions.²⁷³ This is especially pertinent to composite procedures, since preparatory steps are often not formally indicated as decisions, but may nonetheless produce binding legal effect. Also, this way institutions cannot avoid judicial review by disregarding formal requirements relating to a formal decision.²⁷⁴

Intermediate measures aiming at preparing a final decision do, in principle, not constitute acts that may be challenged.²⁷⁵ Any legal defect in the preparatory phase may be relied upon in an action against such a final decision.²⁷⁶

T-281/18, ABLV Bank v ECB, ECLI:EU:T:2019:296, para. 29; Case T-283/18, Bernis and Others v ECB, ECLI:EU:T:2019:295, para. 29. The Court has emphasized in the Reynolds Tobacco case that, although these conditions have to be interpreted in light of the principle of effective judicial protection, such an interpretation cannot have the effect of setting aside these conditions without going beyond the jurisdiction that the Treaty confers on the CJEU (para. 81). Furthermore, only the operative part of an act is capable of producing legal effects and, as a consequence, of adversely affecting a person's interests. The legality of recitals to the decision are open to review by the EU Courts only 'to the extent to which, as grounds of an act adversely affecting a person's interests, they constituted the necessary support for its operative part' (Case T-138/89, NBV and NVB v Commission, ECLI:EU:T:1992:95, para. 31; Lenaerts et al 2014, pp. 269-270 and the case law mentioned there).

²⁷² Case C-301/03, Italy v Commission, ECLI:EU:C:2005:727, paras 20-24; cf. Lenaerts et al. 2014, p. 270.

²⁷³ Case C-521/06 P, Athinaiki Techniki v Commission, ECLI:EU:C:2008:422, paras 42-43; Case C-322/09 P, NDSHT v Commission, ECLI:EU:C:2010:701, para. 47; Case T-369/03, Arizona Chemical and Others v Commission, ECLI:EU:T:2005:458, para. 56.

²⁷⁴ Opinion of Advocate General Bot in Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:445, paras 65-67. Cf. Case C-521/06 P, Athinaiki Techniki v Commission, ECLI:EU:C:2008:422, para. 45.

²⁷⁵ Case C-60/81, IBM v Commission, ECLI:EU:C:1981:264, para. 10; Case C-521/06 P, Athinaiki Techniki v Commission, ECLI:EU:C:2008:422, para. 42; Case C-147/96, Netherlands v Commission, ECLI:EU:C:2000:335, para. 26; Case T-687/18, Pilatus Bank v ECB, ECLI:EU:T:2019:542, paras 17-18; Case T-281/18, ABLV Bank v ECB, ECLI:EU:T:2019:296, para. 30; Case T-283/18, Bernis and Others v ECB, ECLI:EU:T:2019:295, para. 30.

²⁷⁶ Case C-60/81, IBM v Commission, ECLI:EU:C:1981:264, para. 12; Case T-123/03, Pfizer v Commission, ECLI:EU:T:2004:167, para. 24; Joined cases T-10/92, T-11/92, T-12/92, and T-15/92, Cimenteries CBR and Others v Commission; ECLI:EU:T:1992:123, para. 31; Case C-282/95 P, Guérin automobiles v Commission, ECLI:EU:C:1997:159, para. 36; Case T-687/18, Pilatus Bank v ECB, ECLI:EU:T:2019:542, paras 20 and 27.

Such acts of a purely preparatory character are, for example, the general investigatory powers that the Commission exercises in its capacity of competition authority. The General Court considers these preparatory measures to be acts implementing the decision ordering the inspection. As such, the General Court does not consider them to be actionable decisions under Article 263 TFEU.²⁷⁷

Furthermore, the Court has ruled in the *IBM* case that neither the initiation of a procedure in light of an infringement of Articles 85 and 86 TFEU (currently Articles 101 and 102 TFEU) nor the decision to state objections may, on the basis of their nature and the legal effects they produce, be challenged in an action for annulment.²⁷⁸

An example of preparatory measures in the context of banking supervision is the ‘failing or likely-to-fail assessment’ issued by the ECB to the Single Resolution Board on the basis of Article 18(1) SRM Regulation. Since the General Court has concluded that these acts constitute mere assessments and do not bind the Single Resolution Board in any way, these assessments are not separately subject to judicial review under Article 263 TFEU.²⁷⁹

This is only different when preparatory measures in themselves meet the Court’s requirements for being an actionable decision under Article 263 TFEU. So, for an intermediate step to be subject to review in itself, it must create legal effect vis-à-vis a party and be the culmination of a special procedure distinct from the preparatory procedure for the final measure.²⁸⁰

²⁷⁷ The General Court has decided that neither reports that Commission officials have drawn up during investigations of what has been said by company representatives during those investigations, nor copying documents or asking question during an inspection, are considered acts which are subject to separate review by the EU Courts. Such acts have to be considered to be measures implementing the decision ordering the inspection and may be relied upon in the action brought against the final decision. These measures do not have an immediate and irreversible effect to the legal position of the person involved. (Case T-9/97, *Elf Atochem v Commission*, ECLI:EU:T:1997:83, paras 18-27; Case T-135/09, *Nexans France and Nexans v Commission*, ECLI:EU:T:2012:596, para. 125 (the appeal case concerns other elements of the case and has been dismissed by the Court; cf. Case C-37/13 P, *Nexans and Nexans France v Commission*, ECLI:EU:C:2014:2030). Cf. Lenaerts et al. 2014, p. 276.)

²⁷⁸ Case C-60/81, *IBM v Commission*, ECLI:EU:C:1981:264, para. 21.

²⁷⁹ Case T-281/18, *ABLV Bank v ECB*, ECLI:EU:T:2019:296, paras 33-36; Case T-283/18, *Bernis and Others v ECB*, ECLI:EU:T:2019:295, paras 33-36.

²⁸⁰ Case C-60/81, *IBM v Commission*, ECLI:EU:C:1981:264, paras 10-11; Joined cases T-10/92, T-11/92, T-12/92, and T-15/92, *Cimentieries CBR and Others v Commission*; ECLI:EU:T:1992:123, paras 42-43; Case T-123/03, *Pfizer v Commission*, ECLI:EU:T:2004:167, paras 21-23; Case T-326/99, *Fern Olivieri v Commission and EMEA*, ECLI:EU:T:2003:351, paras 51 and 53; Case T-93/10, *Bilbaína de Alquitrances and Others v ECHA*, ECLI:EU:T:2013:106, para. 28; Case T-94/10, *Rüttgers Germany and Others v ECHA*, ECLI:EU:T:2013:107, para. 29; Case C-322/09 P, *NDSHT v Commission*, ECLI:EU:C:2010:701, para. 48; Case C-170/89, *BEUC v Commission*, ECLI:EU:C:1991:450, para. 11;

If an EU preparatory measure is appealable in itself, an annulment procedure is to be instituted in accordance with Article 263 TFEU. In such cases, the preparatory measure is held to be valid if no proceedings against the preparatory act have been instituted within the applicable time limits.²⁸¹

As illustrated by the cases discussed in this section, when assessing whether a preparatory measure is an actionable decision under Article 263 TFEU, the Court looks at the effect the measure creates, whether sufficient judicial protection is provided, the procedural rules that are applicable (the legislator's intention), and whether there is a possible risk of confusing the procedural stages.

Advocate General Bot concludes in his opinion in the joined cases *Deutsche Post AG, Federal Republic of Germany v European Commission*²⁸² that in its case law the Court of Justice is looking for a balance between, on the one hand, ensuring effective judicial protection of a person's rights under EU law and, on the other hand, avoiding paralysis of the EU institutions' activities because actions against preparatory measures are multiplying. The Court furthermore aims at preserving the division of powers and the system of legal remedies laid down by the Treaty.

These different aims of balancing and preserving have resulted in a system in which preparatory acts capable of producing legal effect and constituting a culmination of a procedure ancillary to the main procedure must be open to review by the courts, whereas admissibility will be declined in case of actions against a preparatory act obliging the Court to arrive at a decision in questions on which an EU institution has not yet had an opportunity to state its position.²⁸³

These various elements are elaborated below, to start with the issue of whether sufficient judicial protection is ensured if the possibility is lacking to bring an action for annulment against a preparatory act.

A preparatory measure cannot in itself be the subject matter of an action if it has been established that the illegality attached to that preparatory measure can be relied upon to support an action against the final decision for which that act is an intermediate step. In such circumstances, sufficient judicial protection is

Case T-281/18, ABLV Bank v ECB, ECLI:EU:T:2019:296, para. 31; Case T-283/18, Bernis and Others v ECB, ECLI:EU:T:2019:295, para. 31.

²⁸¹ 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 441-442. Cf. Lenaerts et al. 2014, pp. 275 and 277.

²⁸² Opinion of Advocate General Bot in Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:445.

²⁸³ Opinion of Advocate General Bot in Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:445, paras 78-79.

provided by bringing action against the final decision.²⁸⁴ However, if sufficient judicial protection is not ensured, the preparatory measure produces legal effect independently and is therefore capable to form the subject matter of an action for annulment.²⁸⁵

A good example of this reasoning can be found in the joined cases *Deutsche Post AG, Federal Republic of Germany v European Commission*. In this case, the Court of Justice has determined that an action against the final decision, i.e. the decision terminating the procedure concerning the alleged state aid in favour of Deutsche Post, was not capable of ensuring sufficient judicial protection for the applicants. The measure at issue, i.e. the information injunction under Article 10(3) of Regulation No. 659/1999, independently produced legal effects.²⁸⁶

The Court states that, firstly, if the applicants correctly claim the injunction to be disproportionate in that the information requested is not relevant for assessing the state measure, the illegalities vitiating the preparatory measure cannot affect the legality of the final decision, since that decision is not based on information obtained by way of the contested injunction.²⁸⁷

Secondly, the Court continues, in the context of the procedure at hand, the events of the possible illegality attached to the preparatory measure cannot be removed by an action against the final decision.²⁸⁸

Assessing the sufficiency of the judicial protection in place may also focus on the question whether or not certain rights of defence may be irredeemably impaired during a preparatory phase (i.e. because of the effect the measure produces). If the measure can irredeemably impair the rights of defence, a

²⁸⁴ Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:656, para. 53; Case C-53/85, AKZO Chemie v Commission, ECLI:EU:C:1986:256, para. 19; Case T-281/18, ABLV Bank v ECB, ECLI:EU:T:2019:296, para. 32; Case T-283/18, Bernis and Others v ECB, ECLI:EU:T:2019:295, para. 32.

²⁸⁵ Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:656, para. 54; Case C-53/85, AKZO Chemie v Commission, ECLI:EU:C:1986:256, paras 19-20; Case C-39/93 P, S.F.E.I. and Others v Commission, ECLI:EU:C:1994:253, para. 28; Case C-521/06 P, Athinaiki Techniki v Commission, ECLI:EU:C:2008:422, para. 54. Even a preparatory measure expressing a provisional opinion of the institution concerned may be the subject of judicial review in such a case (Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:656, para. 54).

²⁸⁶ Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:656, paras 55-56.

²⁸⁷ Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:656, para. 57.

²⁸⁸ Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:656, paras 58-60.

distinct change in a person's legal position could be conceivable, thus requiring a separate judicial review of the preparatory measure at issue.

In a state aid procedure for instance, the Court has considered the Commission's decision, involving a choice of review procedure, to have irreversible consequences, since it entailed suspending payment of the aid. Therefore, the Court has considered the Commission's decision to be actionable in itself under Article 263 TFEU.²⁸⁹

The *Spain v Commission* case concerns the reviewability of a decision on the procedure applicable in case of state aid. The rules of procedure laid down in the Treaty vary according to whether the aid is classified as 'existing aid' or 'new aid'. Classifying the aid as 'new aid' infers suspension of payment of the aid, whereas classifying it as 'existing aid' does not suspend payment. The Court has ruled accordingly that the decision to initiate the procedure for 'new aid' has legal effect, since it clearly involves a choice of the relevant category of aid and the related procedural rules.²⁹⁰

The Court considers a delay in paying the aid, due to the prohibition laid down in the rules applicable to paying it, to have irreversible consequences that cannot be removed by the final decision in the procedure, i.e. either a decision that the aid is compatible with the Treaty or a ruling in proceedings brought against the Commission decision that the aid is incompatible.²⁹¹

Additionally, the Court considers that if the measures the Commission categorizes as new aid have been implemented, the legal effect of that categorization is definitive. Consequently, the decision contested by this action is not simply a preparatory step, in which case judicial protection would have been sufficiently ensured by bringing an action against the final decision.²⁹²

In the field of competition law, the Court has considered furthermore that certain rights are already to be respected in the preliminary inquiry phase so as to prevent these would be irremediably impaired during the preliminary inquiry procedure. Those rights include at least the right to legal representation,

²⁸⁹ Case C-312/90, *Spain v Commission*, ECLI:EU:C:1992:282, paras 11-26. Cf. Alonso de León 2017, p. 302; Lenaerts et al. 2014, p. 292. This is contrary to for instance initiating a procedure in light of an infringement of Articles 85 and 86 TFEU (currently Articles 101 and 102 TFEU) (see footnote 278) or initiating an anti-dumping procedure (Case T-134/95, *Dysan Magnetics v Commission*, ECLI:EU:T:1996:38, paras 21-28), since those procedures do not immediately and irreparably affect the legal position of the person concerned (Case T-134/95, *Dysan Magnetics v Commission*, ECLI:EU:T:1996:38, paras 24-26).

²⁹⁰ Case C-312/90, *Spain v Commission*, ECLI:EU:C:1992:282, paras 14-20.

²⁹¹ Case C-312/90, *Spain v Commission*, ECLI:EU:C:1992:282, para. 22.

²⁹² Case C-312/90, *Spain v Commission*, ECLI:EU:C:1992:282, paras 23-24.

the privileged nature of the correspondence between lawyer and client (legal privilege) and the right not to incriminate oneself.²⁹³

In line with this, a Commission decision to reject a request for protection of (possibly) privileged documents has been considered to produce legal effect for the undertakings concerned. The Commission decision withheld the protection provided by Union law from these undertakings, was definitive in nature and independent of any final decision regarding a breach of competition rules.²⁹⁴ The Court considers that the undertakings' opportunity to bring an action against a final decision does not provide them with an adequate degree of protection of their rights.²⁹⁵

In *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, the General Court points at the possibility that the administrative procedure does not result in a decision finding an infringement to be committed. Besides, even in case of an action brought against a final decision, the companies at issue would in any event not be able to prevent the irreversible consequences resulting from improper disclosure of documents protected under legal professional privilege. Therefore, no adequate judicial protection could be ensured by an action against the final decision alone.²⁹⁶

However, the Court only considers such a Commission act rejecting the request for the protection of documents to be a decision producing legal effect if the person concerned has invoked the confidential nature of the documents the Commission has requested to produce in the course of an inspection. In *Nexans France and Nexans v Commission*, the Court points out that the applicants did not claim, at the time the contested acts were adopted, protection of the documents at hand similar to that conferred on the confidentiality of communications between lawyers and their clients. Thus, when the Commission copied those documents and requested the applicants to provide more information, it did not adopt a decision withholding that protection from the applicants. The Court considers that the applicants were not taking issue with the Commission for having consulted or copied certain specific protected documents, but for having examined those documents in the Commission's own offices and for having kept

²⁹³ Case C-46/87, *Hoechst v Commission*, ECLI:EU:C:1989:337, paras 15-16; Case 374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, paras 33-36. For more about these rights, see: Section 4.2 of this chapter.

²⁹⁴ Case T-125/03, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:T:2007:287, paras 45-48.

²⁹⁵ Case T-125/03, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:T:2007:287, para. 47.

²⁹⁶ Case T-125/03, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:T:2007:287, para. 47.

them until the time of examination. The Court concludes that in this case the contested acts could not be regarded as actionable measures.²⁹⁷

The above reasoning does however not apply, for instance, to a Commission decision refusing access to the file. The General Court considers that such a decision in principle produces only limited effect, which is characteristic for a preparatory measure, and is thus not subject to review separately.²⁹⁸

The legislator's intention is another element the Court considers when determining whether or not a preparatory action is separately subject to judicial review. The Court assesses the applicable procedural rules in order to determine whether the legislator intends to give a binding legal effect to the measure. If it follows from the applicable provisions that the Union legislator intends to confer a binding effect on a preparatory measure, then, in principle, an action for annulment against such a measure seems possible.²⁹⁹ In its case law, the Court has indicated that it is not decisive that sanctions are absent if the person concerned does not comply with such a preparatory measure.³⁰⁰

To illustrate the legislator's intention to confer a binding effect on a preparatory measure, the joined cases *Deutsche Post AG, Federal Republic of Germany v*

²⁹⁷ Case T-135/09, *Nexans France and Nexans v Commission*, ECLI:EU:T:2012:596, paras 128-132. Cf. footnote 277.

²⁹⁸ Case T-10/92, *Cimenteries CBR and Others v Commission*, ECLI:EU:T:1992:123, para. 42. Cf. Lenaerts et al. 2014, pp. 279-280. For other examples in which the General Court considers the legal position of the person concerned not to be immediately and irreversibly affected, see: Case T-9/97, *Elf Atochem v Commission*, ECLI:EU:T:1997:83, paras 21-26; Case T-134/95, *Dysan Magnetics v Commission*, ECLI:EU:T:1996:38, paras 21-28.

²⁹⁹ The importance attributed to the legislator's intention is illustrated, e.g., by Case T-283/15, *Esso Raffinage v ECHA*, ECLI:EU:T:2018:26, in which the General Court has ruled that the legislator's intention prevails over the relevant authority's intention. The General Court determines that the intention of the European Chemicals Agency (ECHA) to not adopt a provision producing binding legal effects is only of subsidiary importance to the examination of objective criteria such as the substance of the contested act (para. 75), and the informal nature of the existing mechanism of cooperation between the ECHA and national authorities cannot call into question the division of competences as laid down in the relevant regulation (para. 77). The Court emphasizes that a different interpretation, according to which the act at issue would not be binding, would 'defeat a substantial part of the architecture as it was expressly intended to be by the EU legislature' (para. 78). While the appeal case before the Court is still pending at the moment of writing, the Advocate General's opinion has already been published and follows the General Court in its take on the issue (Opinion of Advocate General Tanchev in Case C-471/18 P, *Federal Republic of Germany v Esso Raffinage SAS, European Chemicals Agency (ECHA)*, ECLI:EU:C:2020:752, paras 105-106).

³⁰⁰ Joined cases C-463/10 P and C-475/10 P, *Deutsche Post AG, Federal Republic of Germany v European Commission*, ECLI:EU:C:2011:656, para. 48.

European Commission deserve being looked at more closely.³⁰¹ In its ruling the Court considers that the Commission's injunction for information by decision directed at a Member State in light of a state aid case was intended to produce binding legal effect (see indent). However, one has to keep in mind that, generally, transferring information from one authority to another will not be subject to separate judicial review.³⁰²

In order to determine whether or not the preparatory act creates legal effect vis-à-vis the person concerned, the Court of Justice has looked at the procedure in place. The provisions at hand contain a two-stage procedure, in which the Commission may require by decision that the information be provided (second stage) if a Member State does not provide the information upon a simple information request of the Commission (first stage).

The Court concludes that the decision in the second stage is to be considered a decision within the meaning of Article 288 TFEU and, accordingly, binding in its entirety. Thus, by providing that an information injunction shall take the form of a decision, the Union legislator intends to confer a binding character on such a measure. Accordingly, a Commission's injunction for information, such as the one contested in this case, is intended to produce binding legal effect and, therefore, constitutes an act subject to review by the EU Courts pursuant to Article 263 TFEU.³⁰³

This approach is in line with the assessments made in the field of competition law with regard to information requests by the Commission and Commission decisions ordering on-site inspections.³⁰⁴ The provisions applicable to information requests issued by the Commission in its capacity as competition authority provide for two ways of requesting information: the Commission can send a 'simple' request for information or request information by decision. The latter form of request is, as explicitly provided for by the applicable rules, subject to judicial review.³⁰⁵

In case of on-site inspections too only the decision ordering such an inspection is subject to separate judicial review.³⁰⁶ The Commission may conduct all inspections of undertakings and associations of undertakings necessary in

³⁰¹ Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:656.

³⁰² Alonso de León 2017, pp. 307-309 and the case law mentioned there.

³⁰³ Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:656, paras 41-45.

³⁰⁴ Cf. the Court's statement in this regard in Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:656, para. 46.

³⁰⁵ Article 18(3) Regulation (EC) 1/2003. Cf. Chapter 5, Section 3.1.

³⁰⁶ Cf. Lenaerts et al. 2014, p. 276. Such a decision has been subject to review by the EU Courts in e.g. Case T-135/09, Nexans France and Nexans v Commission, ECLI:EU:T:2012:596.

order to carry out its duties as a competition authority.³⁰⁷ However, only in case such inspections have been ordered by Commission decision, undertakings and associations of undertakings are actually required to submit to such inspections,³⁰⁸ and only those decisions may be contested before the Court.

Note that, as already mentioned previously in this section, investigatory powers used during the on-site inspection, such as copying the documents at issue and asking questions, are not considered to be acts subject to separate judicial review.³⁰⁹

A last element the Court considers when assessing the reviewability of preparatory measures, is whether an action for annulment against a preparatory measure involves a risk of confusing the administrative with the judicial procedure. Indeed, the Court may not decide in questions on which the administrative authority concerned has not yet had an opportunity to state its position. If it would be allowed for the Court to decide in such cases, the Court would anticipate arguments on the substance of the case, which may lead to confusing the different procedural stages.³¹⁰

For example, in cases where the measure at issue expresses a provisional opinion of the administrative authority concerned, the Court of Justice considers that the preparatory measure in itself cannot be the subject of an action for annulment.³¹¹ In such a case, the action for annulment may require the EU Courts to decide in questions on which the institution concerned has not yet stated an opinion, which thus may lead to confusing the administrative with the judicial procedural stage.³¹² Confusing the different procedural stages would be ‘incompatible with the system

³⁰⁷ Article 20(1) Regulation (EC) 1/2003

³⁰⁸ Article 20(4) Regulation (EC) 1/2003. In case of on-site inspections, the Commission may immediately decide to adopt a decision ordering the inspection and so it does not need to carry out an on-site inspection without issuing a decision first (Case C-136/79, *National Panasonic v Commission*, ECLI:EU:C:1980:169, para. 11). Such a decision ordering an inspection shall specify the inspection’s subject matter and purpose, set the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 of Regulation (EC) 1/2003. The decision shall also specify the right to have it reviewed by the CJEU (Article 29(4) Regulation (EC) 1/2003). Lenaerts et al. conclude that due to their binding character, the legality of decisions ordering inspections can be contested before EU Courts (Lenaerts et al. 2014, p. 276 and the case law mentioned there).

³⁰⁹ Case T-135/09, *Nexans France and Nexans v Commission*, ECLI:EU:T:2012:596, para. 125. See footnote 277.

³¹⁰ Joined cases C-463/10 P and C-475/10 P, *Deutsche Post AG, Federal Republic of Germany v European Commission*, ECLI:EU:C:2011:656, para. 51; Case C-60/81, *IBM v Commission*, ECLI:EU:C:1981:264, para. 20.

³¹¹ Case C-60/81, *IBM v Commission*, ECLI:EU:C:1981:264, para. 20; Case C-147/96, *Netherlands v Commission*, ECLI:EU:C:2000:335, paras 34-35; Case T-10/92, *Cimenteries CBR and Others v Commission*, ECLI:EU:T:1992:123, para. 36.

³¹² Case C-60/81, *IBM v Commission*, ECLI:EU:C:1981:264, para. 20.

of the division of powers between the Commission and the EU judicature and of the remedies laid down by the Treaty, as well as the requirements of the sound administration of justice and the proper course of the administrative procedures to be followed in the Commission'.³¹³

5.3 Standing criteria

Article 263 TFEU lays down the standing criteria, which are the conditions that each of the groups of applicants have to meet in order to be able to challenge a Union act before the Court. In the context of this research, especially the fourth subparagraph is relevant, which sets out the conditions under which natural and legal persons are able to institute proceedings before the Court.³¹⁴ It states that natural and legal persons are permitted to institute proceedings against an act addressed to them or which concerns them directly and individually. Persons may also start proceedings before the Court against a regulatory act which is of direct concern to them and does not entail implementing measures. In this research, these conditions particularly raise questions in the context of top-down procedures and are therefore discussed extensively in Chapter 6.³¹⁵

The standing criteria in the case of acts of general application have often been subject to debate.³¹⁶ The third standing condition of Article 263, fourth subparagraph, TFEU with respect to regulatory acts, has been introduced by the Lisbon

³¹³ Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:656, para. 51. In the Joined cases Deutsche Post AG, Federal Republic of Germany v European Commission, the Court concludes that this risk does not exist: an action for annulment directed against the preparatory act at issue, i.e. an information request, should not lead the Court to rule on the substance of the case, i.e. to rule on the existence of a state aid measure or its possible compatibility with the internal market (Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:656, para. 52).

³¹⁴ Article 263, second subparagraph, TFEU includes the conditions for the privileged applicants, i.e. Member States, the European Parliament, the Council and the Commission. The third subparagraph lays down the conditions for semi-privileged applicants, i.e. the Court of Auditors, the ECB and the Committee of the Regions. For more about these groups of applicants, see *inter alia*: Lenaerts et al. 2014, pp. 309-312; Craig & De Búrca 2011, pp. 490-491.

³¹⁵ See Chapter 6, Section 3.1.

³¹⁶ An act of general application is a measure applying to situations that have been determined objectively and have legal effect vis-à-vis a category of persons viewed in a general and abstract manner; cf. Case C-244/88, UCDV v Commission, ECLI:EU:C:1989:588, para. 13; Case C-229/88, Cargill v Commission, ECLI:EU:C:1990:138, para. 18; Case T-35/06, Honig-Verband v Commission, ECLI:EU:T:2007:250, paras 39-42; Case T-262/10, Microban International and Microban (Europe) v Commission, ECLI:EU:T:2011:623, para. 23; Case T-93/10, Bilbaína de Alquitranes and Others v ECHA , ECLI:EU:T:2013:106 , para. 56; Case T-94/10, Rütgers Germany and Others v ECHA, ECLI:EU:T:2013:107, para. 57.

Treaty. Although this has broadened the standing criteria,³¹⁷ in *Inuit Tapariit Kanatami and Others v Parliament and Council*, the Court of Justice still interprets it strictly.³¹⁸ It concludes that the concept of ‘regulatory act’, as provided for in Article 263, fourth subparagraph, TFEU, does not encompass legislative acts.³¹⁹ According to the Court, Article 263, fourth subparagraph, TFEU has been amended for the purpose of enabling persons to bring, under less stringent conditions, actions for annulment of acts of general application other than legislative acts.³²⁰ This means that bringing an action for annulment under the fourth subparagraph of Article 263 TFEU against an act of general application is only possible if that act does not entail an implementing measure³²¹ nor is a legislative act.³²²

When persons are not permitted to challenge a Union act of general application under Article 263, fourth subparagraph, TFEU, they can bring a direct action against an implementing measure which is either addressed to them or

³¹⁷ The right of appeal before the EU Courts has been broadened because the system before the Lisbon Treaty contained a gap in judicial protection against acts of general application that are not of individual concern and do not require an implementing measure. This gap led to the situation that persons could only gain judicial protection if they would breach such an act of general application. After the amendment, the judicial protection now includes that a person only has to proof to be directly concerned in case of a regulatory act which does not entail implementing measures. It is thus not necessary any longer to proof an individual concern in such a case. Cf. Widdershoven 2014, para. 2; Lenaerts et al. 2014, pp. 332-333; Pernice 2013, pp. 385-388; Case C-274/12 P, *Telefónica v Commission*; ECLI:EU:C:2013:852, para. 27.

³¹⁸ Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, paras 58-61.

³¹⁹ A legislative act is an act adopted in accordance with either the ordinary legislative procedure or the special legislative procedure within the meaning of Article 289(1)-(3) TFEU (e.g. Case T-94/10, *Rüters Germany and Others v ECHA*, ECLI:EU:T:2013:107, para. 58). Cf. Lenaerts et al. 2014, pp. 334-335.

³²⁰ Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, paras 60-61. Cf. Case T-262/10, *Microban International and Microban (Europe) v Commission*, ECLI:EU:T:2011:623, para. 21; Case T-93/10, *Bilbaína de Alquitranes and Others v ECHA*, ECLI:EU:T:2013:106, para. 55. The circumstance that this broader right of appeal does not apply to legislative acts may be related to the strong democratic legitimacy of such acts (Widdershoven 2014, para. 4).

³²¹ Case T-262/10, *Microban International and Microban (Europe) v Commission*, ECLI:EU:T:2011:623, paras 33-38; Case C-274/12 P, *Telefónica v Commission*, ECLI:EU:C:2013:852, paras 33-38; Case T-93/10, *Bilbaína de Alquitranes and Others v ECHA*, ECLI:EU:T:2013:106, paras 63-64; Case T-94/10, *Rüters Germany and Others v ECHA*, ECLI:EU:T:2013:107, paras 60-65; Case C-132/12 P, *Stichting Woonpunt and Others v Commission*, ECLI:EU:C:2014:100, paras 49-53; Case C-133/12 P, *Stichting Woonlinie and Others v Commission*, ECLI:EU:C:2014:105, paras 36-40.

³²² Case T-262/10, *Microban International and Microban (Europe) v Commission*, ECLI:EU:T:2011:623, para. 22; Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, paras 60-61; Case T-93/10, *Bilbaína de Alquitranes and Others v ECHA*, ECLI:EU:T:2013:106, para. 57.

concerns them directly and individually. This follows from the existence of a complete system of legal remedies and procedures in the EU,³²³ ensuring that persons are protected against the application to them of the general Union act at issue.³²⁴

Depending on the authority responsible for the administrative implementation, persons have to go to either the Union or the national court. If a Union institution is responsible for the implementation of a general act, the persons are entitled to go to the Court to bring a direct action against the implementation of the measure under the conditions of Article 263 TFEU, as stated previously. In support of their actions, they can plead for the invalidity of the general act at issue.³²⁵ If a national authority is responsible for the implementation of a general act, the person has to bring an action before its national courts. The national courts, in turn, have to request a preliminary ruling from the Court about the validity of the relevant general Union act.³²⁶

5.4 National courts

As mentioned previously, national courts have a vital role to play within the Union's complete system of legal remedies and procedures.³²⁷ Together with the CJEU, they must ensure judicial review of compliance with the Union's legal order.³²⁸ The Court has repeatedly pointed out that the

³²³ Case C-294/83, *Les Verts v Parliament*, ECLI:EU:C:1986:166, para. 23; Case C-274/12 P, *Telefónica v Commission*, ECLI:EU:C:2013:852, para. 28; Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, paras 92-93. Cf. Widdershoven 2014.

³²⁴ Case C-274/12 P, *Telefónica v Commission*, ECLI:EU:C:2013:852, para. 28. In accordance with the principle of sincere cooperation, national courts have, insofar as possible, to interpret and apply the national procedural rules regarding the exercise of rights of action in a way that enables persons to challenge before the courts the legality of any national decision or measure relating to the application to them of an EU act of general application (Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, para. 42).

³²⁵ Case C-294/83, *Les Verts v Parliament*, ECLI:EU:C:1986:166, para. 23; Case C-274/12 P, *Telefónica v Commission*, ECLI:EU:C:2013:852, para. 29; Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 93

³²⁶ Case C-294/83, *Les Verts v Parliament*, ECLI:EU:C:1986:166, para. 23; Case C-274/12 P, *Telefónica v Commission*, ECLI:EU:C:2013:852, para. 29; Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 93. The General Court has repeated in this context that the admissibility before the EU Courts does not depend on whether there is a remedy before a national court, and so that admissibility before the EU Courts cannot depend on the alleged slow-moving wheels of national courts (Case T-541/10, *ADEDY and Others v Council*, ECLI:EU:T:2012:626, para. 93).

³²⁷ About the role of national courts in general, see inter alia: Ravo 2012, pp. 107-110; Fennelly 2013.

³²⁸ Cf. Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 90; Opinion of the Court: Avis 1/09, Avis rendu en vertu de l'article 218, paragraphe 11, TFUE,

national courts, together with the Court itself, fulfil a duty entrusted to them both of ensuring that the law is observed in interpreting and applying the Treaties.³²⁹

The Court is only competent to rule on matters if it has a specific legal basis for its tasks and competences in the Treaties.³³⁰ Thus all matters falling outside the Court's jurisdiction fall within the national courts' competences.³³¹ These competences include for instance definitive measures adopted by national authorities as well as national measures that are part of a Union process and that are binding on a Union institution. In case of doubts about the validity of a Union act, national courts may request a preliminary ruling from the Court.³³²

No specific procedural Union law is applicable when persons bring actions before the national court in order to safeguard the rights they derive from Union law. It is for the Member States to establish a system of legal remedies and procedures ensuring respect for the right to effective judicial protection.³³³

In accordance with the principle of national procedural autonomy, and limited by the requirements following from Articles 19 TEU and 47 Charter and

ECLI:EU:C:2011:123, para. 66. National courts are often referred to as *juge de droit commun* when they act in their capacity of a European court. Cf. Ortlep & Widdershoven 2015, p. 334; Vermeulen 2001, p. 42; Lenaerts 2007, p. 1645. Lenaerts argues that national courts can be considered *juge de droit commun* since they, *inter alia*, have to apply EU law, have to set aside national law that conflicts with EU law and have to interpret national law in line with EU law.

³²⁹ Case C-583/11 P, Inuit Tapiriit Kanatami and Others v Parliament and Council, ECLI:EU:C:2013:625, para. 99; Opinion of the Court: Avis 1/09, Avis rendu en vertu de l'article 218, paragraphe 11, TFUE, ECLI:EU:C:2011:123, para. 69. See also: Tridimas 2013, p. 368 (who emphasizes that the interaction between both judicatures is vital for the effective functioning of EU law); Pernice 2013, p. 390 (who points out that the dialogue between the EU Courts and national courts is essential for both a uniform application of EU law in all Member States and to guarantee effective judicial protection as required by Article 47 Charter).

³³⁰ Pursuant to Articles 13(2) and 5(2) TEU, EU institutions, including the CJEU, shall act within the powers conferred on them by the Treaties. Cf. Lenaerts et al. 2014, p. 3; Case C-50/00 P, Unión de Pequeños Agricultores v Council, ECLI:EU:C:2002:462, paras 44-45; Case C-169/09, Miles and Others, ECLI:EU:C:2011:388, para. 45.

³³¹ Lenaerts et al. 2014, p. 3.

³³² See Section 5.1 of this chapter.

³³³ Case C-583/11 P, Inuit Tapiriit Kanatami and Others v Parliament and Council, ECLI:EU:C:2013:625, para. 100; Case C-50/00 P, Unión de Pequeños Agricultores v Council, ECLI:EU:C:2002:462, para. 41; Case C-263/02 P, Commission v Jégo-Quéré, ECLI:EU:C:2004:210, para. 31; Case C-432/05, Unibet, ECLI:EU:C:2007:163, para. 42. This has been reaffirmed in Article 19(1) TEU, which sets out that Member States shall provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law (cf. Case C-583/11 P, Inuit Tapiriit Kanatami and Others v Parliament and Council, ECLI:EU:C:2013:625, para. 101; Case C-562/12, Liivimaa Lihaveis, ECLI:EU:C:2014:2229, para. 68.). Tridimas points out that this is not only a recognition, but also a stipulation. In addition to strengthening the principle of effectiveness, it creates expectations from the national laws (Tridimas 2013, p. 368).

the principles of equivalence and effectiveness, Member States are required to designate which national courts have jurisdiction and to provide for the procedural rules governing the actions brought before them.³³⁴ National courts may even have to rule on matters in which the domestic rules of procedure do not provide for a legal remedy,³³⁵ or may have to provide for certain remedies in order to ensure the principle of effective judicial protection.³³⁶ When a national court concludes that there is no right of action before the national courts, the complete system of legal remedies and procedures does not infer that a person should automatically be permitted to bring an action before the EU Courts.³³⁷

5.5 The preliminary ruling procedure

The possibility for national courts to request a preliminary ruling from the Court of Justice is important in shaping the cooperation between the Union and national courts; the preliminary ruling procedure facilitates Union law being properly applied and uniformly interpreted in all Member States.³³⁸ As such, the preliminary ruling procedure ensures that Union law has full effect and autonomy.³³⁹

The preliminary ruling procedure enables the Court to influence the way in which national courts apply Union law, but also to get involved in legal issues it would otherwise have been unable to rule on and to get insight into the legal and practical issues on a national level.³⁴⁰ At the same time, national courts can be considered the gatekeepers, as they filter what issues shall be referred

³³⁴ Lenaerts 2007, p. 1645. Cf. Schermers & Waelbroeck 2001, pp. 199-200. For more about the principle of national procedural autonomy, see Section 4.3.1 of this chapter.

³³⁵ Case C-97/91, *Oleificio Borelli v Commission*, ECLI:EU:C:1992:491, para. 13. Cf. Case C-432/05, *Unibet*, ECLI:EU:C:2007:163, para. 41; Case C-583/11 P, *Inuit Tapiril Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 104. Cf. Section 5.1 of this chapter.

³³⁶ National courts must, for instance, be able to set aside national measures or to grant interim relief (Van Gerven 2000, p. 503).

³³⁷ Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, para. 43. If it would be possible for a person to bring the same action before the EU Courts, the EU Courts would need to examine and interpret national procedural law in each individual case, which would go beyond the CJEU's jurisdiction when reviewing the legality of (at the time) Community measures (para. 43). In this case, the Court points out that other systems of judicial protection may be open with regard to acts of general application, but that it is for the Member States, if necessary, to reform their current system in accordance with Article 48 TFEU (para. 45). Cf. Pernice 2013, p. 385; Lenaerts 2007, p. 1629.

³³⁸ Case C-244/80, *Foglia/Novello*, ECLI:EU:C:1981:302, para. 14. Cf. Lenaerts et al. 2014, pp. 50-51; Craig & De Búrca 2011, pp. 442-443; Schermers & Waelbroeck 2001, pp. 219 and 227-228.

³³⁹ Case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para. 37; Case C-619/18, *Commission v Poland (Indépendance de la Cour suprême)*, ECLI:EU:C:2019:531, para. 45.

³⁴⁰ Arnulf 2012, p. 118.

to the Court of Justice and, subsequently, give effect to the Court's preliminary rulings.³⁴¹

The Court has jurisdiction to give preliminary rulings concerning (i) the interpretation of the Treaties and (ii) the validity and interpretation of acts of *inter alia* Union institutions.³⁴² A national court may request the Court to give a ruling on such questions of interpretation or validity, if it considers such a Court decision necessary for it to render judgment itself.³⁴³

A national court shall bring any such question to the Court of Justice in case no judicial remedy under national law exists against its own decision.³⁴⁴ However, it is not obliged to do so if the answer to the Union law question at issue can, regardless what it may be, in no way affect the outcome of the case,³⁴⁵ or if the Court has already interpreted that rule (*acte éclairé*)³⁴⁶ or if there is no scope for any reasonable doubt as to the correct application of the relevant Union law (*acte clair*).³⁴⁷ It is up to the national court to determine whether it needs to

³⁴¹ Tridimas 2013, p. 375. He points out that this role is understated but essential, since only a tip of the iceberg reaches the EU Courts, and the rest is dealt with by national courts.

³⁴² Article 267 TFEU. Contrary to Article 263 TFEU, Article 267 TFEU does not exclude recommendations or opinions (Case C-322/88, Grimaldi v Fonds des maladies professionnelles, ECLI:EU:C:1989:646, para. 8). Moreover, a request for a preliminary ruling is not devoid of purpose merely because it concerns a preparatory measure or a measure without legal effect, since the relevant national law may provide legal protection in such cases and it is for the referring national court to interpret the national law (Case C-62/14, Gauweiler and Others, ECLI:EU:C:2015:400, paras 27-28).

³⁴³ Article 267, second subparagraph, TFEU. About the request for a preliminary ruling in general, see: Lenaerts et al. 2014, pp. 48-106; Schermers & Waelbroeck 2001, pp. 218-307; Arnulf 2006, pp. 95-137. The CJEU has also published recommendations to national courts and tribunals relating to the initiation of preliminary proceedings to remind them of the character of the procedure, the factors to be considered when submitting a request, and to provide them with more practical information (2018/C 257/01).

³⁴⁴ Article 267, third subparagraph, TFEU.

³⁴⁵ Case C-283/81, CILFIT v Ministerio della Sanità, ECLI:EU:C:1982:335, para. 10.

³⁴⁶ Case C-283/81, CILFIT v Ministerio della Sanità, ECLI:EU:C:1982:335, paras 13-14.

³⁴⁷ Case C-283/81, CILFIT v Ministerio della Sanità, ECLI:EU:C:1982:335, para. 16. For more about the obligation to request a preliminary ruling, see *inter alia*: Craig & De Búrca 2011, pp. 446-447; Lenaerts et al. 2014, pp. 94-101. For more about the application of the Cilfit exceptions by national courts and tribunals, see: Research Note of the CJEU, 'Application of the Cilfit case-law by national courts or tribunals against whose decisions there is no judicial remedy under national law, May 2019 (available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/ndr-cilfit_synthese_en.pdf; last visit on 9 August 2020); for the three exceptions in particular, see p. 6 of the Research Note. In the case of Commission v France (Précompte mobilier), the Court of Justice states that the French Republic failed to fulfil its obligation under Article 267, third subparagraph, TFEU, since the Conseil d'État (French Council of State), as a court adjudicating at last instance, failed to refer to the Court in order to determine the interpretation of the EU law at issue even though the Conseil d'État's interpretation of that EU law was not so obvious as to leave no scope for doubt (Case C-416/17, Commission v France

use the possibility of requesting a preliminary ruling from the Court or not. Parties do not have a right to a preliminary ruling.³⁴⁸

When parties challenge the validity of a Union measure in a national procedure, the national court may consider the arguments supporting the invalidity to be unfounded. It may then reject those arguments and conclude the Union measure is valid. The Court of Justice has concluded that, in such cases, national courts are not calling into question the existence of the Union measure in itself,³⁴⁹ and so a preliminary question is unnecessary.

National courts may, on the other hand, not declare Union acts invalid.³⁵⁰ The Court emphasizes that the main purpose of the preliminary ruling procedure is to ensure a uniform application of Union law by national courts, and divergences between national courts concerning the validity of Union acts jeopardize this purpose. Moreover, in light of the Court's exclusive jurisdiction to declare Union acts void, the coherence of the complete system of legal remedies and procedures requires that the power to declare Union acts invalid is reserved to the EU Courts.³⁵¹

A preliminary ruling is binding on the national court that referred the matter to the Court of Justice.³⁵² Moreover, in view of legal certainty and a uniform application of Union law, any other national court besides the national court who referred the matter to the Court of Justice, has to regard a Union act as void for the purpose of a judgment it has to give if the Court has declared that act void.³⁵³

The Court has repeatedly pointed out that a preliminary ruling has to be seen as purely declaratory, i.e. it interprets the law and does not create or alter it. Consequently, a preliminary ruling takes effect from the date on which the rule it interprets has entered into force and an administrative body has to apply such

(Précompte mobilier), ECLI:EU:C:2018:811, paras 105-114). The ECtHR, furthermore, has ruled that not providing a proper reasoning for refusing to refer questions of EU law to the Court of Justice for a preliminary ruling constitutes a violation of Article 6(1) ECHR (*Sanofi Pasteur v France*, ECtHR App. no 25137/16, 13 February 2020).

³⁴⁸ Case C-283/81, *CILFIT v Ministerio della Sanità*, ECLI:EU:C:1982:335, paras 9-10. Cf. *Craig & De Búrca* 2011, pp. 448-449.

³⁴⁹ Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452, para. 14. Cf. *Lenaerts* 2007, p. 1632 and the case law mentioned there.

³⁵⁰ Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452, para. 20.

³⁵¹ Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452, paras 15-17.

³⁵² Case C-29/68, *Milch-, Fett- und Eierkontor v Hauptzollamt Saarbrücken*, ECLI:EU:C:1969:27, para. 3.

³⁵³ Case C-66/80, *International Chemical Corporation v Amministrazione delle fianze dello Stato*, ECLI:EU:C:1981:102, paras 12-13.

interpretation even to legal relationships that have arisen or have been formed before the Court's ruling.³⁵⁴

However, in view of the principle of legal certainty, the Court has also pointed out that it is important for administrative decisions to have finality. Therefore, Union law does, in principle, not require that administrative bodies be placed under an obligation to reopen an administrative decision that has become final. In specific circumstances, a national administrative body may be required to review a final administrative decision when an application for such a review is made, in order to take account of the interpretation that the Court has subsequently given of a relevant Union law provision.³⁵⁵

6 Recapitulation

This chapter has set out the requirements for assessing the effectiveness of legal protection in case of individual decisions based on composite administrative procedures and adopted within the SSM. Before taking an extensive look at the actual framework, the chapter has discussed both the importance of the rule of law for ensuring judicial control and the relevant sources for legal protection both during the administrative phase and before court.

It is currently explicitly laid down in Article 2 TEU that the European Union is founded on, among other values, the rule of law, inferring that acts of Union institutions must be subject to judicial review. To this end, a complete system of legal remedies and procedures has been established within the EU, which must be ensured by both the Union and national courts. It is settled case law that the rule of law requires this complete system to be interpreted in light of the fundamental right to judicial protection. This results in an interpretation, to the greatest extent possible within the boundaries set by the Treaties, that may contribute to achieving effective judicial protection of persons' rights under Union law.

In respect of the sources relevant to effective legal protection, the Charter and the general principles of Union law are the framework's starting points, which are complemented by the ECHR and the case law deriving from it.

³⁵⁴ Case C-2/06, Kempter, ECLI:EU:C:2008:78, paras 35-36; Case C-453/00, Kühne & Heitz, ECLI:EU:C:2004:17, para. 22.

³⁵⁵ Such circumstances are: (i) the administrative body has the power to reopen the decision under national law; (ii) the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance; (iii) the judgment is, in light of a decision given by the Court subsequent to it, based on a misinterpretation of EU law which has been adopted without a question being referred to the Court of Justice for a preliminary ruling; and (iv) the person concerned has complained to the administrative body immediately after becoming aware of the Court's decision (Case C-2/06, Kempter, ECLI:EU:C:2008:78, paras 37/38; Case C-453/00, Kühne & Heitz, ECLI:EU:C:2004:17, paras 24-28).

The Charter and the general principles of Union law are applicable to Union institutions in general and to Member States in particular when they implement Union law, which is the case, for instance, of banking supervision, since it is laid down in substantive EU law. Therefore the Charter and general principles of Union law are relevant to this research. As the Member States are responsible for their national bodies, among which NCAs, the Charter and the general principles of Union law are applicable to both the ECB and NCAs.

Furthermore, the ECHR is relevant to this research, since rights provided for by the Charter that correspond to rights guaranteed by the ECHR shall have the same meaning and scope as their counterparts laid down in the ECHR. Union law may still provide more extensive protection, but not less. Moreover, the fundamental rights set out in the ECHR form an integral part of the general principles of Union law and so the EU Courts will also take the ECtHR's judgments into account when determining the content of the general principles of Union law.

The rule of law and the legal sources relevant to effective legal protection both form the framework's basis. Subsequently, the framework uses a broad interpretation of effective legal protection: in this research effective legal protection not only infers that a person's rights are to be safeguarded under Union law, but also that this safeguarding is done in a way which least hampers the effectiveness of Union law.

This broad interpretation for the purposes of this research allows for choices within the concept of effective legal protection regarding the organization of legal protection and particularly the effectiveness of the way in which Union law is applied and enforced. Such choices may entail limitations in the meaning of Article 52(1) of the Charter, or simply constitute considerations regarding the effectiveness of the administrative procedure when deciding about the legal protection at hand.

The assessment framework is divided into two parts. The first part of the framework determines which elements are being considered and evaluated in assessing the effectiveness of legal protection. This substantive part of the framework encompasses the rights of defence and the principle of effective judicial protection (i.e. the safeguard perspective), on the one hand, and the elements of effectiveness in general, including the elements of the Union principle of effectiveness (i.e. the instrumental perspective), on the other. The second part is the institutional part of the assessment framework, which describes along which lines the tasks and responsibilities are divided between the Union and national judicial authorities when ensuring effective legal protection. This division stems from the complete system of legal remedies and procedures and the Court's interpretation of that system.

Together, these two parts result in a framework allowing us to review the effectiveness of legal protection in the case of individual decisions based on composite procedures. The framework lays down the aspects that must be considered and balanced to assess the legal protection's effectiveness. It is not meant as a checklist for determining whether or not legal protection is effective since in my opinion such an approach cannot possibly fully capture the complexity of effective legal protection. This framework is briefly summarized below.

The substantive part of the assessment framework

The rights of defence refer to various rights of persons, on the one hand, and obligations of the authorities involved, on the other, and include the right to be heard, the right to have affairs handled impartially and fairly and within a reasonable period of time, the right of access to files, the right to reasoned decisions, the obligation to act with due diligence when preparing decisions and to decide only after having considered all relevant factors and accurate data and after having investigated the file thoroughly, the right to sufficient time to prepare a defence, and the right to legal assistance and legal privilege.

These rights of defence must be guaranteed in all procedures initiated against a person that may result in a measure adversely affecting the person. In other words, the rights of defence must be observed as from a very early stage of supervision. Another right that must be observed in all procedures is the right of respect for private and family life, which in the context of this research is especially relevant in relation to on-site inspections.

In case of decisions imposing sanctions of a criminal nature, additional legal safeguards may apply. In this respect, the right not to incriminate oneself is particularly relevant to this research. Although this right applies as from an early stage of supervision as well, it is uncertain whether the EU Courts will apply it in all procedures or, similar to the ECtHR case law, only in procedures leading to sanctions of a criminal nature. In this research the right not to incriminate oneself is discussed in the context of procedures that may lead to sanctions of a criminal nature.

In principle, the authority adopting the final decision must guarantee compliance with the rights of defence, which are considered an important tool to ensure legal protection, especially when an authority has broad discretionary powers. The deferential judicial review applied in such cases will to a certain extent be compensated by a stricter review of the procedural requirements.

The other element of effective legal protection from a safeguard perspective is the EU principle of effective judicial protection. This principle has been developed over many years, starting with case law from the ECtHR, which has first been confirmed by the Court and later been implemented in the TEU and the

Charter. Despite its implementation in the TEU and Charter, many requirements of effective judicial protection continue to be based on general principles of law and case law.

The principle of effective judicial protection encompasses minimum conditions with regard to access to a court, and the process and the remedies at the court's disposal.

A person must have access to a court which is established by law, is permanent, has compulsory jurisdiction, applies the rules of law, and is independent and impartial. The right of access to a court does, however, not entail an unconditional entitlement to bring actions before the EU Courts. The interpretation of standing criteria cannot result in setting aside the conditions with regard to standing as laid down in the Treaties. It is important to bear in mind that even decisions adopted in the preparatory phase of supervision may be regarded as intended to produce legal effect vis-à-vis a person and, therefore, be considered subject to judicial review.

Judicial proceedings must meet the requirements of fair justice, which are due process, independence and impartiality, a reasonable time period, public access, and the requirement that courts dispose of effective remedies to repair breaches of Union law. Furthermore, effective judicial protection requires that a court has the jurisdiction to examine the questions of fact and law relevant to the dispute before it, and meets certain standards for the intensity of the judicial review.

Looking at effective legal protection from an instrumental perspective, firstly the EU principle of effectiveness is relevant. However, this principle is not easy to define as it relates to various aspects of Union law.

First, it relates to the principle of loyal cooperation, on the basis of which the Court has determined that Member States have to ensure the effectiveness of Union law, and that enforcement of Union law must meet the requirements of equivalence, effectiveness, proportionality and dissuasiveness. National courts have to assess whether the measures and sanctions used in order to enforce Union law actually meet these requirements.

Second, the principle of effectiveness is related to the principle of procedural autonomy, which infers that, if there are no Union rules governing the matter, the procedural autonomy of Member States is respected to the extent that their national procedural rules are in line with the principles of equivalence and effectiveness. The principle of effectiveness requires that national courts ensure effective protection of Union rights and an effective enforcement of Union law in national courts. This may even entail that national courts have to ensure protection in cases not provided for by national law.

In addition to the Union principle of effectiveness, other aspects are to be considered in order to have a judicial structure organized in such a way that it does not prevent EU law from being effectively implemented.

An effective implementation of Union law assumes it to be in line with the legislator's intentions. The legal protection has to reflect the division of tasks and responsibilities as laid down by the legislator in the applicable legal framework. Ideally, in practice the decision-making corresponds to the legislator's intentions. The legal protection would thus be applied at the level at which the information is established, the interests are weighed and the discretion is used.

Furthermore, it is important to have a system of judicial protection in place that ensures speedy and efficient procedures, and remains coherent. This entails that double judicial proceedings are to be avoided, and the administrative authorities are to carry out their work efficiently. Moreover, the logic and coherence of the complete system of legal remedies and procedures must be upheld when finding solutions for the legal issues faced in the context of composite procedures.

Certain elements of the principle of effective judicial protection (i.e. the safeguard perspective) also relate to the instrumental perspective. Examples of such elements which are also important in ensuring an effective enforcement of banking rules, are the requirements that a proceeding is to be handled within a reasonable period of time or that courts have effective remedies at their disposal. Likewise, the principles of legal certainty and of legality are important to both perspectives.

The principle of legal certainty protects person's rights by requiring that persons have to know the law they are subject to so as to be able to anticipate on it, inferring that rules must be clear and precise, and their application predictable.

This principle may also help to ensure achieving the objectives set out in the banking rules. The Court refers, for instance, to this principle when safeguarding the integrity of Union law and justifying rules for procedural exclusivity, both of which are aspects helping to achieve the aims of the SSM and, therefore, the effectiveness of the Union law at hand.

In order to safeguard legal certainty, the Court is also strict in upholding time limits to lodge appeals, and, if an institution adopted several similar individual decisions of which only some have been contested, the Court precludes any necessity to re-examine the legality of the unchallenged decisions. These rulings prevent measures involving legal effect from being called into question indefinitely, which is important in guaranteeing the effectiveness of a supervisor and, therefore, of any relevant rules.

The principle of legality requires that powers of administrative authorities are limited and regulated by law. Without a proper legal basis and clear legal limits and rules that regulate an administration's actions, it is impossible for a court to

review such actions. For this reason, the principle of legality is important from a safeguard perspective. At the same time, a clear limitation and regulation of an administration's actions will contribute to the administration's effectiveness by avoiding judicial proceedings due to unclarities. This principle basically is the starting point for legal protection and is thus already relevant in the administrative decision-making phase.

The institutional part of the assessment framework

The second part of the assessment framework concerns the institutional set-up of judicial protection and focuses on the complete system of legal remedies and procedures the Court has been setting out over the years. This analysis results in a number of starting points regarding the division of tasks and responsibilities between the EU Courts and national courts.

The general starting point is that, pursuant to Article 263 TFEU, the Court is competent to assess the legality of decisions adopted by Union institutions. The Court has no jurisdiction to rule on the lawfulness of legally binding measures issued by national authorities. National courts are competent to assess decisions of national authorities, but are in turn not competent to rule on the lawfulness of Union acts.

The Court uses a strict interpretation of this division of competences. Thus, it has concluded that it is also not competent to rule on a measure of a national authority, despite it being part of a Union procedure, when the national measure is clearly binding upon the Union institution involved. Furthermore, it has ruled that its competence does not depend on whether or not national rules provide for judicial protection against the measure at hand. On the other hand, when it concerns non-binding national preparatory measures that are part of an EU decision-making procedure in which the final decision-making powers remain at the Union level, the Court has confirmed it is exclusively competent to review the legality of the Union decision, including any national non-binding preparatory measures.

The Court has taken measures to reduce the risk existing in certain composite procedures that the national level contaminates the Union level, by stating that any irregularity that may affect the national binding opinion cannot affect the validity of the Union decision following such an opinion. It accepts, at the same time, that non-binding national preparatory measures may be vitiated by defects which may affect the validity of a Union decision.

On the basis of Article 263 TFEU, the Court has provided criteria for the conditions under which a person is able to bring an action before the Court (standing criteria) and for the circumstances in which an action can be subject to review by the Court (appealable decisions). This infers that if a person does not meet these criteria, or no appeal can be lodged against an action before the EU

Courts, it has to be considered whether or not the person concerned may gain judicial protection before a national court.

In conclusion, national courts have an important role to play in the complete system of legal remedies and procedures. In order to ensure a uniform interpretation of Union law and to support collaboration between the national and Union courts, national courts may and sometimes must, pursuant to Article 267 TFEU, submit requests for preliminary rulings if they have questions about the interpretation of the Treaties or the validity and interpretation of acts of inter alia Union institutions.

Together, these two parts set the requirements for effective legal protection in case of ECB or NCA decisions adopted within the SSM, while also ensuring a system of legal protection that does not hamper the implementation of European prudential banking rules. As the discussion in Chapters 4-7 teaches, these requirements will not always be aligned.

Achieving effective legal protection within the SSM from both a safeguard and an instrumental perspective undoubtedly is a challenge. Whereas some elements are hardly affected by the shared administration in place within the SSM, others give rise to many questions when they have to be applied within such a far-reaching shared administration. In part II of the research, the interpretation of effective legal protection as set out in this chapter, will be applied to various composite procedures within the SSM.

PART II
CHAPTER 4

Common Procedures

1 Introduction

Chapter 3 explains the assessment framework that the research uses to assess the effectiveness of legal protection within the Single Supervisory Mechanism. This assessment framework will be applied to the different types of composite decisions that exist in the context of the SSM. This chapter elaborates on the common procedures,¹ which are the procedures by which an authorization for taking up the business of a credit institution is granted² or withdrawn,³ and by which a notification of acquisition of a qualifying holding in a credit institution is assessed.⁴

The chapter focuses on the way in which common procedures are organized in two steps as laid down in the SSM Regulation. This is discussed first. Then the legal protection in these cases is analysed, beginning with the legal protection before court so as to assess which decisions and parts of the procedure are subject to separate review and by which court, and winding up with the legal protection in relation to the preparatory phase. The chapter concludes by providing an interim evaluation of the effectiveness of the legal protection in place.

2 A two-step procedure

Ultimately, the European Central Bank decides on the approval, or withdrawal, of an authorization to take up business as a credit institution, and on an approval for acquiring a qualifying holding in such a credit institution. The distinction between Significant Institutions and Less Significant Institutions does not apply to common procedures,⁵ and so these procedures are similar for both SIs and LSIs.

All common procedures start, in principle, with a draft decision by the relevant National Competent Authority, i.e. the NCA of the Member State where the credit institution is or will be established, and end with a final decision from the ECB. The only exceptions are, on the one hand, when the ECB withdraws an authorization at its own initiative, thus not taking a draft decision by the NCA as the starting point, and, on the other hand, when an NCA immediately rejects an application for an authorization, thus ending the procedure with an NCA

¹ The term ‘common procedures’ has been introduced in Part V, SSM Framework Regulation.

² Articles 14 SSM Regulation and 73-79 SSM Framework Regulation.

³ Articles 14(5) SSM Regulation and 80-84 SSM Framework Regulation.

⁴ Articles 15 SSM Regulation and 85-88 SSM Framework Regulation.

⁵ The tasks listed in subparagraphs (a) and (c) of Article 4(t) SSM Regulation (i.e. authorization, withdrawal of authorizations and assessment of notifications of the acquisition and disposal of qualifying holdings in credit institutions) are excluded from the division of responsibilities pursuant to Article 6(4) SSM Regulation.

decision instead of an ECB decision. As these two exceptions do not follow the two-step structure characteristic for common procedures, they are not discussed in this chapter.⁶

An application for authorization shall be submitted to the NCA of the Member State where the credit institution is to be established. The requirements for an application are laid down in national laws transposing the relevant Union law⁷ and applications have to be made in accordance with these national requirements.⁸ This also infers that when the ECB adopts a final decision in these cases, it must, in accordance with Article 4(3) of the SSM Regulation,⁹ apply such national law transposing the relevant provisions of the fourth Capital Requirements Directive (CRD IV) and any specific national legal requirements.¹⁰

The relevant NCA has to assess whether the applicant complies with all conditions for authorization set out in its national law. It carries out the assessment with the involvement of the Joint Supervisory Teams concerned, if in place. The NCA and ECB assessments are closely interlinked to ensure the relevant requirements are met. Both the NCA and ECB may require the applicant to provide additional information needed for the assessment, and all information related to the application is shared between both authorities.¹¹

If the conditions for authorization are met, the NCA adopts a draft decision to propose the ECB to grant an authorization; this is called a ‘draft authorization decision’ (hereafter generically referred to as ‘NCA draft decision’). Both the ECB and the applicant will be notified of the draft decision at least twenty working days before expiry of the maximum assessment period provided for by the relevant national law. The CRD IV states that a decision to grant or refuse

⁶ Although an authorization withdrawal at the ECB’s own initiative does not comprise a formal NCA draft decision, the ECB still has to consult with the NCA (Article 14(5) SSM Regulation). This situation resembles the cooperation that occurs during ongoing supervision in bottom-up procedures, involving less formalized NCA input, as discussed in Chapter 5. An immediate rejection by an NCA is an NCA decision, which would be subject to review by a national court. If the ECB would be involved in such a decision informally, it resembles the cooperation that occurs during ongoing supervision in top-down procedures, as discussed in Chapter 6.

⁷ The provisions of the CRD IV are based on Article 53(2) TFEU, which only provides for the possibility of adopting directives. Cf. Title III CRD IV.

⁸ Article 14(1) SSM Regulation. The NCA shall notify the receipt of an application within 15 working days to the ECB, informing it of the applicable national time limits (cf. Article 73(1) and (2) SSM Framework Regulation).

⁹ See Section 3.2 of this chapter.

¹⁰ ECB Guide on licensing 2019, p. 3. In its Guide, the ECB points out that this may give rise to differing treatments of licence applications across Member States (p. 3).

¹¹ SSM Supervisory Manual 2018, p. 51.

authorization shall, in any event, be taken within twelve months after receiving the application.¹² However, these periods can differ in each Member State.¹³

The NCA may propose to attach recommendations, conditions and restrictions to a draft decision.¹⁴ If the applicant does not comply with all the conditions for authorization set in the relevant national law of the Member State concerned, then the NCA will reject the application immediately¹⁵ (which is, as mentioned previously, not discussed in this chapter).

The ECB has to decide whether or not it supports the draft decision within the maximum period laid down in the SSM Regulation.¹⁶ Consequently, the ECB has ten working days from receipt of the NCA's draft decision to assess the application and decide, unless the evaluation period is extended for an additional ten working days.¹⁷ In practice, the ECB will be involved as from an earlier stage of the procedure and will thus have more time for an assessment when necessary.¹⁸

The ECB can object to the draft decision only where the conditions for authorization set in relevant Union law are not met. If the ECB considers that these conditions have not been met, it will state the reasons for its rejection in writing and give the applicant the opportunity to comment on relevant facts and objections.¹⁹ While the aforementioned deadlines for deciding on an application are already rather tight, the time limits for providing comments will pose an even greater

¹² Article 15 CRD IV (cf. Article 15 CRD V) states that a refusal shall be notified to the applicant within 6 months after receiving the application or, if the application is incomplete, within 6 months after receiving the complete information required for the decision.

¹³ The Netherlands, for instance, has implemented a shorter assessment period. Under Dutch law, the competent authority has to prepare a draft decision for the ECB within 13 weeks after receiving the notification and the final decision has to be adopted at the very maximum within 6 months; see Articles 1:102(3) and 1:103(2) Act on Financial Supervision (*Wet op het financieel toezicht*). However, this may be amended, since the national legislator has for a second time proposed to extend this period for draft authorization decisions; see Wissink 2017, p. 443. The countdown start of the period can also vary between Member States; see ECB Guide on licensing 2019, p. 27.

¹⁴ Article 76(3) SSM Framework Regulation.

¹⁵ Articles 14(2) SSM Regulation and 74-76 SSM Framework Regulation.

¹⁶ The draft authorization decision shall be deemed adopted by the ECB unless the ECB objects within a maximum period of 10 or, in case of extension, 20 working days (Article 14(3) SSM Regulation).

¹⁷ Article 78(1) in conjunction with 77(2) SSM Framework Regulation.

¹⁸ Cf. Article 73 SSM Framework Regulation. Pursuant to this article, the NCA shall notify the receipt of an application to the ECB within 15 working days, and the ECB may request an NCA to ask the applicant for additional information if the application is not complete. Such additional information shall also be sent to the ECB within 15 working days after the NCA has received it. Cf. SSM Supervisory Manual 2018, p. 51.

¹⁹ Articles 14(3) SSM Regulation and 77-78 SSM Framework Regulation. An applicant is also given the right to be heard in case of a positive ECB decision which is subject to conditions and obligations (SSM Supervisory Manual, pp. 51-52; ECB Guide on licensing 2019, pp. 32-33).

challenge, the standard period of two weeks the applicant usually has to submit comments being shortened to three days in the case of common procedures.²⁰ If a meeting with the applicant is considered necessary, the ECB may extend the maximum period to decide on an application with a maximum of another ten working days.²¹ Ultimately, the ECB may support the draft decision (grant approval of authorization), or object to the draft decision (reject authorization). The NCA will notify the applicant of the ECB's final decision.²²

In the cases laid down in relevant Union law, the ECB may withdraw an authorization, either on its own initiative following consultations with the relevant NCA or at an NCA's request.²³ As mentioned previously, only withdrawal by the ECB on the NCA's request is an example of the two-step procedure discussed in this chapter. For this to be the case, the NCA proposes to withdraw the authorization by submitting a draft decision to that effect to the ECB, called a 'draft withdrawal decision' (hereafter generically referred to as 'NCA draft decision'). The ECB will assess the draft decision without undue delay and may accept or reject it.²⁴ In both cases, the right to be heard shall apply²⁵ and the ECB shall notify the credit institution concerned of its decision.²⁶

The procedure for assessing acquisitions of qualifying holdings in credit institutions is very similar to the authorization procedure. A notification is submitted to the NCA of the Member State where the credit institution is established. Such a notification needs to be in accordance with the relevant national law based on relevant Union law.²⁷ Upon receipt, the NCA must notify the ECB of both the notification and the applicable national time limits.²⁸

A proposed acquisition can only be opposed to either if the information provided by the proposed acquirer is incomplete, or on reasonable grounds based on the limitative list of assessment criteria provided in the CRD IV. Be that as it is, the rules to be applied are laid down in national laws transposing relevant Union law.²⁹

The NCA assesses whether the notification complies with the conditions laid down in the relevant Union and national law, and prepares a draft decision for the ECB to oppose or not oppose the acquisition (hereafter generically referred

²⁰ Article 31(3) SSM Framework Regulation.

²¹ Article 77(2) SSM Framework Regulation.

²² Articles 14(4) and 88(3) SSM Framework Regulation.

²³ Article 14(5) SSM Regulation

²⁴ Articles 81(1) and 83(1) SSM Framework Regulation.

²⁵ Articles 81(2) and 82(3) SSM Framework Regulation.

²⁶ Article 88(1)(a) SSM Framework Regulation.

²⁷ Title III, Chapter 2, CRD IV (cf. Title III, Chapter 2, CRD V).

²⁸ Article 85 SSM Framework Regulation.

²⁹ Article 23 CRD IV (cf. Article 23 CRD V).

to as an ‘NCA draft decision’). The NCA has to submit its draft decision to the ECB at least fifteen working days before expiry of the assessment period defined in the CRD IV.³⁰ While the NCA must immediately reject an application for authorization if the relevant conditions are not complied with, it cannot do so when assessing an acquisition of a qualifying holding. Both in case of proposing a decision in favour of the acquisition or opposing it, the NCA shall send its proposal to the ECB, thus making all of them part of a two-step procedure. Ultimately, it is for the ECB to decide whether or not to oppose the acquisition, and to notify the applicant of its decision.³¹ The right to be heard will be applicable, but the applicable provisions again reduce the time limits to three working days.³²

Time is of the essence in the authorization procedure as well as in assessing an acquisition of a qualifying holding. The SSM Regulation sets provisions for the authorization procedure and the CRD IV set provisions for assessing an acquisition of a qualifying holding, both stating that, if the time limits have past and an authorization application has not been rejected, or a notification of a qualifying holding acquisition has not been opposed to, the authorization shall be deemed granted and the acquisition deemed approved.³³

3 Legal protection before court

Now that Section 2 has set out the procedures relevant to this chapter, this section discusses the legal protection before a court in case of common procedures. The main challenge here is found in the judicial review for the national part of the procedure.

The decisions which the ECB adopts on the basis of a common procedure are final decisions and therefore subject to review by the Court whenever they meet the criteria of Article 263, first subparagraph, TFEU.³⁴ When challenging a final ECB decision before the Court, credit institutions may also rely upon

³⁰ Article 86 SSM Framework Regulation. Note that the SSM Framework Regulation sets a shorter deadline for the NCAs to submit a draft decision than the SSM Regulation (cf. Articles 86(2) SSM Framework Regulation and 15(2) SSM Regulation).

³¹ Article 15(3) SSM Regulation and Articles 87 and 88(1)(b) SSM Framework Regulation.

³² Article 87 in conjunction with 31(3) SSM Framework Regulation. This applies to all common procedures.

³³ Articles 14(3) SSM Regulation and 78(3) SSM Framework Regulation, and Article 22(6) CRD IV (cf. Article 22(6) CRD V), respectively.

³⁴ Pursuant to Article 263 TFEU, the CJEU shall review inter alia acts of the ECB, other than recommendations and opinions, intended to produce legal effect vis-à-vis third parties. This is the case when the effects of an act ‘are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position’. See Chapter 3, Sections 5.1 and 5.2.

any irregularity in the ECB's preparatory measures.³⁵ The judicial review of the Union part of the procedure seems, thus, little affected by the composite procedure in place.³⁶

Although the Court clarifies in *Berlusconi and Fininvest*³⁷ that its review of the ECB's final decision includes an examination of any defects that vitiate the national authorities' preparatory acts or proposals in such a way that these defects affect the validity of the final ECB decision,³⁸ the judicial protection of the national part still raises questions. This is discussed in Sections 3.1 and 3.2 below.

The below analysis consists of two parts: firstly it explains which court can provide judicial protection in case of NCA draft decisions, and secondly it discusses the intensity of the national part's judicial review. Note that this analysis only concerns NCA draft decisions that are part of common procedures and does not consider the NCA's independent use of powers when preparing an NCA draft decision separately. It is possible that NCA decisions to use supervisory powers, such as requesting information, to prepare their NCA draft decision are subject to review under their national laws. However, this kind of preparatory measure is more relevant in the context of ongoing supervision and is therefore discussed extensively in Chapter 5.

3.1 The reviewability of national draft decisions

Judicial review of a preparatory measure should, in principle, be guaranteed by the possibility to bring an action against the final decision following such a preparatory measure. Only in certain cases the preparatory measure is in itself subject to review by the Court.³⁹ Following the *Berlusconi*

³⁵ Cf. Chapter 3, Section 5.2.

³⁶ Note that, in line with settled case law about Commission decisions, final ECB decisions remain the sole responsibility of the ECB, even when partly based on NCA input as is the case in bottom-up procedures such as the common procedures currently discussed. The Court observes repeatedly 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.' (Case C-413/98, *Frota Azul-Transportes e Turismo*, ECLI:EU:C:2001:55, para. 30). Also: Case C-32/95 P, *Commission v Lisrestal and Others*, ECLI:EU:C:1996:402, para. 29; Case C-135/11 P, *IFAW Internationaler Tierschutz-Fonds v Commission*, ECLI:EU:C:2012:376, paras 60-61.

³⁷ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023. For a discussion of this case, see inter alia: Brito Bastos 2019; Dermine & Eliantonio 2019; Demková 2019; Wissink 2019.

³⁸ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, para. 44. Cf. para. 58. Also: Opinion of Advocate General Campos Sánchez-Bordona in Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:502, para. 109.

³⁹ See Chapter 3, Section 5.2.

and Fininvest judgment, this reasoning seems to apply in case of composite administrative procedures too.⁴⁰ In this judgment the Court confirms its exclusive jurisdiction to review the validity of a final ECB decision opposing an acquisition pursuant to Article 15 of the SSM Regulation and, as an incidental matter, to determine whether the preparatory national acts have been vitiated by defects that may affect the validity of the ECB's decision.⁴¹

The *Berlusconi and Fininvest* case concerns a request for a preliminary ruling from the Consiglio di Stato (Italian Council of State) in proceedings that Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) have brought against Banca d'Italia (Bank of Italy) and the Istituto per la Vigilanza sulle Assicurazioni (Institute for the Supervision of Insurance, IVASS) regarding the assessment of a qualifying holding to be acquired in a credit institution.⁴²

The Bank of Italy assessed the acquisition first, and forwarded a draft decision to the ECB proposing to oppose the acquisition by Berlusconi and Fininvest of a qualifying holding in Banca Mediolanum. The ECB followed the Bank of Italy's proposal and, after hearing Berlusconi and Fininvest, it adopted a final decision opposing the acquisition.⁴³

Berlusconi and Fininvest started several procedures, under which one before the Italian Council of State. In this procedure, they claim the Bank of Italy's draft decision to be void because it disregards the force of *res judicata* of a previous judgment the Council of State has rendered in a related case.⁴⁴

⁴⁰ In itself it is not new that a person concerned by a procedure can rely upon preparatory measures of one authority in an action for annulment against a final decision of another authority. The Court has accepted before that such person may rely on circumstances affecting the legality of the contested Council measure even when they relate to the conduct of the Commission, i.e. a different EU institution. (Case C-445/00, Austria v Council, ECLI:EU:C:2003:445). The Court states that the action may only be brought against the institution that has adopted the contested measure, but the circumstances affecting the legality of a contested measure may be relied upon to support such an action, even when they relate to the conduct of an institution other than the institution concerned in the action. The Court has pointed out that the Commission cannot be involved as a main party to the proceedings at hand but may intervene in support of one of the main parties, as the Commission has done in this case (paras 33-34). However, the preparatory and final measures have both been taken at the EU level. Contrary to the Berlusconi and Fininvest case, in the Austria v Council case the EU Courts are thus competent to review measures of both authorities.

⁴¹ Case C-219/17, Berlusconi and Fininvest, ECLI:EU:C:2018:1023, para. 58.

⁴² Case C-219/17, Berlusconi and Fininvest, ECLI:EU:C:2018:1023, para. 2.

⁴³ Case C-219/17, Berlusconi and Fininvest, ECLI:EU:C:2018:1023, paras 32-33.

⁴⁴ Case C-219/17, Berlusconi and Fininvest, ECLI:EU:C:2018:1023, paras 36-37. The ECB has based its view that the reputation requirement imposed by the national legislation on persons possessing qualifying holdings has been not satisfied on, inter alia, the fact that Berlusconi had been sentenced by final judgment to four years' imprisonment for tax fraud (para. 34). However, a previous decision of the Bank of Italy and IVASS upon a procedure following the judgment by which Berlusconi had been found guilty of

The Italian Council of State has referred its questions to the Court of Justice, asking, in essence, two clarifications. First it needs to have clarified whether Article 263 TFEU is to be interpreted as precluding national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by NCAs in the common procedures at issue. Second, it seeks clarification as to whether it is relevant to the answer on the previous question that a national court has been asked to rule on a specific action brought before it to declare invalidity on the ground of alleged disregard of the force of *res judicata* attaching to a national judicial decision.⁴⁵

In *Berlusconi and Fininvest*, the Court focuses on the effects that the national authorities' involvement has had in the course of a procedure about the division of jurisdiction between Union and national courts. It distinguishes between the situation in which Union law does not aim to establish a division between the Union and national powers and the situation in which a clear division of powers is envisioned.⁴⁶

No division between the two powers is envisioned if the acts of the national authorities constitute a stage in a procedure in which the Union institution exercises, alone, the final decision-making power without being bound by the preparatory acts or proposals of the national authorities. If such is the case, the national authority's involvement in the course of a procedure leading to a Union act cannot change the classification of that Union act.⁴⁷ Thus, instead of establishing a division between the Union and national powers, Union law lays down that a Union institution is to have exclusive decision-making power. This is in line with the Court's previous judgments in comparable cases.⁴⁸ This time,

tax fraud, determining that Berlusconi had ceased to fulfil the reputation requirements laid down in the applicable legislation, had been annulled by the Italian Council of State in 2016, so before the forwarding of the draft decision. In that case the Council of State had concluded that the legislation preceding the adoption of the reputation criteria, upon which the applicants relied, had remained applicable despite arguments to the contrary (para. 29).

⁴⁵ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, para. 40.

⁴⁶ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, paras 41 and 44-45.

⁴⁷ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, paras 41-44.

⁴⁸ Cf. Case C-64/05 P, *Sweden v Commission*, ECLI:EU:C:2007:802; Case C-512/07 P(R), *Occhetto and Parliament v Donnici*, ECLI:EU:C:2009:3. In the *Sweden v Commission* case, the Court concluded that the procedure at hand did not aim to establish a division between national and EU powers serving different purposes. The provision at issue provided for a decision-making procedure in order to determine whether access to files should be refused under one of the substantive exceptions listed in that provision. The Court stated that both the (at the time) Community institution and the Member State concerned played a part in that decision-making procedure. The Member State's prior agreement did not resemble a discretionary right of veto but merely a form of assent confirming that none of the grounds of exception had been present (paras 93 and 76.) The provision was procedural in nature and merely dealt with the process of adopting the EU decision (para. 81; also: Case C-135/11 P, *IFAW*

the Court is more explicit about the review of the procedure's national part in stating that 'it falls to the EU Courts, by virtue of their exclusive jurisdiction to review the legality of EU acts on the basis of Article 263 TFEU [...], to rule on the legality of the final decision adopted by the EU institution at issue and to examine, in order to ensure effective judicial protection of the persons concerned, any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision'.⁴⁹

With respect to situations in which there is a clear division of powers, the Court recalls its *Borelli* judgment. It emphasizes that the judicial review of a national authority's act that is part of an EU decision-making process falls to the national courts if it follows from the division of powers between the national and Union institutions that the national act is a necessary stage in a procedure for adopting a Union act in which the EU institutions have only limited discretion or none at all and the national act is therefore binding on the EU institution.⁵⁰

The Court concludes that in *Berlusconi and Fininvest* the procedure at issue does not aim at establishing a division of power, but, on the contrary, explicitly lays down the ECB's exclusive decision-making power.⁵¹ Since the ECB is also exclusively competent to decide on authorizing credit institutions or withdrawing authorizations from them, the Court's conclusions seems to be *mutatis mutandis* applicable to other common procedures discussed in this chapter.⁵²

Internationaler Tierschutz-Fonds v Commission, ECLI:EU:C:2012:376, para. 53). Therefore, it was within the jurisdiction of the EU Courts to review the validity of an application by a party to whom the EU institution had refused to grant access, regardless of whether that refusal had been based on an assessment of those exceptions by the EU institution or by the Member State involved. The Member State's intervention did not affect the Community nature of the EU decision that had been addressed to the person concerned in reply to the request he had made for access to a document in the EU institution's possession (paras 93-94.). In the *Ochetto and Parliament v Donnici* case, the European Parliament stated that the General Court wrongfully relied on the *Borelli* case law, since it concerned – according to the European Parliament – a single decision-making procedure. The Court, however, did not agree with the Parliament's position, considering the decision-making procedure in place, and confirmed the General Court's judgment in this respect (paras 48-55; cf. Case T-215/07 R, *Donnici v Parliament*, ECLI:EU:T:2007:344, para. 93).

⁴⁹ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, para. 44.

⁵⁰ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, paras 45-46.

⁵¹ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, para. 56.

⁵² This conclusion is admissible since the reasoning that the Court applies in para. 54 to establish the ECB's exclusive competence is *mutatis mutandis* applicable to common procedures by which the ECB can authorize credit institutions or withdraw authorizations from credit institutions (cf. Articles 4(1)(a) and 14 SSM Regulation). Cf. Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, para. 54. The Court has repeated this reasoning in Case C-414/18, *Iccrea Banca*, ECLI:EU:C:2019:1036.

Although the notification regime differs in each common procedure,⁵³ this seems, however, not to affect the general analysis about the judicial protection in place and is therefore not considered any further.⁵⁴

The Court of Justice's conclusion that the NCA draft decision in *Berlusconi and Fininvest* is not separately subject to judicial review by the national courts resembles the Court's previous stances. According to the Court, a preparatory measure is only subject to review if it creates legal effect vis-à-vis the person concerned and is, in itself, a culmination of a special procedure distinct from the preparatory procedures for the final measure.⁵⁵ This is not applicable to the NCA draft acquisition decision in *Berlusconi and Fininvest*, nor is it applicable to any other NCA draft decision. Be they for granting or withdrawing authorizations or approving acquisitions, NCA draft decisions are not binding upon the ECB and are, thus, not binding to an applicant or credit institution, nor capable of affecting their interests by bringing about a distinct change in the person's legal position. Hence, NCA draft decisions do not create any legal effect vis-à-vis a third party, and thus the Court considers them to be purely preparatory measures.⁵⁶

⁵³ While it is for the NCA to notify the applicant in case of an authorization decision, it is for the ECB to notify parties of an authorization withdrawal and a decision on the acquisition of a qualifying holding (cf. Articles 14(4) and 15(3) SSM Regulation and Article 88 SSM Framework Regulation).

⁵⁴ When the NCA is the sole interlocutor with the applicants, the situation may be more similar to a number of cases concerning requests for repayment of import duties. In these cases, the national authority had doubts concerning the possibility of repaying the import duties and therefore submitted the files to the Commission. Subsequently, the Commission decided on the cases upon consulting an expert group, and adopted a decision addressed to the national authority, who then notified the applicant of the Commission's decision (cf. Case T-346/94, *France-Aviation v Commission*, ECLI:EU:T:1995:187, paras 9 and 15-16; Case T-50/96, *Primex Produkte Import-Export and Others v Commission*, ECLI:EU:T:1998:223, paras 25-28; Case T-42/96, *Eyckeler & Malt v Commission*, ECLI:EU:T:1998:40, paras 26-29.) In these cases, the circumstance that the national authority was the sole interlocutor on the basis of the applicable procedures did not change the fact that it still was for the Court to review the validity of the EU measures at stake. The General Court took *inter alia* into account whether the Commission had any discretionary powers (Case T-346/94, *France-Aviation v Commission*, ECLI:EU:T:1995:187, paras 34-36; Case T-50/96, *Primex Produkte Import-Export and Others v Commission*, ECLI:EU:T:1998:223, paras 60 and 67-68; Case T-42/96, *Eyckeler & Malt v Commission*, ECLI:EU:T:1998:40, paras 84-85; Case T-290/97, *Mehibas Dordtselaan v Commission*, ECLI:EU:T:2000:8, para. 45), which the ECB also has in authorization procedures. The different notification regimes seem thus irrelevant for the reviewability of the ECB's final decision.

⁵⁵ See Chapter 3, Section 5.2.

⁵⁶ Cf. Wissink et al. 2014, pp. 96-101; Bastos 2015, p. 280; Opinion of Advocate General Campos Sánchez-Bordona in Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:502, paras 107-109. In comparable anti-dumping cases, the Court has concluded that the Commission's proposal cannot be contested whenever the Commission's role forms an integral, but non-binding part of the Council's decision-making process. In these cases, the Commission has been responsible for carrying out the necessary investigations and for deciding on whether to terminate the procedures or to continue them,

Should the Court have allowed an action for annulment against an NCA draft decision, that would have resulted in a situation in which the national court would have to decide about the substance of the case before the credit institution involved has had an opportunity to state its view and the ECB to adopt a final decision. Thus, allowing an action for annulment against an NCA draft decision would result in confusing different stages of administrative and judicial procedures, which the Court considers incompatible with the division of powers.⁵⁷ This could, for instance, result in a situation in which the national judgment about a national preparatory measure differs from the Court's judgment about the ECB decision of the same content as the preceding national preparatory measure. So, parties would end up with two contradicting judgments in the same case.⁵⁸

The Court's reasoning in *Berlusconi and Fininvest* is also in line with the Court's approach in the reverse situation, i.e. in top-down procedures.⁵⁹ The case law involving the European Anti-Fraud Office (OLAF), as more extensively discussed in Chapters 6 and 7,⁶⁰ concerns procedures ending in a national decision and including non-binding measures from OLAF. The Court has concluded in these cases that only the national authorities have the power to adopt the decisions which are capable to affect the legal position of the parties at stake, and that consequently actions for annulment against the non-binding acts of OLAF are inadmissible.⁶¹

However, while a national court can ask the Court of Justice for a preliminary ruling with respect to the validity of the Union measure, the EU Courts do not have such tools to have the national preparatory measure examined by national courts. This issue is discussed in Section 3.2.

by adopting provisional measures and by proposing that the Council adopts definitive measures. However, the Commission cannot bind the Council. The Council has the final decision-making power, which means it may refrain from adopting a decision in case it disagrees with the Commission, or it may adopt a decision on the basis of the Commission's proposal. Therefore, the Court considers the Commission's act to be a purely preparatory measure, which does not immediately and irreversibly affect the persons concerned (Joined cases C-133/87 and C-150/87, *Nashua Corporation and Others v Commission and Council*, ECLI:EU:C:1990:115, paras 8-9; Case T-134/95, *Dysan Magnetics v Commission*, ECLI:EU:T:1996:38, paras 22-23.)

⁵⁷ Cf. Chapter 3, Section 5.2. Also: Brito Bastos 2018, p. 110.

⁵⁸ Opinion of Advocate General Campos Sánchez-Bordona in Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:502, para. 110.

⁵⁹ For the categorization notes on composite procedures in which the terms 'top-down' and 'bottom-up' procedures are demarcated, see Chapter 1, Section 4.3.

⁶⁰ See Chapter 6, Section 3.4 and Chapter 7, Section 4.1.1.

⁶¹ Inghelram 2011, pp. 203-204 and the case law mentioned there. For other examples, see also: Alfonso de León 2017, pp. 286-290.

3.2 The intensity of judicial review of national draft decisions

In accordance with the theoretical framework set out in Chapter 3, the Court must have sufficient jurisdiction to review both questions of fact and of law in the proceedings before it.⁶² As discussed in Section 3.1, a review of a final ECB decision based on a common procedure will also capture the review of the preceding NCA draft decision, inferring that the judicial proceedings before the Court concern questions of fact and of law relating to both the Union and national levels.

The Court will thus have to review facts that have been considered at the national level (i.e. by the NCA), as well as questions of law regarding national law that may be at stake.

The facts regarding the common procedure at issue may be considered by the NCA, i.e. relate to the national level, but the ECB has to make its own appraisal of them. If the ECB follows the NCA draft decision and uses those facts to base its decision on, it has made the facts and the considerations its own. Although it is thus less relevant at what level those facts are gathered and established, this section completes the picture by briefly discussing in what way the Court can review these questions.

The questions of law may include additional national administrative standards, and national substantive laws insofar as the relevant EU Directive and the accompanying lower legislation allows.⁶³ The additional national administrative standards can, in turn, pertain to the procedural rules related to that specific provision in national law or to legal safeguards in general that provide more protection than is provided for under Union law.⁶⁴ Section 4.2 of this chapter discusses in more detail to what extent national administrative standards will be applied by the EU Courts. However, even when the Court does not apply any national administrative standards, it still faces the other questions of fact and law relating to the national level. Therefore, this section already elaborates on the intensity of judicial review separately.

⁶² See Chapter 3, Section 4.2.4.

⁶³ The room left for Member States to give their own interpretation to EU substantive rules when implementing them becomes less over time, since both the EBA and the ECB are, in line with their respective mandates in this regard, trying to further harmonize the applicable rules so as to come to an actual single rulebook and level playing field. Cf. Article 8(1)(a) Regulation (EU) No 1093/2010 of The European Parliament and of the Council of 24 November 2010; Article 4(3) SSM Regulation. However, an important part of the relevant EU banking rules is still laid down in a directive, which means that they must be transposed into national laws and that national laws thus remain relevant.

⁶⁴ Cf. Lo Schiavo 2019, p. 185. Note that the importance of national administrative standards increases if the ECB directly exercises a power that is provided for under national law on the basis of Article 9(1) SSM Regulation. This is particularly relevant given the ECB's broad interpretation of this provision. For a more extensive discussion about Article 9(1) SSM Regulation and the ECB's interpretation thereof, see Chapter 5, Section 4.1.

The above considerations may affect the intensity of the Court's review of NCA draft decisions, discussed in more detail below. First, the section focuses on the intensity of the judicial review in previous cases concerning national input. Next, the review of questions of fact is considered, as well as complex assessments and cases in which the authorities have discretion. The section closes by discussing the procedural review and the review of questions of law related to national law at issue.

The Court has dealt with comparable situations before, in which it had to take national preparatory parts of the decision-making procedure into consideration. However, in those cases its review of the national part seems to be limited. The Court has simply held the Union authority responsible for the entire decision-making process, and has refrained from actually reviewing the conduct of the national authority.⁶⁵

The cases concern requests for access to files originating from the Member State involved, but in the possession of a Union authority. The Court concludes that the decision-making procedure to determine whether access should be granted does not aim to establish a division between Union and national powers serving different purposes. Both the Union institution and the relevant Member State play a part in the procedure, without changing the Union nature of the final decision, thus making the EU Courts competent to review the refusal.⁶⁶

In the *Sweden v Commission* case, the Commission has had to make sure that the reasons which the involved Member State provided to refuse disclosure of the documents actually existed, and that it referred to those reasons in its decision to refuse access.⁶⁷

However, as the Court points out in the *IFAW* case, this does not mean that the Union institution involved has to carry out an exhaustive assessment of the Member State's decision to object, by conducting a review going beyond it verifying the mere existence of reasons that refer to the exceptions laid down in the applicable provisions. Indeed, such an exhaustive assessment would allow for a situation in which the Union institution could wrongly decide differently from the Member State's decision.⁶⁸

⁶⁵ See also: Wissink 2019.

⁶⁶ Case C-64/05 P, *Sweden v Commission*, ECLI:EU:C:2007:802, paras 93-94.

⁶⁷ The Court points out that, in this case, the Member State's influence to not disclose a document in the EU authority's possession is not without condition. The Member State can only object to the disclosure of documents originating from it on the basis of specific exceptions, laid down in the applicable rules, and by giving proper reasons for its position. Subsequently, the EU authority involved must make sure that those reasons exist and refer to them in its decision to refuse access (Case C-64/05 P, *Sweden v Commission*, ECLI:EU:C:2007:802, paras 88 and 98-99). Also: Case C-135/11 P, *IFAW Internationalaler Tierschutz-Fonds v Commission*, ECLI:EU:C:2012:376, para. 61.

⁶⁸ Case C-135/11 P, *IFAW Internationalaler Tierschutz-Fonds v Commission*, ECLI:EU:C:2012:376, paras 63-64. Also: Case T-669/11, *Spirlea v Commission*, ECLU:EU:T:2014:814, paras 54-55.

In these cases, the Court imputes full responsibility for the lawfulness of the procedure on the Union authority in case of a single decision-making procedure,⁶⁹ but limits this responsibility at the same time to verifying the mere existence of the reasons that the national authority uses and including those reasons in the final decision. An exhaustive assessment of the national preparatory measure at stake is explicitly excluded.

In *Berlusconi and Fininvest*, the Court does not indicate the way in which the Court has to review whether or not any defects exist that may vitiate the national preparatory measure. However, an approach similar to the cases discussed in the indent above would imply that, although part of one and the same common procedure, the national preparatory measures would have to be reviewed less intensively than the ECB preparatory measures.

Should the Court apply a similar limited review as it did in the two above-mentioned cases, it would be debatable whether this can be considered a sufficient judicial review as required in light of the principle of effective judicial protection. Although the procedures are similar in nature, i.e. the national authorities' involvement does not change the EU nature of the decision-making procedure, the national authorities seem to have played very different parts. Whereas the Member States' role in the previous two cases is rather limited,⁷⁰ the NCAs have an important role to play in assessing applications in common procedures. One could reason that this requires a more in-depth review of the questions of fact and of law relating to the national part of the procedure. Below, the possibilities are discussed that the Court would have in order to do so.

In general, the Court can review questions of fact with input from the parties involved, so also questions of fact considered at the national level and adopted by the ECB in its final decision. As pointed out by Prek and Lefèvre, the idea of *curia novit legem*, i.e. that courts are supposed to have knowledge of the relevant law, does not apply to questions of fact.⁷¹ Although it is not only for the parties to establish the relevant facts, their role is much larger in questions of fact than in questions of law.⁷² This will help the EU Courts to review questions of all facts on which the final decision is based. In addition to this, the Court may request

⁶⁹ Brito Bastos concludes that the EU Courts generally holds the EU authority responsible for the national authority's behaviour (i.e. accepts derivative illegality) in case an EU authority (i) voluntarily incorporates the illegal preparatory national acts into the final measure, or (ii) adopts that final measure without correcting an illegality practised at national level when it has the power to do so (Brito Bastos 2018, p. 121). Cf. Dermine & Eliantonio 2019, pp. 245-246.

⁷⁰ As mentioned in footnote 67, the Member States can only object to the disclosure of documents originating from it on the basis of specific exceptions, laid down in the applicable rules, and by giving proper reasons for its position.

⁷¹ Prek & Lefèvre 2017, pp. 388-389.

⁷² Prek & Lefèvre 2017, pp. 389-391.

NCAAs to supply all information it considers necessary for the proceedings.⁷³ Thus, the national level being involved does not seem to have an immediate effect on the intensity of such reviews.

An NCA is not a party to the dispute before the Court, which may complicate the review. In the *Vébic* case,⁷⁴ the Court of Justice has ruled that national competition authorities should be able to participate, as a defendant or respondent, in national judicial proceedings brought against a decision of that authority, in order to ensure that the effectiveness of the relevant Treaty provisions is not jeopardized.⁷⁵ Likewise, one could reason that an NCA should be able to participate in an EU judicial proceeding against a decision that includes preparatory measures of that NCA in order to ensure full effectiveness of the relevant banking rules. Nonetheless, it still is to be awaited if the Court will follow a similar reasoning in the context of the SSM.

Moreover, it is likely that the Court will carry out a more limited review due to the specialized area of law and the discretions granted to the ECB and NCAs.⁷⁶ As discussed in Chapter 3, the Court will in such cases apply a more limited review with respect to the appraisal of the facts.⁷⁷ At the same time, the establishment of the facts will be assessed more strictly. However, for this stricter judicial review of the interpretation of the facts, it does not seem all that relevant whether the facts are considered at the Union or the national level.⁷⁸ The Court will probably be able to carry out similar reviews with respect to the interpretation of facts when it comes to facts pertinent to the national level and facts pertinent to the EU level.

The following question is whether the Court is able to carry out a strict procedural review with respect to the NCA draft decision. The Court may apply such a strict procedural review, since such review also compensates, to a certain

⁷³ Article 53 in conjunction with Article 24 Statute of the CJEU.

⁷⁴ Case C-439/08, VEBIC, ECLI:EU:C:2010:739

⁷⁵ Case C-439/08, VEBIC, ECLI:EU:C:2010:739, para. 64. In this case, the national competition authority was not allowed to participate in the judicial proceedings brought against its own decision.

⁷⁶ Also: Brescia Morra 2016, pp. 132-133, although it is debatable how much deference the EU Courts will actually take in case of banking supervision, cf. Bosque & Pizarro 2019. For a discussion about the first cases before the General Court about ECB decisions imposing administrative pecuniary which also involved the issue of the ECB's wide margin of appreciation to determine the penalty's amount in relation with its obligation to state the reasoning is, see: Petit 2020.

⁷⁷ Chapter 3, Section 4.2.4.

⁷⁸ Cf. Chapter 3, Section 4.2.4. In such a case, the EU Courts must establish 'whether the evidence relied on is factually accurate, reliable and consistent' and 'whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it'.

extent, the judicial deference to the substance of the case alluded to above.⁷⁹ As discussed in Section 4.1 of this chapter, particularly the right to be heard, the right to reasoned decisions, the right to access files and the right to have affairs handled within a reasonable time seem to be relevant in the context of common procedures. Assessing compliance with those rights will probably be rather straightforward,⁸⁰ and not give rise to many problems, not even when this concerns the national level. The Court may thus also be able to carry out a strict procedural review in this case.

The question of what administrative standards the Court will apply when reviewing national preparatory measures, as discussed in Section 4.2 of this chapter, is also important to the intensity of the judicial review. The limited review the Court of Justice has applied in the aforementioned cases relating to access to files,⁸¹ infers that the Court has not taken into account any additional national legal safeguards.

At the same time, one may ask whether the EU Courts are in fact equipped to review additional national legal safeguards.⁸² The parties may need to bring up that such protection exists under national law as the EU Courts will not necessarily know about it. Furthermore, the EU Courts may not have sufficient possibilities to interpret and apply such administrative standards, also depending on the kind of national rule at issue. For example, a straightforward national time limit will be simpler to apply than a more complex legal safeguard that requires knowledge about the national legal context for it to be interpreted and applied correctly.

The last issue in this respect concerns the review of questions of law related to national law. As mentioned in the introduction to this section, these questions concern the national substantive laws transposing the relevant Union law⁸³ and, to the extent allowed under the relevant EU Directive and the accompanying lower legislation, additional national substantive rules.

Note that the national laws transposing relevant Union law must be applied by both the ECB and NCAs. According to Article 4(3) of the SSM Regulation the ECB

⁷⁹ See Chapter 3, Section 4.2.4.

⁸⁰ It can for instance relatively easily be verified whether or not a person has been given the possibility to provide its view and whether a decision is sufficiently reasoned. It may be more complicated to assess compliance with the right not to incriminate oneself. This right is, however, irrelevant in case of common procedures (see Section 4 of this chapter, footnote 92). The review of this right is further discussed in Chapter 7, Section 3.2.

⁸¹ I.e. Case C-64/05 P, *Sweden v Commission*, ECLI:EU:C:2007:802, and Case C-135/11 P, *IFAW Internationaler Tierschutz-Fonds v Commission*, ECLI:EU:C:2012:376; see also footnotes 66-68.

⁸² Also: Dermine & Eliantonio 2019, p. 251.

⁸³ The relevant EU rules are laid down in the CRD IV and must thus be transposed into national law.

has to apply national law implementing relevant Union law.⁸⁴ The application of national law by an EU institution is a novelty in EU law.⁸⁵

So far, a couple of judicial proceedings against ECB decisions based on national laws have been brought before the Court, in which it indeed interprets and applies the national law at issue.⁸⁶ Nevertheless, these judgments still leave unanswered some issues with respect to the review of questions of national law.

Whether a full review of these questions of national law can be guaranteed depends, firstly, on the Court's interpretation of its mandate on the basis of the Treaties. Will an infringement of national law be considered to be an infringement of the Treaties or any rule of law relating to their application, and thus be a ground for annulment under Article 263 TFEU? Furthermore, will the Court consider an infringement of national law by the General Court to be an infringement of Union law by the General Court, and as such a ground for appeal?⁸⁷

Another issue in this respect is the circumstance that the Court is not necessarily familiar with the relevant national laws and its national legal context. In the judicial proceedings against ECB decisions based on national laws alluded to above, the Court has referred to the interpretation given by national courts in order to interpret the relevant national laws. This approach is used in cases in which the national law is considered to be a question of fact.⁸⁸ In such cases, the national law is thus necessary to prove a certain position or to establish a fact, which is not necessarily similar to interpreting and applying national laws.⁸⁹

⁸⁴ Article 4(3) SSM Regulation reads: 'For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options.'

⁸⁵ Bovenschen et al. 2013, p. 367; Lehmann 2017, pp. 7-8; Boucon & Jaros 2018, pp. 179-180; Sarmiento 2019.

⁸⁶ See, e.g.: Joined cases C-152/18 P and C-153/18 P, Crédit mutuel Arkéa v ECB, ECLI:EU:C:2019:810; Joined cases T-133/16 to T-136/16, Caisse régionale de crédit agricole mutuel Alpes Provence v ECB, ECLI:EU:T:2018:219. For a discussion about the Court's judgments in these cases, see: Sarmiento 2019; Gagliardi & Wissink 2020, pp. 44-51. For a discussion of other judicial proceedings in which the EU Courts face questions of law regarding national law, see: Prek & Lefèvre 2017, pp. 374-383, pp. 393-395, and pp. 398-401.

⁸⁷ Article 58 Protocol on the Statute of the Court of Justice of the European Union. For a more extensive discussion of these questions, see: Gagliardi & Wissink 2020, pp. 48-50.

⁸⁸ For a discussion about the different roles of national law in EU judicial proceedings, i.e. as question of fact or question of law, see: Prek & Lefèvre 2017, pp. 371-374.

⁸⁹ Gagliardi & Wissink 2020, p. 50.

Although interpretations given by national courts of course constitute a good starting point, the Court may still face situations in which this will not suffice for answering the question of national law at issue.⁹⁰ Arrangements for the cooperation between the Court and national courts are in place, but these do not provide a formal possibility to request a national court for advice or a ruling.⁹¹ It is uncertain whether the Court itself would interpret the relevant questions of national law and in doing so ensure a full judicial review. And, if so, in what way uniformity can be guaranteed in national law.

4 Legal protection in the administrative procedure

The theoretic framework presented in Chapter 3 addresses the importance of adhering to the principles of legality and good administration in order to ensure effective legal protection. Both principles provide legal safeguards as from an early stage in the administrative procedure and facilitate better judicial control of the decision following such a procedure.

Of all composite procedures in place within the SSM, the SSM Regulation lays down the common procedures in the greatest detail. Consequently, the legal basis for the acts of the ECB and NCAs does not lead to any specific issues relevant to this research, and will therefore not be dealt with. The protection provided by the right of good administration, however, does result in challenges,⁹² which are looked at in this section. First, it discusses which authority must ensure that administrative standards are implemented in general, then it examines which standards will be applied by the Court when reviewing decisions based on common procedures.

4.1 The implementation of administrative standards

The right of good administration has to be respected in case parties may be negatively affected by a decision.⁹³ Decisions following a

⁹⁰ Cf. Gagliardi & Wissink 2020, pp. 50-51. Also: Dermine & Eliantonio, p. 251.

⁹¹ For a discussion of the possibilities, see: Gagliardi & Wissink 2020, pp. 62-68.

⁹² The discussion focuses on respecting the principle of good administration. The other legal safeguards applicable in this early stage of the administrative procedure (i.e. the right to respect private and family life and the right not to incriminate oneself, discussed in Chapter 3, Sections 4.2.2 and 4.2.3) are not relevant in this context, since they will, respectively, not be breached or not be applicable due to the simple fact that common procedures lack criminal nature. In common procedures, the parties are responsible themselves for providing the authorities with the requested information in order to gain the authorization or approval they apply for. The authorities do not actively gather information from the parties involved by way of, e.g., on-site inspections, in which case these rights do become relevant. Moreover, this chapter only concerns procedures that cannot end in sanctions of a criminal nature.

⁹³ See Chapter 3, Section 4.2.1.

common procedure may adversely affect the applicant's or credit institution's interest as they can keep a party from starting up or continuing its plans to carry out a business or acquire a qualifying holding. During these procedures, compliance with the principle of good administration therefore has to be assured.

Given the power of appraisal that the ECB and NCAs enjoy in common procedures, respect for the rights of defence is all the more important. As the Court points out in *Technische Universität München*, it is only able to carry out an adequate judicial review within the limits given by the EU institution's power of appraisal if these institutions ensure respect for the rights of the defence.⁹⁴

In principle, the authority adopting the final decision is also responsible for ensuring the rights of defence, inferring that the ECB is bound to ensure the rights of defence of the applicant or credit institution. The applicable legal framework also emphasizes the ECB's responsibility to fully respect the rights of defence of the persons concerned.⁹⁵ The relevant provisions that the ECB must adhere to address, in particular, the right to be heard,⁹⁶ the obligation to state reasons,⁹⁷ and the right to access the file.⁹⁸ The ECB is thus made fully responsible for ensuring respect of the principle of good administration.

Nevertheless, NCAs also have to ensure respect of the rights of defence during the national part of a procedure. It is, however, uncertain what administrative standards the NCAs must adhere to in such cases. Section 4.2 looks into this.

In addition to the responsibilities that the ECB and NCAs each separately and respectively have to guarantee the rights of defence, the interaction between both levels also has to be explored. Although the applicable legal framework remains silent about the interaction between the ECB and NCAs in respect of

⁹⁴ See Chapter 3, Section 4.2.1.

⁹⁵ Articles 22(1) SSM Regulation and 32(1) SSM Framework Regulation (cf. Chapter 2, Section 7).

⁹⁶ Article 22(1) SSM Regulation and Articles 31, 77, 81(2), 82(3) and 87 SSM Framework Regulation. Note that Article 77 SSM Framework Regulation regarding the right to be heard in case of the ECB's assessment of applications for authorizations limits the right to be heard to the facts and objections relevant to the ECB's assessment on the basis of the conditions for authorization laid down in the relevant EU law. This could infer that applicants can only provide their comments on the ECB's part of the assessment regarding EU conditions, and not on the national assessment. However, the general right to be heard, which is laid down in Article 31(1) SSM Framework Regulation and does not include any limitations, remains applicable. Moreover, a similar limitation has not been repeated in case of an ECB assessment of acquisitions of qualifying holdings, while the ECB's assessment also only pertains to the EU conditions in these cases.

⁹⁷ Articles 22(2) SSM Regulation and 33 SSM Framework Regulation. Article 14(3) SSM Regulation particularly stipulates that the ECB shall state the reasons in writing in case it rejects an NCA draft authorization decision (i.e. rejection of an application for an authorization).

⁹⁸ Articles 22(2) SSM Regulation and 32 SSM Framework Regulation.

guaranteeing these rights, their interplay may be affected by the far-reaching shared administration in place. This is elaborated below.

The right to be heard is an important element of the principle of good administration, and the issue of how it can be ensured in shared administrations merits a more in-depth exploration. The main question is whether or not an authority other than the authority adopting the final decision, in the case of common procedures an NCA instead of the ECB, may carry out the hearing of persons on behalf of the authority adopting the final decision. It is not clear-cut to what extent exactly this is allowed.

The Court has faced this issue *inter alia* in cases concerning the reduction of financial assistance from the European Social Fund (hereafter ‘ESF grants’) and cases concerning the repayment or remission of customs duties (hereafter ‘import duties’),⁹⁹ and took different approaches in these distinct procedures.¹⁰⁰ It has taken a more flexible approach in the ESF grants cases, in which it has allowed the right to be heard to be ensured by either the Commission or the national authority on behalf of the Commission. In the import duties cases, however, the Court has required the Commission to ensure the right to be heard.

Whereas the General Court in the import duties cases first concluded that the Commission had a duty to arrange for the person concerned to be heard by the national authority,¹⁰¹ it later stated that the procedure before the Commission had been vitiated by a breach of essential procedural requirements since the Commission had not given the persons concerned the opportunity to put their own case and effectively make known their views on the allegations at issue.¹⁰² In the ESF grants cases, the Court stated that the right to be heard could have been met by an invitation to the person concerned ‘by or on behalf of the Commission’ to submit its observations on the relevant documents within a reasonable period of time. Thus, the Commission needed to either give the beneficiary the possibility of effectively setting forth its views itself, or ensure that the beneficiary had been able to do so before the national authority.¹⁰³

⁹⁹ The Court first addressed the issue of which authority is ultimately responsible for ensuring the right to be heard in these kinds of composite procedures, and concluded that it was the Commission’s responsibility. In the common procedures, as in other bottom-up procedures, it is clear that the ECB is ultimately responsible. Therefore, this issue is not discussed any further. This chapter only discusses the issue of how the Commission can ensure the right to be heard.

¹⁰⁰ For an extensive discussion of these cases, see: Eckes & Mendes 2011, pp. 653-657; Alonso de León 2017, pp. 220-230.

¹⁰¹ Case T-346/94, France-Aviation v Commission, ECLI:EU:T:1995:187, para. 36.

¹⁰² Case T-50/96, Primex Produkte Import-Export and Others v Commission, ECLI:EU:T:1998:223, paras 67-71; Case T-42/96, Eyckeler & Malt v Commission, ECLI:EU:T:1998:40, paras 84-88.

¹⁰³ Case C-462/98 P, Mediocurso v Commission, ECLI:EU:C:2000:480, para. 43; Case T-102/00, Vlaams Fonds voor Sociale Integratie van Personen met een Handicap v Commission, ECLI:EU:T:2003:192,

This difference may be explained by the different procedures and the ensuing differences in intensity of the interference,¹⁰⁴ but the Court does not explicitly mention these differences in the context of ESF grants or import duties. It is thus difficult to fully grasp the Court's different stances.¹⁰⁵ It consequently remains uncertain for now whether or not the ECB may rely on NCAs to carry out the ECB's responsibility to ensure that the right to be heard is respected insofar as the NCA draft decision has been followed in the ECB's final decision. If the ECB does not follow the NCA draft decision, or if the ECB does not follow certain points in that decision, the ECB itself still must respect the right to be heard. It may, after all, base its supervisory decisions only on facts and objections on which a party has been able to comment.¹⁰⁶

Another important aspect of the rights of defence that may be affected by having in place a shared administration is the obligation to state reasons. In this respect, the Court takes a clearer stance on the extent to which flexibility is allowed.¹⁰⁷ Although the authority responsible for the final decision is also responsible for meeting the obligation to state reasons,¹⁰⁸ the Court has concluded that it is also acceptable if the final decision refers with sufficient clar-

para. 61; Case T-72/97, *Proderec v Commission*, ECLI:EU:T:1998:179, para. 127.

¹⁰⁴ In earlier case law, the Court has emphasized the difference in procedures applicable to competition law and anti-dumping duties cases, on the one hand, and import duties cases, on the other. In the competition law and anti-dumping cases, the EU institution decides to institute a procedure which may lead to the punishment of an economic agent who has contravened the Treaty provisions, and the right to be heard is of special importance. In import duties cases, traders lodge applications for remission of duty themselves, and the right to be heard is respected at the EU level if the procedure for adopting the disputed decision has been followed, since this procedure comprises several stages, some at the national and some at the EU level, and as such affords the persons concerned all the necessary legal safeguards (Joined cases, C-121/91-122/92, *CT Control (Rotterdam) and JCT Benelux v Commission*, ECLI:EU:C:1993:285, paras 52 and 48). Advocate General Mischo has used this case law to point out the different procedures in the context of ESF grants (Opinion of Advocate General Mischo, delivered on 25 November 1999, in Case C-0462/98 P, *Mediocurso v Commission*, ECLI:EU:C:1999:586, paras 17-18). This has also been pleaded for by Eckes and Mendes (Eckes & Mendes 2011, p. 664 and the literature mentioned there).

¹⁰⁵ See also Alonso de León 2017, pp. 235-238.

¹⁰⁶ See Article 33(3) SSM Framework Regulation. This may only be set aside in urgent situations and under the conditions as referred to in Article 31(4) SSM Framework Regulation.

¹⁰⁷ For a more extensive discussion of this issue, see: Alonso de León 2017, pp. 244-251 and the case law mentioned there.

¹⁰⁸ Cf. Case T-85/94 (122), *Commission v Branco*, ECLI:EU:T:1995:210. In this case, the General Court states: 'It follows that it is the Commission which assumes, vis-à-vis the recipient of ESF assistance, the legal responsibility for the decision by which its assistance is reduced, irrespective of whether that reduction was or was not proposed by the national authority concerned. Since responsibility for a decision to reduce ESF assistance resides with the Commission, such a decision must satisfy the reasoning requirement laid down in Article 190 of the Treaty' (para. 24).

ity to the measure containing the explanation of the national authority.¹⁰⁹ The measure would then become part of the contested decision.¹¹⁰ This infers that, if the ECB adopts the NCA draft decision as is, it may comply with the obligation to state reasons by clearly referring to the NCA draft decision and properly communicating this to the credit institution concerned.¹¹¹ This resembles the Court's reasoning in *Landeskreditbank Baden-Württemberg v ECB*,¹¹² in which it states that the Opinion of the Administrative Board of Review may be taken into account for the purpose of determining whether the reasons have been sufficiently stated in the contested decision.¹¹³

Guaranteeing the right of access to files may also be more challenging in case of composite procedures. The files to which the parties are entitled to have access to consist of all documents obtained, produced or assembled by the ECB during the ECB supervisory procedure, unless relevant provisions limit access.¹¹⁴ These files thus also include documents that the ECB has obtained from an NCA. In most common procedures, the NCAs provide the ECB with a draft decision. The SSM Supervisory Manual points out that all information and data related to applications are shared between the ECB and the relevant NCA, thus ensuring that NCA documents are part of the ECB file to which a party is entitled to have access to.

The right of access to files may become more problematic when a party considers certain documents of the NCA relevant, that are not included in the file. The risk that NCA documents are not included in the ECB's file increases when the NCA plays a more informal role, since it is less likely in such a case that the NCA provides the ECB with a 'set' of documents, such as a draft decision and accompanying documents. This situation is more likely to occur in case

¹⁰⁹ Case T-85/94 (122), *Commission v Branco*, ECLI:EU:T:1995:210, para. 27. The General Court emphasizes that [...] in a situation where, as in the present case, the Commission purely and simply confirms the proposal of a Member State to reduce assistance initially granted, the Court takes the view that a Commission decision may be regarded as adequately reasoned, for the purposes of Article 190 of the Treaty, if the decision either clearly sets out itself the reasons which justify the reduction in assistance or, failing that, refers with sufficient clarity to a measure of the competent national authorities of the Member State concerned in which those authorities set out clearly the reasons for such a reduction' (para. 30).

¹¹⁰ Case T-199/99, *Sgaravatti Mediterranea v Commission*, ECLI:EU:T:2002:228, para. 103.

¹¹¹ Alonso de León 2017, p. 246.

¹¹² Case T-122/15, *Landeskreditbank Baden-Württemberg v ECB*, ECLI:EU:T:2017:337, and the appeal procedure before the Court of Justice, Case C-450/17 P, *Landeskreditbank Baden-Württemberg*, ECLI:EU:C:2019:372.

¹¹³ Case C-450/17 P, *Landeskreditbank Baden-Württemberg*, ECLI:EU:C:2019:372, para. 95. See also Chapter 3, Section 4.2.1. Although the Administrative Board of Review carries out internal administrative reviews of ECB decisions and is thus at the same level as the ECB, this judgment illustrates that a decision may 'lean' on other bodies' reasonings.

¹¹⁴ Article 32(2) SSM Framework Regulation.

of bottom-up procedures¹¹⁵ in ongoing supervision and is therefore discussed in more detail in Chapter 5.¹¹⁶

A last right of defence worth mentioning here, is the right to have affairs handled within a reasonable time. This right seems to be ensured by the tight time limits laid down in the applicable legal framework, as indicated in Section 2 of this chapter, and thus does not seem to result in any problems. At the same time, it may be challenging for the ECB to live up to these time limits due to the composite procedures in place, and respect of the legal safeguards may be under pressure.

4.2 Applicable administrative standards

The next question is what administrative standards apply to the acts of, respectively, the ECB and NCA in the context of common procedures. This section first discusses which administrative standards are relevant in this context and, secondly, which standards could apply to the ECB and NCAs, respectively.

The administrative standards comprise rules with respect to legal safeguards in general (e.g. the rules implementing the principle of good administration), but also procedural rules such as time limits and notification requirements. These standards ensue from the Charter and the general principles of Union law, as well as from national laws. However, the possibility to set additional national administrative standards is limited, as this section shows.

The starting point is the principle of national procedural autonomy, which is in turn subject to the principles of equivalence and effectiveness. This infers that Member States, in the absence of Union rules governing a matter, lay down detailed procedural rules necessary for the implementation of Union law. Member States have to decide on the procedures to be followed when national bodies fulfil their Union obligations, provided that the principles of equivalence and effectiveness are adhered to.¹¹⁷ This is also true in the context of the SSM,

¹¹⁵ For the categorization notes on composite procedures in which the terms ‘top-down’ and ‘bottom-up’ procedures are demarcated, see Chapter 1, Section 4.3.

¹¹⁶ See Chapter 5, Section 4.2.

¹¹⁷ Cf. Chapter 3, Section 4.3.1. A good example can be found in the Sopropé case, in which the Court states that [...] [t]he authorities of the Member States are subject to that obligation [i.e. observance of the rights of defence, para. 36; added by author] when they take decisions which come within the scope of Community law, even though the Community legislation applicable does not expressly provide for such a procedural requirement. As regards the implementation of that principle and, in particular, the periods within which the rights of the defence must be exercised, it must be stated that, where those periods are not, as in the main proceedings, fixed by Community law, they are governed by national law on condition, first, that they are the same as those to which individuals or undertakings in comparable

and entails that in certain cases national rules may lay down additional procedural rules such as time limits and notification requirements.

Furthermore, with respect to fundamental rights protection, the Court has ruled in the *Melloni* case¹¹⁸ and in *Åkerberg Fransson*¹¹⁹ that, subject to certain conditions, national standards for the protection of fundamental rights may be applied when the Member States' action is not entirely determined by Union law. This is allowed if the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of Union law are not compromised.¹²⁰

The question whether a national rule compromises the effectiveness of EU law was at issue in the *Melloni* case. The case concerns a preliminary ruling request from the Spanish court in proceedings about the execution of a European arrest warrant to serve a prison sentence handed down by judgment *in absentia* against Mr. Melloni.¹²¹

The Court ruled that it was not allowed to refuse the request to execute the warrant on the basis of a ground in the national constitution, since the person concerned was in one of the situations mentioned in the applicable EU law in which it may not be refused to execute a European arrest warrant.¹²² Allowing a Member State to refuse such a request on the basis of such a national ground would undermine the principles of mutual trust and recognition underlying the applicable legal framework and, therefore, the efficacy of that framework.¹²³

As a result of the principle of effectiveness, the higher national standard of protection was thus not acceptable. Its application would undermine the arrangements between Member States as laid down in EU law and thus the effectiveness of the EU legal framework regarding European arrest warrants.

When Union law does not allow for any discretion lying with the Member States and completely determines by full harmonization the action of Member States,

situations under national law are entitled and, secondly, that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the Community legal order.' Case C-349/07, *Sopropé*, ECLI:EU:C:2008:746, para. 38.

¹¹⁸ Case C-399/11, *Melloni*, ECLI:EU:C:2013:107.

¹¹⁹ Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105.

¹²⁰ Case C-399/11, *Melloni*, ECLI:EU:C:2013:107, para. 60; Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 29. Also: Case C-476/17, *Pelham and Others*, ECLI:EU:C:2019:624, para. 80.

¹²¹ Case C-399/11, *Melloni*, ECLI:EU:C:2013:107, para. 2.

¹²² Case C-399/11, *Melloni*, ECLI:EU:C:2013:107, paras 61 and 40. As discussed by Sarmiento, the Spanish case law provided for more protection for individuals, but clearly clashed with the pertaining EU law (Sarmiento 2013, p. 1289).

¹²³ Case C-399/11, *Melloni*, ECLI:EU:C:2013:107, para. 63.

national standards protecting fundamental rights are no longer allowed.¹²⁴ In such cases, only the fundamental rights provided for by the Charter apply.¹²⁵

Sarmiento discusses that the Court emphasizes the importance of a coordinated separation of tasks between the EU and Member States regarding the protection of fundamental rights by ‘recognizing the relevance of national fundamental rights when EU rules grant discretionary choice to Member States, but imposing strict primacy once a domain is completely determined by EU rules’.¹²⁶

The degree of discretion granted to Member States must be determined for each provision separately in the EU regulatory act at issue. It is thus possible that some provisions may grant a degree of discretion to Member States, while other provisions in the same directive may constitute measures fully harmonizing the corresponding substantive law.¹²⁷

Briefly stated, also in the context of the SSM, additional legal safeguards would only be allowed when NCAs’ actions are not entirely determined by Union law, and if the national legal safeguards do not compromise the primacy, unity and effectiveness of Union law.¹²⁸ In line with the Pelham judgment, the Charter applies, however national legal safeguards may also still be applicable as long as they do not compromise the primacy, unity and effectiveness of EU law, since the rights of defence are not fully harmonised.

As discussed in Chapter 2, the substantive prudential banking rules are largely, but still not fully, harmonized by means of the Single Rulebook.¹²⁹ Administrative standards, relevant for the current analysis, are generally less harmonised in the applicable legal framework, while the rights of defence are not further harmonised at all in either the SSM Regulation or the relevant Union law.

The above considerations together provide the framework within which it is possible to have additional national administrative standards in place. If such national rules are allowed, it has to be determined next whether they are applicable to, respectively, the ECB and NCAs in the context of common procedures. This is discussed below.

The ECB is, as a Union institution, subject to the Charter and general principles of Union law, as well as to other relevant Union law such as the SSM Regulation

¹²⁴ Case C-476/17, Pelham and Others, ECLI:EU:C:2019:624, para. 81.

¹²⁵ Widdershoven 2020, pp. 1350-1351; Sarmiento 2013, p. 1289.

¹²⁶ Sarmiento 2013, p. 1291.

¹²⁷ Case C-476/17, Pelham and Others, ECLI:EU:C:2019:624, paras 81-85. Cf. Widdershoven 2020, p. 1351.

¹²⁸ Cf. Van Bockel 2015, p. 6.

¹²⁹ Cf. Chapter 2, Section 9. The intended maximum harmonization by the CRR has also been emphasized by the Court (cf. Case C-52/17, VTB Bank (Austria), ECLI:EU:C:2018:648, para. 41).

and SSM Framework Regulation.¹³⁰ In principle, the ECB's actions are reviewed on the basis of Union law standards only.¹³¹ In *Akzo Nobel Chemicals and Akcros Chemicals v Commission* (referred to as the Akzo case), the Court has rejected the use of national rules or legal concepts for the principle of legal privilege when reviewing the Commission's actions, since that would adversely affect the unity of EU law.¹³² The situation resulting from the Court's rejection, that Commission's actions under Union law would gain a treatment differing from that of national authorities' actions in national inquiries, did, according to the Court, not give rise to any legal uncertainty as to the scope of protection under the principle of legal privilege.¹³³

The central question in the *Akzo* case concerns the scope of legal professional privilege in case of documents copied by Commission staff, acting as a competition authority, during an on-site inspection at business premises in the United Kingdom. The appeal case is about two documents, i.e. printed email correspondence between the general manager of the company and an employee of Akzo's in-house legal department who was also a member of the Netherlands Bar.¹³⁴ The Dutch rules, providing for more protection, have been set aside by the Court of Justice in order to ensure the unity of EU law. The Court emphasizes that it concerns a case about the lawfulness of an EU decision on the basis of EU law, which does not contain any reference to national law.¹³⁵ The uniform interpretation and application of the principle of legal professional privilege at an EU level cannot depend on the place of the inspection or any specific features of national law.¹³⁶

¹³⁰ Chapter 3, Section 3.

¹³¹ Cf. Case C-11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, ECLI:EU:C:1970:114, para. 3; Case C-44/79, Hauer v Land Rheinland-Pfalz, ECLI:EU:C:1979:290, para. 14.

¹³² Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:512 (see next indent on the Akzo case).

¹³³ Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:512, para. 101. See also the discussion about the applicable administrative standards for NCAs in this section.

¹³⁴ Cf. Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:512, para. 3; Opinion of Advocate General Kokott in Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:229, paras 1-3.

¹³⁵ Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:512, para. 114. Note that a few other Member States have adopted this broader interpretation of the principle of legal privilege too, such as Greece, Portugal and Poland (Opinion of Advocate General Kokott, delivered on 29 April 2010, in Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:229, para. 103, footnote 88).

¹³⁶ Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:512, para. 115.

The Court of Justice recalls that, in accordance with the principle of national procedural autonomy, in the absence of EU rules governing the matter, it is for the Member States to inter alia lay down the detailed procedural rules governing actions to safeguard rights which persons derive from EU law. However, in this case, the Court has been called on to decide on the legality of a decision taken by an EU institution on the basis of a regulation adopted at the EU level, which, moreover, did not refer back to national law.

It furthermore states that national law is applicable in the context of investigations conducted by the Commission as an EU competition authority only insofar as the national authorities lend their assistance, in particular with a view to overcoming opposition by the undertakings concerned through the use of coercive measures. This, however, does not change the fact that the question of which documents and business records the Commission may examine and copy as part of its inspections under antitrust legislation is determined exclusively in accordance with EU law.¹³⁷

In the same vein, no additional national administrative rules would be applicable to the ECB when carrying out its supervisory tasks. However, contrary to the Akzo case, the applicable legal framework does in some cases refer to national law, requiring the ECB to also apply national substantive law in certain circumstances.¹³⁸ Additionally, in certain cases such as time limits, national law has to provide for administrative rules when Union law does not regulate the matter.¹³⁹

While the ECB is clearly obliged to apply the relevant national substantive rules, it is less straightforward whether the ECB also has to apply additional administrative standards (i.e. procedural rules and legal safeguards) laid down in national laws.¹⁴⁰ In line with the principle of national procedural autonomy, it can be argued that the ECB must do so when Union law does not govern the matter.¹⁴¹ This seems most logical in case of national procedural rules, since

¹³⁷ Case C-550/07 P, Akzo Nobel Chemicals and Akcros Chemicals v Commission, ECLI:EU:C:2010:512, paras 113-120.

¹³⁸ Article 4(3) SSM Regulation. Cf. Chapter 2, Section 9. The ECB may also have to exercise powers laid down in national laws that competent authorities have under the relevant EU law and which are transposed by these national laws (Article 9(i), second paragraph, SSM Regulation. Cf. Chapter 2, Section 6.2). In such cases, national law may even be more relevant for the applicable administrative standards. The ECB has also communicated to banks that it will comply with national law requirements in such cases (see footnote 141). Particularly the ECB's broad interpretation of this competence may increase the interconnectedness with national laws; see Chapter 5, Section 4.1. Article 9(i) SSM Regulation is, however, not relevant to common procedures and will thus not be discussed in this chapter, but within the context of the principle of legality in ongoing supervision; see Chapter 5, Section 4.1.

¹³⁹ See Section 2 of this chapter.

¹⁴⁰ Boucon & Jaros 2018, pp. 176-177.

¹⁴¹ Although not officially communicated, as far as known, the ECB seems to assume it is not bound by national administrative standards unless it is directly applying national powers (for a discussion of the national powers, see Chapter 5, Section 4.1). With regard to those national powers, the ECB has

they must be provided for in national laws when Union law does not arrange for such rules and they generally concern rather straightforward provisions, such as time limits, which may easily be applied by the Court. As discussed below, such a reasoning seems more complicated with respect to additional national legal safeguards.

It is debatable whether in Court the aforementioned involvement of national law would lead to a different outcome regarding the applicability of national legal safeguards than in the *Akzo* case. This depends on whether the involvement of national law, in accordance with the principle of national procedural autonomy, suffices in itself or whether the ‘reference to national law’, as the Court mentions in the *Akzo* case, must be an explicit reference to the applicability of national legal safeguards.¹⁴² In case of a strict interpretation, the Court would apply Union administrative standards only, since the applicable legal framework does not explicitly require the ECB to act in compliance with national legal safeguards.¹⁴³ However, the ECB will have to interpret and apply national law transposing relevant Union law, and possibly also national additional procedural rules. Thus, in case of the former, more flexible interpretation, the Court may also apply additional national administrative standards.

One has to keep in mind as well that, in light of the case law regarding fundamental rights protection discussed previously, additional national legal safeguards are only allowed in specific circumstances, i.e. only when discretion is left to the Member States and such additional legal safeguards will not compromise the primacy, unity and effectiveness of Union law. This ‘test’ may already answer the Court’s concern, as referred to in the *Akzo* case, regarding the unity

confirmed it will follow the criteria set in the applicable national law when deciding on requests, applications and notifications submitted by banks. The ECB will also comply with national law requirements, also including procedural aspects, connected specifically to this type of supervisory powers (e.g. publication requirements, specific time limits). (See: Letter to banks from ECB of 31 March 2017, ‘Additional clarification regarding the ECB’s competence to exercise supervisory powers granted under national law’, SSM/2017/0140; available at: https://www.bankingsupervision.europa.eu/press/letterstobanks/shared/pdf/2017/Letter_to_SI_Entry_point_information_letter.pdf?cb0801df81ba2db9d450ce4fb53065c8; last visit on 19 September 2020. Cf. Ter Kuile 2020, p. 124.) An *a contrario* reasoning would imply that the ECB will not do so in all other cases.

¹⁴² This is submitted by Luchtman and Vervaele, see: Luchtman & Vervaele 2017(a), p. 256.

¹⁴³ Compare e.g. Article 3(3) of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), which reads: ‘[d]uring on-the-spot checks and inspections, the staff of the Office shall act, subject to the Union law applicable, in compliance with the rules and practices of the Member State concerned and with the procedural guarantees provided for in this Regulation’ (cf. Luchtman & Vervaele 2017(a), p. 256). This includes an explicit obligation to adhere to national rules and practices, which is not the case in the SSM Regulation.

of EU law. If the unity of EU law would be compromised by the national legal safeguards, these safeguards are after all not allowed.

Nevertheless, even when additional national legal safeguards are allowed, they will have to be applied by the ECB, a Union institution, instead of national authorities, and because of that reviewed by the EU Courts instead of national courts. This in itself may already lead the Court to the conclusion that the primacy, unity and effectiveness of Union law would be harmed by reviewing such an ECB act on the basis of additional national legal safeguards as well, even though this would be allowed in light of the *Melloni* case. It is thus debatable whether the Court still recognizes ‘the relevance of national fundamental rights when EU rules grant discretionary choice to Member States’¹⁴⁴ if that means it has to apply these national rights itself when reviewing Union institutions.

NCAs too must comply with the Charter and the general principles of Union law, since they operate in a situation in which they, being national authorities, implement Union law and act within the scope of Union law.¹⁴⁵ These Union rules are the minimum standards that must be adhered to by the NCAs. Subsequently, the extent to which NCAs are still subject to additional national administrative rules has to be looked into.

As national administrative bodies, NCAs will in principle be subject to their national administrative rules. It is, however, questionable whether the Court will review the NCA draft decision against national administrative rules as well.

It still seems possible that NCAs may be subject to different, national administrative standards than the ECB. In the *Akzo* case discussed earlier, the Court points out that a possible different treatment of Commission’s actions and national competition authorities’ actions, as a result of its conclusion to only apply Union standards, does not give rise to legal uncertainty, since the different procedures are based on a division of powers between those authorities. The undertakings involved can still determine their rights and obligations vis-à-vis the relevant competition authority and the law applicable in such circumstances.¹⁴⁶

As pointed out previously, in the *Akzo* case, the Court does not accept a broader interpretation, based on national concepts, of legal professional privilege (see previous indent), but, nonetheless, neither does the Court prohibit such national treatment. The Court concludes that the EU and national procedures are based on a division of powers between the respective competition authorities, and the rules on legal privilege may, therefore, vary according to that division of powers and the

¹⁴⁴ Cf. Sarmiento 2013, p. 1291 (see also footnote 126).

¹⁴⁵ Cf. Chapter 3, Section 3.

¹⁴⁶ Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:512, paras 100-105.

rules relevant to it.¹⁴⁷ The principle of legal certainty does not require, according to the Court, that identical criteria be applied as regards legal privilege in the EU and national procedures.¹⁴⁸

This seems to leave room for national treatments in a purely national context. On this basis, the Netherlands Supreme Court has concluded for instance that this judgment is not applicable outside of the scope of EU competition law.¹⁴⁹ It ruled that it did not see any reasons to change the Dutch rules with respect to legal privilege, which are also applicable to in-house lawyers, insofar as a purely national context is at hand. Considering Dutch practice and the guarantees the Netherlands has put in place with respect to the method of practice of in-house lawyers, the court did not see any reason to exclude in-house lawyers from the right of legal privilege.¹⁵⁰

In line with this, one could argue that in common procedures the powers are also clearly divided between the ECB and NCAs, and that persons are thus able to determine their rights and obligations vis-à-vis the ECB and the relevant NCA, respectively. Such reasoning would allow for different administrative standards to be applicable. However, contrary to the Akzo case, in which the Court refers to differing procedures at the Union and the national level, the situation of the common procedures is about administrative standards applicable to different authorities in one and the same administrative procedure.

Even if legal certainty may still be guaranteed in such cases, the applicability of national administrative standards may affect the ECB decision since it concerns a single procedure. Put differently, a breach of national administrative standards by the NCA could affect the legality of the final ECB decision. This would indirectly infer that the ECB decision is to be reviewed against national standards, which seems contrary to the autonomy of the EU legal order.¹⁵¹ Moreover, considering the fact that such national administrative standards could be different in each Member State, this would immediately put the uniformity

¹⁴⁷ Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:512, para. 102.

¹⁴⁸ Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:512, para. 105.

¹⁴⁹ Hoge Raad der Nederlanden (Netherlands Supreme Court), Case 12/02667, 15 March 2013, ECLI:NL:HR:2013:BY6101, para. 5-3.

¹⁵⁰ Hoge Raad der Nederlanden (Netherlands Supreme Court), Case 12/02667, 15 March 2013, ECLI:NL:HR:2013:BY6101, paras 5-3-5-5.

¹⁵¹ Brito Bastos states that this risk would be difficult to accept in light of the principle of the EU legal order's autonomy (Brito Bastos 2019, p. 1371). He discusses that one of the dimensions essential to the autonomy of EU law is that it is to be considered as founded on an 'independent source of law', the Treaties, and therefore the validity of EU measures can only be reviewed on the basis of EU law of higher rank, not national law (Brito Bastos 2018, pp. 111-112).

and effectiveness of Union law at risk.¹⁵² It is questionable whether the Court will accept that.¹⁵³

In practice though, this issue may be less of a problem in common procedures. As discussed in Section 4.1 of this chapter, the main question is in what way the interaction between the ECB and NCA can help to ensure the right to be heard. However, as discussed, it is for the ECB to ensure respect of this right in that persons have had a chance to comment on all facts and objections on which its final decision is based. The ECB having final responsibility also entails that it is for the ECB to repair any irregularities regarding the right to be heard on the national level before it adopts its final decision. When this has not been done, this infers that the ECB itself did not ensure respect of the right to be heard with regard to its final decision in accordance with the relevant provisions. It seems thus unlikely that the legality of an ECB final decision in a common procedure will actually be affected by irregularities in the NCA draft decision. Nevertheless, this may well be different in other contexts, as discussed in Chapters 5, 6 and 7.¹⁵⁴

5 Interim evaluation: the effectiveness of legal protection in common procedures

While Sections 3 and 4 have analysed the legal protection currently in place for ECB decisions in common procedures and the preceding NCA draft decisions, this section elaborates on the legal protection's effectiveness. This interim evaluation provides input to the broader discussion in Part III of this research, about the effectiveness of legal protection in the composite procedures that are in place within the SSM.

Common procedures are characterized by a two-step structure, which is clearly laid down in the applicable regulation. This procedural structure defines the tasks and responsibilities of the ECB and NCAs, respectively, and the explicitly legally non-binding nature of the national preparatory measure. The ECB is exclusively competent to decide in case of common procedures.

¹⁵² Cf. Dermine & Eliantonio 2019, p. 251; Brito Bastos 2018, p. 132.

¹⁵³ Brito Bastos argues that the EU Courts may only assess the national preparatory measure against the EU's own standards, i.e. whether there is an infringement of an essential procedural requirement. The alternative, i.e. to use national standards, would imply that the validity of an EU measure based on the same composite procedure may vary depending on the national rules, which would jeopardize the uniformity and autonomy of EU law (Brito Bastos 2018, pp. 130-132). Demková is also of the opinion that the EU Courts have to review any errors vitiating national preparatory measures on the basis of essential procedural requirements (Demková 2019, p. 217).

¹⁵⁴ This seems more challenging with respect to the right of legal privilege and the right not to incriminate oneself, as discussed in Chapter 5, Section 4.2 and Chapter 7, Section 3.2, respectively.

The effectiveness of legal protection before court

In *Berlusconi and Fininvest*, the Court concludes that, given the ECB's exclusive competence, the Court is also exclusively competent to review ECB decisions concerning approval of an acquisition of a qualifying holding in a credit institution, including any national preparatory measures in those procedures. It points out that the legislator does not intend to divide powers between the EU and national authorities, and that a single judicial review by the Court alone is necessary for such a decision-making process to be effective.¹⁵⁵

This ruling seems to encompass an important step towards ensuring effective legal protection. It provides more clarity about which court is competent in case of these types of procedures and avoids a gap in judicial protection with regard to the national preparatory measures in question. It furthermore avoids contradicting judgments on a Union and a national level, and seems to reduce the risk of judicial proceedings becoming long and complex because both levels are involved. Thus it supports in many ways the effectiveness of legal protection from both a safeguard and an instrumental perspective.

Nevertheless, some important questions with respect to the review of NCA draft decisions still remain unanswered. Although the Court does not say how it will carry out the review of these measures, the way in which it eventually does so obviously has an impact on the effectiveness of the legal protection at issue.

Whereas the Court has, in previous cases involving non-binding national preparatory measures, imputed full responsibility for ensuring good administration to the EU authority and limited its review to the EU level, in *Berlusconi and Fininvest* it explicitly referred to examining 'any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision'. It remains to be seen if this wording also entails a more in-depth review of the national preparatory measure at stake.

Should the Court, on the one hand, let the autonomy, uniformity and effectiveness of Union law prevail above all, it may carry out only a limited review of the national part of the decision-making process. This approach could be justifiable in light of the ECB's exclusive competences and the centralization of supervision. However, it seems to bypass the role of NCAs, and therefore the division of tasks and responsibilities in the administrative procedures as laid down in the relevant legislation. Besides, it would ignore the emphasis placed on national law in the context of the SSM and the fact that the substantive requirements applicable in the common procedures are still laid down in a directive.¹⁵⁶

One could reason that the importance of the national part in the procedure would at least require a full judicial review of NCA draft decisions in order to

¹⁵⁵ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, para. 49.

¹⁵⁶ See also: Wissink 2019.

achieve effective legal protection. Additionally, it is debatable whether it is in line with the idea of effective judicial protection to ignore any additional national legal safeguards that persons would have had in case of a national judicial proceeding when it comes to an EU judicial proceeding, and especially so when such additional national legal safeguards are allowed under EU law. This seems to be the case, according to the Court's case law, when national implementing measures are required, or NCAs' actions are not entirely determined by EU law, and if the national legal safeguards do not compromise the primacy, unity and effectiveness of Union law. Lastly, making the principles of autonomy, uniformity and effectiveness of Union law leading seems not to be in line with the administrative procedures in place and thus not with the legislator's intention. This would therefore not lead to the most effective legal protection from an instrumental point of view.

This last reason illustrates that the effectiveness of Union law can be looked at from various perspectives. Although it may be the most effective approach not to burden the ECB, and consequently the EU Courts, with any national rules, one could also say that not considering the national part is contrary to the way in which the legislator has laid down the administrative procedures in Union law and thus to its effective implementation.

However, on the other hand, even if the Court would fully review NCA draft decisions, ensuring effective legal protection may still be challenging. It is uncertain how the Court can ensure a judicial review of the national part similar to its review of EU measures.

It would probably be able to ensure a sufficient review of the questions of fact related to the national level, since the parties are more involved in this respect and the Court can request additional information from NCAs. It would perhaps even go as far as to argue that, resembling its reasoning in the *Vébic* case, the relevant NCA should be able to participate as a party to the judicial proceedings in order to ensure the effectiveness of the relevant Union law. Admitting an NCA as a party would be a new step in EU judicial proceedings and, indeed, could ensure the effectiveness of the relevant Union law and at the same time also improve the effectiveness of the legal protection.

Moreover, the specialized area of law and the authorities' discretion will probably result in a more limited review with respect to the appraisal of the facts. The establishment of the facts will be assessed more strictly, but the involvement of the national level seems to cause less challenges in this respect. Thus, in the context of common procedures, it does not seem to be impossible for the Court to provide similar judicial reviews of questions of fact related to the Union level and those related to the national level.

A similar conclusion seems to stand out with respect to a strict procedural review, which the Court may apply to compensate to a certain extent the more limited review of the case's substance. The rights of defence relevant to common

procedures seem to be rather straightforward (see ‘Effectiveness of legal protection during the administrative procedure’ below), which makes it more likely that the Court is able to assess compliance with these rights.

The involvement of substantive national laws and possibly, as discussed in Section 4.2, national administrative standards, may affect the Court’s review of the questions of law involved, since these questions may thus be related to the national laws at issue. The Court has applied national law before in judicial proceedings against ECB decisions based on national substantive laws. However, not all questions regarding the EU Court’s grounds for annulment and grounds for review in appeal of such decisions are answered. Additionally, it is not clear in what way the Court can interpret the relevant national laws if the interpretations given by the national courts are insufficient. Obviously, the outcome of these issues affects the effectiveness of legal protection.

By interpreting and applying the national substantive laws at stake too, the Court avoids gaps in legal protection. It is, however, thus uncertain how effective the Court can be in this respect, since the Court is not necessarily familiar with the national laws and their legal context and the cooperation arrangements in place for Union and national courts do not accommodate such situations (as yet). It is furthermore debatable how the Court can uphold uniformity, a principle it highly values with respect to Union law, in case it has to interpret national laws.

A full review of NCA draft decisions in common procedures may thus be challenging for the Court, in particular with respect to questions of law relating to the national laws at stake. In common procedures there seems to be no easy solution to ensure effective legal protection before court from both a safeguard and an instrumental perspective.

The effectiveness of legal protection during the administrative procedure

In addition to the legal protection before court, this chapter has shown how legal protection can be guaranteed during the decision-making process. In general, protection must be ensured at the level at which the final decision is adopted. In the applicable legislation, the ECB has been made fully responsible for ensuring the principle of good administration in common procedures. The right to be heard, the right to reasoned decisions, the right to access files, and the right to have affairs handled within a reasonable time are particularly relevant in this context.

This clarity about the ECB’s final responsibility is desirable from a safeguard perspective as it ensures an ultimate responsibility for respecting the legal safeguards, and avoids any gaps in this respect. Such a strict interpretation may also be better aligned with the idea that respecting the rights of defence is of even greater importance when an administrative authority has a broad discretionary power, as is the case for the ECB in common procedures.

It comes however at a cost, since it may be rather burdensome for the ECB to meet those requirements. After all, this implies that the ECB cannot rely on NCAs for meeting these requirements, which may have as a consequence that the ECB has to repeat the work the NCA involved has already done. Although it may better ensure respect of the principle of good administration and even increase the thoroughness of the decision-making process, it may also hamper the ECB's effectiveness and thus an effective implementation of the applicable Union rules.

The tight time limits applicable to common procedures may in particular cause friction, since they are already challenging to live up to in themselves, without duplicating any work.¹⁵⁷ The positive effect for credit institutions of having in place tight time limits may even be annulled when the ECB's responsibility becomes too burdensome and cannot be lived up to, due to the same tight time limits. This could result in an ECB that has to either hold on to rigid procedures in order to respect the time limits, or reject applications if it cannot ascertain whether the applicant has met the requirements within the set time limits. Thus, allocating full responsibility to the ECB for ensuring the rights of defence may be desirable from a safeguard perspective, but may also hamper the ECB's effectiveness and thus have an undesirable effect from the instrumental perspective.

It may help that the Court previously has shown flexibility with respect to the way in which the obligation to state reasons can be met. The analysis in Section 4.1 illustrates that it probably suffices for the ECB to make sufficiently clear reference in its final decision to the measure containing the NCA's explanation. The national measure would then become part of the contested decision. The credit institution or applicant involved must obviously know about the national measure.

The Court has not yet provided similar clarity about the extent in which the ECB may lean on NCAs for meeting the other requirements under the principle of good administration. One has to keep in mind that, even when NCAs may ensure respect of the rights of defence on behalf of the ECB, it still is for the ECB, being the final decision-making authority, to ascertain whether the NCA has met the requirements that pertain to respecting those rights. Regardless,

¹⁵⁷ Cf. COM(2017) 591 final, pp. 11-12. In its evaluation of the SSM, the Commission states in this respect that 'The common procedures for authorisations and assessment of acquisitions represent a challenging task for the ECB, given the tight deadlines applicable, the high number of decisions and the complexity of assessing proposals prepared by NCAs based on 19 different national legal frameworks. These procedures intrinsically rely on close cooperation between the ECB and the NCAs. [...] The ECB and NCAs have done a remarkable job and managed to create tools and procedures that help the ECB deliver on its tasks within the applicable constraining timeframe. The evolution of common procedures shows that mutual trust between the ECB and the NCAs is increasing, thus constructively supporting the functioning of the SSM.'

the ECB's flexibility would still increase and ensuring an effective implementation of the relevant Union laws would still be made easier, which thus seems preferable from an instrumental perspective. At the same time, the ECB being ultimately responsible in this respect guarantees that the principle of good administration is respected in the decision-making procedure, which in turn is desirable from a safeguard perspective.

In the context of common procedures and the rights of defence relevant to them, it seems thus possible to optimize the ECB's effectiveness while still ensuring respect of the legal safeguards during the administrative procedure. This could be done by allowing a more flexible approach as to which authority must respect the rights of defence in practice, and at the same time leaving the final responsibility with the ECB. However, it is necessary to gain more clarity about how much flexibility would be allowed in this respect.

A last question discussed in this chapter concerns the applicable administrative standards, analysing which administrative standards the Court will apply when reviewing preparatory measures of both the ECB and NCAs in the context of common procedures.

Certainly, both the ECB and NCAs are subject to the Charter and general principles of Union law. Uncertain, however, is how far the applicability extends of any national administrative standards that provide more protection or more specific procedural rules than EU administrative standards do.

National administrative standards will in principle be allowed if this is in accordance with the principle of national autonomy, so only when Union law does not govern the matter, and subject to the principles of equivalence and effectiveness. Additional national legal safeguards are only allowed when discretion is left to Member States and these safeguards do not compromise the primacy, unity and effectiveness of Union law. When Union law is fully harmonized and thus determines the Member States' actions in full, no additional legal safeguards are allowed.

While the application of additional national procedural rules, such as time limits or notification procedures, may be rather straightforward for the Court and not give rise to many issues, the question remains whether the Court will apply additional legal safeguards as well.

In view of the Court's judgment in the *Akzo* case, it seems likely that the Court will prioritize protecting the unity of EU law and therefore refrain from reviewing the ECB's actions against any additional national legal safeguards. This could be different, however, if the Court considers the references to national law in the SSM context of such importance that this justifies the application of national legal safeguards too, and if it considers this not compromising the unity of EU law. This involves not only an assessment of whether the additional national legal safeguards are allowed, but also of whether the application of such additional national legal safeguards by the ECB, and accordingly their

review by the EU Courts, would compromise the primacy, unity and effectiveness of Union law.

The *Akzo* case seems to leave room for a difference in administrative standards applicable to the ECB and to NCAs, since the Court has ruled that legal certainty is not at risk when it concerns different procedures, thus clearly dividing the tasks and responsibilities between the authorities. It remains, nonetheless, questionable whether this also holds true in situations such as the current common procedures, i.e. in which the tasks and responsibilities are clearly divided but which concern one and the same administrative procedure.

Even if this would be acceptable from a legal certainty point of view, one can debate whether or not this harms the autonomy, unity and effectiveness of Union law. After all, reviewing NCA draft decisions against national administrative standards infers that the legality of the ECB decision following such an NCA draft decision may indirectly be at stake if these national administrative standards have been breached.

As discussed, this issue may in practice be less relevant in common procedures. The interaction between the ECB and NCAs may be most helpful, although remaining unclear, for ensuring effective legal protection with respect to the right to be heard in the decision-making phase. However, the ECB has a clear responsibility to ensure this right with respect to the facts and objections on which its final decision is based. This responsibility ensures that the ECB is able to, and has to, repair any irregularities regarding the right to be heard at the national level before adopting its final decision. This may however be different in other composite procedures within the SSM, which are discussed in Chapters 5, 6 and 7.

On the one hand, not taking national administrative standards into account seems undesirable from a safeguard perspective, since this way the parties' position before the Court would be worse than before a national court. After all, national courts apply the additional national standards (i.e. national procedural rules and, to the extent allowed in light of the *Melloni* case law, national legal safeguards). Moreover, leaving aside national standards would not reflect the explicit role of the national authority in common procedures, and that could be considered to be a less effective implementation of Union law.

On the other hand, applying Union standards alone would increase the ECB's effectiveness as it does not need to apply the relevant national administrative standards, nor does it need to verify NCAs' compliance with them, in each common procedure. It would even be easier for the Court to ensure a good interpretation of the applicable laws when it applies Union law only, since the legal maxim of *iura novit curia* does not apply to the Court in case of national law. When the Court has to interpret and apply national administrative laws, it may need to cooperate closely with national courts or parties in order to

guarantee effective legal protection, which at the same time will make the Court less effective.

In conclusion, no easy solution seems immediately available for having legal protection in place that is effective from both a safeguard and an instrumental perspective.

Final remarks

Broadly speaking, it can be concluded that the main challenge to ensure effective legal protection in common procedures relates to the review of the NCA draft decisions in these procedures. There is a constant tension between the autonomy and unity of EU law, on the one hand, and ensuring a sufficient judicial review and optimal protection of legal safeguards, on the other.

The effectiveness of Union law may benefit from different approaches, depending on the way it is looked at. Not considering the national part, or only to a limited extent, may increase the ECB's effectiveness, while this may at the same time not do justice to the way in which the EU legislator has laid down the administrative procedures in Union law and the role of national law in this context. The part played by national law could in turn be considered to be hampering an effective implementation of Union law.

These tensions illustrate that in common procedures there is no straightforward or single approach for ensuring effective legal protection from both a safeguard and an instrumental perspective. The only realistic approach is to try and find the most optimal middle ground, implying choices to be made between the various aspects at stake. Part III of this research elaborates on just that.

Bottom-up Procedures in Ongoing Supervision

1 Introduction

This chapter discusses the legal protection in case of bottom-up procedures in ongoing supervision. Similar to the common procedures discussed in Chapter 4, bottom-up procedures consist of preparatory steps on a national level and a final decision on the Union level. As the preparatory measures in these procedures generally are less formal in character a separate discussion is justified and so this chapter only addresses bottom-up procedures in ongoing supervision.

First the chapter describes the characteristics of the various bottom-up procedures, then it continues with an analysis of the legal protection in place. Both the legal protection before court and the legal protection in the administrative procedure are part of the analysis. The chapter concludes by evaluating the effectiveness of the legal protection currently in place for decisions ensuing from bottom-up procedures in ongoing supervision.

2 Formal and informal cooperation in bottom-up procedures

The decisions discussed in this chapter are ECB decisions based on bottom-up procedures and adopted in ongoing supervision. Ongoing supervision is the day-to-day supervision of banks in order to ensure they comply with relevant Union law.¹ This supervision is carried out by Joint Supervisory Teams composed of staff members from both the European Central Bank and National Competent Authorities.

It is in principle for the ECB, being directly competent to supervise the large banks, called the Significant Institutions, to adopt the final decision with respect to these SIs. The ECB decisions based on bottom-up procedures and adopted in ongoing supervision, as discussed in this chapter, are thus related to SI supervision.²

The ECB's tasks in ongoing supervision include ensuring compliance with prudential requirements (e.g. own funds requirements, and liquidity and reporting requirements) and with governance requirements (e.g. having in place robust governance arrangements, fit and proper requirements for persons

¹ See also Chapter 2, Section 4.

² Note that top-down composite procedures are, on the other hand, mainly related to LSI supervision; see Chapter 6. There is one top-down procedure related to ongoing supervision of SIs as well, also discussed in Chapter 6, which concerns the ECB's power under Article 9(1) SSM Regulation to give instructions to NCAs. Since such an instruction ends in a final NCA decision, this is a top-down procedure. See Chapter 6, Sections 2 and 3.5.

responsible for the bank's management, and risk management processes).³ These requirements are supervised by means of gathering information, regular and ad hoc meetings with the credit institution, thematic investigations, periodic regulatory review processes, and annual reviews of the arrangements, strategies, processes, and mechanisms implemented by the credit institutions.⁴ These annual reviews usually together are referred to as the SREP, short for 'Supervisory Review and Evaluation Process'.⁵ The SREP results in an annual SREP decision, which may include various quantitative supervisory measures, such as own funds requirements or institution-specific quantitative liquidity requirements, and qualitative supervisory measures, such as a restriction or limitation of business.⁶

In addition to the SREP decision, the daily supervision may be followed by other final ECB decisions, typically being supervisory measures addressed to the credit institution. A supervisory measure may in turn be followed up by an enforcement measure or a sanction of a criminal nature.⁷ This chapter only discusses the supervisory or enforcement decisions, i.e. sanctions not of a criminal nature; decisions imposing sanctions of a criminal nature are discussed in Chapter 7.

This research refers to the ongoing supervision discussed in this chapter as the supervisory phase. The research distinguishes this phase from the investigatory phase,⁸ which is discussed in Chapter 7 and concerns administrative procedures that may lead to imposing sanctions of a criminal nature, as well as the actual decisions imposing a sanction of a criminal nature. Thus, speaking about the ECB's use of powers in this chapter, reference is only made to the use of powers in the supervisory phase, which concerns ongoing supervision.

In ongoing supervision, both the ECB and NCA carry out preparatory measures when preparing the ECB decisions. As discussed in Chapter 2, the SSM Framework Regulation has created Joint Supervisory Teams and on-site inspection teams in order to ensure that the ECB and NCAs closely cooperate in supervising SIs. These are the teams carrying out the SI supervision and preparing ECB decisions addressed to the SIs. The ECB decisions at issue are thus prepared by teams consisting of both ECB and NCA staff, which are supported by the ECB's and NCAs' horizontal divisions.⁹

³ Article 4(i)(d) and (e) SSM Regulation.

⁴ SSM Supervisory Manual 2018, pp. 77-80.

⁵ See Chapter 2, Section 4.

⁶ SSM Supervisory Manual 2018, p. 86.

⁷ See SSM Supervisory Manual 2018, p. 61.

⁸ Cf. Chapter 1, Section 4.2.

⁹ SSM Supervisory Manual 2018, p. 77.

The ECB's powers in ongoing supervision include the powers laid down in Articles 10 up to and including 13 of the SSM Regulation (i.e. to request information, and to carry out general investigations and on-site inspections), the ECB's competence to take the necessary supervisory measures in an early stage so as to address relevant problems in certain circumstances (e.g. the powers laid down in Article 16 of the SSM Regulation, such as to require a bank to hold more own funds or to remove a member from the management board), and its competence to take enforcement measures (e.g. periodic penalty payments or, if available under national law, cease-and-desist orders).¹⁰

In addition to the above-mentioned powers immediately stemming from the SSM Regulation, Member States may also have allocated additional powers to NCAs under their national laws. Although most of the competences are harmonized under the relevant Union law, additional supervisory competences laid down in national laws still exist. Following the ECB's interpretation of Article 9(1) of the SSM Regulation, the ECB is also directly competent to exercise powers granted under national law that are not explicitly mentioned in Union law, if they (i) fall within the scope of the ECB's tasks under Articles 4 and 5 of the SSM Regulation and (ii) underpin a supervisory function under Union law.¹¹ These powers may vary in each Member State and include, for instance, the approval of mergers and de-mergers involving SIs, the approval of asset transfers and divestments involving SIs, and the approval of an SI's statutes.¹²

As mentioned previously, both the ECB and NCAs carry out preparatory measures, whereby the NCAs' contribution to the Joint Supervisory Teams mainly consists of preparatory measures that remain informal, since the applicable regulations do not contain any formal steps in this respect.

¹⁰ Cf. Chapter 2, Section 6. Here, the differences in terminology may lead to confusion, since the ECB's powers include the powers stipulated in Articles 10-13 SSM Regulation, which the SSM Regulation calls *investigatory* powers, even though such *investigatory* powers may also be used in the supervisory phase. To complicate matters, the ECB's powers to take supervisory measures are referred to as *supervisory powers* in Article 16 SSM Regulation. The terminology used in this research, which is thus not an exact match of the terminology used in the SSM Regulation, is defined in Chapter 2, Section 6.1.

¹¹ Letter to banks from the ECB of 31 March 2017, 'Additional clarification regarding the ECB's competence to exercise supervisory powers granted under national law', SSM/2017/0140 (available at: https://www.banksupervision.europa.eu/press/letterstobanks/shared/pdf/2017/Letter_to_SI_Entry_point_information_letter.en.pdf; last visit on 14 August 2020). This is discussed in more detail in Section 4.1 of this chapter.

¹² Letter to banks from the ECB of 31 March 2017, 'Additional clarification regarding the ECB's competence to exercise supervisory powers granted under national law', SSM/2017/0140, p. 1 (available at: https://www.banksupervision.europa.eu/press/letterstobanks/shared/pdf/2017/Letter_to_SI_Entry_point_information_letter.pdf?cbo801df81ba2db9d450ce4fb53065c8; last visit on 14 August 202).

In the context of ongoing supervision, the only more formal step an NCA can take for its preparatory measure is to use the possibility it has to prepare draft decisions for the ECB. Such draft decisions can be prepared by NCAs either at their own initiative or on the ECB's request, but are legally non-binding to the ECB.¹³ Because of their comparability with NCA draft decisions in common procedures, this type of preparatory measure is left aside here and instead reference is made to Chapter 4.

NCA staff in the Joint Supervisory Teams remain employed by the NCA and are thus national staff. Accordingly, they use their competences under national law when assisting the ECB in the Joint Supervisory Teams to carry out the ongoing supervision. As mentioned previously, such competences generally are a transposition of the relevant Union law, although additional 'purely' national powers still exist too. NCAs have more or less the same powers as the ECB has under Articles 10-13 of the SSM Regulation. They assist the ECB, for instance, by means of gathering and establishing information. However, when NCA staff participate in an on-site inspection team, they shall have the powers stipulated in Article 12(2) and (4) of the SSM Regulation, which powers are thus based on Union law.

It also remains possible for NCAs to assist the ECB outside the context of a Joint Supervisory Team. For instance when making a fit and proper assessment, the ECB and the relevant NCA together collect the necessary information, carry out the assessment and present a detailed proposal for a decision.¹⁴ Although this may be outside the context of a Joint Supervisory Team, this kind of cooperation has the same characteristics, as the NCAs' powers still are based on national law, and the collaboration still is not formalized in the SSM Regulation.

This introduction illustrates the complex intertwining of the different authorities involved when preparing ECB decisions in ongoing supervision.

3 Legal protection before court

Similar to the ECB's decisions in common procedures, ECB decisions based on bottom-up procedures in ongoing supervision are subject to judicial review by the Court when the criteria of Article 263 TFEU are met. Any irregularities in the measures preparing these ECB decisions may in principle be relied upon in an action brought against the ECB decision, unless the preparatory measure in itself is considered to be an actionable decision. In order to determine what judicial protection is provided and how, two questions need to

¹³ Article 91(2) SSM Framework Regulation and Articles 91(1), 90(1)(a) and 95(2) SSM Framework Regulation, respectively.

¹⁴ SSM Supervisory Manual 2018, p. 77.

be answered: are the preparatory measures actionable in themselves, and which court would be competent to review those measures?

To answer these questions, different kinds of preparatory measures in bottom-up procedures must be distinguished. The preparatory acts for the final ECB decision may comprise preparatory measures by the ECB and by the NCAs. The ECB preparatory measures are discussed first and pertain to the use of powers such as requesting information, requiring to submit documents or carrying out on-site inspections, as laid down in Articles 10-13 of the SSM Regulation. The second part of the section discusses the reviewability of NCA preparatory measures in the course of an EU decision-making procedure.

Although having composite procedures in place does in principle not affect the reviewability of ECB preparatory measures followed by a final ECB decision,¹⁵ analysing these measures may still be helpful. Such an analysis may provide insight as to the Court's reasoning when it is asked to review similar national preparatory measures relied upon in a judicial proceeding against a final ECB decision. Therefore, ECB preparatory measures are discussed first, looking into on-site inspections in more detail, since these may actually be affected by the fact that both the Union and national levels are involved.

3.1 The reviewability of ECB preparatory measures

As the below analysis infers, it seems likely that in most cases the formal ECB decisions ordering the use of the ECB's powers laid down in Articles 10-13 of the SSM Regulation will be separately subject to review by the Court.¹⁶ Contrastingly, the informal use of these powers will probably not be subject to separate judicial review.

As has been discussed in Chapter 3, for the Court to determine whether or not a preparatory measure is separately subject to judicial review under Article 263 TFEU, it looks at the effect created by the preparatory measure and whether the judicial protection at hand suffices (for instance, does the measure bring about a distinct change in a person's legal position by irremediably impairing the rights of defence), as well as at the procedural rules that apply (i.e. the legislator's intention), and any possible risk of confusing procedural stages.¹⁷ Below, these

¹⁵ After all, the power finds both its legal basis and its use at the EU level only. Also, since the ECB adopts the final decision, it does not prepare a decision on another level. This is different in case of top-down procedures, which are discussed in Chapter 6.

¹⁶ The powers laid down in Articles 10-13 SSM Regulation are elaborated in Chapter 2, Section 6.3.

¹⁷ See Chapter 3, Section 5.2.

aspects are discussed insofar as they prove to be relevant for each of the ECB's powers laid down in Articles 10-13 of the SSM Regulation.¹⁸

Whereas the analysis below pertains to the phase this research refers to as the supervisory phase, it includes several case law examples from the field of competition law, which generally concern the investigatory phase.¹⁹

The requirements of legal protection are stricter in the investigatory than in the supervisory phase, as during the investigatory phase sanctions of a criminal nature may be imposed.²⁰ There is no knowing as of yet whether the Court will apply the standards it uses to decide on the reviewability of the Commission's use of powers *mutatis mutandis* to the ECB's use of similar powers in the supervisory phase.

Nevertheless, the case law examples are, in my view, useful given the similarities between the ECB's supervisory powers and the Commission's powers in its capacity as a competition authority. These competition law cases provide an interesting overview of the elements that the Court considers when determining whether a measure generally is subject to separate judicial review. Moreover, the Court's considerations seem not directly related to the criminal nature of a sanction, but merely to ensuring effective judicial protection in general and therefore they could be assumed relevant for both the supervisory and investigatory phases.

The first power is the ECB's competence to request information under Article 10 of the SSM Regulation.²¹ Only ad hoc requests are discussed here.²² As

¹⁸ Note that these powers are excluded from the right to be heard (Article 31(1) SSM Framework Regulation). Although this may be logical in the context of ongoing supervision, which will often – contrary to investigations – be carried out with the consent of the institutions involved, and given the amount of cases concerned, this interpretation of the right to be heard may be too narrow (as discussed in Chapter 2, Section 7).

¹⁹ The Commission uses its investigatory powers in the field of competition law to investigate possible breaches of law (cf. Recitals 23-26 and Article 17 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition law laid down in Articles 81 and 82 of the Treaty (hereafter: Regulation (EC) 1/2003)). Prudential banking supervisors, on the other hand, use their powers to carry out ongoing supervision as well as to investigate possible breaches of law.

²⁰ Cf. Chapter 2.

²¹ Under the conditions set in Article 10(1) SSM Regulation, the ECB may request information from the following legal or natural persons: (a) credit institutions established in the participating Member States; (b) financial holding companies established in the participating Member States; (c) mixed financial holding companies established in the participating Member States; (d) mixed-activity holding companies established in the participating Member States; (e) persons belonging to the entities referred to in points (a) to (d); (f) third parties to whom the entities referred to in points (a) to (d) have outsourced functions or activities.

²² Most of the basic information necessary for the supervision of SIs will be gathered on the basis of standard supervisory reporting requirements under the CRR and CRD IV. This is information that credit institutions are obliged to provide on the basis of relevant EU law, without any specific supervisory

elaborated below, formal ECB decisions requesting information are likely to be subject to judicial review. These formal decisions are to be distinguished from informal requests for information, i.e. without ECB decision. This informal kind of information gathering and establishing will presumably not be subject to review by the Court, as it does not intend to produce any legal effect vis-à-vis a third party.²³

The legislation relevant to the ECB's power to request information is not as explicit about the legal effect of such a request as are, for instance, the relevant provisions in competition law.²⁴ On the basis of the applicable rules, it can however be argued that the ECB decisions requesting information in themselves are to be considered to create legal effect vis-à-vis a party.

The applicable rules do not specify whether an information request by the ECB has to be made by decision and, if it is made by decision, whether that decision would be legally binding. There is, nonetheless, a legal obligation for persons to provide the requested information to the ECB.²⁵ Moreover, Article 18(7) of the SSM Regulation stipulates that the ECB may fine a breach of an ECB decision, and so this also applies to a breach of an ECB decision requesting information. Although the Court does not consider the absence of any sanctions in case of non-compliance with a preparatory act to be a decisive factor,²⁶ that does not mean that the

decisions being necessary, and is also referred to as 'regular reporting' (SSM Supervisory Manual 2018, pp. 68-69). Besides this information, supervisors may request additional information necessary for executing their tasks. In line with this, the ECB may require all information needed to carry out its supervisory tasks from the persons listed in Article 10(1) SSM Regulation, subject to the conditions set in relevant EU law. This includes both ad hoc information requests and information to be provided at recurring intervals and in specified formats for supervisory and related statistical purposes. This section of the chapter particularly discusses the information requests by ECB decision addressed to individual banks (cf. also: SSM Supervisory Manual 2018, pp. 69-70). Standardized information requests based on EU law or general ECB decisions are outside the scope of this research.

²³ Cf. Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:656, paras 41-46, discussed in Chapter 3, Section 5.2.

²⁴ Cf. Article 18(3) Regulation (EC) 1/2003. The competition rules state that a simple request for information has to include the legal basis and purpose of the request, and specify the necessary information and time limits within which the information is to be provided. Furthermore, the request must mention the fines provided for in Article 23 of the Regulation for supplying incorrect or misleading information (Article 18(2) in correlation with Article 23(1)(a) Regulation (EC) 1/2003). In case of an information request by decision, the Commission shall, in addition to the information included in the simple request, indicate or impose the periodic penalty payments provided for in Article 24 Regulation (EC) 1/2003 and the right to have the decision reviewed by the CJEU. (Article 18(1)-(3) Regulation (EC) 1/2003). Cf. Lenaerts et al. 2014, pp. 275-276.

²⁵ Article 10(2) SSM Regulation.

²⁶ Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:656, para. 48. Cf. Chapter 3, Section 5.2.

possibility to impose a fine could not be viewed as a confirmation of the legislator's intention to make such a preparatory act legally binding.²⁷

In order to determine whether an ECB decision requesting information is separately subject to review, it is also relevant to look at the effect created by these requests and whether the judicial protection at hand suffices.

As to the question whether an information request intends to produce a legal effect that would make it admissible for review, competition law may again serve as a precursor. In the context of investigations the Commission has conducted as a competition authority, the Court has concluded that a distinct change in a person's legal position could be conceivable when certain rights of defence are irremediably impaired during a preparatory phase. This may hold true, for instance, for the principle of legal privilege.²⁸ However, the applicant must have invoked the confidentiality of the requested documents to get a reviewable act.²⁹ Although the aspect of legal effect may thus be relevant in the context of information requests, this does not infer that a decision requesting information in itself is subject to review because of that.

If an ECB decision requesting information in itself is not subject to separate review, subsequently the judicial protection at hand needs to be analysed.

Often, irregularities relating to a request for information can be relied upon in a proceeding against the final ECB decision based on the information obtained as a result of the request. This will however not always be the case. For instance, if an information request covers information that is not used in the final decision or if the information request is addressed to a person other than the person the final decision is addressed to and who may thus be the applicant in a proceeding, that applicant cannot rely on the pertaining irregularities and the person to whom the information request has been addressed is left without judicial protection.

²⁷ The Court has ruled in the Berlioz case that persons have a right to a remedy against a penalty imposed on them for failure to comply with an information order issued to them by tax authorities. Thus, the decision by which a fine has been imposed on the person for failure to comply with an administrative decision requesting information is separately subject to judicial review according to Article 47 Charter (Case C-682/15, Berlioz Investment Fund, ECLI:EU:C:2017:373, paras 58-59). The current question is whether a decision requesting information is subject to judicial review, but the fact that a fine can be imposed in case of failure to comply with such a request may be an additional ground to assume, in line with the Berlioz judgment, that the decision requesting information may also be separately subject to judicial review. If that would not be the case, the person involved can only gain judicial protection by being disobedient, that is by not following up on the information request, and wait for a fine to be imposed.

²⁸ See Chapter 3, Section 5.2.

²⁹ Case T-135/09, *Nexans France and Nexans v. Commission*, ECLI:EU:T:2012:596, para 128-132. See Chapter 3, paragraph 5.2.

The first situation may occur when the credit institution involved considers the request to be disproportionate and the information irrelevant for the ECB's supervisory tasks. If this turns out to be the case, the final ECB decision towards which the information request was a preparatory measure will not be based on this information. Consequently, the credit institution involved will not have a chance to contest such an information request's legality in an action against the final ECB decision.³⁰ A similar gap in judicial protection may occur in the second situation, when the addressee of the information request is not the same person as the addressee of the final ECB decision.³¹

In situations in which the information request in itself cannot be contested, this may result in a gap in judicial protection. The above part of the analysis illustrates that the rules in place already may justify a separate judicial review of an ECB decision requesting information and, if not so justified, separate review seems at least necessary in cases in which otherwise no sufficient judicial protection would be in place.

The second power is the ECB's competence to conduct all necessary investigations of any person referred to in Article 10(1) of the SSM Regulation.³² To carry out these investigations, the ECB may, for instance, require to submit documents, examine and copy the books and records of the persons concerned, and obtain written or oral explanations from them.³³

Concerning the power to investigate, the SSM Regulation explicitly states that a general investigation shall be launched on the basis of an ECB decision, which seems to indicate the legislator's intention to make such decisions separately subject to judicial review. Again, the relevant provisions do however not state

³⁰ See Chapter 3, Section 5.2. In the Deutsche Post case, the Court has noted that the applicant's claim, considering the injunction to be disproportionate in that the information requested was not relevant for assessing the state measure, may imply that the illegalities affecting the preparatory measure cannot affect the legality of the final decision, since the final decision is not to be based on information obtained on the basis of the contested injunction (Joined cases C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:656, paras 55–60). A similar situation may occur in case information has been obtained during an investigation related to another subject matter or purpose (called fishing expeditions) (cf. Chapter 3, Section 4.2.1).

³¹ The ECB may also request information from e.g. third parties to whom credit institutions have outsourced functions or activities (Article 10(1)(f) SSM Regulation). This information may be used for a decision addressed to the relevant credit institution, in which case the addressee of the final ECB decision is not the same person as the addressee of the information request.

³² See footnote 21 above for the full list of persons referred to in Article 10(1) SSM Regulation.

³³ Article 11 SSM Regulation. Cf. SSM Supervisory Manual 2018, p. 78.

explicitly that these ECB decisions in themselves actually are subject to judicial review.³⁴

The persons referred to in Article 10(1) of the SSM Regulation shall be subject to a general investigation launched on the basis of an ECB decision.³⁵ When a person obstructs such an investigation to be carried out, the relevant NCA shall afford the necessary assistance, in accordance with national law, so the general investigatory rights can be exercised.³⁶ Again, although not determining, any obstruction of the investigation also implies a breach of an ECB decision and may be fined by the ECB in accordance with Article 18(7) of the SSM Regulation. On the basis of these elements, it can be argued that the legislator has intended to allocate a binding legal effect to the exercise of these investigatory powers.

This may be different when the ECB exercises the general investigatory powers in light of an on-site inspection on the basis of Article 12(2) of the SSM Regulation. The Court may consider the use of the general investigatory powers to be implementing measures of the decision ordering the on-site inspection, in which case judicial protection is guaranteed by means of an action against that decision. The use of general investigatory powers should then be relied upon in an action against such ECB decision ordering the on-site inspection.

The Commission's general investigatory powers³⁷ seem to be comparable to those of the ECB set in Article 12(2) of the SSM Regulation, on the basis of which officials conducting an on-site inspection shall have all the powers stipulated in Article 11(1), i.e. the general investigatory powers. The General Court has concluded that the Commission's exercise of general investigatory powers during an inspection are not separately subject to review by the EU Courts.³⁸ Only Commission decisions ordering inspections, on the basis of which the general investigatory powers have been carried out as well, are actionable decisions in themselves; the investigatory powers used during these inspections have to be considered to be implementing the decision ordering the inspection.

³⁴ Although, contrary to Regulation (EC) 1/2003 with regard to the Commission's decision ordering an inspection (Cf. Article 18(4) Regulation (EC) 1/2003), the SSM Regulation does not state that the ECB's decision exercising the general investigatory rights has to mention the right to bring an action for annulment before the CJEU, the presence or absence of such wordings does not affect the actual right to bring an action before the CJEU and thus does not seem relevant to the interpretation of the legislator's intention.

³⁵ Article 11(2) SSM Regulation and Article 142 SSM Framework Regulation.

³⁶ Article 11(2) SSM Regulation.

³⁷ Cf. Article 20(2) Regulation 1/2003.

³⁸ Case T-9/97, Elf Atochem v Commission, ECLI:EU:T:1997:83, paras 18-27; Case T-135/09, Nexans France and Nexans v Commission, ECLI:EU:T:2012:596, para. 125 (the appeal case concerned other elements of the case and has been dismissed by the Court, cf. Case C-37/13 P, Nexans and Nexans France v Commission, ECLI:EU:C:2014:2030). Cf. Lenaerts et al. 2014, p. 276.

The above analysis regarding the ECB's power to request information and to carry out general investigations illustrates that it has to be examined each time what judicial protection exists in each individual case, and which decision following the actual action at issue can in itself be the subject of judicial review and thus provide sufficient judicial protection.

Note that an action brought before the Court against an ECB decision does not have suspensory effect. The Court may nonetheless order that the application of the contested ECB act must be suspended if it considers that circumstances so require.³⁹

The third and last power to look at is the ECB's competence to carry out on-site inspections. The procedure is comparable to the procedure for general investigatory powers (as discussed above): the persons involved are subject to the on-site inspection on the basis of an ECB decision.⁴⁰ The Commission, as a competition authority, has a similar power to order an on-site inspection by a decision which is actionable due to its binding character.⁴¹ It seems thus likely that the ECB decision ordering an on-site inspection is an actionable decision in itself.

It is important to note that the judicial review in case of a decision ordering an on-site inspection concerns the ordering of the inspection, and not its implementation. The implementation of the inspection concerns actual actions the authorities take after the decision ordering the on-site inspection has been adopted. Any irregularities with respect to the inspection's implementation may be raised in an action against the final ECB decision based on the information gathered during the inspection.⁴² Again, as is the case for decisions ordering a general investigation, one has to keep in mind that a judicial proceeding against a decision ordering an on-site inspection will not suspend its operation, unless the Court orders so.

Similar to general investigations, on-site inspections shall be carried out on the basis of an ECB decision,⁴³ the credit institution involved shall be subject to the inspections and when a person obstructs the inspection, the relevant NCA shall afford the necessary assistance, in accordance with national law, so the on-site

³⁹ Article 278 TFEU. Cf. Chapter 3, Section 5.1. Suspension of the operation of an ECB act can be requested in an interlocutory proceeding. Lenaerts et al. point out however that the EU Courts do not often order such suspensions (Lenaerts et al. 2014, p. 563).

⁴⁰ Article 12(3) SSM Regulation.

⁴¹ Cf. Articles 20(4) and 21(1) Regulation (EC) 1/2003; Lenaerts et al. 2014, p. 276. In competition law, the Commission must adopt a decision ordering the on-site inspection. This is contrary to carrying out inspections by written authorization (Article 21(3) Regulation (EC) 1/2003), which are not binding and accordingly not separately subject to judicial review (Lenaerts et al. 2014, p. 276).

⁴² Lenaerts et al. 2014, p. 277 and the case law mentioned there.

⁴³ Articles 12(3) SSM Regulation and 143(2) SSM Framework Regulation.

inspection can be carried out.⁴⁴ Any obstruction of an on-site inspection implies a breach of an ECB decision and may be fined by the ECB in accordance with Article 18(7) of the SSM Regulation.⁴⁵ Although the SSM Regulation does not state that the ECB's decision ordering an on-site inspection has to mention the right to bring an action for annulment before the CJEU, this does not seem to change the above conclusions, since the presence or absence of such an obligation to mention this possibility does not affect the right to go to Court.⁴⁶

Most ECB on-site inspections will be planned inspections, which probably enables credit institutions to go to Court before the actual inspection takes place. However, as discussed below, even if this is not possible, the Court considers that effective judicial protection may even be ensured if events are reviewed by the Court afterwards.

It is relevant to keep in mind that on-site inspections are considered to interfere with the right of respect for private and family life, and are therefore only allowed under certain conditions.⁴⁷ As discussed in Chapter 3, in practice the judicial review of on-site inspections will boil down to an assessment of the inspection's necessity and proportionality, which includes a review of its arbitrariness and excessiveness.⁴⁸

An element taken into consideration by the ECtHR when reviewing the necessity of an interference with the right of respect for private and family life, that is when reviewing an inspection, is whether the inspection has been based on a warrant issued by a judge. This is relevant in order to examine whether domestic law and practice afford adequate and effective safeguards against any abuse and arbitrariness.⁴⁹ A prior judicial authorization is, however, not always necessary. Its absence may be counterbalanced by the availability of an ex post judicial review covering both questions of fact and questions of law.⁵⁰

⁴⁴ Articles 12(3) and 12(5) SSM Regulation.

⁴⁵ Article 143(2)(b) SSM Framework Regulation.

⁴⁶ Cf. footnote 34 above.

⁴⁷ See Chapter 3, Section 4.2.2.

⁴⁸ Chapter 3, Section 4.2.2.

⁴⁹ Wieser and Bicos, ECtHR App. no. 74336/01, 16 October 2007, para. 57. Cf. Veenbrink 2016, p. 244.

⁵⁰ Heino, ECtHR App. no. 56720/09, 15 February 2011, para. 45. Cf. Veenbrink 2016, p. 245. The Court has confirmed the ECtHR's stance in this case in, *inter alia*, Case C-583/13 P, Deutsche Bahn and Others v Commission, ECLI:EU:C:2015:404, paras 22-26, in which it has concluded, with respect to the Commission's powers as a competition authority, that, although the Commission does not need a prior judicial warrant for carrying out an on-site investigation, the system put in place in the EU meets the requirements the ECtHR has set to ensure effective judicial protection. The applicable regulation expressly states that the Commission decision's lawfulness is to be subjected to review by the EU Courts. The Treaties ensure an in-depth review by the EU Courts of the law and of the facts on the basis of the evidence adduced by the applicant in support of the pleas in law put forward (Case C-583/13 P, Deutsche Bahn and Others v Commission, ECLI:EU:C:2015:404, paras 32-34). See also: Ligeti & Robinson 2017, p. 223. They point out that, in order to counterbalance ex ante judicial review by ex post

The system of prior judicial authorization as laid down in the SSM Regulation is a hybrid one. The regulation does not require the ECB to get a judicial authorization prior to carrying out an inspection on the business premises, but anticipates that certain national laws do require prior judicial authorization for on-site inspections.

Anticipating on requirements of prior authorization under national law implies anticipating on the national judicial authorities becoming involved in the ECB's exercise of coercive measures. Such involvement requires a well-balanced division of competences between the Union and national courts, a balance that has been laid down in Article 13 of the SSM Regulation with respect to the ECB's on-site inspections.

Pursuant to this provision, such a prior authorization shall be applied for if an on-site inspection or any assistance provided by the NCAs require authorization by a judicial authority according to national rules. Article 13(2) of the SSM Regulation sets the limits of the national judicial authority's assessment, which is in line with the Court's judgment in the *Roquette Frères* case.⁵¹ The national judicial authority shall assure itself of the decision being authentic and the envisaged coercive measures being neither arbitrary nor excessive with regard to the subject matter of the inspection.⁵² National courts are, however, required to ensure that the actions taken by the ECB are effective and to refrain from substituting their own assessment of the need for the ordered inspection for that of the ECB. It is, after all, up to the Court to rule about the lawfulness of the ECB decision at hand.⁵³

The fact that certain Member States do not provide for a prior judicial authorization⁵⁴ while others do, may on its own cause risks for the effectiveness of the judicial protection. If the national court has not assessed the arbitrariness and excessiveness of an on-site inspection due to the fact that no prior judicial authorization is required, there is a risk of this not being assessed at all. This would be the case if the Court assumes that the procedures in the relevant Member State have been carried out properly and therefore leaves assessing the arbitrariness and excessiveness aside when reviewing an ECB decision ordering

judicial review, effective access to the remedy, a review covering both questions of fact and of law, and an appropriate redress in case of unlawfulness of the inspection have to be available. Especially the last criterion, i.e. redress in case of unlawfulness, may cause difficulties (p. 223). However, as discussed in the remainder of this section, in case an on-site inspection would prove to be unlawful, the ECB will be prevented from using any documents or evidence which it may have obtained in the course of that inspection.

⁵¹ Case C-94/00, *Roquette Frères*, ECLI:EU:C:2002:603.

⁵² Article 13(2) SSM Regulation. Cf. Case C-94/00, *Roquette Frères*, ECLI:EU:C:2002:603, para. 40.

⁵³ Article 13(2) SSM Regulation. Cf. Case C-94/00, *Roquette Frères*, ECLI:EU:C:2002:603, paras 35, 39 and 51.

⁵⁴ Cf. De Moor-van Vught 2012, p. 25.

an on-site inspection or a final ECB decision that is, entirely or partly, based on information stemming from such an on-site inspection.⁵⁵

Should the Court annul the ECB-decision ordering the on-site inspection, the ECB would, in line with the Court's reasoning in the *Roquette Frères* case, be prevented from using any documents or evidence it may have obtained in the course of that inspection. Alternatively, the Court may annul the decision on the infringement, insofar as it has been based on evidence obtained in such a way.⁵⁶ That way, effective judicial protection is deemed to be ensured.⁵⁷

3.2 The reviewability of national preparatory measures

This section will look into the reviewability of the use of supervisory powers by NCAs under their national laws,⁵⁸ which powers generally are comparable to the ECB's powers stipulated in Articles 10 and 11 of the SSM Regulation,⁵⁹ during the preparatory phase of a final ECB decision. The preparation of draft supervisory decisions by NCAs in the context of ongoing supervision is comparable to NCA draft decisions in the context of common procedures and so NCA draft supervisory decisions are left aside in this section.⁶⁰

In principle, national courts are competent to decide on the reviewability of measures carried out by NCAs. However, in *Berlusconi and Fininvest*, the Court interprets Article 263 TFEU as precluding national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by NCAs in procedures assessing acquisitions of a qualifying holding.⁶¹

⁵⁵ For a more extensive discussion of this risk, see: Wissink et al. 2014, pp. 110–111.

⁵⁶ Case C-94/00, *Roquette Frères*, ECLI:EU:C:2002:603, para. 49.

⁵⁷ Cf. Wissink et al. 2014, p. 106. Additionally, Veenbrink lists the various other ways in which ex post judicial protection can be gained (Veenbrink 2016, pp. 243 and 248–249). Besides the possibility of challenging the ECB decision ordering an on-site inspection, any obstruction of an on-site inspection may be fined by the ECB, in which case the institution involved may object against the ECB decision imposing the fine. Institutions may also challenge possible mistakes made during the on-site inspections (thus not the inspection itself, but the ECB's actions during the inspection) in an objection against a final ECB decision imposing a measure or fine on the involved institution. However, this is only possible if the on-site inspection is followed by a final ECB decision. Lastly, Veenbrink mentions the possibility for institutions to hold the EU liable on the basis of Article 340 TFEU for the consequences of an on-site inspection (Veenbrink 2016, p. 243 and the case law mentioned there).

⁵⁸ When assisting the ECB, NCAs use the supervisory powers allocated to them on the basis of their national laws.

⁵⁹ NCAs may exercise the on-site inspection powers of Article 12 SSM Regulation on the basis of that same regulation, cf. Chapter 2, Sections 6.3 and 6.5.

⁶⁰ See the discussion of NCA draft decisions in Chapter 4.

⁶¹ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023. This case is discussed extensively in Chapter 4, Section 3.1.

It is debatable how much room this judgment leaves for national courts to decide on the reviewability of non-binding national preparatory measures that are part of an EU decision-making procedure. In the operative part of the judgment, the Court speaks of ‘decisions to initiate procedures, preparatory acts or non-binding proposals’. Depending on how broad an interpretation has to be given to ‘preparatory acts’, national courts may no longer be competent to decide about the reviewability of some, or even any, non-binding measures of NCAs followed by a final ECB decision. The various scenarios are discussed below.

The different terminology the Court uses may cause confusion. It speaks, for instance, also of ‘any involvement of the national authorities’ (para. 43), ‘acts adopted by national authorities’ (paras 47 and 48), and ‘preparatory acts adopted by the national authorities’ (para. 51). The wording ‘adopt’ seems to refer to more formal intermediate steps an NCA may take during an EU decision-making procedure, such as the NCA draft decision at stake in that case. This is, nonetheless, not fully clear. It is worth looking into the different interpretations in order to understand the impact of this judgment may have.

A first scenario is that *Berlusconi and Fininvest* must be interpreted broadly, implying that any defects in any national preparatory measure that is not legally binding to the ECB must be relied upon in an action before Court for annulment of the final ECB decision.⁶²

This scenario implies that the Court would ignore its own standards of reviewability with respect to EU preparatory acts, as discussed in Section 3.1 of this chapter. Indeed, in an action against a final ECB decision the Court would review all national preparatory measures, while similar ECB preparatory measures may be subject to separate judicial review.⁶³ The scenario also implies that national standards of reviewability would be ignored as well.

This broad interpretation simply infers that, if it concerns a national preparatory measure in order to assist the ECB, it is up to the Court to provide judicial protection, regardless of whether the national measure would have been separately subject to judicial review under national law if it would not have been part of an EU decision-making procedure. This interpretation also avoids a gap in judicial protection for preparatory acts of NCAs that are followed by an ECB decision and that would not be subject to separate review under national law. After all, in this interpretation, all national preparatory measures leading to a final ECB decision would be subject to the Court’s review.

However, this approach also implies that defects in national preparatory measures that would have been separately subject to judicial review under national law have to be relied upon in an action against the final ECB decision.

⁶² See also Wissink 2019.

⁶³ For the requirements applicable to preparatory measures in order for them to be subject to separate review, see Chapter 3, Section 5.2.

A national court would thus no longer be allowed to review such a national measure, since it is up to the Court to do so when reviewing the final ECB decision.

Another scenario is that the Court interprets the wording ‘preparatory acts’ as concerning any national preparatory act that is not binding upon the ECB, and not separately subject to judicial review according to the standards that the Court itself applies to Union acts and which are based on Article 263 TFEU.

In this scenario, the Court does not accept ECB and NCA preparatory measures to be treated differently. It applies one and the same standard of reviewability to Union and national preparatory measures, but in case the preparatory measure is a national one and, according to the Court’s standards, subject to separate judicial review, the Court leaves it to the national court to provide judicial protection. ECB and national preparatory measures that are not subject to separate review on the basis of the Court’s standards, may both be relied upon in a case before the Court against the final ECB decision following those measures.

This interpretation would encompass a big step towards harmonization of the reviewability standard within the EU. In it, the Court could oblige the national court to provide judicial protection in case a national preparatory measure is subject to separate judicial review according to the Court’s standards, regardless of whether the national laws provide for such a judicial review. National courts would thus not only be obliged to ensure judicial protection in case the national measure is binding upon the ECB, in line with the *Borelli* case, but also when a national preparatory measure would be separately subject to judicial review according to the Court’s standards based on Article 263 TFEU.

A third, and last, scenario would be that *Berlusconi and Fininvest* concerns national preparatory measures directed to the ECB only, as is the case for NCA draft decisions, but no general preparatory measures such as requesting and establishing information.

This narrower interpretation would imply that the reviewability of general preparatory measures carried out by NCAs to assist the ECB in its supervision is still to be determined by national courts on the basis of their national laws. If the national court concludes that the general preparatory measure at issue is valid under national laws or in case no legal proceedings have been started within the national time limits for doing so, the Court would have to assume the validity of the measure.

Theoretically, another possibility would be that the EU Courts only review those national preparatory measures that are not subject to judicial review according to the relevant *national* laws. In such cases, the EU Courts would basically apply national standards of reviewability, which would probably make its work impracticable. After all, in order to do so, the EU Courts would need an in-depth

knowledge of the different national standards in each Member State, which it has to update continuously because of the developments in national legislation and case law.

Earlier, the Court of Justice has refused to make an action for annulment available if national rules do not allow persons to bring proceedings contesting an EU measure's validity, since such an interpretation would require the EU Courts to examine and interpret national procedural law for each individual case. The Court has concluded that this would go beyond its jurisdiction.⁶⁴ Applying national administrative standards of reviewability would lead to a similar situation, which will thus, probably, not be accepted by the Court. This scenario is therefore not discussed any further in this research.

In the last two scenarios, national courts may have to provide judicial protection against the use of supervisory powers by NCAs, either according to the Court's standards as referred to in the second scenario, or according to their national standards as referred to in the last scenario. In both cases, such a separate national judgment does not seem to pose a risk of having in place different judgments about the substance of the case in one and the same procedure, since the national preparatory measures that would be subject to separate review would not lead to a judgment about the substance of the case.⁶⁵

The next question is how a national judgment stating that a national preparatory measure contains irregularities would affect a final ECB decision following such a measure. In the *Greenpeace* case, the responsibilities between the Union and national courts could remain logically divided due to the particular procedure in place, in which the national court ended up reviewing a national decision following the Commission's decision, which in its turn had been based on a national measure. In this case the Court arrives at an interesting conclusion. It states that, when the national court judges the national decision's legality to be affected by irregularities in the examination, it must refer the matter to the Court for a preliminary ruling if it considers that those irregularities may affect the validity of the Commission's decision. Subsequently, the Court must rule on the question of validity of the Union decision.⁶⁶

The *Greenpeace* case concerns a situation in which it is for the national court to decide on the regularity of the national authority's examination of the notification, and on the possible consequences of any irregularities for the legality of the national authority's decision.⁶⁷ The Court emphasizes the role of the national

⁶⁴ Case C-263/02 P, *Commission v Jégo-Quéré*, ECLI:EU:C:2004:210, para. 33. Also: Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, para. 43.

⁶⁵ For the Court's reasoning on this point, see Chapter 3, Section 5.2. Also: Wissink 2019.

⁶⁶ Case C-6/99, *Greenpeace France and others*, ECLI:EU:C:2000:148, paras 53-57.

⁶⁷ A favourable opinion of the national authority (first phase) was required in order to proceed with the second phase of the procedure. The second phase included the possibility for other Member States to

authority's opinion, i.e. that a favourable national decision is the prerequisite for the second phase of the procedure on a Union level and that, unless another Member State indicates the contrary within the specified period, this national decision may even determine the outcome of the procedure on the Union level.⁶⁸ Since the favourable national decision is based on a national examination, it is for the national court to review that examination's regularity.⁶⁹

In the cases discussed in this chapter, the national preparatory measures precede the ECB final measure, and then the administrative procedure stops. The national court will thus not have a chance to ask the Court how an invalid national preparatory measure impacts the final ECB measure. It will therefore probably be up to the persons involved to raise this issue before the Court.

4 Legal protection in the administrative procedure

As explained in the theoretical framework in Chapter 3, for effective legal protection to be ensured the principles of legality and of good administration need to be adhered to. Both principles provide legal safeguards as from an early stage, i.e. already in the administrative procedure, and facilitate a court in assuring a better judicial control of the decision following an administrative procedure.

raise objections. If another Member State would have raised objections, and the competent authorities concerned would have been unable to reach an agreement within the specified period, the Commission would have to take a decision in accordance with the procedure laid down in the applicable rules (cf. for the Commission's role: Opinion of Advocate General Mischo, delivered on 25 November 1999, ECLI:EU:C:1999:587, paras 59-65). If no objections would have been raised, the national decision would have been followed (Case C-6/99, Greenpeace France and others, ECLI:EU:C:2000:148, paras 5-7).

⁶⁸ Case C-6/99, Greenpeace France and others, ECLI:EU:C:2000:148, para. 51.

⁶⁹ Case C-6/99, Greenpeace France and others, ECLI:EU:C:2000:148, para. 52. Whereas the Court seems to emphasize the more or less binding role of the national opinion, Advocate General Mischo recognizes that a favourable national decision in this procedure does not automatically entail a favourable decision by the (at the time) Community but merely makes it possible (Opinion of Advocate General Mischo, delivered on 25 November 1999, ECLI:EU:C:1999:587, para. 100.). In his opinion, this still does not mean that any irregularities in the national examination ought not to be penalized by the national court if they are referred to it. To the contrary, national courts must, as stated in the Borelli case, provide for judicial protection (Opinion of Advocate General Mischo, delivered on 25 November 1999, ECLI:EU:C:1999:587, para. 103.). In this respect, he notices that it may be a harsh judgment to take that the irregularity which may affect the national procedure cannot affect the validity of the EU decision, but that it is based on very sound reasons. Mischo finds it 'impossible to see how the Community Court, which has sole jurisdiction to declare a Community act invalid, could form an opinion as to the existence of an irregularity with respect to national law when it has no jurisdiction to interpret or apply that law in the context of the jurisdiction conferred on it under [the Treaty]' (Opinion of Advocate General Mischo, delivered on 25 November 1999, ECLI:EU:C:1999:587, para. 98.)

This section firstly focuses on the principle of legality, since this principle raises questions that are particularly relevant to the context currently discussed, and less so for other composite procedures in place within the SSM.⁷⁰ Furthermore, the challenges arising when implementing administrative standards are discussed to the extent relevant to bottom-up procedures, and the question is answered as to which standards have to be applied to which authority. Most of the issues discussed in the context of common procedures also apply here, so reference is made to Chapter 4 in this regard.

4.1 Adherence to the principle of legality

The powers allocated to the ECB so as to enable it to carry out its supervisory tasks are generally explicitly laid down in the SSM Regulation and the ECB may exercise them directly in all participating Member States.⁷¹ Therefore, these powers mostly raise but few issues with respect to the principle of legality in case of bottom-up procedures. However, the ECB's powers laid down in Article 9 of the SSM Regulation, relevant for its SI supervision, are not that straightforward, and so these do raise some issues with respect to the principle of legality.⁷²

Article 9(1) of the SSM Regulation reads: 'For the exclusive purpose of carrying out the tasks conferred on it by Articles 4(1), 4(2) and 5(2), the ECB shall be considered, as appropriate, the competent authority or the designated authority in the participating Member States as established by the relevant Union law.'

[...] It shall also have all the powers and obligations, which competent and designated authorities shall have under the relevant Union law, unless otherwise provided for by this Regulation. [...].'

In the context of the far-reaching shared administration in place within the SSM, this seems to be a catch-all provision. On the basis of this provision, where relevant, the ECB is considered to be the competent authority in the participating Member States and is, in general, allotted all the powers that competent authorities have under the relevant Union law. It seems to function as a linking pin between the laws laying down the required powers, on the one hand, and the ECB's legal basis for exercising the necessary powers to carry out its

⁷⁰ While in common procedures the different competences of the authorities involved are more precisely defined (cf. Chapter 4), and in top-down procedures these are less interlaced (cf. Chapter 6), in bottom-up procedures in ongoing supervision the authorities' competences are strongly intertwined. This complex intertwining requires a closer look at the legal basis of those competences, and so the principle of legality is more extensively discussed in this chapter.

⁷¹ E.g. the ECB's investigatory powers as laid down in Articles 10-13 SSM Regulation and Article 16 SSM Regulation. For a description of these powers, see Chapter 2, Section 6.

⁷² Also: Kastelein 2017.

tasks, on the other. More specifically, the required powers are laid down in the fourth Capital Requirements Directive, which requires Member States to ensure competent authorities have certain powers, as well as the national laws by which the CRD IV is implemented and the powers are actually provided to the competent authorities. Now, Article 9(1), second subparagraph, of the SSM Regulation ensures that the ECB may carry out the powers competent authorities have under the relevant Union law. In other words, by way of this provision the ECB is competent to exercise powers allocated to the NCAs by national law, that the NCAs shall have under the relevant Union law.

When NCAs have other powers under national law and these cannot be considered to be transposed from relevant Union law, nor have they been conferred on the ECB by the SSM Regulation, the ECB may, to the extent necessary for its supervisory tasks, give an instruction to NCAs to use such powers under and in accordance with their national laws.⁷³ This is often referred to as an indirect use of national powers, contrary to the direct use of national powers under the second subparagraph of Article 9(1) of the SSM Regulation.⁷⁴

The wording in Article 9(1) of the SSM Regulation, particularly the phrase ‘shall have under the relevant Union law’, leaves room for discussion however. It is not clear which powers laid down in national law are powers that NCAs shall have on the basis of relevant Union law and which powers must be considered as additional powers on the basis of national law (also referred to as *purely* national powers).⁷⁵ The powers the ECB may exercise directly pursuant to this provision thus vary according to the interpretation of what exactly is considered to be required by relevant Union law.⁷⁶

⁷³ Article 9(1), third subparagraph, SSM Regulation. This last subparagraph of Article 9(1) SSM Regulation refers to an indirect use of national powers by the ECB (by means of instructions to the NCAs), whereas the second subparagraph enables the ECB to use national powers directly. The indirect use of national powers by the ECB is discussed in Chapter 6, since this results in a national decision and can be qualified as a top-down procedure. Cf. Witte 2016, p. 251.

⁷⁴ Cf. Witte 2016, pp. 251–252.

⁷⁵ Cf. Boucon & Jaros 2018, p. 169; Witte 2016, p. 252. However, it is debatable how much room the Court leaves for any purely national powers in case of prudential banking supervision, given its statement in para. 41 of its judgment in Case C-52/17, VTB Bank (Austria), ECLI:EU:C:2018:648.

⁷⁶ The Vice-Chair of the ECB’s Supervisory Board has raised this issue in a speech in which she put forward the question of what ‘transposition’ means (Keynote speech by Sabine Lautenschläger, member of the ECB’s Executive Board and Vice-Chair of the ECB’s Supervisory Board, at the Workshop of the European Banking Institute (EBI) hosted by the ECB in Frankfurt, 27 January 2016, section ‘Consequences of an imbalance between supervisory and regulatory harmonisation’, available at: <https://www.banksupervision.europa.eu/press/speeches/date/2016/html/se160127.en.html>; last visit on 16 August 2020). Boucon and Jaros provide a two-step approach to answer the question whether the ECB may make use of a power assigned to NCAs: (i) is the ECB acting within the remit of Articles 4(1) and 5(2) of the SSM Regulation, and (ii) if so, is the provision the ECB intends to use a transposition

The ECB interprets this provision broadly and has communicated to the credit institutions that it is competent to directly, i.e. thus *not* by way of an instruction, exercise certain supervisory powers granted under national law that are not explicitly mentioned in Union law.⁷⁷ This illustrates that the provision leaves room for the ECB to interpret its own powers,⁷⁸ which seems to conflict with the idea that it is, in principle, the legislator who determines the limits of an administrative authority's acting.⁷⁹

The ECB's interpretation of Article 9(1) of the SSM Regulation may also affect other elements of legal protection. The ECB would, according to its interpretation, be directly exercising certain powers granted under national law that are not explicitly mentioned in Union law. This may imply that the ECB would have to take administrative national rules, or other relevant substantive national rules, into account as well, particularly because these powers do not stem from EU law directly, so the only applicable legal framework is to be found in national law. The ECB's interconnectedness with national law may thus increase and affect the discussion about the possibility that additional national legal safeguards are applicable to the ECB. Additionally, the ECB's broad interpretation may further

of EU law or is it a purely national provision? If it is a transposition of EU law, the ECB may use the power directly, and if it is not, the ECB may instruct the NCA to make use of this power on its behalf (Boucon & Jaros 2018, pp. 168-169).

⁷⁷ Letter to banks from the ECB of 31 March 2017, 'Additional clarification regarding the ECB's competence to exercise supervisory powers granted under national law', SSM/2017/0140 (available at: https://www.bankingsupervision.europa.eu/press/letterstobanks/shared/pdf/2017/Letter_to_SI_Entry_point_information_letter.pdf?cbo801df81ba2db9d450ce4fb53065c8; last visit on 16 August 2020). The ECB states that it is competent to exercise supervisory powers granted under national law, even if they are not explicitly mentioned in EU law, as they (i) fall within the scope of the ECB's tasks under Articles 4 and 5 of the SSM Regulation and (ii) underpin a supervisory function under EU law (page 2 of the letter). In its opinion of 8 November 2017 on amendments to the Union framework for capital requirements of credit institutions and investment firms (CON/2017/46)(2018/C 34/05)(available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017AB0046&rid=4>), the ECB has addressed the issue of these national powers and has requested to provide these supervisory powers with a common legal basis in Union law. The ECB suggests to include a clear reference in Union law to additional supervisory powers in a number of areas in which this discussion is relevant (ECB opinion (CON/2017/46), para 1.12). However, this has not been picked up by the EU legislator in the amendments of the capital requirements framework laid down in CRR II and CRD V.

⁷⁸ In his opinion in the Berlusconi and Fininvest case, Advocate General Campos Sánchez-Bordona also notes that, '[e]ven in areas of banking supervision that are regulated by rules of Member States' domestic law that are not explicitly mentioned in EU law, the ECB *considers* it has competence to exercise supervisory functions and it effects a detailed application of national rules' (Opinion of Advocate General Campos Sánchez-Bordona in Case C-219/17, Berlusconi and Fininvest, ECLI:EU:C:2018:502, footnote 67; italics added by author).

⁷⁹ Cf. Chapter 3, Section 4.4.

complicate the Court's review of ECB decisions in these cases, since the number of questions of fact and of law involving the national level will only increase.⁸⁰

Moreover, the ECB's broad interpretation of Article 9(i), subparagraph 2, of the SSM Regulation also results in a broad interpretation of subparagraph 3 of that provision, which concerns the ECB's power to give instructions to NCAs. This subparagraph states that the ECB may require NCAs by way of instruction to use their powers granted under national laws, under the conditions set in that subparagraph, where the SSM Regulation does not confer such powers on the ECB.⁸¹ Having the ECB's broad interpretation of this second subparagraph of Article 9(i) in mind, the sentence 'where this Regulation does not confer such powers on the ECB' has to be interpreted as powers not concerning banking laws. After all, the ECB interprets everything related to its task to be a power it may exercise directly under the second subparagraph of Article 9(i), i.e. powers which are according to the ECB conferred on it by the SSM Regulation. This reading implies that the ECB may, to the extent necessary for its supervisory tasks, require NCAs by way of instructions to make use of their powers granted by national laws *other than those implementing relevant Union law*.

Thus, the ECB may, because of its own broad interpretation of its powers, give binding instructions to NCAs with respect to fields of law not covered by the SSM Regulation, i.e. outside the scope of its own powers, if necessary for its supervisory tasks. The vague wording in which the legal basis for the ECB's powers is put in Article 9(i) of the SSM Regulation results in a seemingly unlimited power for the ECB to give binding instructions to NCAs when the ECB considers this necessary to carry out its tasks. This could be at odds with the idea of the principle of legality and does not seem to guarantee the safeguards required under this principle.⁸²

⁸⁰ Cf. Chapter 4, Section 3.2.

⁸¹ Article 9(i), third subparagraph, of the SSM Regulation reads: 'To the extent necessary to carry out the tasks conferred on it by this Regulation, the ECB may require, by way of instructions, those national authorities to make use of their powers, under and in accordance with the conditions set out in national law, where this Regulation does not confer such powers on the ECB. Those national authorities shall fully inform the ECB about the exercise of those powers.'

⁸² Another issue with respect to this indirect way of allocating powers to the ECB is the way in which the ECB now depends on the Member States' implementation of the relevant EU law. When a Member State has not, or incorrectly, implemented the powers required under relevant EU law, the ECB may be left empty-handed. See e.g. the letter from the ECB to the European Parliament of 11 July 2017 about Italy not yet having fully implemented the fit and proper requirements (available at: https://www.banksupervision.europa.eu/ecb/pub/pdf/ssm/meletter170711_zanni.en.pdf?2cafafodb99c144482f796206e29582a; last visit on 16 August 2020). This issue is however merely related to the ECB's effectiveness and not to the legal protection that needs to be provided by means of the principle of legality, and is therefore not discussed in this research.

The powers of NCAs are, generally, laid down in their relevant national laws. This is only different in the context of on-site inspections, as discussed after the following indent. NCAs are still considered to be competent authorities in the meaning of the CRD IV and CRR,⁸³ and thus maintain their national competences.⁸⁴ Even if NCA staff participate in a Joint Supervisory Team, they are still employed by the NCA itself, and their national laws remain the legal basis for their powers. As a consequence, the shared administration in place within the SSM does not have any impact on whether or not the legal basis of the NCAs' powers adheres to the principle of legality.

The CRD IV obliges Member States to ensure that competent authorities have powers to carry out, *inter alia*, their functions relating to prudential banking supervision.⁸⁵ This includes the extensive regime with regard to the exchange of information as laid down in the CRD IV, which allows NCAs to exchange information, under certain conditions, between each other and with the ECB.⁸⁶ Thus, NCAs must in principle have the necessary powers under national law to carry out their supervisory tasks within the SSM. They enjoy these national powers when assisting the ECB in preparing and implementing any acts relating to the ECB's supervisory tasks and when carrying out the direct supervision of Less Significant Institutions.

As said, the national legal basis for the NCAs' powers may possibly be substituted by a Union legal basis in case of certain powers NCAs have in the context of on-site inspections, since it is possible that NCA staff are allotted the

⁸³ Cf. Articles 4(1) CRD IV and 4(40) CRR (cf. Article 4(1) CRD V and 4(40) CRR II respectively).

⁸⁴ Article 6(6) SSM Regulation stipulates that, without prejudice to Articles 10-13, NCAs shall maintain their powers, in accordance with national law, to obtain information from *inter alia* credit institutions and to perform on-site inspections. This seems to merely confirm the analysis that NCAs maintain their national powers. If this is to be interpreted as an allocation of investigatory powers to NCAs, that would imply that NCAs only have the power to request information and to perform on-site inspections. Such a limited set of powers would hinder them from carrying out all the tasks allocated to them under the SSM Regulation.

⁸⁵ Cf. Articles 1(b), 4(4), 44 and Title VII, Chapter 1, Section IV (Articles 64-72), CRD IV (cf. Articles 1(b), 4(4), 44, Title VII, Chapter 1, Section IV (articles 64-72) CRD V respectively). See also Chapter 2, Sections 6.5 and 6.7.

⁸⁶ Cf. Chapter 2, Section 6.5. Note that the regime also includes the provisions relating to on-the-spot checks and inspection of branches established in another Member State, competences which seem to overlap with the powers relating to on-site inspections laid down in the SSM Regulation. In addition, these competences are only applicable for the purpose of tasks that Article 4 SSM Regulation does not confer on the ECB (Article 17(1) SSM Regulation) and for the purpose of LSI supervision (Articles 11 and 12 SSM Framework Regulation). This division seems logical in light of the respective supervisory responsibilities in general and entails that NCAs can still use their related competences for the supervision of LSIs, but not with regard to SIs. However, as said, these competences seem to overlap with the on-site inspection powers, so it would not make a difference in practice.

necessary Union powers directly on the basis of Article 12(2) and (4) of the SSM Regulation.

Pursuant to Article 12(4) of the SSM Regulation, officials and other accompanying persons authorized or appointed by the NCA of the Member State where the inspection is to be conducted may enter any business premises and land of the legal persons subject to the on-site inspection and have all the general investigation powers stipulated in Article 11 of the SSM Regulation.⁸⁷ The SSM Regulation does not explicitly allocate powers to staff members from other NCAs – i.e. NCAs of Member States other than the Member State where the on-site inspection is to be conducted –, but the ECB may authorize them to conduct an on-site inspection in accordance with Article 12(2) of the SSM Regulation, in which case they enjoy the same powers as ECB officials and the above-mentioned NCA staff of the Member State where the inspection is to be conducted.⁸⁸

It is questionable whether this construction, in which the legal basis is Union law or an ECB decision based on Union law without further implementation in national law, is sufficient in light of the principle of legality. Especially the possibility that the ECB decides which NCA staff member shall have the relevant investigatory powers in case of an on-site inspection may be in conflict with this principle.

As discussed in Wissink et al., this construction seems to be similar to the one implemented in the fishery sector.⁸⁹ In the fishery sector, the Commission may appoint inspectors of different Member States to supervise waters falling within other Member States' sovereignty, and to exercise supervisory powers in those waters.⁹⁰ Boswijk, Jansen and Widdershoven discuss that further implementation may not be necessary, since the regulation at hand explicitly states which powers these inspectors have. On the other hand, in light of the principle of national legality, good reasons may exist to further implement such powers in national law, since one could also argue that the regulation at hand is not precise enough to be the legal basis for exercising such far-reaching powers.⁹¹

Although a stricter interpretation of the principle of legality may require supervisory powers to have a legal basis in national law, the construction laid down in Article 12 of the SSM Regulation still seems to provide a limitation and

⁸⁷ Article 12(4) in conjunction with 12(2) SSM Regulation.

⁸⁸ Article 12(2) SSM Regulation.

⁸⁹ Wissink et al. 2014, pp. 107-108.

⁹⁰ Articles 79 and 4(7) Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Union control system for ensuring compliance with the rules of the common fisheries policy (lastly amended by Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019).

⁹¹ Boswijk et al. 2008, p. 183.

regulation of the NCA staff members' powers at issue, only on a Union instead of a national basis. The NCA staff would probably be subject to the Union framework instead of national law, since in that context Union law is the basis for their powers.

4.2 The implementation of administrative standards

When a decision may have a negative impact for the persons involved, respect of the right of good administration has to be ensured.⁹² Since the ECB's supervisory decisions may adversely affect the person involved, the rights of defence already have to be complied with as from the preparatory phase of those decisions. This holds true, for instance, for SREP decisions of the ECB,⁹³ for ECB decisions imposing a supervisory measure (e.g. requiring an SI to hold own funds in excess of the capital requirements laid down in the relevant EU laws),⁹⁴ and for ECB decisions regarding the suitability of an SI manager.⁹⁵

However, the rights of defence are not applicable when no additional supervisory action is required besides the usual ongoing supervision, or if ECB decisions are taken in the course of ongoing supervision that do not adversely affect a person.

In principle, the ECB is responsible for ensuring respect of the rights of defence. After all, the decisions discussed in this chapter, i.e. decisions based on a bottom-up procedure in ongoing supervision, are decisions addressed to SI's and adopted by the ECB. The NCAs have an important role to play in the preparation of such decisions, but their role is limited to assisting the ECB and preparing non-binding draft decisions. The ECB is thus exclusively competent and ultimately responsible for the final decisions. Accordingly, the ECB is in principle also responsible for ensuring a good administration and hence for respecting the rights of defence.

As more extensively discussed in Chapter 2⁹⁶ and in line with the ECB being responsible for ensuring a good administration, the SSM Regulation and the SSM Framework Regulation provide for a comprehensive set of due process requirements to be applied by the ECB in case of an ECB supervisory procedure.⁹⁷

⁹² Cf. Chapter 3, Section 4.2.1.

⁹³ Cf. SSM Supervisory Manual 2018, pp. 80-87.

⁹⁴ Cf. SSM Supervisory Manual 2018, pp. 98-99.

⁹⁵ Cf. SSM Supervisory Manual 2018, pp. 72-77.

⁹⁶ See Chapter 2, Section 7.

⁹⁷ As discussed in Chapter 2, this ECB supervisory procedure includes any ECB activity directed towards preparing the issuance of an ECB supervisory decision. An ECB supervisory decision refers to a legal act, not being a legal act of general application, adopted by the ECB in the exercise of the tasks and

Most of the challenges in relation to these due process requirements are similar to the ones regarding the implementation of administrative standards in common procedures as discussed in Chapter 4, and also apply in the current context. As it turns out in Chapter 4, an important and still unanswered question is to what degree the ECB may rely on NCAs for fulfilling these requirements.⁹⁸ In addition to the issues discussed in Chapter 4, the right of access to files and the principle of legal privilege may be particularly challenging in bottom-up procedures in ongoing supervision.⁹⁹

The right of access to files may become more complex when it concerns documents from NCAs that are used in preparing a final decision from the ECB. Contrary to common procedures, there is no formal step, e.g. an NCA draft decision, by which the NCA provides all relevant information to the ECB. The way of informally and closely collaborating in the Joint Supervisory Teams and on-site inspection teams may complicate tracing specific information to the authority it originated from. Obviously, the accuracy of tracing also depends on the information system that the authorities use to gather and archive information, and may be complicated even more because information will probably be exchanged continually instead of by means of one formal document, such as an NCA draft decision, through one point of file transfer.

Another issue is how a person objecting to a final ECB decision is to gain access to information gathered and established by the NCA, given that the NCA is not a party to the judicial proceedings before the Court. Would a national judicial procedure remain available when it comes to information gathered by an NCA but used for a final decision from the ECB?¹⁰⁰ Or would the Court require the ECB to provide access to the requested documents given their relation to its final decision? So far it is uncertain how the Court would assess such a request.

Lastly, the principle of legal privilege is worth discussing here.¹⁰¹ The implementation of this principle illustrates well the challenges arising from the uncertainty about the administrative standards that are applicable when the ECB and

powers conferred on it by the SSM Regulation and addressed to a credit institution or other person. See Articles 2(24) and 2(26) SSM Framework Regulation and Chapter 2, Section 7 for the exact definitions.

⁹⁸ See the discussion in Chapter 4, Section 4.1.

⁹⁹ Note that the right of respect for private and family life is relevant in this context as well, given the ECB's power to carry out on-site inspections. In case of this right, the challenges relate however to meeting the requirements of Article 47 Charter with respect to the judicial review of this right. This has been discussed in Section 3.1 of this chapter, in the context of legal protection before court.

¹⁰⁰ According to Article 32(1) SSM Framework Regulation, NCAs shall forward to the ECB, without undue delay, any request received by them related to access to files connected with ECB supervisory procedures.

¹⁰¹ Although common procedures are also bottom-up procedures, the principle of legal privilege is not relevant in common procedures and was therefore left aside in Chapter 4 (cf. Chapter 4, Section 4,

NCAAs carry out preparatory measures in one and the same EU administrative procedure.

The principle of legal privilege becomes relevant as from the moment the ECB or an NCA seizes any document that may be privileged.¹⁰² In case it is seized by the ECB, the Court will likely review the measure on the basis of Union standards only.¹⁰³

Now, under the Dutch interpretation, documents of in-house lawyers are also protected under the principle of legal privilege, whereas in the Court's interpretation of this principle these are not protected.¹⁰⁴ Should the Court also only apply EU administrative standards to the NCAs involved in preparing the ECB final decision, the persons involved will not gain protection under the right of legal privilege when it concerns documents of in-house lawyers while Dutch law would have offered them protection for those documents. Thus, depending on which administrative standards will be applicable to the ECB and NCAs,¹⁰⁵ the persons involved may or may not claim legal privilege for documents from in-house lawyers.

However, the matter may become even more complicated than this. Indeed, should the Court apply national administrative standards to the NCA involved, the ECB becomes prone to complex situations in relying on NCA documents, since it would not be allowed to use documents of in-house lawyers that were gathered by the NCA and fall under the national right of legal privilege, while similar documents could probably be used indeed if gathered directly by the ECB. Therefore, the ECB then has to be aware of the national administrative standards and whether they have been complied with by the relevant NCA.

It would also be possible, as discussed in Section 3.2 above, that judicial protection must be gained before the national court. If that is the case, the national court can apply its national standards when deciding about the privileged nature of documents.

4.2 Applicable administrative standards

The question of which administrative standards the Court may apply to review ECB and NCA preparatory acts in the context of common procedures has been discussed in Chapter 4. However, the way in which the

footnote 92). In case of ongoing supervision, however, the principle is relevant since supervisors do actively gather and establish information in this supervisory context.

¹⁰² Case C-550/07P, Akzo Nobel Chemicals and Akcros Chemicals v Commission, ECLI:EU:C:2010:512, para. 25. See Chapter 3, Section 4.2.1.

¹⁰³ Cf. Chapter 4, Section 4.2.

¹⁰⁴ Note that the Dutch interpretation is only applicable in a purely national context; see Chapter 4, Section 4.2. In addition to the Netherlands, Greece, Portugal, and Poland apply this broader interpretation too (Opinion of Advocate General Kokott, delivered on 29 April 2010, in Case C-550/07 P, Akzo Nobel Chemicals and Akcros Chemicals v Commission, ECLI:EU:C:2010:229, para. 103, footnote 88).

¹⁰⁵ This is discussed in Chapter 4, Section 4.2.

collaboration between the ECB and NCAs is intertwined in the current context of ongoing supervision may be particularly challenging. The extent to which the Court will be facing this issue depends on the scope of the judicial review regarding the national part of the procedure, as discussed in Section 3.2 of this chapter.

In ongoing supervision, the role of NCAs in preparing the ECB final decision is not as clearly defined as in case of common procedures or NCA draft decisions in ongoing supervision. The different preparatory measures in ongoing supervision are therefore not always easy to separate. Both the ECB and NCAs may exercise their supervisory powers in order to prepare a final ECB decision, and their respective input may be different for each type of decision. It may be difficult for the Court to disentangle the different preparatory measures and to determine which administrative standards apply to each of the preparatory measures.

An example of cooperation in a preparatory phase in a shared administration is the exchange of information between different authorities. Hofmann points out that information exchange or establishment does often not qualify as a reviewable act. He adds that this is generally no problem if the information is gathered and used for an administrative procedure in one single jurisdiction. However, if information exchange takes place in a different jurisdiction than the jurisdiction of the final decision, it becomes difficult to disentangle the legality of the information establishment.¹⁰⁶

In ongoing supervision within the context of the SSM, the ECB and NCAs closely cooperate in Joint Supervisory Teams. Gathering and establishing information is a continuous process, which is carried out by both the ECB and the NCAs. All information may be used as input for a final ECB supervisory decision. It may be difficult for a court to determine afterwards which authority gathered and established what information.¹⁰⁷

This results in uncertainty about the applicable legal framework on the basis of which the authorities' actual actions must be assessed. Especially the existence of Joint Supervisory Teams, which consist of both ECB and NCA staff and carry out the ongoing supervision,¹⁰⁸ may pose challenges when disentangling which staff member, and consequently which authority, used what powers towards the credit institution in the ongoing supervision.

¹⁰⁶ Hofmann 2009(b), pp. 157 and 159.

¹⁰⁷ Although much information used in supervision is provided on the basis of standard formats and will probably not raise that many questions with respect to the legal basis, it may also concern more sensitive information such as personal information in light of a fit and proper assessment. This example shows the importance of the ability to assess the legality of the information's establishment.

¹⁰⁸ Cf. Chapter 2, Section 5.

The legal implementation of Joint Supervisory Teams does not necessarily accommodate a good solution to this situation, since it confirms the national status of NCA staff members who are part of these teams and their use of powers laid down in national laws. So, the legal framework clearly distinguishes between the ECB and national staff of a Joint Supervisory Team as well as the respective legal bases of their powers, while in practice such a distinction may be less clear.¹⁰⁹

5 Interim evaluation: the effectiveness of legal protection in bottom-up procedures

This section specifically looks at the effectiveness of the legal protection in place for ECB decisions in ongoing supervision and based on bottom-up procedures. Part III of this research discusses the effectiveness of the legal protection in case of decisions adopted in the context of the SSM more extensively, and this interim evaluation provides input to this broader discussion.

The way in which the cooperation between the ECB and NCAs is organized in ongoing supervision is relevant to the effectiveness of the legal protection in this context. Whereas the SSM Regulation provides for clearly divided steps in case of common procedures, it only contains an obligation to closely cooperate in case of ongoing supervision. The cooperation arrangements have been elaborated in the ECB's SSM Framework Regulation, as required under Article 6(7) of the SSM Regulation.

The SSM Framework Regulation provides for Joint Supervisory Teams and on-site inspection teams in which both the ECB and NCAs jointly carry out the ongoing supervision. The NCA staff participating in these teams explicitly remain employed by their NCA. The result is a closely intertwined system, in which various types of national preparatory measures are possible, either formal or informal. Thus, bottom-up procedures in ongoing supervision are not characterized by clearly defined preparatory measures serving as intermediate steps, as is the case in common procedures, but by a strongly intertwined cooperation between the authorities involved.

¹⁰⁹ It must be noted that these teams are provided for by the SSM Framework Regulation, i.e. an ECB Regulation. The SSM Regulation only states that the NCAs must assist the ECB, although this still is done on the basis of their powers provided for in national law, and does not allocate any powers to NCAs after all, except in case of on-site inspections.

The effectiveness of legal protection before court

The challenges with respect to ensuring effective legal protection before court are mainly related to the way in which judicial protection can be ensured in case of national preparatory measures that are part of a bottom-up procedure.

First, the chapter has looked into the Court's approach regarding judicial protection of EU preparatory measures. The Court bases this approach on Article 263 TFEU, and apparently balances adequately between ensuring effective judicial protection and the effectiveness of the EU institutions,¹¹⁰ i.e. between the safeguard and instrumental perspectives of effective legal protection, as this research identifies them. When assessing the reviewability of an EU preparatory measure, the Court takes account of the effect that the measure has and whether the judicial protection suffices in the case at hand, and of the administrative procedures that apply and the possible risk of confusing procedural stages.

Accordingly, ECB decisions ordering the use of powers laid down in Articles 10-13 of the SSM Regulation will probably in most cases be subject to judicial review separately. Should the ECB use such powers without taking an ECB decision to do so, which is conceivable in case of information gathering, this use of powers will not be subject to separate review. If a person involved disagrees with the ECB's – informal – action, it may refuse to cooperate in this informal setting and force the ECB to take formal steps, resulting in an appealable decision. A person involved may also claim protection under the principle of legal privilege, in which case it either gains the requested protection or forces the ECB to adopt a, reviewable, decision refusing such protection.

When ECB decisions requesting information, or ordering the use of its general investigatory powers, or ordering to carry out an on-site inspection are separately subject to judicial review, a balanced approach seems indeed to be achieved between the safeguard and instrumental perspectives of effective legal protection. After all, pursuant to Article 278 TFEU, actions brought before the Court do not have suspensory effect, unless the Court orders so if it considers that circumstances so require. The ECB may thus in principle continue its supervision, while the persons involved can gain judicial protection. In the context of competition law, the Court has determined that, when a judicial proceeding results in the Court annulling the decision that orders the use of a power, the evidence gathered by way of that power may not be used to impose a penalty.¹¹¹ It is not certain if this also applies to sanctions not of a criminal nature as discussed in this chapter, but it may be a good solution to still ensure effective legal protection without hampering the ECB's effectiveness by suspending its actions during a judicial proceeding. Furthermore, the risk of hampering

¹¹⁰ See Chapter 3, Section 5.2.

¹¹¹ Wissink et al. 2014, p. 106 and the case law mentioned there.

the ECB's effectiveness by a possible overload of judicial proceedings may be counter-balanced by the quick legal certainty that may be gained this way.¹¹²

It is uncertain whether this approach can be applied *mutatis mutandis* to national preparatory measures that are part of an EU decision-making procedure, such as information gathered by NCAs or general investigations carried out by them.

In case of an approval for an acquisition of a qualifying holding, one of the common procedures, the Court will, in accordance with *Berlusconi and Fininvest*, review NCAs' preparatory measures that are not binding upon the ECB during an action brought against the final ECB decision. This judgment leaves, nonetheless, room for different interpretations about the scope of the Court's review concerning the national part of the procedure. These different scenarios have been discussed in this chapter.

One scenario is that the Court will review all national preparatory measures that are part of an EU decision-making procedure and non-binding to the EU institution. A second scenario is that the Court applies its own standards of reviewability based on Article 263 TFEU also to national preparatory measures that are part of an EU decision-making procedure. If that would be the case, the Court would include the national preparatory measures that are not separately subject to judicial review in its review of the final ECB decision. The other national preparatory measures, which are according to the Court's standards separately reviewable, could – or perhaps, parallel to the *Borelli* case, must – be reviewed by the national courts. A last scenario is that the Court will only review formal intermediate steps. These reviews would concern national preparatory measures that are addressed to the ECB but not binding upon it, such as an NCA draft decision. Each scenario has its merits and demerits from a safeguard and an instrumental point of view.

The first scenario would avoid any gaps in judicial protection, but also implies that the Court would ignore both its own standards of reviewability based on Article 263 TFEU and national standards of when measures are subject to separate judicial review. The awkward situation would occur in which the Court would use different ways of treating similar ECB and NCA preparatory measures belonging to one and the same EU decision-making procedure. Indeed, whereas certain ECB measures would be separately subject to judicial review according to the Court's interpretation of Article 263 TFEU, none of the NCA preparatory measures would be. In this scenario, the aforementioned balance between effective judicial protection and effective EU institutions in the Court's

¹¹² The two-month period of Article 263 TFEU is applicable if the decision to use supervisory powers is subject to judicial review separately. After this time limit, the legality of such a decision cannot be challenged any longer; solely the way in which the decision has been implemented can be contested in a judicial proceeding against the final decision (Wissink et al. 2014, p. 105 and the case law mentioned there).

approach towards the reviewability of EU preparatory measures would be at stake. This seems undesirable from both a safeguard and an instrumental perspective.

Moreover, although it may be easier and faster to have a single judicial review of the entire EU decision-making procedure by the Court than to have multiple reviews in which both the Union and national courts are involved, the Court may also make its own, and the ECB's, life harder. After all, the ECB becomes fully responsible for all actions that NCAs actually undertake, and the Court has to find a way to provide effective judicial protection for the national part of the procedure. As discussed in the context of common procedures in Chapter 4, this may not be that easy for the Court to accomplish. The Court may not be able to apply a similar level of judicial protection to the national preparatory measures as it does to EU preparatory measures due to the questions of fact and law it would then face in relation to national situations, and to national laws and their legal context.¹¹³

The second scenario implies that the Court assesses the reviewability of preparatory measures of both the ECB and NCAs in a similar way. The Court's well-balanced approach would remain intact, and even be applied more broadly. Another advantage is that the national courts may be better equipped to assess actual actions of NCAs, because of their familiarity with the national context, laws and legal order.

However, there is a risk of gaps in judicial protection, depending on whether the Court would oblige national courts to provide effective judicial protection for contested national preparatory measures that are separately subject to judicial review according to the Court's standards. Should the Court oblige national courts to do so, similar to its ruling in the *Borelli* case,¹¹⁴ judicial protection is ensured at the national level. Should the Court not oblige national courts to do so, gaps may exist where the applicable national rules do not provide for the possibility to challenge such national measures before court. Needless to say, the latter situation would be undesirable from a safeguard perspective of effective legal protection.

This second scenario may result in a limitation of the national procedural autonomy if the Court indeed imposes the obligation to provide effective judicial protection on national courts. The reviewability of national preparatory measures that are part of EU decisionmaking procedures would then be assessed on the basis of the standards developed by the Court on the basis of Article 263 TFEU within all Member States.

In the short term, such harmonization may hamper the effectiveness of legal protection from an instrumental perspective. It will take time for national courts

¹¹³ See Chapter 4, Section 3.2.

¹¹⁴ See Chapter 3, Section 5.1.

to become familiar with the Court's standards of when an action is reviewable separately, which may give rise to more preliminary ruling procedures in this respect. In the long term, such harmonization will probably be beneficial to the effectiveness of legal protection, since it makes judicial life a bit more orderly as access to court in case of preparatory measures that are part of an EU decision-making procedure is equally guaranteed in the EU and in its Member States. Therefore, it may create a more coherent system.

It furthermore divides the cases between the Union and national courts more evenly than the first scenario does, and allows national courts to review these national preparatory measures on the basis of their own, national laws. When national preparatory measures are separately subject to review by the national court, national legal safeguards can be applied even though national rules for reviewability of acts would no longer be applicable.

The larger involvement of national courts may, at the same time, also lead to a risk of hindering the ECB's effectiveness. The possible national judicial proceedings may create delays and increase uncertainties for the ECB's supervision, which would be detrimental to the effectiveness of legal protection from an instrumental perspective.

The third and last scenario may be the most straightforward one and would respect the national procedural autonomy most, since in the context of bottom-up procedures in ongoing supervision the national measures that, in this scenario, would be reviewed by the Court are limited to NCA draft decisions.

The downside is that the risk of gaps in judicial protection is relatively high as compared to the previous two scenarios and the differences between Member States will be maintained. After all, it depends on the relevant national law whether or not a national preparatory measure, other than NCA draft decisions, will be subject to judicial review by the national court. It is possible that persons involved will not be able to contest such NCA preparatory measures that are part of an ECB decision-making procedure before their national courts, while not being able to get judicial protection via the EU Courts either. The accompanying uncertainties about possible national judicial proceedings and accordingly about the lawfulness of national preparatory measures may hamper the ECB's effectiveness and consequently the effectiveness of legal protection from an instrumental perspective.

The last two scenarios involve the possibility of having in place a separate national judgment about the legality of the national preparatory measure that is part of an ECB decisionmaking procedure. The effect that such a national judgment may have on the validity of a final decision issued by the ECB following the national preparatory measure can only be determined, if the final decision is already adopted, in a judicial proceeding brought against the final decision before the Court. Since there is no alignment in case of separate Union and

national judicial proceedings regarding one and the same EU administrative procedure, it would be for the parties to raise the invalidity or irregularities of the national preparatory measures in the EU judicial procedure. This may complicate and thus harm the effectiveness of the legal protection.

The effectiveness of legal protection during the administrative procedure

In case of bottom-up procedures in ongoing supervision, the legal protection during the administrative procedure is challenged in various ways. First, the chapter has explored the challenges to the principle of legality, which requires, basically, that government acting has a legal basis and that the acts of administrative bodies are limited and regulated by law.¹¹⁵

From a legality perspective, the ECB's powers are generally adequately laid down in the applicable laws. There is nonetheless one provision that raises questions in light of the principle of legality. The provision at issue, Article 9(1) of the SSM Regulation, seems to be included in the regulation in order to accommodate the shared administration and the according mixed legal orders in place. It basically ensures that the ECB has all powers under relevant Union law it needs for carrying out its supervision.

The wording of this article is rather broad and subject to different interpretations. This broad wording may ensure that no powers are forgotten and that the ECB is able to use all powers that shall be required under relevant Union law in order to be effective. This would be less certain in case of a precise and limited list of powers allocated to the ECB. On the basis of this provision, the ECB will even be able to exercise any additional future powers required under relevant Union law. Consequently, the provision may ensure the ECB's effectiveness as a supervisor, and thus an effective implementation of Union law.

The broad wording of the provision creates, however, uncertainties as to which powers this provision captures exactly. The powers that can be directly exercised by the ECB may vary according to the interpretation that is given to the provision's wording. The fact that there is room for discussion about what powers are actually allocated to the ECB seems incompatible with the idea underlying the principle of legality that government acting is limited and regulated by law. The effectiveness of the legal protection at hand may be harmed because a clear legal framework is lacking that would be the basis for the ECB to act and, accordingly, for the Court to assess the ECB's acts. This is undesirable from a safeguard perspective.

At the same time, the ECB's effectiveness may be harmed by the discussions about which authority is competent to carry out which powers that may arise due to the uncertainties regarding the ECB's powers. Consequently, from both a safeguard and an instrumental perspective, the broad legal basis as provided for

¹¹⁵ Cf. Chapter 3, Section 4.4.

in Article 9(t) of the SSM Regulation seems undesirable for ensuring effective legal protection.

The legal basis of the NCAs' powers is mainly laid down in national laws, which seems to be the best way to ensure the safeguards provided for by the principle of legality. It prevents the uncertainties that mixed legal orders cause with respect to the legal basis. It furthermore allows Member States to meet their own specific requirements for the principle of legality, so specific national safeguards will not be lost.¹¹⁶ A side effect is, however, that the national legal basis causes uncertainty as to which administrative standards are applicable if an NCA preparatory measure is judicially reviewed by the Court. This may be challenging for ensuring effective judicial protection.¹¹⁷

An alternative way to provide NCAs with the powers they need to carry out their tasks when assisting the ECB in its SI supervision can be found in Article 12 of the SSM Regulation. This provision allocates, in specific situations, powers to NCA staff in case of on-site inspections. This alternative way makes it more logical for the Court to apply EU administrative standards when reviewing NCA staff's conduct in such cases, as their powers stem from Union law. However, in some Member States the principle of legality may require further implementation in national laws. This structure also implies that any additional national legal safeguards will no longer be applicable and that Member States give up their national procedural autonomy in situations like these.

Besides the challenges under the principle of legality, this chapter has also discussed possible issues for legal protection when it comes to the implementation of administrative standards. These issues are more or less similar to the ones discussed in the context of common procedures in Chapter 4, except for two aspects that are particularly relevant in this context of bottom-up procedures in ongoing supervision.

Firstly, the right of access to files may be more complicated in this setting, since the cooperation between the ECB and NCAs is less formal than in common procedures. It seems likely that information transfers from the NCAs to the ECB do not consist of just one file of all information gathered, but of many document transfers or exchanges on a regular basis. Due to the intertwined cooperation, it may moreover not always be possible to determine afterwards what information was coming from which authority. Lastly, it is uncertain whether persons involved will have to bring Union or national judicial proceedings to gain access to documents from NCAs that are used to prepare a final decision of the ECB.

¹¹⁶ It is not carved in stone at what point the principle of legality is met, and this may vary per Member State, see Chapter 3, Section 4.4.

¹¹⁷ Cf. Chapter 4, Section 4.2.

This uncertainty may be detrimental to the safeguard perspective of effective legal protection.

Secondly, the principle of legal privilege has been discussed as it is, contrary to the situation in common procedures, of relevance in ongoing supervision. This principle is a good example of challenges that, due to the uncertainty about what administrative standards apply, possibly arise in ongoing supervision, which is the phase in which the authorities actually implement these administrative standards. Whether or not certain documents may fall under the right of legal privilege will depend on the administrative standards that are to be applied to the situation. The outcome is relevant for the question whether or not the ECB can rely on documents from the NCA.

It would be the easiest for the ECB if the EU administrative standards are to be applied to both its own and the NCAs' actions when preparing an ECB final decision. However, this entails that any additional legal protection that is available under national laws would be ignored. At the same time, if the NCA must gather information in accordance with its national laws, the ECB needs to verify whether these laws have been complied with to know if it can rely on the information gathered by the NCA. This may ensure that also national additional legal safeguards remain applicable, but it may hinder the ECB's effectiveness.

The last aspect in exploring the effectiveness of legal protection during the administrative procedure concerns the challenges with respect to the applicable administrative standards. In this context, a challenging aspect, which adds to the issues already raised regarding common procedures in Chapter 4,¹¹⁸ is the intertwined cooperation between the ECB and NCAs without having in place formal intermediate steps.

When the Court applies national administrative standards to review national preparatory measures that will be part of its review of the final ECB decision, it must differentiate between preparatory measures carried out by the ECB and by NCAs. It may be difficult for the Court to disentangle the various measures due to the close, but informal cooperation and it may not manage to differentiate properly and thus to guarantee effective judicial protection. However, to ignore the national standards completely seems to be contrary to the way in which the daily supervision is organized in the SSM Framework Regulation, since NCA staff remain explicitly employed by their NCA and use their powers under national law.

Final remarks

Generally speaking, the analysis in this chapter has taught us that the intertwined, and less clearly demarcated way of cooperating between the ECB and NCAs within the SSM only adds challenges for the effectiveness of

¹¹⁸ See Chapter 4, Section 4.2.

legal protection on top of the ones already highlighted in Chapter 4 regarding common procedures.

The lack of a clearly demarcated NCA preparatory measure, such as an NCA draft decision, makes it more difficult to distinguish the preparatory measures of the ECB from those of the NCAs. This may be all the more challenging in the implementation and application of the administrative standards.

In this context of bottom-up procedures in ongoing supervision, it also becomes apparent that the exact scope of the Court's review of the national part in an EU decision-making procedure is far from clear. Unfortunately, a perfect solution seems not available. All will depend on the Court's interpretation of its competences, and how it weighs the safeguard and instrumental aspects that are at stake for an effective legal protection in the cases relating to bottom-up procedures. In Chapter 8 I share my views on these safeguard and instrumental aspects.

CHAPTER 6

Top-down Procedures in Ongoing Supervision

1 Introduction

Whereas Chapters 4 and 5 contain an analysis of the legal protection in case of the bottom-up procedures within the Single Supervisory Mechanism, this chapter looks into the legal protection in the top-down procedures of ongoing supervision within the SSM. Thus, the discussion now turns to the reverse situation, and concerns procedures which consist of preparatory measures on the Union level, followed by a final decision on the national level. In general, top-down procedures result in decisions from the National Competent Authorities relating to their supervision of Less Significant Institutions, although in the supervision of Significant Institutions top-down procedures exist as well. The chapter analyses both kinds.

It is important to note that this chapter only discusses the ongoing supervisory phase, the investigatory phase and decisions imposing sanctions of a criminal nature to which this phase may lead, being looked at separately in Chapter 7.¹ This Chapter 6 first looks into the various forms of cooperation in top-down procedures and subsequently elaborates on the legal protection, first before court and, second, in the administrative procedure. The chapter concludes by evaluating the effectiveness of the legal protection in top-down procedures.

2 Forms of cooperation in top-down procedures in ongoing supervision

NCAs are the direct supervisors of LSIs and thus a decision directed to an LSI in principle is a decision adopted by an NCA. Nevertheless, LSI supervision is still considered to be a task of the European Central Bank, and the ECB remains responsible for the effective and consistent functioning of the SSM.² The Court has framed the NCAs tasks regarding LSIs therefore as being a decentralized implementation of some of the ECB's supervisory tasks in relation to LSIs.³ The result is a form of supervision that includes various top-down procedures.

The supervision of LSIs is generally carried out by the relevant NCA itself. There are, contrary to the supervision of SIs, no mixed teams to carry out the

¹ For an explanation about the different phases of supervision identified in this research, see Chapter 1, Section 4.2.

² Article 6(1) SSM Regulation.

³ Case C-450/17 P, Landeskreditbank Baden-Württemberg, ECLI:EU:C:2019:372, paras 38-41. For the functioning of the ECB's oversight of NCA supervision of LSIs in the first years of the SSM, see: SWD(2017) 336 Final, pp. 46-48.

daily supervisory tasks.⁴ However, in order to embed the ECB's involvement in LSI supervision, the applicable regulations contain several cooperation arrangements, which are discussed in this section to provide an overview of the possible top-down procedures in LSI supervision.

Firstly, the ECB has general powers in the context of LSI supervision, which enable it to fulfil its tasks of overseeing the functioning of the system.⁵ Most of these powers are either powers used directly vis-à-vis a credit institution or powers addressed to NCAs, and thus do not necessarily result in a top-down procedure.⁶ The ECB's power to issue regulations, guidelines or general instructions to NCAs, according to which NCAs have to perform their prudential supervisory tasks and to adopt their supervisory decisions, may however result in a top-down procedure.

These ECB instruments, included in Article 6(5)(a) of the SSM Regulation, are binding⁷ and may set rules for LSIs by providing interpretations of the rules laid down in the relevant Union laws. When these regulations, guidelines or general instructions are applied by NCAs in their LSI supervision, they become part of a top-down composite procedure as the ECB measure is followed by a national decision and, being its precursor, also forms part of the decision. The same applies to non-binding instruments the ECB issues, such as a guide or recommendation.⁸

The ECB has furthermore been allotted certain specific powers in relation to 'material supervisory procedures' and 'material supervisory decisions' with

⁴ Cf. Chapter 2, Section 5. The ECB may in certain cases require an NCA to involve staff members of another NCA (see Chapter 2, Section 5), but this is not common practice. For general descriptions of the LSI supervision, see: SSM Supervisory Manual 2018, pp. 106-116; Report LSI Supervision 2017.

⁵ Cf. Article 6(5) SSM Regulation.

⁶ Cf. Chapter 2, Sections 3 and 6.3, for a complete overview of the ECB's general powers in the context of LSI supervision.

⁷ Article 6(5)(a) SSM Regulation states that NCAs shall perform their supervisory tasks and adopt their supervisory decisions in accordance with the ECB's regulations, guidelines or general instructions. See e.g.: Guideline (EU) 2017/697 of the European Central Bank of 4 April 2017 on the exercise of options and discretions available in EU law by national competent authorities in relation to less significant institutions (ECB/2017/9) (available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.L_.2017.101.01.0156.01.ENG; last visit on 14 September 2020).

⁸ E.g. Guide to on-site inspections and internal model investigations, July 2017, p. 3 (available at: https://www.banksupervision.europa.eu/legalframework/publicicons/pdf/osi/ssm.osi_draftguide.en.pdf?545ba56129bf07158420cc9b436dedb; last visit on 18 August 2020); Recommendation of the European Central Bank of 4 April 2017 on common specifications for the exercise of some options and discretions available in EU law by national competent authorities in relation to less significant institutions (ECB/2017/10) (2017/C 120/02).

respect to LSIs.⁹ NCAs must notify the ECB of any material supervisory procedure, upon which notification the ECB may request the NCA to further assess specific aspects of the procedure. Additionally, NCAs must transmit material draft supervisory decisions to the ECB and the ECB may express its views on those draft decisions.¹⁰ In these cases, a final decision from an NCA may thus be preceded by the ECB's view on a draft decision of the NCA, or be based on a procedure in which the ECB requested to further assess specific aspects of that procedure.

Furthermore, the ECB may carry out informal intermediate steps in the preparation of an NCA decision addressed to an LSI by participating in supervisory activities. It may at any time use the powers laid down in Articles 10-13 of the SSM Regulation, which comprise the powers to request information, to carry out general investigations, including for instance the right to examine books and records or obtain written or oral explanations, and to conduct on-site inspections. This means in practice that the ECB may participate in an on-site inspection or provide expertise and support to NCAs in the context of their LSI supervision.¹¹

Besides the top-down procedures in respect of LSI supervision, the SSM Regulation also provides for top-down procedures in the context of SI supervision. Although supervisory decisions concerning SIs are in majority adopted by the ECB, some decisions have to be adopted by the NCAs. Pursuant to Article 9(1), third subparagraph, of the SSM Regulation,¹² the ECB may, to the extent necessary for its supervisory tasks, require the NCAs, by way of instruction, to make use of their powers under and in accordance with the conditions set in national law, if the SSM Regulation has not allocated these powers to the ECB.¹³

Remember that, in the context of SI supervision, other top-down procedures are possible with respect to sanctions of a criminal nature and that these are discussed separately in Chapter 7. Top-down procedures also exist in the context of close cooperation with competent authorities of participating Member States whose currency is not the euro,¹⁴ but this is outside the research' scope.

⁹ Cf. Article 6(7)(c) SSM Regulation and Articles 97 and 98 SSM Framework Regulation. These procedures and decisions concern the ability to remove members from the management boards of LSIs and to appoint special managers to take over the LSI's management, and procedures and decisions which have a significant impact on the LSI. Also: SSM Supervisory Manual 2018, p. 113.

¹⁰ Cf. Chapter 2, Section 5.

¹¹ SSM Supervisory Manual 2018, pp. 107, 115-116; Report LSI Supervision 2017, p. 10.

¹² See also Article 22 SSM Framework Regulation.

¹³ For a discussion about this provision in the context of the principle of legality, see Chapter 5, Section 4.1.

¹⁴ Article 7 SSM Regulation. On 10 July 2020, a close cooperation has been established with Croatia's central bank and Bulgaria's central bank.

3 Legal protection before court

While Chapter 3 contains a discussion of the reviewability of Union acts and of standing of persons before the EU Courts in more general terms,¹⁵ Section 3.1 below elaborates these elements in more detail with respect to top-down composite procedures. The following four sections each analyse the reviewability of the preparatory acts in place in top-down procedures within the SSM.

In those four sections, the discussion focuses on when a person may, and (as explained) therefore must, bring an action before the EU Courts. When this is not possible, judicial protection must be gained taking the national path.¹⁶ In order to determine whether or not a person may challenge an action before the EU Courts, two questions need answering: is the action in itself subject to separate judicial review, and does the person involved have standing. Since these criteria are often closely related, both are discussed together.¹⁷ At the same time, if one can conclude there is no legal effect and the act is thus not reviewable, it is obviously not necessary anymore to analyse whether a person has standing before the EU Courts.

The chapter does not elaborate on the scope and intensity of the judicial review, since these matters are less of an issue in the context of top-down procedures. On the one hand, the Court is exclusively competent to declare Union acts invalid and, on the other hand, national courts have the possibility to request a preliminary ruling with respect to the validity of Union acts.¹⁸ The possibility of requesting such a preliminary ruling is also available for Union acts that are of a non-binding nature.¹⁹ This judicial structure reduces the questions regarding the scope and intensity of judicial review. Indeed, the Court can review the Union act at issue on the basis of its own standards of judicial review. The issues in this respect that occur in the reverse situation of bottom-up procedures are therefore largely avoided.²⁰

¹⁵ See Chapter 3, Sections 5.2 and 5.3.

¹⁶ See Chapter 3, Section 5.1.

¹⁷ The question whether or not the national authority has any discretion is relevant for both the reviewability of an act (i.e. does an act have legal effect vis-à-vis a person) and the standing of a person (i.e. is a person directly concerned by an act).

¹⁸ See Chapter 3, Section 5.5.

¹⁹ The scope of a preliminary ruling is thus much broader than in case of an action for annulment under Article 263 TFEU. See Chapter 3, Section 5.5. Acts of a non-binding nature are comparable with soft law; for the Court's approach in this respect, see: Luijendijk & Senden 2011, p. 18.

²⁰ Contrary to bottom-up procedures, there is no discussion regarding the scope of the review by the court assessing the final decision, in this case being a national court, since the review can be easily 'divided' if necessary between both courts by means of the preliminary ruling procedure. Furthermore, as discussed in Chapter 4, Section 3.2, in certain cases it may be more challenging for the EU Courts to apply a strict procedural review to a national preparatory measure that is part of a bottom-up procedure,

An ECB preparatory measure that is part of a national decision-making procedure could, indirectly, be challenged before a national court in an action against the final national measure.²¹ If a national court considers that a ruling of the Court of Justice regarding the validity or interpretation of an ECB preparatory act is necessary to be able to give a judgment in the case at hand, it may request the Court to give a ruling thereon.²² One must, nonetheless, keep in mind that there is no *right* to a preliminary ruling,²³ and that national courts not seem to use this possibility whenever appropriate.²⁴ Still, as a result of the existence of a preliminary ruling procedure, both courts are able to review the measures carried out at their respective levels, which simplifies the question of scope of judicial review, and reduces the risk that national courts may face limitations to the intensity of their review of measures taken at ‘the other level’.

3.1 Reviewability and standing in top-down procedures

The starting point for discussing the reviewability of EU preparatory measures which are part of a national decision-making procedure is that when a person can undoubtedly bring an action against the EU preparatory measure before the EU Courts, that is the path to follow within the set time limits. Otherwise the person may not be able to have that part of the decision-making procedure reviewed by a court at all, since national courts are in such a case, even if the person involved did not bring an action before the EU Courts, to assume the lawfulness of the EU preparatory measure at issue, unless the Court determines differently.

In the *TWD* case, the Court determines that, if a party undoubtedly could have brought an action under Article 263 TFEU and the party has been informed about the EU institution’s decision, allowing the party to challenge the unlawfulness of such a decision before a national court would undermine the idea of safeguarding

and to interpret and apply the national substantive laws in question. In case of top-down procedures these issues can be avoided by requesting the Court to render a preliminary ruling on the EU act at stake.

²¹ This idea is supported by the *Tillack* case, in which the Court has stated that ‘the applicant also had the opportunity to request the national courts, which have no jurisdiction themselves to declare that the act by which OLAF forwarded information to the Belgian judicial authorities is invalid [...], to make a preliminary reference to the Court of Justice in that regard’ (Case T-193/04, *Tillack v Commission*, ECLI:EU:T:2006:292, para. 80). Cf. *Eliantonio* 2014, p. 81. Also: *Luchtman & Wasmeier* 2017, pp. 241-242.

²² Article 267, subparagraph 2, TFEU. If the question is raised in a case pending before a court against whose decision there is no judicial remedy under national law, the court must bring the matter before the Court (Article 267, subparagraph 3, TFEU).

²³ Cf. Chapter 3, Section 5.5.

²⁴ See *Luchtman* and *Wasmeier*’s analysis in the context of OLAF (*Luchtman & Wasmeier* 2017, pp. 242-243).

legal certainty that underlies the time limits laid down in Article 263 TFEU.²⁵ This would only be different if the party brings, within the time limits set in Article 263 TFEU, an action for annulment of the decision in question before the EU Courts as well. That would overcome the time-barring effects of expiring time limits. The possibility of bringing a direct action under Article 263 TFEU against an act of an EU institution does not preclude the possibility of bringing an action in a national court against a national implementing measure on the ground that the latter measure is unlawful.²⁶

When it is not beyond any doubt that a person would be admissible, the issue can be raised in a national judicial proceeding.²⁷ Any questions concerning the validity of the EU preparatory act at issue have to be addressed to the Court of Justice by requesting a preliminary ruling, as national courts may not assess the lawfulness of such ECB acts themselves.²⁸

To know whether or not somebody is able to bring an action before the EU Courts, the first issue to consider is whether the preparatory step taken by the ECB is separately subject to review by the EU Courts, i.e. if the ECB measure intends to produce legal effect vis-à-vis that person. This analysis is comparable to analysing the reviewability of preparatory measures in bottom-up procedures. An ECB preparatory step would be separately subject to review when the legal effect of the measure is ‘binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position’.²⁹

In top-down composite procedures, the Court assesses whether the act of the Union authority has bound the national authority and therefore has created any legal effect. If the intermediate Union act does not bind the national authority, but is considered to be an advice only, it does not have any legal effect and cannot be separately challenged before the EU Courts.³⁰ Whether or not an

²⁵ Case C-188/92, TWD/Bundesrepublik Deutschland, ECLI:EU:C:1994:90, paras 16-18. Cf. Chapter 3, Section 5.1 and the case law and literature mentioned there. Tridimas pleads for a restrictive reading of the TWD judgment, since it rarely is very obvious that a person has standing under Article 263 TFEU (Tridimas 2006, pp. 249-250).

²⁶ Joined cases C-133/85 to 136/85, Rau v BALM, ECLI:EU:C:1987:244, para. 12. For the Court’s consideration about the time limits, see: Case C-188/92, TWD/Bundesrepublik Deutschland, ECLI:EU:C:1994:90, paras 19-20.

²⁷ When a person is not fully aware of the EU act or it is not beyond any doubt that the person may challenge the act before the EU Courts, the lawfulness of the EU act can still be challenged before national courts in an action for annulment against the national decision which is based on that EU act, even if the EU act may be binding on Member States (Case C-216/82, Universität Hamburg/Hauptzollamt Hamburg-Kehrwieder, ECLI:EU:C:1983:248, para. 10).

²⁸ Chapter 3, Section 5.1 and the literature mentioned there.

²⁹ Cf. Chapter 3, Section 5.2 and the literature and case law mentioned there.

³⁰ Case C-133/79, Sucrimex v Commission, ECLI:EU:C:1980:104, paras 15-18; Case T-160/98, Van Parys and Pacific Fruit Company v Commission, ECLI:EU:T:2002:18, paras 64-75; Case C-151/88,

intermediate act intends to produce legal effect follows from the content of the contested act and from the context in which that act has been adopted.³¹

If the preparatory measure from the ECB is an appealable act, it subsequently is to be determined whether the person involved has standing. Natural or legal persons may institute proceedings before the EU Courts against (i) an act addressed to them, (ii) an act which is of direct and individual concern to them and (iii) a regulatory act which is of direct concern to them and does not entail implementing measures.³²

In case of top-down procedures within the SSM, the preparatory ECB act is usually not addressed to the person or credit institution at hand, but to the relevant NCA.³³ This infers that the ECB preparatory measure must be of direct and individual concern to the persons involved for them to be able to lodge a case before the EU Courts against such a measure. However, if the ECB preparatory measure is a regulatory act that does not entail implementing measures, only the requirement of being directly concerned is relevant.³⁴ If a person is not directly concerned by the ECB measure, it can solely object against the final NCA decision before the national court. These requirements are further discussed below.

It is settled case law that, in order to be ‘directly concerned’ by a measure, the measure has to ‘directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules’.³⁵

Italy v Commission, ECLI:EU:C:1989:201, paras 20-25; Case T-234/04, Netherlands v Commission, ECLI:EU:T:2007:335, para. 61; Joined cases T-393/06 R, T-393/06 RIII, T-393/06 RI, Makhteshim-Agan Holding and Others v Commission, ECLI:EU:T:2007:104, paras 40-44; Case C-521/04 P(R), Tillack v Commission, ECLI:EU:C:2005:240, paras 30-34.

³¹ Case C-242/00, Germany v Commission, ECLI:EU:C:2002:380, para. 45. Cf. Inghelram 2011, p. 208. Inghelram points out that it ultimately is a question of fact whether an act brings about a distinct change in the legal position of the person concerned, since the specific circumstances of a case may be decisive. It is therefore also possible that an act which normally does not intend to produce legal effect, may well produce legal effect due to exceptional circumstances (Inghelram 2011, p. 208 and the case law mentioned there).

³² Article 263, subparagraph 4, TFEU.

³³ As is often the case in composite procedures in general, cf. Eliantonio 2014, p. 85.

³⁴ Article 263, subparagraph 4, TFEU.

³⁵ Case C-386/96 P, Dreyfus v Commission, ECLI:EU:C:1998:193, para. 43; Case C-125/06 P, Commission v Infront WM, ECLI:EU:C:2008:159, para. 47; Case C-343/07, Bavaria and Bavaria Italia, ECLI:EU:C:2009:415, para. 43; Case C-519/07 P, Commission v Koninklijke FrieslandCampina, ECLI:EU:C:2009:556, para. 48; Case T-541/10, ADEDY and Others v Council, ECLI:EU:T:2012:626,

If there is no discretion for the national authorities with regard to the implementation, the Union act is subject to review by the EU Courts.³⁶ This is also considered to be the case ‘where the possibility for addressees not to give effect to the Community measure is purely theoretical and their intention to act in conformity with it is not in doubt’.³⁷

The General Court has further explained that if the measure ‘leaves it to the Member State whether or not to act, it is the action or inaction of the Member State that is of direct concern to the person affected, not the measure itself’. So ‘the measure in question must not depend for its effect on the exercise of a discretionary power by a third party, unless it is obvious that any such power is bound to be exercised in a particular way’.³⁸

In several cases, the Court has concluded that there remains wide discretion for the national authorities when the Union act only sets a general limit or contribution but the national authorities may decide on the method of

para. 64; Case T-16/04, Arcelor v Parliament and Council; ECLI:EU:T:2010:54, para. 97; Case C-414/18, Iccrea Banca, ECLI:EU:C:2019:1036, para 66.

³⁶ Case C-41/70, International Fruit Company and Others v Commission, ECLI:EU:C:1971:53, paras 23-28; Case C-113/77, NTN Toyo Bearing v Council, ECLI:EU:C:1979:91, paras 11-12; Case T-155/94, Climax Paper Converters v Council, ECLI:EU:T:1996:118, para. 53; Case T-170/94, Shanghai Bicycle v Council, ECLI:EU:T:1997:134, para. 41; Case T-72/97, Proderec v Commission, ECLI:EU:T:1998:179, para. 34; Case T-198/95, Comafrika and Dole Fresh Fruit Europe v Commission, ECLI:EU:T:2001:184, para. 98; Case T-219/09, Albertini and others v Parliament, ECLI:EU:T:2010:519, para. 44. This is also vice versa: when a national measure is binding on an EU institution, the national measure can only be subject to review by the national courts (cf. Case C-97/91, Oleificio Borelli v Commission, ECLI:EU:C:1992:491, paras 9-13, and the discussion about this case in Chapter 3, Section 5.1). It is not clear-cut when a national authority is considered to still have discretionary power; for a more extensive discussion on this topic, see: Alonso de León, pp. 312-315 and 316-318.

³⁷ Case C-386/96 P, Dreyfus v Commission, ECLI:EU:C:1998:193, para. 44; Case T-541/10, ADEDY and Others v Council, ECLI:EU:T:2012:626, para. 71. For examples of state aid cases in which it has been stated that the applicants were directly concerned by a Commission decision because there was no doubt about the national authorities’ intention to implement that decision, see: Case T-435/93, ASPEC and others v Commission, ECLI:EU:T:1995:79, para. 60; Case T-17/96, TF1 v Commission, ECLI:EU:T:1999:119, para. 30; Case T-266/94, Skibsvaerftsforeningen and others v Commission, ECLI:EU:T:1996:153, para. 49 (cf. Lenaerts et al. 2014, p. 320).

³⁸ Case T-223/01, Japan Tobacco and JT International v Parliament and Council, ECLI:EU:T:2002:205, para. 46. Cf. Case T-136/04, Freiherr von Cramer-Klett and Rechtlerverband Pfronten v Commission, ECLI:EU:T:2006:170, para. 46; Case T-137/04, Mayer and Others v Commission, ECLI:EU:T:2006:171, para. 59; Case T-150/05, Sahlstedt and Others v Commission, ECLI:EU:T:2006:172, para. 53.

allocation.³⁹ When the national authorities have discretionary power, the national decision should be contested before national courts.⁴⁰

In addition to the requirement of being directly concerned, a person also has to show being individually concerned by the Union measure in order to have standing before the EU Courts. As mentioned before, this requirement is not applicable in case of proceedings against a regulatory act which does not entail implementing measures.⁴¹ Persons may claim to be individually concerned if ‘that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed’.⁴²

The standing criteria are usually more problematic to proof in case of an act of general application. If such an act of general application entails an implementing measure, appeal is only open regarding the implementing measure at hand, not regarding the act itself. If the general act does not entail an implementing

³⁹ Case C-372/08 P, Atlantic Dawn and Others v Commission, ECLI:EU:C:2009:287, para. 36; Case C-6/08 P, US Steel Košice v Commission, ECLI:EU:C:2008:356, para. 62; Case T-139/02, Institouto N. Avgerinopoulou and Others v Commission, ECLI:EU:T:2004:75, paras 63-66 (in this last-mentioned case, it did not matter that the document managing the implementation had to be sent to the Commission, since this was only to inform the Commission, leaving room for Commission intervention only when the document would change the information in the general EU decision, which was not the case, para. 66).

⁴⁰ For examples of cases in which the national authority has a wide discretion or only the national decision affects the legal situation of the person involved, see: Case C-123/77, Unicme v Council, ECLI:EU:C:1978:73, para. 11; Case C-55/86, Arposol v Council, ECLI:EU:C:1988:8, paras 11-13; Case C-372/08 P, Atlantic Dawn and Others v Commission, ECLI:EU:C:2009:287, para. 35-41; Case C-6/08 P, US Steel Košice v Commission, ECLI:EU:C:2008:356, paras 59-75; Case T-492/93, Nutral v Commission, ECLI:EU:T:1993:85, paras 24-29; Case T-54/96, Oleifici Italiani and Fratelli Rubino Industrie Olearie v Commission, ECLI:EU:T:1998:204, paras 48-61; Case T-139/02, Institouto N. Avgerinopoulou and Others v Commission, ECLI:EU:T:2004:75, paras 62-71; Case T-223/01, Japan Tobacco and JT International v Parliament and Council, ECLI:EU:T:2002:205, paras 45-57; Case T-136/04, Freiherr von Cramer-Klett und Rechtlerverband Pfronten v Commission, ECLI:EU:T:2006:170, paras 45-54; Case T-137/04, Mayer and Others v Commission, ECLI:EU:T:2006:171, paras 58-67; Case C-69/69, Alcan v Commission, ECLI:EU:C:1970:53, paras 14-15 in relation to para. 8.

⁴¹ Article 263, subparagraph 4, TFEU.

⁴² Case C-25/62, Plaumann v Commission of the EEC, ECLI:EU:C:1963:17, p. 107; Case T-16/04, Arcelor v Parliament and Council, ECLI:EU:T:2010:54, para. 99; Case C-583/11 P, Inuit Tapirit Kanatami and Others v Parliament and Council, ECLI:EU:C:2013:625, paras 69-72; Case C-414/18, Icrea Banca, ECLI:EU:C:2019:1036, para 68. For more about the requirement of ‘individual concern’, see inter alia: Eliantonio 2014, pp. 88-90; Ortlep & Widdershoven 2015, pp. 340-343; Craig & De Búrca 2011, pp. 493-510; Lenaerts et al. 2014, pp. 323-331.

measure, the general act in itself may be challenged pursuant to Article 263, fourth subparagraph, third limb, TFEU.⁴³ This provision lays down that in case of regulatory acts, i.e. acts of general application other than legislative acts,⁴⁴ persons only have to show they are directly concerned by the act.

In the following four sections, the possibilities to lodge an appeal before the EU Courts against the different ECB intermediate acts are discussed for each type of intermediate act separately.

3.2 Judicial review of ECB regulations, guidelines, general instructions and non-binding instruments to NCAs

In the context of LSI supervision, the ECB can issue legal instruments of a general nature which both do and do not legally bind NCAs, as pointed out in Section 2 of this chapter. Since these legal instruments, be they legally binding or non-binding, are adopted by the ECB, they are not considered to be legislative acts within the meaning of Article 289 TFEU.⁴⁵ This infers, as discussed in the Section 3.1, that they may fall under the scope of ‘regulatory acts’ as referred to in the fourth subparagraph of Article 263 TFEU. Yet, this is uncertain, particularly in case of non-binding instruments of a general nature.⁴⁶

When the ECB act is of a general nature, but does not qualify as a ‘regulatory act’, a person must be directly and individually concerned by the measure to be able to contest the measure before the EU Courts, which will probably not be the case given the general nature of the act. When the ECB act does qualify as a ‘regulatory act’, persons may bring an action before the EU Courts against the general act itself on the basis of Article 263, fourth subparagraph, TFEU, if they are directly concerned by the act and if the act does not entail an implementing measure. Does the act entail an implementing measure, which would in a top-down procedure be adopted by a national authority, persons may bring an action before the national court against that – national – implementing measure, and the national court may submit a preliminary question to the Court of Justice about the validity of the ECB act at issue.

⁴³ Note that parties may always plead the inapplicability of an act of general application in proceedings in which an act of general application adopted by an institution, body, office or agency of the EU is at issue under Article 277 TFEU.

⁴⁴ For an explanation about the scope of this third limb of Article 263, subparagraph 4, TFEU, see Chapter 3, Section 5.3. Especially in case of a measure of general application, it may be difficult for persons acting as applicant to show that they are individually concerned by the measure (Lenaerts et al. 2014, pp. 325-329).

⁴⁵ Cf. Chapter 3, Section 5.3.

⁴⁶ For more about judicial protection in case of EU soft law, see *inter alia*: Utrilla 2020, pp. 18-20; Luijendijk & Senden 2011, pp. 14-24; Prechal & Widdershoven 2020, pp. 94-96.

In order to determine whether or not a regulatory act entails an implementing measure, it has to be determined whether the general act has legal consequences in itself or whether the legal consequences only ensue from the implementing measure.⁴⁷ This should be assessed by reference to the position of the person bringing an action under Article 263, fourth subparagraph, third limb, TFEU. Whether or not the act at issue entails implementing measures with respect to other persons is thus irrelevant. Furthermore, reference should be made exclusively to the action's subject matter, and whether an implementing measure exists relating to that subject matter.⁴⁸

In the *Woonlinie* case, the Dutch government provided the commitment to implement the contested Commission decision by a ministerial decree and a new housing law. The contested decision, however, did not define the specific and actual consequences for the activities of the persons involved resulting from applying such a commitment. The Court indicated that those consequences would materialize by way of measures adopted to implement the ministerial decree and new housing law, which therefore are implementing measures entailed by the contested decision. Therefore, the persons involved were not admissible under Article 263, fourth subparagraph, third limb, TFEU.⁴⁹

The general binding and non-binding legal instruments issued by the ECB in the context of LSI supervision are in principle addressed to and, depending on the instrument chosen, binding on the NCAs. They may contain interpretations of rules applicable to LSIs that NCAs have to apply in their LSI supervision, or ways in which NCAs are to carry out their supervision of LSIs. The impact of the ECB instruments on LSIs can therefore be rather large.

Nevertheless, it seems likely that no direct action against such general acts of the ECB is possible. It depends on the wording of the act in question, but in most cases that is not an issue as such acts would probably require an implementing measure of an NCA to have legal effect.

These types of tools for the ECB to steer the NCAs' tasks regarding LSIs, or their interpretations of relevant Union law, usually only create legal consequences for an LSI if, for instance, an NCA requires the LSI, by means of a formal decision, to comply with the interpretation of the rules laid down in

⁴⁷ For examples of cases in which there was no implementing measure, see: Case T-93/10, *Bilbaína de Alquitrances and Others v ECHA*, ECLI:EU:T:2013:106, paras 63-65; Case T-94/10, *Rüters Germany and Others v ECHA*, ECLI:EU:T:2013:107, paras 63-65.

⁴⁸ Case C-274/12 P, *Telefónica v Commission*, ECLI:EU:C:2013:852, paras 30-31; Case C-132/12 P, *Stichting Woonpunt and Others v Commission*, ECLI:EU:C:2014:100, paras 50-51; Case C-133/12 P, *Stichting Woonlinie and Others v Commission*, ECLI:EU:C:2014:105, paras 37-38.

⁴⁹ Case C-133/12 P, *Stichting Woonlinie and Others v Commission*, ECLI:EU:C:2014:105, paras 39-41. A similar situation was at issue in Case C-132/12 P, *Stichting Woonpunt and Others v Commission*, ECLI:EU:C:2014:100, paras 52-53.

the ECB act,⁵⁰ or if an NCA grants or denies approval in accordance with such an ECB act. The general ECB act seems thus to have legal effect only as of the moment that an NCA adopts a formal decision addressed to an LSI referring to interpretations or procedures laid down in the general ECB act. This results in a situation in which an LSI can only get judicial review if it provokes an NCA decision.⁵¹ Judicial protection then has to be sought before the national court, which may submit a request for a preliminary ruling on the validity of the ECB measure to the Court of Justice.

Should no national implementing measure be necessary, persons have to be directly concerned by the act, as discussed in Section 3.1, in order to be able to challenge such an ECB act directly before the EU Courts on the basis of Article 263, fourth subparagraph, TFEU.⁵²

3.3 Judicial review of ECB preparatory measures in LSI supervision

The ECB may support NCAs in their LSI supervision by using the powers laid down in Articles 10-13 of the SSM Regulation, which include requesting information, examining books and records, obtaining written or oral explanations, and carrying out on-site inspections.⁵³ The ECB may adopt formal decisions ordering the use of these powers, but may also assist NCAs in a more informal way by providing support and expertise.

As discussed in Chapter 5, ECB decisions ordering the use of the powers laid down in Articles 10-13 of the SSM Regulation will probably often be subject to separate judicial review, especially if otherwise no sufficient judicial protection is guaranteed or if rights are irremediably impaired in the preparatory phase of supervision. The latter case may rise in particular if the ECB refuses a person's request for protection under the principle of legal privilege.⁵⁴ In such a case, the

⁵⁰ For instance, when the NCA adopts a decision vis-à-vis the credit institution in which it applies the ECB's Guidelines with respect to options and discretions under relevant EU law (see footnote 7 of this chapter).

⁵¹ The Court has accepted this consequence before in the Jégo-Quéré case (Case C-263/02P, Commission v Jégo-Quéré, ECLI:EU:C:2004:210, para. 34). Cf. Alemanno 2010, p. 331. Note that the same applies to general acts issued by the ECB in the context of SI supervision. However, such cases do not concern composite procedures, the implementing measure being a decision from the ECB, and are, therefore, not discussed in this research.

⁵² Cf. Lamandini 2015, pp. 128-129. He takes a rather critical stance about the level of judicial protection provided in case of general ECB measures. His concerns however are of a more general nature and do not necessarily relate to having composite procedures in place and therefore they are not taken into further consideration.

⁵³ Pursuant to Article 6(5)(d) SSM Regulation, the ECB may use its powers laid down in Articles 10-13 SSM Regulation also with respect to LSIs. See also Section 2 above.

⁵⁴ Cf. Chapter 5, Section 3.1.

persons involved can go directly to the EU Courts if they meet the conditions set in Article 263 TFEU to challenge the use of these powers. This may, as Section 3.1 discusses when looking at the *TWD* case, even be the only way possible for them to gain judicial protection, since such an ECB decision is directly addressed to them and a case against it may without any doubt be admissible before the EU Courts. The informal use of these powers will, on the contrary, probably not be subject to separate review by the EU Courts.

The above reasoning nonetheless only concerns the lawfulness of the powers' use, and does not yet analyse the judicial review of the powers' implementation or the authorities' assessment and use of the gathered information. The ECB's preparatory measures eventually result in information the ECB can transfer to the relevant NCA, and which the NCA may then use for its final decision. As it is for the NCA to decide whether it uses the information or not, these ECB results will probably not be separately subject to judicial review by the Court.

In *Sucrimex v Commission*, the Court has applied a similar line of reasoning. It has ruled that an information transfer from the Commission to a national authority in itself cannot form the basis of an action for annulment if a national authority is not bound by this information, since it then lacks legal effect.⁵⁵

The *Sucrimex v Commission* case concerns a request for the payment of export refunds. In its rejection, the national authority referred to the opinion expressed by the officers of the Commission.⁵⁶ Sucrimex and Westzucker, the applicants, filed an action before the Court against the Commission's message to the national authority. In its ruling, the Court refers to established case law, stating that the matter at issue is for the national authorities and that the Commission has no power to take decisions in the matter but may only express its opinion, which is not binding upon the national authority. It furthermore concludes that neither the wording nor the content of the contested message shows any intention to produce legal effect. The action for annulment was thus inadmissible.⁵⁷

Thus, even when the information transferred by the Commission to the national authority has been essential to the final national decision, it is not subject to review by the EU Courts. This does not infer, however, that the implementation by the ECB of its powers or the use of information gathered by it are not subject to judicial review at all. In accordance with the relevant national laws, persons involved may bring judicial proceedings against the national decision before the national courts, in which case the national court may request the Court of Justice to give a preliminary ruling on the validity of the ECB's input. Section 4.1 additionally discusses another way in which the national courts may consider

⁵⁵ Case C-133/79, *Sucrimex v Commission*, ECLI:EU:C:1980:104, paras 16-18. Cf. Alonso de León 2017, pp. 307-309.

⁵⁶ Case C-133/79, *Sucrimex v Commission*, ECLI:EU:C:1980:104, para. 9.

⁵⁷ Case C-133/79, *Sucrimex v Commission*, ECLI:EU:C:1980:104, paras 16-18.

ECB information which, in part or in its entirety, forms the basis of a contested NCA decision.

3.4 Judicial review of ECB preparatory measures in case of material supervisory procedures and decisions in LSI supervision

An ECB request to further assess specific aspects of a material supervisory procedure or the ECB's view on material draft supervisory decisions are in principle not binding upon an NCA. The applicable rules only provide for the obligation to inform the ECB and to ensure that both parties have sufficient time to provide and implement any input.⁵⁸ The Supervisory Manual stresses that the ECB has a purely advisory role to play when it comes to material supervisory procedures and decisions in LSI supervision.⁵⁹ The NCAs maintain their discretionary power and ultimately decide on the procedure and the decision at issue. It may thus be assumed that such an intermediate step of the ECB is not separately subject to judicial review, since it does not create any legal effect vis-à-vis the LSI at issue.

The Court has concluded that a non-binding report from the European Anti-Fraud Office (OLAF) to a national authority pertaining to OLAF's findings regarding suspicions of breach of professional secrecy and bribery, is merely a forwarding of information and does not bind the national authority involved. The national authorities are responsible for initiating national proceedings and a possible decision following such a national investigation. In line with the non-binding character of the OLAF report, the Court has stated that actions for annulment against an OLAF investigatory act are inadmissible, since the OLAF report in itself does not have binding legal effect.⁶⁰

However, the ECB's role in the national decision-making procedure is not meaningless either. The NCA has, for instance, the duty to cooperate in good faith.⁶¹ As the Court has recalled in the *Tillack* case, this duty implies that national authorities have to take all the measures necessary to guarantee the application and effectiveness of Union law, inferring that they have to examine the received information carefully and draw the appropriate consequences from it in order to comply with Union law. However, this duty does not change the non-binding effect of the preparatory measure emanating from the Union level. The Court points out in the *Tillack* case that any interpretation to the contrary would alter the division of tasks and responsibilities as prescribed by the relevant Union

⁵⁸ Articles 97 and 98 SSM Framework Regulation.

⁵⁹ SSM Supervisory Manual 2018, p. 113.

⁶⁰ See: Chapter 7, Section 4.I.I; Ingelham 2011, pp. 203-206.

⁶¹ Article 6(2) SSM Regulation.

law.⁶² Applying this *mutatis mutandis* to the measures at hand means that, although NCAs have to consider the ECB's advice carefully and draw the appropriate consequences from it, the ECB's advice remains non-binding for NCAs.

One other aspect seems to be able to affect the legal character of ECB intermediate steps in material supervisory procedures and decisions. The ECB may, at any time, decide to exercise itself all the relevant powers directly vis-à-vis one or more LSIs whenever this is necessary to ensure consistent application of high supervisory standards.⁶³ When deciding to use this last resort, the ECB takes into account, *inter alia*, the fact that the NCA has not been following its instructions or has not complied with the relevant Union law.⁶⁴

The existence of this option seems to require, at the very least, that the NCA needs to provide an adequate reasoning if it decides to *not* follow up on the ECB's request to further investigate aspects of a procedure or to *not* act in line with the ECB's view on a draft decision. One could even debate whether the ECB's power to ultimately carry out the supervision of an LSI directly is capable of changing the non-binding character of the ECB's powers in case of material supervisory procedures and decisions. Could the non-binding character, for example, be at stake if the ECB explicitly states it will use this nuclear option when the NCA does not follow up on its advice?

Should a real threat of this 'nuclear option' indeed turn the ECB measure into a binding one for the NCA, then the ECB measure itself would be subject to judicial review. An LSI would probably also have standing in such a case, since it could be argued that an explicit 'threat' of the ECB to use this option reduces the NCA's discretionary power to a mere theoretical one.⁶⁵ Since material procedures and decisions concern individual cases, the ECB measure would then concern the LSI at issue not only individually, but also directly. In these specific circumstances, one could perhaps build a case that an LSI can itself bring an action against the ECB measure directly before the EU Courts.

Even in such a case it is nonetheless unlikely that an LSI is 'beyond any doubt' admissible before the EU Courts, since it is uncertain whether or not the concerned credit institution has been informed about the ECB measure, and, if so, about the ECB's 'threat' to carry out the supervision itself. If the credit institution is informed about all these circumstances, it may be admissible when directly challenging the ECB measure before the EU Courts. If there are any doubts about any of these aspects, the national path probably remains available as well.

⁶² Order in Case C-521/04 P(R), *Tillac v Commission*, ECLI:EU:C:2005:240, para. 33. See also the General Court in the main proceedings: Case T-193/04, *Tillac v Commission*, ECLI:EU:T:2006:292, para. 72.

⁶³ Article 6(5)(b) SSM Regulation.

⁶⁴ Article 67(i) and (2)(d-e) SSM Framework Regulation.

⁶⁵ Cf. Section 3.1 of this chapter, footnote 37.

3.5 Judicial review of ECB instructions to NCAs with respect to SI supervision

Although most top-down procedures are related to the supervision of LSIs, there is also a top-down procedure in place for the supervision of SIs. This procedure concerns the ECB's right to give instructions to NCAs pursuant to Article 9(1) of the SSM Regulation.

As explained, persons have to challenge a Union act before the Court when the Union act has been communicated to them and they can without any doubt challenge the act before the Court.⁶⁶ To be able to do so, the act needs to be reviewable and the person has to have standing. Below we look into these aspects in relation to the ECB's instruction right.

The ECB instruction is addressed to the relevant NCA, and the ECB is not obliged to publish its instruction or send it to the credit institution involved. Whether or not the credit institution addressed by the national decision is also familiar with the preceding ECB instruction depends on the ECB's practice in this regard, which so far has not been published on its website. Therefore, it is uncertain whether or not the persons involved are informed about the instruction.

If the credit institution involved is not informed about, and thus is not familiar with, the ECB instruction, it will obviously not be able to challenge the act before the Court.⁶⁷ Should the instruction have been communicated to the SI concerned, the credit institution may be able to challenge the act directly before the EU Courts if it has standing and the act is reviewable. The requirement to be individually concerned to proof standing may usually be assumed in cases like these, since the instruction is in place to enable the ECB to carry out its supervisory tasks and usually concerns the use of powers towards a specific credit institution. The remaining, and main, questions are whether the instruction has legal effect, and can thus be reviewed separately by the Court, and whether it concerns the credit institution directly.

Looking at the legislative context of the ECB instruction, one may argue that an instruction based on Article 9(1) of the SSM Regulation is in principle not directly binding on the institution involved. The rationale of this provision is precisely that the ECB does not have a similar power towards the relevant SIs directly and hence needs the NCAs to use their powers under national law.⁶⁸

⁶⁶ See Section 3.1 of this chapter.

⁶⁷ Even the question as to when a person is supposed to be familiar with the ECB instruction could be the subject of debate: is this only the case when the ECB instruction has been communicated to the credit institution, or also when e.g. the NCA decision refers to such an instruction?

⁶⁸ The General Court has followed a similar line of reasoning in the Nutral v Commission case. In its judgment, the General Court has decided that, although the national authorities had to recover certain aid granted to the applicant on the basis of a Commission's request, only the national decision creates

Regardless, it still seems possible for an ECB instruction to affect the interests of the SI involved by bringing about a distinct change in the SI's legal position. The ECB instruction to the NCA is an instruction related to a specific SI, requiring the use of a specific power under national law, and must be followed by the relevant NCA. It cannot be ruled out that such a specific instruction determines and, therefore, affects the SI's legal position. This would, as discussed below, depend on the wording of the instruction as well as the relevant national law.

The ECB instruction may create legal effect vis-à-vis the credit institution addressed by the NCA decision ensuing from such an instruction, and thus also directly affect the credit institution, if its wording fully determines the outcome of the national decision. If the instruction, on the contrary, only requires the NCA to use a certain power, but does not fully determine the outcome, it will not be considered to be a reviewable act in itself. Alternatively, it may also be possible for the instruction to partly determine the outcome of the NCA decision. In such a case, that specific part of the instruction may be objected against, if of course the other requirements for admissibility are also met.

Another element to take into consideration is the wording of the national law. While NCAs are obliged to follow the ECB's instructions when performing their supervisory tasks,⁶⁹ including the instructions based on Article 9(1) of the SSM Regulation, the same Article 9(1) also obliges NCAs to take national law into account. It states that NCAs have to make use of their national powers 'under and in accordance with the conditions set out in national law'. This infers that it is for the NCAs to ensure their compliance with the applicable national laws, which may give a certain discretion to NCAs despite the instruction's binding character. Accordingly, it may depend on the specific rules at issue whether or not the national laws contain specificities that may, in the end, turn out to give a certain level of discretion to the relevant NCA. Thus, the starting point is that

binding effect. The General Court considered that it was up to the Member States to implement the (at the time) Community regulations in question and to take the necessary individual decisions regarding the traders concerned, in accordance with the rules and procedures laid down by national legislation, subject to the limits imposed by Community law, since Member States are responsible for ensuring that Community regulations are implemented within their territory – especially those concerning the common agricultural policy, as in the case at hand – and that this responsibility is explicitly laid down in the regulation in question. Consequently, even though this was on the Commission's request, only the national decision produced binding legal effect and was subject to review. (Case T-492/93, *Nutral v Commission*, ECLI:EU:T:1993:85, paras 25-28, which has been confirmed by the Court of Justice in Case C-476/93 P, *Nutral v Commission*, ECLI:EU:C:1995:401, paras 30-32.) The Advocate General observed it is relevant that the national authorities involved seemed to have a certain level of discretion in deciding on the case (Opinion of Advocate General D. Ruiz-Jarabo Colomer of 12 October 1995 in Case C-476/93 P, *Nutral v Commission*, ECLI:EU:C:1995:311, para. 23.)

⁶⁹ Article 6(3) SSM Regulation. Cf. Chapter 2, Section 5.

the ECB instruction in itself is binding, but the discretionary power left to the NCA may vary depending on the national law at issue and the way in which the ECB instruction is phrased.

The fact that the ECB instruction is followed by an NCA decision, i.e. an actionable decision, may be relevant in this respect as well. This may imply that it is not unacceptable to not allow for separate legal review of the ECB instruction in itself.⁷⁰ Sufficient judicial protection thus seems guaranteed, since the ECB instruction may indirectly be challenged by way of an action against an NCA decision ensuing from such an instruction brought before the national court and a request for preliminary ruling filed by the national court with the Court of Justice.

4 Legal protection in the administrative procedure

During the decision-making process several legal safeguards are already in place to ensure effective legal protection. In top-down composite procedures, it is particularly relevant to discuss what administrative standards apply and which authority must ensure their implementation.

The principle of legality is less of an issue, since the powers of the ECB and NCAs are rather straightforward in this context. The ECB is equipped with the powers the SSM Regulation confers on it to carry out its tasks with regard to LSI supervision and may use its powers in all participating Member States, whereas the NCAs use their respective powers under their national laws.⁷¹

4.1 Applicable administrative standards

The ECB's preparatory measures in a top-down procedure may result in the ECB transferring information to the NCAs or addressing an opinion (i.e. 'view') or instruction to them. An NCA final decision following a top-down procedure may thus be, partly, based on information gathered and established by the ECB, or an ECB opinion or an ECB instruction. Regarding the administrative standards that apply in case of top-down procedures, the main question, analysed below, is whether NCAs may base their final decision on information gathered and established by the ECB, if the ECB did not comply with any of the more protective national legal safeguards.

Chapter 4 discusses that national legal safeguards providing more protection than the minimum EU administrative standards ensuing from the Charter and

⁷⁰ Cf. Chapter 3, Section 5.2.

⁷¹ Chapter 2, Sections 5 and 6.

the EU general principles of law are allowed as far as they do not compromise the primacy, unity and effectiveness of Union law.⁷²

In line with the principle of national procedural autonomy, national procedural rules will also be allowed if the matter is not governed by EU law, and provided that the principles of equivalence and effectiveness are met.⁷³ Sometimes it may even be necessary to apply additional national procedural rules in order to ensure an effective implementation of the relevant EU laws. Moreover, the procedures at issue end in a final decision taken at the national level and therefore the national procedural rules are applicable to such decisions and need to be applied by the authorities, again provided that the principles of equivalence and effectiveness are adhered to. Since this does not give rise to any general issues, and a more precise analysis of the applicability of any additional national procedural rules is outside the scope of this research, this is not further discussed.

However, Chapter 4 also analyses that such more protective national legal safeguards are probably not applicable to the ECB. The ECB is at least, and probably also only, subject to the EU administrative standards ensuing from the Charter and the general principles of EU law. In line with the judgment in *Akzo Nobel Chemicals and Akcros Chemicals v Commission* (referred to as the *Akzo* case) and the Court's emphasis on the unity of EU law,⁷⁴ the ECB's preparatory acts are not likely to be subject to any of the more protective national legal safeguards. This reasoning also seems relevant in case of top-down procedures, as applying national legal safeguards would entail that ECB acts are assessed according to different standards in each Member State. Moreover, the applicable legal framework contains no reference justifying the applicability of national legal safeguards to the ECB.⁷⁵ National law is only mentioned in the context of instructions pursuant to Article 9(1) of the SSM Regulation, and even then the NCA is made responsible for compliance with the conditions set in national law. Therefore, presumably the ECB is in principle not subject to any of the more protective national legal safeguards in case of top-down procedures.

It is for the NCAs to adopt the final decisions in top-down procedures, and they will do so under and in accordance with their national laws. NCAs thus have to comply with national administrative standards, whereby the Charter and the general principles of EU law are the minimum standards.⁷⁶ As shown in Chapter 4, even when more protective national legal safeguards are allowed, chances still are that the EU Courts will not apply them to NCAs when carrying out preparatory measures in the context of bottom-up procedures, due to the risk

⁷² Chapter 4, Section 4.2.

⁷³ Cf. Chapter 4, Section 4.2.

⁷⁴ For a more extensive discussion on this topic, see Chapter 4, Section 4.2.

⁷⁵ See the discussion on the *Akzo* case in Chapter 4, Section 4.2 in this respect.

⁷⁶ See Chapter 3, Section 3.

of harming the primacy, unity and effectiveness of Union law.⁷⁷ This risk seems however less likely to occur when procedures end in a national final decision, as in top-down procedures, since the more protective legal safeguards apply to the NCAs and may leave the Union law at issue unaffected. Moreover, in the *Akzo* case, the Court did not rule out the possibility of having in place different administrative standards for Union and national authorities.⁷⁸ Thus, NCAs probably have to comply with such more protective national legal safeguards.

When national legal safeguards are in place that provide for more protection, a situation can occur in which the ECB has gathered information on the basis of less strict EU legal safeguards, which apply to the ECB, than those applicable in the Member State of the NCA to which the ECB addresses its measure. Again, the principle of legal privilege is a good example for such a situation.⁷⁹ Under Union law, documents of in-house lawyers are not protected by the right of legal privilege, while for instance Dutch, Greek, Polish and Portuguese law do provide protection of such documents under this right.⁸⁰ Thus, different administrative standards may apply for the ECB and the relevant NCA while carrying out measures in the same decision-making procedure.

This divergence raises the question whether the NCA may base its final decision partly or entirely on such documents if they are gathered by the ECB in accordance with the EU standard in this respect, and if they may do so, how national courts will review such evidence. Since the SSM Regulation does not address this situation, the question needs answering, in case of top-down procedures that is, on the basis of national law, provided that the principles of equivalence and effectiveness are adhered to.

With respect to reports drawn up by OLAF, the regulation at hand stipulates that reports drawn up by OLAF shall constitute admissible evidence in the relevant national judicial procedures, in the same way and under the same conditions as administrative reports drawn up by national authorities.⁸¹ This is basically an appli-

⁷⁷ See Chapter 4, Section 4.2.

⁷⁸ Chapter 4, Section 4.2.

⁷⁹ See also Chapter 5, Section 4.2.

⁸⁰ Cf. Opinion of Advocate General Kokott, delivered on 29 April 2010, in Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:229, para. 103, footnote 88.

⁸¹ Article 11(2) Regulation (EU, Euratom) No 883/2013 of the European Parliament and the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) reads: 'In drawing up such reports and recommendations, account shall be taken of the national law of the Member State concerned. Reports drawn up on that basis shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall have the same evidentiary value as such reports.' Cf. Inghelram 2011, p. 148. Cf. Chapter 7, Section 4.1.

cation of the principle of equivalence. Although a similar provision is not provided for in the context of the SSM, one could argue on the basis of the principle of equivalence that this reasoning is applicable to the current context of top-down procedures in ongoing supervision within the SSM as well.⁸²

According to the principle of equivalence, ECB evidence will be admissible evidence in national judicial procedures, similar to any NCA evidence. A national court may review whether such ECB evidence suffices to support the NCA final decision on the basis of its national evidential laws. This line of action does not result in any problems as long as, on the one hand, no national legal safeguards apply that provide for more protection than the equivalent EU standards offer, or on the other hand, if more protective national legal safeguard do apply, as long as evidence gathered in breach of such legal safeguards is not as a matter of course excluded under national evidential law as evidence in a judicial procedure.

The question of how national courts review evidence coming from another authority outside their jurisdiction has been analysed in research about the admissibility of OLAF final reports as evidence in criminal proceedings. The research report explores the ways in which national courts may review OLAF final reports by discussing cross-border examples and examples in which national courts review the use made in an administrative procedure of evidence gathered in a criminal procedure, or vice versa. The report concludes that most of the investigated Member States allow evidence declared inadmissible in administrative proceedings in principle to be admissible in criminal proceedings and, due to a lack of specific rules, similarly accept evidence collected by an EU institution or agency to be admissible in a national punitive administrative procedure.⁸³

The OLAF research has shown that the effect of having in place different administrative standards on the transfer and use of evidence is still uncertain and any solutions that the Court has given so far are not clear-cut.⁸⁴ The outcome of such review can thus still be different per Member State.

However, a problematic situation may develop if more protective national legal safeguards are in place and ECB evidence that is not gathered and established in

⁸² Widdershoven and Craig discuss that documents gathered and established by an EU institution in preparation of a national final decision may be considered to be evidence that the national decision is based on and, accordingly, may be reviewed on the basis of national rules of evidence. The review obviously has to meet the EU standards of Article 47 Charter and the Rewe requirements of equivalence and effectiveness (Widdershoven & Craig 2017, pp. 349-351).

⁸³ See: Giuffrida 2019, pp. 236-239 for an overview of the report's conclusions, and examples of other Member States in this respect; pp. 239-243 on the admissibility in the various Member States of evidence collected by OLAF and used in punitive administrative proceedings; and pp. 247-248 on evidence collected by the ECB and used in punitive administrative proceedings.

⁸⁴ Cf. Giuffrida 2019, p. 236.

accordance with such safeguards is disregarded for that very reason. In such a case, the more protective national legal safeguards are being applied to the ECB indirectly, which seems to conflict with the principle of effectiveness and the *Melloni* requirement that it may not compromise the primacy, unity and effectiveness of EU law.⁸⁵

Whereas the applicability of more protective national legal safeguards to NCA acts does not seem to harm the primacy, unity and effectiveness of Union law, the applicability of these safeguards will probably not be allowed in case of ECB acts. If any ECB evidence that is not gathered in compliance with such national legal safeguards would subsequently not be allowed as evidence in national judicial procedures for that very reason, the ECB would become indirectly subject to such national standards. This risk has already been considered to be unacceptable given the harm it may cause for the primacy, unity and effectiveness of EU law. In such a case, the ECB's preparatory measure within the composite procedure would become meaningless, unless the ECB meets the more protective national legal safeguards after all. This seems unacceptable from the perspective of the principle of effectiveness. Moreover, it would imply that ECB evidence would possibly not be admissible in one Member State while it would be in another. This will have a direct effect on the unity of EU law and the ECB's effectiveness, which again is unacceptable, this time under the *Melloni* doctrine.

Any doubts about the applicability of national legal safeguards to ECB acts that are part of a top-down procedure can be submitted by the relevant national court to the Court of Justice by way of a preliminary ruling procedure. The same holds true for any question that may arise in a national judicial procedure in which an NCA final decision is contested as regards the ECB's compliance with EU administrative standards when it gathered information, or drafted an opinion or instruction. This is a question about the validity of the ECB act which could by way of a preliminary ruling procedure be referred to the Court.

Lastly, with respect to the question of what administrative standards are to be applied, one has to bear in mind that this may also depend on the actual way in which the authorities cooperate and the ECB's preparatory measure is shaped. If the ECB's assistance is informal, it may be more difficult to disentangle who took which of the various preparatory steps to arrive at the final national decision.⁸⁶ Moreover, as pointed out by Alonso de León, information is at times transferred together with an opinion on the legal assessment of that same information,⁸⁷ which may complicate the legal protection in such a case.

⁸⁵ For a discussion of the *Melloni* case, see: Chapter 4, Section 4.2.

⁸⁶ Cf. Hofmann 2009(b), p. 159. See also Chapter 5, Section 4.3 with respect to this issue in the context of bottom-up procedures.

⁸⁷ Alonso de León 2017, p. 307.

4.2 The implementation of administrative standards

In top-down procedures, it is basically for the NCA, being the authority adopting the final decision, to guarantee compliance with the administrative standards that apply, such as the principle of good administration and the right of respect for private and family life.⁸⁸ Nevertheless, situations may occur in which the ECB is also obliged to ensure compliance with for instance the right to be heard. This section discusses these situations, together with one particular right of defence that may give rise to specific challenges in case of top-down procedures, which is the right of access to files.

In top-down procedures, the ECB provides either general or non-binding input to NCAs, that has to be adhered to or considered by the NCAs when adopting a final decision, respectively. Thus, the ECB's intermediate acts do usually not create legal effect vis-à-vis the credit institution involved. However, this outcome is not carved in stone and in the event an ECB intermediate act does create legal effect vis-à-vis a credit institution, the ECB may be compelled to ensure compliance with the relevant rights of defence. Such a situation may for instance occur in the top-down procedure relating to SIs, when the ECB exercises its instruction right, as discussed in Section 3.5 of this chapter.

In *Commission v Lisrestal*⁸⁹ the Court considers that, in cases in which a direct relationship has been established between the Commission and the persons concerned, the Commission has to guarantee the right to be heard despite the fact that the decision is not addressed to these persons.⁹⁰ The determining factor seems to be whether the persons involved are directly implicated by the EU investigation at issue.

⁸⁸ Cf. Chapter 3, Section 4.2.

⁸⁹ Case C-32/95 P, *Commission v Lisrestal and Others*, ECLI:EU:C:1996:402.

⁹⁰ In cases related to ESF grant, the Court has concluded that a Commission decision can be of individual and direct concern to beneficiaries and may adversely affect them, even though the Member State concerned has been the sole interlocutor of the ESF in the administrative procedure. It was decisive that the beneficiaries were adversely affected by the economic consequences of the decision to reduce or cancel the assistance, since they were primarily responsible for paying back the sums paid without warrant. Thus, it was for the Commission – who solely assumed legal liability to the beneficiaries for its decision to reduce the support - to give the beneficiaries the possibility to provide comments before adopting its decision, or to make sure that the beneficiaries had a possibility to do so at the national level. (Case C-32/95 P, *Commission v Lisrestal and Others*, ECLI:EU:C:1996:402, paras 24-30; Case T-102/00, *Vlaams Fonds voor Sociale Integratie van Personen met een Handicap v Commission*, ECLI:EU:T:2003:192, paras 60-61.) In one case, the General Court also took into account whether or not the Commission used new information without giving the person involved the possibility of commenting on such information (Case T-102/00, *Vlaams Fonds voor Sociale Integratie van Personen met een Handicap v Commission*, ECLI:EU:T:2003:192, para. 83).

In *Commission v Lisrestal*, the Court has determined that the Commission decision to repay the aid, although directed to the Member State, directly concerns the persons involved in the case, who therefore have the right to be heard.

After investigating the persons involved and hearing the national authority, the Commission sent a repay order to the national authorities, who then passed it on to the persons involved. Although the Member State fulfilled a central role in the procedure as an interlocutor, the persons involved were directly implicated by the investigation that led to the Commission's decision ordering the repay, *inter alia* because the investigations had been carried out at the premises of the persons involved and the final decision expressly named and referred to them as being the aid's direct beneficiaries.

The Court considers furthermore that although a decision to suspend, reduce or withdraw aid may sometimes reflect an assessment and evaluation by the national authorities on the basis of the regulation in question, it is the Commission who adopts the final decision and takes sole legal liability for such a decision vis-à-vis the beneficiaries.

In this case, hearing the national authorities does not suffice to comply with the general principle of the right to be heard; the persons involved need to be heard as well.⁹¹ Finally, the Court has stated very clearly that practical grounds, i.e. that it would be extremely difficult for the Commission to consult the beneficiaries directly, cannot justify an infringement of a fundamental principle such as observing the rights of defence.⁹²

The Court shows flexibility in the way in which the Commission has to ensure the right to be heard in these cases: the Commission has to give the persons involved the possibility, or has to ensure they have had the possibility, to effectively state their views on the proposed decision.⁹³ This seems to infer that it also suffices when NCAs give the persons involved the possibility to state their views on the NCA final decision, including the ECB preparatory measure, as long as the ECB ascertains that the NCA involved respects the right to be heard.

⁹¹ Case C-32/95 P, *Commission v Lisrestal and Others*, ECLI:EU:C:1996:402, paras 24-30.

⁹² Case C-32/95 P, *Commission v Lisrestal and Others*, ECLI:EU:C:1996:402, paras 35-37. Cf. Case T-30/91, *Solvay v Commission*, ECLI:EU:T:1995:115, para. 102. However, the General Court decided that it was appropriate to not hear the relevant undertaking in an application procedure for aid, based on documents provided by the undertaking itself, since there were hundreds of applications to be evaluated (Case T-109/94, *Windpark Groothusen v Commission*, ECLI:EU:T:1995:211, para. 48, which has been confirmed by the Court of Justice in Case C-48/96 P, *Windpark Groothusen v Commission*, ECLI:EU:C:1998:223, para. 46). Cf. Tridimas 2006, pp. 381-382.

⁹³ Case T-450/93, *Lisrestal e.a. v Commission*, ECLI:EU:T:1994:290, para. 49 (without being overruled by the Court of Justice in Case C-32/95 P, *Commission v Lisrestal and Others*, ECLI:EU:C:1996:402).

The right of access to files is another challenging element when implementing the applicable administrative standards in the context of top-down procedures. The matter to be considered is whether the persons involved can gain access to ECB documents relevant for the NCA decision. Again, the situation of OLAF may be of interest in this respect.

The General Court has stated that OLAF does not need to give access to files when it issues a final report and forwards it to national authorities, since final reports are not considered to be challengeable acts in themselves.⁹⁴ Applying this to the current context implies that the ECB does not have to give access to the documents relevant to the preparatory measure it has directed to the NCA.

However, as Stefanou et al. point out, persons may gain access to the OLAF file indirectly when in a later stage follow-up proceedings are taken on by Union or national authorities. Through these authorities, persons may gain access to the relevant OLAF documents, subject to the applicable administrative rules.⁹⁵ Applying this reasoning to the current situation infers that a credit institution would be able to gain access to ECB documents by way of a procedure against an NCA decision.

This approach could be rather straightforward with regard to ECB documents that are part of the NCA file. The NCA's file should include all documents, both incriminating evidence and exculpatory evidence, on which the NCA has based its decision and the NCA must ensure the right to access those files.⁹⁶ The EU regime regarding access to files is at least applicable to both ECB and NCA documents and, as discussed in Section 4.1, national courts are likely to apply additional national standards on NCAs.⁹⁷

The remaining question is how a person can gain access to an ECB document which is not included in the NCA's file. A possibility to be considered is that the NCA can be held responsible to give access to ECB documents, but this approach may be problematic as the NCA may have no formal tools to request

⁹⁴ Stefanou et al. 2011, pp. 90–91, and the case law mentioned there. For a discussion on the reviewability of an OLAF report and similar measures within the SSM, see Chapter 7, Section 4.1.1.

⁹⁵ Stefanou et al. 2011, p. 92. Article 11(2) of Regulation 883/2013 states in this respect: 'In drawing up such reports and recommendations, account shall be taken of the national law of the Member State concerned. Reports drawn up on that basis shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall have the same evidentiary value as such reports.' Cf. Luchtman & Vervaele 2017(b), p. 328.

⁹⁶ Cf. Chapter 3, Section 4.2.1.

⁹⁷ For more about the EU regime regarding access to files and the case law in this respect, see: Ter Kuile 2019.

these documents from the ECB. Persons involved could also try to request access to the ECB documents directly from the ECB.⁹⁸

A middle ground may perhaps be found by using the opening, created by the Court in the *Eurobolt* case, for national courts to obtain information directly from the EU institution involved. In this case, the Court has confirmed that a national court may approach the relevant EU institution in order to obtain information and evidence it considers essential to preclude all doubts about the validity of that institution's measure.⁹⁹

The Court points out that the EU institutions must abide by their duty of sincere cooperation with the judicial authorities of the Member States. Accordingly, the EU institutions are obligated pursuant to Article 4(3) TEU to provide national courts with the requested information, unless legitimate reasons justify a refusal to provide the information. Such legitimate reasons could be, *inter alia*, the protection of third parties' rights or a risk of impeding the functioning or independence of the European Union itself.¹⁰⁰

Perhaps this approach could also be used to gain access to any additional documents, requested by the persons involved, that may be relevant for the national procedure. It remains to be seen whether the Court continues on this path and would allow national courts to involve EU institutions more often in national procedures.

⁹⁸ A request for access to the supervisory file pursuant to Article 32(1) SSM Framework Regulation may not be possible, since the credit institution involved will probably not be considered to be a 'party' in the meaning of Article 26 SSM Framework Regulation and will therefore not fall under Article 32(1) SSM Framework Regulation. Another possibility would be a public access request under the Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3). For a discussion of the relevant case law regarding the public access request, see: Ter Kuile 2019.

⁹⁹ The Court has confirmed in the *Eurobolt* case that 'Article 267 TFEU, read in conjunction with Article 4(3) TEU, must be interpreted as meaning that a national court or tribunal is entitled, prior to bringing proceedings before the Court of Justice, to approach the EU institutions that have taken part in drawing up a piece of secondary EU legislation, the validity of which is being contested before that court or tribunal, in order to obtain specific information and evidence from those institutions which it considers essential in order to dispel all doubts which it may have as regards the validity of the EU act concerned and so that it may avoid referring a question to the Court of Justice for a preliminary ruling for the purpose of assessing the validity of that act' (Case C-644/17, *Eurobolt*, ECLI:EU:C:2019:555, para. 32). Cf. *Widdershoven* 2019(b), pp. 2811-2812.

¹⁰⁰ Case C-644/17, *Eurobolt*, ECLI:EU:C:2019:555, para. 31.

5 Interim evaluation: the effectiveness of legal protection in top-down procedures

After having discussed the legal protection in case of top-down procedures in ongoing supervision, it is now time to look at its effectiveness. In top-down composite procedures the ECB carries out preparatory measures and the NCAs take the final decision. These NCA final decisions are mainly found in the context of LSI supervision, since the NCAs are directly responsible for supervising LSIs. The NCAs' tasks in this respect are considered to be a decentralized implementation of some of the ECB's supervisory tasks with respect to LSIs. Accordingly, the ECB maintains an oversight function regarding LSI supervision. In relation to SI supervision, there is only a top-down procedure in ongoing supervision in case of an ECB instruction to NCAs pursuant to Article 9(1) of the SSM Regulation.

This structure results in various types of top-down procedures. The ECB may issue both general and individual intermediate acts, which usually are well defined and separated from the NCAs' acts. Additionally, generally the NCAs only use their own staff, so in contrast to bottom-up procedures there are no mixed teams involved. Teams staffing both NCA and ECB representatives nevertheless remain a possibility. Also, the ECB is still allowed to use its powers as laid down in Articles 10-13 of the SSM Regulation (e.g. information gathering and carrying out general investigations) with respect to LSIs, which may result in more informal ways of cooperation. Although at first sight most ECB preparatory measures seem not legally binding, this may change depending on the context of the specific case and the wording of the ECB measure and national laws at stake.

The effectiveness of legal protection before court

The effectiveness of the legal protection before court is better guaranteed in top-down procedures because they have the preliminary ruling procedure available. Although this procedure is not ideal either,¹⁰¹ it still eliminates many concerns regarding the judicial review of 'the other level', in this case: the ECB's measures. National courts may request a preliminary ruling from the Court of Justice whenever they have questions regarding the validity of the ECB preparatory measure, which ensures judicial protection for that part of the procedure. Since the preliminary ruling procedure provides the Court with the opportunity to review the Union part of the decision-making procedure, the ECB measure can be judicially reviewed with the intensity and scope needed. This benefits the effectiveness of legal protection from a safeguard perspective.

A more problematic aspect is that it remains uncertain whether or not an ECB preparatory measure forming part of a top-down procedure may be challenged directly before the EU Courts. The Court has ruled in the TWD case that when

¹⁰¹ See Chapter 8, Section 5.4.

persons may undoubtedly bring an action before the EU Courts, they must follow that path within the time limits set in Article 263 TFEU. The underlying idea is that legal certainty is safeguarded by preventing that persons can avoid the time limits set under Union law. This surely is important to guarantee effective legal protection from an instrumental point of view. However, it also creates many uncertainties in the current context due to the lack of clarity about the legally binding effect of ECB preparatory measures.

These uncertainties about the character of the ECB preparatory measure result in unclarity about what court is competent to rule on a matter. This in turn may lead to the more general undesirable that parties start procedures before both courts. Starting a procedure before the EU Courts within the set time limits would overcome the time-barring effects of expiring time limits and still allow credit institutions to also bring an action before a national court.¹⁰² By starting both procedures, a credit institution does not run the risk of losing its rights to challenge the lawfulness of the ECB preparatory measure. This is, obviously, time-consuming and leads to higher legal costs for both the credit institution and the authorities involved and would be undesirable from an instrumental perspective. Therefore, this situation should thus preferably be avoided.

Each of the ECB's preparatory measures raises specific challenges regarding the effectiveness of the legal protection before court.

In the case of general ECB measures issued in the context of LSI supervision, the court's judicial review seems little affected by the far-reaching shared administration in place. Which court is competent depends on whether or not an NCA implementing measure is required. If not, persons may challenge the ECB preparatory measure before the EU Courts if the conditions set in Article 263 TFEU are met. When an NCA implementing measure is required, persons must follow the national path and seek judicial protection by challenging the national implementing measure. In case the national court has doubts about the ECB measure's validity, it may use the possibility of requesting the Court of Justice to give a preliminary ruling.

The way in which it must be assessed whether the general act has legal consequences by itself or whether these consequences ensue from a national implementing act is more or less similar to the situation in which the entire procedure would have been carried out at the EU level, except that in this situation the implementing measure would be at the national level and the national court would thus be involved. The judicial protection's effectiveness seems thus to equal the effectiveness in cases that do not comprise composite procedures. The only exception to this equation is when the national court uses its possibility to ask for a preliminary ruling, which may take more time.

¹⁰² See Section 3.1 of this chapter.

The effectiveness of the legal protection before court in case of ECB instructions and ECB measures in the context of material supervisory procedures and decisions may be harmed by the uncertainties about the legally binding character of the ECB preparatory measure at issue. At first sight, these measures do not seem to have binding legal effect and thus do not seem subject to separate judicial review by the EU Courts. Although these measures are not without obligations for the NCAs either, this does not seem to affect the non-binding character of these measures. In line with the Court's judgment in the *Tillack* case, one could reason that, despite the NCAs' duties to guarantee the application and effectiveness of Union law, a change in the non-binding effect of these ECB measures would alter the division of tasks and responsibilities as laid down in the relevant Union law. This is not intended.

It could, nonetheless, be argued that, because the ECB may, in specific cases, take up the supervision of an LSI, the NCAs' discretionary powers in respect of their LSI supervision turn into mere theoretical ones, in particular if the ECB would explicitly announce to use this option. This could perhaps change the non-binding character of these ECB measures. And in the case of the ECB instruction, the wording of the instruction at hand as well as the relevant national laws may also influence the character of the measure.

These question marks may create uncertainty regarding the possibility to directly challenge the ECB preparatory measure before the Court. However, one has to keep in mind that to be able to challenge the measure the persons involved must be familiar with the ECB preparatory measure at stake to begin with. A measure that is not known to them can, after all, not be challenged.

The applicable regulations do not oblige the ECB, nor the NCAs, to inform the credit institution involved about the measures, and there is no public reference as to whether or not the credit institution at issue will be informed about the ECB preparatory measure in practice. Unless the ECB or the NCAs inform the persons involved about the ECB preparatory measure to be taken, the credit institution is left with the possibility to seek judicial protection before the national courts.

As mentioned before, the uncertainty about what court is competent and the possibility of missing out on judicial protection may lead to double procedures. However, persons may only be left empty-handed if they were familiar with the ECB preparatory measure and if such measure could without any doubt have been challenged directly before the EU Courts. It depends on the specific measure and its legal context whether this will actually be the case, but considering the uncertainties this situation does not risk to occur easily.

If persons are not obliged to follow the EU path to gain judicial protection, they may also challenge the NCA final decision before the national courts. Again, national courts may ask the Court of Justice for a preliminary ruling on the validity of the ECB preparatory measure at stake. The judicial protection

relating to the ECB's measure is therefore guaranteed. Furthermore, in case of ECB instructions, a national judicial proceeding may be beneficial from an instrumental point of view, since these measures concern powers laid down in national laws and thus involve national laws and their legal contexts. A national court will be better equipped to interpret and apply these laws than the EU Courts are.

Thus, from a safeguard perspective, the effectiveness of the legal protection before court generally seems to be guaranteed, but the risk of double procedures remains and may harm the legal protection's effectiveness from an instrumental perspective. This risk will, of course, lessen over time when the Court has had the opportunity to further clarify the matter.

The ECB's use of its powers laid down in Articles 10-13 of the SSM Regulation may also be directly challenged before the EU Courts if the decision ordering the use of these powers is separately subject to judicial review according to the Court's own standards based on Article 263 TFEU. This will not always be the case, for instance when the ECB uses these powers informally without adopting a decision thereto, and such a review would not cover the implementation of such an ECB decision by the NCA, nor would it cover any further use of the information gathered by using these powers. These latter situations will have to be challenged by way of a national judicial procedure against the NCA final decision. On the basis of what administrative standards a national court may review such information gathered by the ECB is discussed below.

The effectiveness of legal protection during the administrative procedure

As a rule, in the context of top-down procedures, the ECB will be subject to EU administrative standards and the NCAs to their national administrative standards, whereby the EU administrative standards, as laid down in the Charter and by the general principles of EU law, are the minimum standards for NCAs as well.

National legal safeguards offering more protection than the equivalent EU standards are allowed insofar as they do not compromise the primacy, unity and effectiveness of Union law. Such national legal safeguards will probably be applicable to NCAs only, and not to the ECB for the very reason that this may compromise the Union law's primacy, unity and effectiveness.

This may lead to the situation in which information gathered by the ECB is subject to a different set of administrative standards, providing less protection, than the one applicable under the national laws of the NCA involved. The resulting question is whether an NCA may use such information to base its final decision on.

This question has to be answered on the basis of the relevant national evidential laws, subject to the EU principles of equivalence and effectiveness, and the *Melloni* requirement that national legal safeguards may not compromise the primacy, unity and effectiveness of Union law. It seems, however, unacceptable under these principles that NCAs would be generally prohibited to use such ECB evidence, since this would disregard ECB input in a national procedure whenever it does not meet the more protective national legal safeguards, while such safeguards are probably not applicable to the ECB as that would harm the unity of EU law.

Any questions regarding the applicability of national legal safeguards to ECB acts that are part of a top-down procedure can be submitted to the Court by way of a preliminary ruling procedure. Moreover, the Court has to answer any question regarding the validity of ECB preparatory measures and whether the ECB has met the EU standards by means of the same procedure.

The question whether or not NCAs may, in their final decisions, rely on ECB information gathered in compliance with administrative standards that do not provide a similar protection as required under their national laws reveals a tension between the safeguard and instrumental perspectives on effective legal protection. When national courts would not allow this, or would require that such evidence complies with the relevant national administrative standards, the effectiveness of legal protection may be harmed from an instrumental point of view. At the same time, when national courts set aside any additional national legal safeguards, the effectiveness of legal protection may be impaired from a safeguard point of view.

A last issue discussed in respect of the applicable administrative standards is that it may prove difficult, as is the case in bottom-up procedures, to disentangle the various preparatory measures and discern which steps have been taken by the ECB and which ones by the NCAs. Accordingly, national courts may have a hard time determining which set of administrative standards is applicable to which information or measure.

The implementation of administrative standards such as the principle of good administration usually is the relevant NCA's responsibility. This seems to be rather straightforward, since there are no mixed supervisory teams. Only if uncertainties arise about the legally non-binding nature of the ECB preparatory measure, this responsibility may cease to be straightforward: when the ECB preparatory measure turns out to actually create legal effect, the ECB itself may need to ensure that relevant legal safeguards, such as the right to be heard, are respected.

This chapter has also discussed the right of access to files, since this right may be challenging to ensure with respect to the ECB documents used in a top-down procedure. It seems most likely that persons involved can access ECB documents by way of the NCA and a national procedure against the NCA final decision. After all, the NCA file has to contain all documents, both incriminating and exculpatory evidence, on which the NCA has based its final decision.

If not all relevant ECB documents are included in the NCA's file, it is uncertain in what way the person concerned still may gain access to the missing documents. It may be difficult to acquire them from the NCA, since the NCA does not have a formal tool to obtain documents from the ECB other than requesting them on the basis of the ECB's duty of loyal cooperation. In order to acquire them directly from the ECB, the person concerned has to open an additional procedure on the Union level.

A useful middle ground may be found in the *Eurobolt* case, which has opened the door for national courts to directly obtain from an EU institution any information and evidence it considers relevant to preclude all doubts about the validity of that institution's measure. As suggested, this middle ground may give national courts more possibilities to involve the relevant EU institution in the national proceedings so as to obtain the information necessary for the review of the NCA final decision resulting from a top-down procedure. This way, the effectiveness of legal protection would be ensured from a safeguard perspective, since access to the relevant ECB documents is ensured, and from an instrumental perspective, since this possibility avoids double procedures.

Final remarks

The preliminary ruling procedure is an important tool to ensure effective legal protection in top-down composite procedures. The tool enables national courts reviewing NCA final decisions to request a preliminary ruling from the Court of Justice about the validity of the ECB preparatory measure at issue. This way, the national judicial review can also cover the measures carried out at 'the other level' than the one at which the final decision is adopted. This avoids gaps in judicial protection, while the Union and national courts may review the measures carried out at their 'own' level, thus overcoming the challenges regarding the scope and intensity of the judicial review that exist in bottom-up procedures, as discussed in Chapters 4 and 5.

The TWD requirements to go to the EU Courts directly if it is without any doubt that an EU measure being part of a top-down procedure can be challenged directly before the EU Courts and the person concerned is familiar with the measure are understandable and desirable to guarantee legal certainty. In the current situation, they may nonetheless also create a risk of double procedures, since it is not always clear whether or not an ECB preparatory measure is of a non-binding nature. However, as discussed, this risk seems to be rather small in practice.

Lastly, it is worth noting that the opening the Court has created in the *Eurobolt* case could produce interesting possibilities to explore in order to increase the effectiveness of the national judicial proceedings reviewing top-down procedures. It remains to be seen whether the Court is willing to expand the use of this possibility for national courts to obtain information from EU institutions directly on the basis of their duty to sincerely cooperate with national courts. This possibility of involving the EU institutions to a higher degree in the national judicial proceedings that relate to their preparatory measures would be a very welcome step in improving the effectiveness of the legal protection in case of top-down procedures.

CHAPTER 7

Investigations and Sanctions of a Criminal Nature

I Introduction

The legal safeguards that apply to an administrative procedure, and the legal protection that therefore applies in each case, depend on the nature of the sanction that is imposed. The way in which the nature of a sanction must be qualified is discussed in Chapter 2.¹ In the context of this research, only the administrative pecuniary penalties, i.e. administrative fines, are considered to be of a criminal nature.²

Since additional legal safeguards apply to decisions imposing a sanction of a criminal nature and the administrative procedures preceding them, these decisions and procedures are discussed separately in this chapter.³ Which legal safeguards additionally apply in case of sanctions of a criminal nature is elaborated in Section 4.2 of Chapter 3, where it comes to the fore that the composite procedures in the Single Supervisory Mechanism particularly seem to affect the respect of the right not to incriminate oneself.⁴

In contrast with Chapters 4-6 which discuss the supervisory phase, this chapter looks into the stage of supervision which investigates a possible breach of law that may lead to a decision imposing a sanction of a criminal nature. This stage is referred to as the investigatory phase, to be distinguished from ongoing supervision in the supervisory phase, as explained in Chapter 1.⁵ This chapter only discusses the issues that may additionally arise due to the criminal nature of the sanction imposed by such decisions. When issues arise that are elaborated in the context of the supervisory phase of the SSM, reference is made to the relevant chapters.

The investigatory phase contains bottom-up and top-down procedures with respect to the supervision of both Significant and Less Significant Institutions. As the direct supervisor of SIs, the European Central Bank may directly impose certain sanctions on SIs, but also has to rely on the relevant National Competent Authority for imposing other sanctions.⁶ As the direct supervisors of LSIs, it is

¹ Chapter 2, Section 6.1.1.

² As discussed in Chapter 1, Section 4.2, and illustrated by the analysis carried out in Chapter 2, Section 6, there is room for discussion about the qualification of the various measures and sanctions involved.

³ Note that only administrative penalties which are of a criminal nature are discussed here. Criminal law proceedings are outside the scope of this research (cf. Chapter 1, Section 4.4).

⁴ See the introductory remarks in Sections 4.2 and 4.2.3. of Chapter 3.

⁵ Chapter 1, Section 4.2.

⁶ The Staff Working Document accompanying the Commission's evaluation of the SSM remarks that this framework may give rise to implementation issues. The ECB has to rely on NCAs in order to sanction infringements of part of the rules it supervises, and it partly has to lean on national regulations in this respect. This structure is however necessary because certain sanctions lack harmonization and due to

usually for the NCAs to impose sanctions on LSIs if necessary; the ECB may only impose sanctions in case an LSI breaches an ECB regulation or decision.⁷

The features of these different kinds of bottom-up and top-down composite procedures are discussed in Section 2 below, as well as the ECB's Investigating Unit.⁸ The subsequent sections will look into the legal protection in case of sanctions of a criminal nature imposed on the basis of bottom-up and top-down procedures, respectively. The chapter will end again with an interim conclusion on the effectiveness of the legal protection in place for investigations and decisions imposing sanctions of a criminal nature.

The applicable Union and national laws use rather varied and vague terminology in the context of enforcement, investigations and sanctioning. Section 6.1 of Chapter 2 explains the terminology used in this research and contrasts it with the terminology used in Union and national law. Chapter 2 furthermore describes in more detail the specific sanctioning powers of both the ECB and NCAs.⁹ Thus, for a more detailed explanation about these aspects, reference is made to this chapter.

2 Types of cooperation procedures & the ECB's independent Investigating Unit

The ECB may directly sanction, under Article 18(1) and (7) of the SSM Regulation, breaches by SIs of requirements under directly applicable Union law, or breaches by either SIs or LSIs of ECB regulations or decisions.¹⁰ The ECB may only impose sanctions of a criminal nature after the ECB's independent Investigating Unit has investigated the matter.

Although the involvement of the Investigating Unit may reduce the role of NCAs in the investigatory phase, NCAs still have a part to play in the process before a matter is referred to the Investigating Unit. In principle, the Joint

the issues that would arise for instance if the ECB itself could sanction individuals (SWD(2017), 336 Final, pp. 45-46).

⁷ E.g.: Regulation (EU) 2015/534 of the European Central Bank of 17 March 2015 on reporting of supervisory financial information (ECB/2015/13) which is also applicable vis-à-vis LSIs, cf. Article 1(1).

⁸ The organization and composition of the Investigating Unit is discussed in Chapter 2, Section 6.

⁹ See respectively Sections 6.6 and 6.7 of Chapter 2. For an overview of the ECB's sanctioning powers, see also: Gortsos 2015; Magliveras 2018.

¹⁰ For an overview of the sanctions the ECB has imposed so far, see: <https://www.banksupervision.europa.eu/banking/sanctions/html/index.en.html> (last visit on 4 December 2020). The ECB is only allowed to directly impose a sanction on an LSI in case the LSI fails to comply with obligations under ECB regulations or decisions insofar as these impose obligations on LSIs vis-à-vis the ECB (Article 18(7) SSM Regulation in conjunction with Article 122(b) SSM Framework Regulation).

Supervisory Team, which consists of both ECB and NCA staff,¹¹ refers the matter to the Investigating Unit, and thus likely plays an important role during the gathering and establishing of information and evidence. NCAs thus take part in the preparatory phase through their participation in the Joint Supervisory Teams. The decision imposing a sanction of a criminal nature is therefore usually the result of a bottom-up procedure.

If the ECB cannot directly impose a sanction on an SI, it may request the relevant NCA to open proceedings,¹² which concern cases not covered by Article 18(1) of the SSM Regulation and relating to sanctions of a criminal nature.¹³ Examples are pecuniary penalties for breaches of national law transposing the relevant directives, or administrative penalties to be imposed on natural persons.¹⁴

The Investigating Unit prepares a proposal for a draft ECB decision requesting the NCA to open proceedings.¹⁵ Upon such a request, NCAs may open proceedings with a view to taking action to ensure that appropriate penalties are imposed. Following such proceedings, an NCA may decide whether or not to impose a sanction on the SI in question.

This procedure is thus top-down in nature, starting with the ECB's request to investigate an SI and possibly ending with an NCA decision imposing a sanction. Although NCAs may only open proceedings at the request of the ECB in accordance with Article 18(5) of the SSM Regulation,¹⁶ they are allowed to ask the ECB for such a request.¹⁷

As mentioned before, it is usually for NCAs to impose sanctions on LSIs when necessary. The preceding investigation procedures and the sanctioning decisions resulting from such investigations may be subject to the notification

¹¹ See Chapter 2, Section 5.

¹² For an overview of the sanctions the NCAs have imposed at the ECB's request so far, see: <https://www.bankingsupervision.europa.eu/banking/sanctions/html/index.en.html> (last visit on 21 August 2020).

¹³ Articles 18(5) SSM Regulation and 134 SSM Framework Regulation. Cf. Article 134(1) SSM Framework Regulation for cases that are included in the application of these articles. The SSM Supervisory Manual indicates that, when the ECB needs NCAs to impose measures or sanctions, sanctions of a criminal nature will be dealt with by way of Article 18(5) SSM Regulation and other measures and sanctions not of a criminal nature will be dealt with by way of Article 9(1) SSM Regulation (SSM Supervisory Manual 2018, pp. 100-102).

¹⁴ Article 18(5), second subparagraph, SSM Regulation. If the ECB has reason to suspect that a criminal offence may have been committed, it will request the relevant NCA to refer the matter to the relevant national authority for investigation and possible criminal prosecution (SSM Supervisory Manual 2018, p. 104).

¹⁵ SSM Supervisory Manual 2018, p. 102.

¹⁶ Article 134(1) SSM Framework Regulation.

¹⁷ Article 134(2) SSM Framework Regulation.

procedures laid down in Articles 96 through 98 of the SSM Framework Regulation.¹⁸ These procedures provide the ECB with the possibility to request further investigations or to provide its views on a draft decision, and are discussed in the context of ongoing supervision (i.e. the supervisory phase) in Chapter 6, Section 3.4.

The investigatory phase starts upon referral of a matter to the Investigating Unit in cases in which the ECB may directly impose sanctions.¹⁹ A referral takes place when the ECB, in practice probably the Joint Supervisory Team involved, considers there is reason to suspect that an SI is or has been committing one or more breaches under the relevant directly applicable Union law (i.e. the Capital Requirements Regulation) or of an ECB regulation or decision.²⁰ The Joint Supervisory Team then establishes the facts and refers the matter to the Investigating Unit for follow-up.²¹

The Investigating Unit may exercise the powers granted to the ECB under the SSM Regulation for the purpose of investigating alleged breaches.²² It also has access to all documents and information gathered by the ECB and, when appropriate, by the relevant NCAs in the course of their supervisory activities.²³ After completion of its investigation, the Investigating Unit may initiate sanction proceedings by notifying the credit institution concerned in writing of the investigation's findings and any objections raised thereto, i.e. by addressing a statement of objections to the credit institution concerned.²⁴ The credit institution may submit comments on the factual results and the objections raised against it as set out in the notification, which includes the individual provisions that have allegedly been infringed.²⁵

¹⁸ See Chapter 2, Section 5.

¹⁹ The Investigating Unit is part of the Enforcement and Sanctions Division within the ECB. Although this division handles both procedures for imposing reparatory sanctions (i.e. not of a criminal nature) and sanctions of a criminal nature (SSM Supervisory Manual 2018, pp. 99 (figure 20), 100 and 102), this chapter only pertains to the sanctions of a criminal nature and the additional legal safeguards applicable in those cases. Only sanctions of a criminal nature are handled by the Investigating Unit (cf. SSM Supervisory Manual 2018, p. 102).

²⁰ Article 124 SSM Framework Regulation. Cf. Chapter 2, Section 6.6.

²¹ ECB Guide to banking supervision, November 2014, p. 38.

²² Article 125(1) SSM Framework Regulation.

²³ Article 125(3) SSM Framework Regulation.

²⁴ Article 126(1) SSM Framework Regulation. Cf. Explanation on the ECB website about sanctions (available at: <https://www.banksupervision.europa.eu/banking/tasks/sanctions/html/index.en.html>; last visit on 21 August 2020).

²⁵ Article 126(2) SSM Framework Regulation. This is in line with the Court's stance in the context of competition law. The Court states that the obligation to send the statement of objections, which must clearly set forth all the essential facts upon which the Commission is relying at that stage of the procedure, constitutes the procedural safeguard for applying the rights of defence (Joined cases C-322/07 P,

If the Investigating Unit considers that an administrative penalty²⁶ should be imposed, it submits, together with its file, a proposal for a complete draft decision to the ECB's Supervisory Board in which it determines that the credit institution concerned has committed a breach and specifies the administrative penalty to be imposed.²⁷

The Supervisory Board may request additional information, agree with the proposal and adopt the draft decision, close the case, adopt the draft decision but specify a different administrative penalty as it considers appropriate, or inform the credit institution concerned of its own findings and of the objections it raises against the credit institution on its own account.²⁸ The last possibility becomes relevant when the Supervisory Board does not agree with the Investigating Unit's proposal, yet concludes that a different breach has been committed or that there is another factual basis for the proposal. In such cases, the procedural rights with respect to the statement of objections, as laid down in Article 126(2)-(4) of the SSM Framework Regulation, apply accordingly.²⁹

3 Bottom-up procedures: sanctions directly imposed by the ECB

As discussed in the introduction to this chapter, the bottom-up procedures in case of ECB decisions imposing sanctions of a criminal nature are based on Article 18(1) and (7) of the SSM Regulation. These bottom-up procedures result in decisions addressed to SIs, or in decisions addressed to LSIs in case they breach an ECB regulation or decision that imposes obligations on them vis-à-vis the ECB. This section looks at the legal protection before court in these cases, followed by a discussion of legal protection in the decision-making phase.

3.1 Legal protection before court

The judicial review of ECB decisions imposing sanctions of a criminal nature does not raise particular issues other than already discussed in the context of decisions based on bottom-up procedures that are adopted in the supervisory phase. The Court will be competent to review the final ECB

C-327/07 P and C-338/07 P, *Distribuidora Vizcaína de Papeles v Commission*, ECLI:EU:C:2008:361, paras 35-36).

²⁶ An administrative penalty means either an administrative pecuniary penalty imposed under Article 18(1) SSM Regulation or fines and periodic penalty payments imposed under Article 18(7) SSM Regulation (Article 120 SSM Framework Regulation). Periodic penalty payments are excluded from this procedure (Article 129 SSM Framework Regulation and the heading of Title 2 of Part X SSM Framework Regulation).

²⁷ Article 127(1) SSM Framework Regulation.

²⁸ Article 127(3)-(7) SSM Framework Regulation.

²⁹ Article 127(7) SSM Framework Regulation.

decision, and the main questions concern the review of the national preparatory measures resulting in such a decision. Similar to bottom-up procedures in ongoing supervision, the national preparatory measures in case of sanctions of a criminal nature will be carried out by NCA staff who are part of the Joint Supervisory Team. Therefore, the analysis in Chapter 5 of the judicial review in case of national preparatory measures also applies to the current context of sanctions of a criminal nature.³⁰

Additionally, in case of judicial review of sanctions of a criminal nature, the Court has unlimited jurisdiction to review the amount of the sanction. An important question is whether the Court will be competent to carry out such an unlimited review of ECB decisions and can thus provide effective judicial protection.³¹ This is, however, not specifically affected by the composite procedures in place. Moreover, if the Court would carry out an unlimited review with respect to the amount of the sanction applied by the ECB, the review will not relate to the national input specifically, since that has already been taken on in the general review of the decision imposing the sanction. Thus, the unlimited review will only see on the amount of the fine and is therefore not discussed any further in this context.

3.2 Legal protection in the administrative procedure

The way that NCAs are involved, through their participation in the Joint Supervisory Teams, in preparing ECB decisions which impose sanctions of a criminal nature may create challenges for ensuring legal protection in

³⁰ See Chapter 5, Section 3.2.

³¹ In the context of competition law, the possibility laid down in Article 261 TFEU to give the CJEU unlimited jurisdiction with regard to penalties provided for in regulations adopted jointly by the European Parliament and the Council has been implemented in Article 31 of 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. A similar unlimited jurisdiction is provided for with respect to the CJEU's review of penalties imposed under Article 18(7) SSM Regulation (Article 5 Council Regulation (EC) No 2532/98), but not regarding penalties imposed under Article 18(1) SSM Regulation (cf. Riso 2014, p. 3; Brescia Morra 2016, pp. 134-135). The CJEU's competence to review ECB decisions imposing penalties under Article 18(1) SSM Regulation is based on Article 263 TFEU and, therefore, limited to the legality of the acts. This excludes the possibility for the EU Courts to apply its unlimited jurisdiction. Furthermore, although the General Court is competent to assess the correctness in law and fact of ECB decisions imposing pecuniary penalties, it is not competent to substitute its assessment for the ECB's assessment and, therefore, to cancel, reduce or increase the penalty imposed. (The General Court is competent to do so in case of Commission decisions in the field of competition law on the basis of the relevant regulation. Cf. Joined cases T-56/09 and T-73/09, Saint-Gobain Glass France and Others v Commission, ECLI:EU:T:2014:160, para. 86.) It is thus debatable whether the requirements under Article 47 Charter are still met in such cases as we are discussing here. At the same time, exactly for that reason, the EU Courts may still apply an unlimited review, even if this is not explicitly provided for in the relevant EU laws, since it would otherwise not meet its own standards based on Article 47 Charter. (Cf. Widdershoven 2019(a), p. 45.)

the administrative procedure. While this is usually so in the supervisory phase, it may be even more so in the investigatory phase, because stricter legal safeguards apply. The legal issues with respect to legal protection in the administrative procedure are not any different from those in the supervisory phase and are therefore not separately discussed here,³² leaving only the additional challenges worth mentioning.

In the context of sanctions of a criminal nature, it is even more relevant, but also at times more challenging, to ensure the rights of defence. In bottom-up procedures, it is in principle for the ECB to guarantee them. In this context it is particularly challenging to ensure that evidence gathered in the supervisory phase and subsequently used as a basis for decisions imposing sanctions of a criminal nature, meets the additional requirements applicable to those decisions.

It is important that the Joint Supervisory Team refers a matter to the Investigating Unit in time for the Unit to ensure that the additional legal safeguards applicable in the investigatory phase and in case of sanctions of a criminal nature may in principle be respected. In practice, however, this may be less straightforward and result in some challenges for the ECB, as discussed below.

It is furthermore not always clear-cut whether ongoing supervision (i.e. the supervisory phase) will be followed by an investigatory phase and a sanction of a criminal nature. Information gathered during the supervisory phase may be relevant evidence for a decision imposing a sanction of a criminal nature and so it seems important to anticipate the possible use of such information as evidence for imposing such a sanction.³³

In this context, a right that is particularly relevant in the investigatory phase and which gives an illustrative insight in the challenges involved, is the right not to incriminate oneself. As more extensively discussed in Chapter 3, this right ensures that persons may not be compelled to provide answers in which they may admit to an infringement that is for the ECB to prove. This is especially relevant when written or oral explanations are obtained from persons, while it may be less of an issue when documents existing independently of the person's will are required to be submitted.³⁴

Whereas ensuring this right may already be difficult in itself,³⁵ the ECB may face additional challenges due to its close cooperation with NCAs in the Joint

³² With respect to the implementation of administrative standards and the applicable administrative standards in case of bottom-up procedures, reference is made to Chapter 4, Sections 4.1 and 4.2, and Chapter 5, Sections 4.2 and 4.3.

³³ Cf. Luchtman & Vervaele 2017(b), pp. 324-325; Lasagni 2019, p. 254; Lamberigts 2016, p. 37.

³⁴ For a more extensive discussion in this respect, see Chapter 3, Section 4.2.3.

³⁵ Lasagni's detailed discussion regarding the right not to incriminate oneself (the privilege against self-incrimination, Lasagni 2019, pp. 235-257) illustrates the fine line dividing situations in which persons

Supervisory Teams before a matter is referred to the Investigating Unit, entailing that evidence used by the ECB may have been gathered and established by different NCAs. As the ECB will remain responsible for the final decision imposing the punitive sanction and, thus, for respecting the legal safeguards, it may need to verify to a high level of detail what exactly has happened at the national level in order to satisfy itself that this right has been respected.

Any information that exists only depending on the person's will and has been gathered under compulsion may not be used for imposing a sanction of a criminal nature. It must therefore be clear whether NCAs have used compulsion to obtain such information, which may be difficult for the ECB to verify.

If it concerns a matter of criminal charge, and the person involved is protected by the right not to incriminate oneself, no information depending on a person's will may be gathered under compulsion at all. As long as there is no criminal charge, gathering such information under compulsion would be allowed, provided that the information is used only for imposing measures or sanctions *not* of a criminal nature. Therefore, the ECB has to ensure that persons involved have not been compelled to provide answers which may involve them admitting to the existence of an infringement which is for the ECB to prove, while they were already protected under the right not to incriminate themselves.³⁶ It may be difficult for the ECB to verify whether NCA staff participating in the Joint Supervisory Team have used compulsion at a moment this was no longer allowed.

Ensuring the right not to incriminate oneself adequately requires that the Joint Supervisory Teams refer a matter to the Investigating Unit in time, i.e. when it appears to be a matter of criminal charge.³⁷ It may be difficult for the ECB to ensure that NCA staff participating in the relevant Joint Supervisory Team indicate a referral to be necessary as soon as they expect that a procedure may end or need to end in imposing a sanction of a criminal nature.

Obviously, such detailed questions may also need to be assessed by the EU Courts should this be a matter of dispute in a judicial proceeding before them, which will bring along similar challenges for the EU Courts.

can and cannot gain protection under this right and how this 'very much' depends on the specific circumstances of the case (p. 255).

³⁶ For a more extensive discussion about this tension and the Court's answer, see Chapter 3, Section 4.2.3.

³⁷ As discussed in Section 2 of this chapter, this needs to be done, in accordance with Article 124 SSM Framework Regulation, when there is reason to suspect that an SI is or has been committing one or more breaches under relevant directly applicable EU law or of an ECB regulation or decision.

4 Top-down procedures: sanctions imposed by NCAs at the ECB's request

The top-down procedures in the investigatory phase result in NCA decisions imposing sanctions of a criminal nature on SIs, that the ECB requests an NCA to issue pursuant to Article 18(5) of the SSM Regulation.

The main question discussed in this respect relates to the reviewability of the ECB's preparatory measures. Other issues that may occur in this context are basically similar to the ones discussed in other chapters and the previous sections of this chapter, and are therefore left aside.³⁸

4.1 Legal protection before court

The discussion in this section focuses on the question of which court is competent to review which part of an NCA decision based on the procedure laid down in Article 18(5) of the SSM Regulation.

The standard of judicial review is not relevant in the context of sanctions imposed by NCAs at the ECB's request, since the Court's requirements in respect of the judicial review's intensity, based on Article 47 of the Charter, will particularly impact the judicial review of the actual fine or penalty imposed by an NCA. After all, effective judicial protection requires, according to the Court, an unlimited review of the amount of the fine.³⁹ In particular, the appropriate sanction, including the amount of a fine when it is relevant, is in principle determined by the final decision-making authority and does not necessarily include the ECB's involvement. Thus, the line of reasoning in Section 3 on the bottom-up procedures⁴⁰ applies to this section too.

To determine which court is competent to review decisions based on Article 18(5) of the SSM Regulation, an analysis of which measure intends to have legal effect vis-à-vis the credit institution is in order.⁴¹ Depending on the outcome, either only the NCA final decision is subject to review, or the ECB's request to open proceedings is separately subject to review by the EU Courts as well.

The relevant provision, i.e. Article 18(5) of the SSM Regulation, reads: '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

³⁸ For a discussion of the issues related to legal protection during the decision-making phase in case of top-down procedures in ongoing supervision, see Chapter 6, Sections 4.1 and 4.2. Besides these issues, it is important to take account of the additional legal safeguards relevant to the investigatory phase and the additional challenges they may bring on. This has been discussed in Section 3.2 of this chapter.

³⁹ Cf. Chapter 3, Section 4.2.

⁴⁰ Cf. Section 3.1. of this chapter.

⁴¹ See Chapter 3, Section 5.2.

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.' It furthermore states that the penalties applied by NCAs shall be effective, proportionate and dissuasive, and it does not contain any obligation for the ECB to publish its request to open proceedings or to send it to the credit institution involved.

A similar structure can be found in the context of the European Anti-Fraud Office (OLAF), which forwards its report to national authorities upon completion of an investigation.⁴² In the well-known *Tillack* case,⁴³ the Court has determined that such a report is not separately subject to review by the EU Courts because of the discretionary power left to the national authorities in respect of such an anti-fraud investigation. Only the actions of the national authorities can thus create legal effect vis-à-vis the persons involved.

The *Tillack* case is about information on suspicions of bribery and a breach of professional secrecy involving the applicant, that OLAF forwarded to the German and Belgian judicial authorities. The applicant brought an action for annulment to the General Court against the act by which OLAF forwarded this information.⁴⁴ However, the General Court has ruled that the contested act does not bring about a distinct change in the applicant's legal position and, consequently, is not subject to an action for annulment.⁴⁵

In its ruling the General Court emphasizes that it is clear from the applicable regulation that 'findings of OLAF set out in a final report do not lead automatically to the initiation of judicial or disciplinary proceedings, since the competent authorities are free to decide what action to take pursuant to a final report and are accordingly the only authorities having the power to adopt decisions capable of affecting the legal position of those persons in relation to which the report recommended that such proceedings be instigated'.⁴⁶

⁴² Article 11 Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999.

⁴³ Case T-193/04, *Tillack v Commission*, ECLI:EU:T:2006:292. See also the discussion in Chapter 6, Section 3.4 regarding this case.

⁴⁴ Case T-193/04, *Tillack v Commission*, ECLI:EU:T:2006:292, para. 66.

⁴⁵ Case T-193/04, *Tillack v Commission*, ECLI:EU:T:2006:292, paras 67-68.

⁴⁶ Case T-193/04, *Tillack v Commission*, ECLI:EU:T:2006:292, para. 69. Also: Case T-309/03, *Camós Grau v Commission*, ECLI:EU:T:2006:110, para. 51; Case T-29/03, *Comunidad Autónoma de Andalucía v Commission*, ECLI:EU:T:2004:235, para. 37.

So, the national authorities are free to assess the content and significance of the information and, thus, to decide on the action to be taken if necessary. It also means that the national authorities are solely and entirely responsible for opening judicial proceedings and any subsequent legal acts.⁴⁷

NCAAs also seem to have a certain degree of discretion under Article 18(5) of the SSM Regulation. They must open proceedings when the ECB requests them to do so, but they have a certain level of discretionary power to decide whether or not to impose penalties following such proceedings.⁴⁸ It is for the NCA to establish whether the ECB information contains a breach according to their national law and, if so, what sanction is appropriate.⁴⁹

The reading that an NCA can also decide to *not* impose any penalty does not necessarily follow from the wording of Article 18(5) of the SSM Regulation. A request under this provision entails that NCAs open proceedings ‘with a view to taking action in order to ensure that appropriate penalties are imposed’. A strict reading could also infer that the appropriate penalties must be imposed. One could moreover question how much discretion NCAs actually have in practice when it comes to imposing penalties.⁵⁰

At the same time, the SSM is clearly set up with a view to respect adherence to national laws, which would plead for the broader reading implemented in the SSM Framework Regulation. Leaving it to the NCAs to decide whether or not to impose any penalties may better guarantee the relevant national laws are adhered to, as the same provision requires as well.⁵¹ This reading is implemented in Article 134 of the SSM Framework Regulation⁵² and does justice to the differences that still

⁴⁷ Case T-193/04, Tillack v Commission, ECLI:EU:T:2006:292, para. 70.

⁴⁸ Note that this contrasts with the binding ECB instructions discussed in Chapter 6, which the NCAs are obliged to follow. How much discretion the NCA is left with depends on the exact wording of the ECB instruction, while in case of proceedings opened pursuant to Article 18(5) of the SSM Regulation the NCAs’ discretion is given on the basis of this article.

⁴⁹ For an example of national judicial proceedings against a national sanction imposed upon an ECB request pursuant to Article 18(5) SSM Regulation, see: Montemaggi 2020. This example concerns an Italian case and the Court of Appeal of Rome confirming the level of discretion for Banca d’Italia, the NCA involved.

⁵⁰ After the Tillack case, it has been noted that ‘the wide latitude ascribed by the Court to national authorities in deciding whether to act on information received from OLAF perhaps overstates the capacity of independent action available to them’ (Wakefield 2008, p. 204; cf. Stefanou et al. 2011, p. 91).

⁵¹ See also the last sentence of Article 18(5), subparagraph 1, SSM Regulation (‘penalties are imposed in accordance with [...] and any relevant national legislation which confers specific powers which are currently not required by Union law’).

⁵² Article 134(3) SSM Framework Regulation reads: ‘An NCA of a participating Member State shall notify the ECB of the completion of a penalty procedure initiated at the request of the ECB pursuant to paragraph 1. In particular, the ECB shall be informed of the penalties imposed, *if any*’ (italics added by author).

exist in national laws regarding sanctions.⁵³ This way, NCAs have to act by opening proceedings, may establish whether there is a breach according to national laws and, if so, decide on an appropriate sanction.

Presuming that the NCAs have discretionary power to decide whether or not to impose penalties, the situation is comparable to the *Tillack* case. This would infer that probably only NCA final decisions following an ECB request to open proceedings pursuant to Article 18(5) of the SSM Regulation are subject to judicial review.

Comparable to the OLAF report forwarded to the national authorities, the ECB decision requesting to open proceedings would not be considered to be a challengeable act in itself. After all, penalties can only be imposed by the NCA after it has opened proceedings. The fact that a formal ECB act requires to open these proceedings does not change this.⁵⁴ Even possible procedural irregularities and infringements of essential procedural requirements that may vitiate the ECB's request to open a proceeding cannot change the fact that the ECB act is not challengeable in itself.⁵⁵ The Court has previously pointed out that such procedural failures can only be challenged in support of an action directed against a challengeable act, and to the extent that the failures have influenced the content of that challengeable act.⁵⁶

The NCAs' discretionary power also seems to remain unaffected by their general duty to cooperate in good faith, as laid down in Article 6(2) of the SSM Regulation. The Court has stated in the *Tillack* case that an interpretation of the duty to cooperate in good faith requiring the provision at hand to be interpreted so as to attribute binding effect to the forwarded information, in the sense that it would oblige the national authorities to take specific measures, would alter the division of tasks and responsibilities as laid down in the applicable regulation.⁵⁷ The Court continues by stating that this duty does require the national authorities to examine the forwarded information carefully and draw the appropriate consequences from it in order to comply with (at the time) Community law, if necessary by initiating judicial proceedings if they consider such action justified.⁵⁸

In line with this, an NCA seems obligated to carefully examine an ECB request under Article 18(5) of the SSM Regulation and draw the appropriate

⁵³ Cf. COM(2017) 591 final, p. 14.

⁵⁴ Case T-309/03, Camós Grau v Commission, ECLI:EU:T:2006:110, para. 57.

⁵⁵ Case T-309/03, Camós Grau v Commission, ECLI:EU:T:2006:110, para. 55.

⁵⁶ Case T-309/03, Camós Grau v Commission, ECLI:EU:T:2006:110, para. 55.

⁵⁷ Case C-521/04 P(R), *Tillack* v Commission, ECLI:EU:C:2005:240, para. 33, and Case T-193/04, *Tillack* v Commission, ECLI:EU:T:2006:292, para. 72.

⁵⁸ Case T-193/04, *Tillack* v Commission, ECLI:EU:T:2006:292, para. 72. This is also discussed in the context of top-down procedures in ongoing supervision; see Chapter 6, Section 3.4.

consequences from it, but is not constrained to impose penalties because it has the general duty to cooperate in good faith.

Following this reasoning, the NCAs remain ultimately responsible for any legal acts following a proceeding which has been opened upon an ECB request under Article 18(5) of the SSM Regulation. Such an NCA decision can be challenged in accordance with the national laws before a national court. The national court reviewing the NCA decision imposing penalties may request the Court of Justice for a preliminary ruling about the validity and interpretation of the ECB request at issue.⁵⁹

As pointed out by Ligeti and Robinson in the context of OLAF, a national final decision may often not be based exclusively on the information received from the Union authority. A decision based on shared information may make it more difficult for persons challenging such a national decision to establish that the validity of that measure is determined by the validity of the Union measure and, thus, that a request for a preliminary ruling is necessary to resolve the national proceedings.⁶⁰

As discussed in the context of top-down procedures in ongoing supervision as well, national courts may consider ECB information on which an NCA final decision is based to be mere evidence for that national decision. In such a case, national courts do not get involved in questioning the validity of the ECB request, but do have to assess whether the ECB information provided in the request suffices to support the NCA final decision.⁶¹ It remains to be seen whether the Court accepts such an interpretation with respect to ECB requests pursuant to Article 18(5) of the SSM Regulation.

Should the Court, after all, consider the ECB request to create legal effect vis-à-vis the persons involved, the request can be challenged before the Court directly, in accordance with the conditions set in Article 263 TFEU.

5 Interim evaluation: the effectiveness of legal protection in case of investigations and sanctions of a criminal nature

This section evaluates the effectiveness of the legal protection in case of decisions imposing sanctions of a criminal nature, and their

⁵⁹ Preliminary rulings may be requested concerning the validity and interpretation of EU institutions' acts, including non-binding acts and thus also non-binding ECB requests to open proceedings (cf. Chapter 3, Section 5.5).

⁶⁰ Ligeti & Robinson 2017, p. 243.

⁶¹ The ECB request would then be reviewed on the basis of the national evidential laws, which must of course meet the conditions of Article 47 Charter and the Rewe requirements of equivalence and effectiveness. See Chapter 6, Section 4.1 for a more extensive discussion on this topic.

preceding administrative procedures, within the SSM. This chapter has brought to the fore which challenges for ensuring effective legal protection arise from the additional legal safeguards that apply in these cases. Both bottom-up and top-down procedures have been looked at in this context of investigation and sanctioning and as it turns out, most issues are more or less similar to the bottom-up and top-down procedures in the context of ongoing supervision.

When the ECB may directly impose a sanction of a criminal nature, i.e. in bottom-up procedures, the ECB's independent Investigating Unit is involved. However, such decisions may still be based on NCA input, which will usually originate from NCA staff participating in the Joint Supervisory Team which referred the matter to the Investigation Unit. Thus, in these cases, here the same issues are relevant as those discussed in Chapter 5 related to the far-reaching cooperation without formal intermediate steps of the different levels involved.

To illustrate the additional challenges that the ECB may face in the decision-making phase, this chapter has taken a more in-depth look at the right not to incriminate oneself. In order to ensure respect of this right, the ECB may need to verify to a high level of detail what has happened at the national level, for instance whether NCA staff truly have not acted from the idea of imposing sanctions, i.e. whether there was no matter of criminal charge yet, or whether NCA staff have used compulsion at a moment it was no longer allowed.

The EU Courts may also face similar challenges regarding questions of fact at the national level when they have to review ECB final decisions imposing sanctions of a criminal nature and such a review includes national preparatory measures.

This may harm both the ECB's and the Court's effectiveness, which is detrimental to the effectiveness of legal protection from an instrumental perspective. From a safeguard perspective too, the Court's challenges may directly affect the effectiveness of legal protection.

When the ECB needs the NCA to impose sanctions, i.e. in top-down procedures, the ECB's intermediate step is clearly defined, being a formal request from the ECB to the NCA to open proceedings. As discussed, the NCA must open proceedings upon such an ECB request, but probably maintains a certain level of discretion to establish whether there is a breach according to national laws and, if so, to decide on an appropriate sanction in accordance with the relevant national and Union laws. This is similar to some of the top-down procedures discussed in Chapter 6 and accordingly similar challenges apply.

The access to court in this specific procedure is also likely to at least start at the national level. In line with the assumption that NCAs maintain a certain level of discretion in this situation, it is likely that, in case of a sanction pursuant to the procedure of Article 18(5) of the SSM Regulation, judicial protection must be

gained by way of a national judicial proceeding. The ECB request does not seem to create a direct legal effect vis-à-vis the persons involved and any irregularities in the request must therefore be relied upon when challenging the NCA final decision imposing the sanction before a national court. Subsequently, the national court may request a preliminary ruling from the Court of Justice if it has doubts about the validity of the ECB request. Another possibility may be that the national courts review the ECB request as being mere evidence for the NCA final decision and assess the ECB input as such on whether it adequately supports the NCA decision, a possibility which is also relevant to top-down procedures in ongoing supervision as discussed in Chapter 6.

Therefore, from both a safeguard and an instrumental perspective, one may infer that the challenges for the effectiveness of legal protection in case of investigations and sanctions of a criminal nature do not differ that much from the challenges discussed in the chapters regarding ongoing supervision. The most important additional challenge seems to be that facts gathered at the national level may need to be verified to a high level of detail in order to ensure that the additional legal safeguards are respected in this phase. Meeting the legal safeguards may thus be weaken the ECB's efficiency, but there seems to be little room to diverge from this line of working without giving in on the minimum required legal safeguards for having in place an effective legal protection.

Observations, Findings and Recommendations

I Introduction

The research now arrives in its third part. Part I, consisting of Chapters 1 through 3, introduces the topic and its context, and sets out the framework for assessing the effectiveness of legal protection. Chapters 4 through 7 of Part II analyse the legal protection for the different types of composite procedures within the Single Supervisory Mechanism. Each of those chapters concludes with an interim evaluation of the effectiveness of legal protection in case of the specific composite procedure discussed in that chapter. These interim evaluations serve as the foundation for the current chapter, which discusses the overarching observations and findings and puts forward some recommendations so as to ensure effective legal protection.

In this chapter, Section 2 sets forth the SSM's objectives, its first evaluations and the first relevant judgments. Section 3 follows by briefly summarizing the assessment framework this research applies to the various composite procedures. The resulting overview of overall issues and challenges is presented in Sections 4 and 5, which also include suggestions for possible ways of interpreting the current legal framework in order to gain effective legal protection. Lastly, Section 6 will end the chapter with various recommendations for the longer term so as to improve the effectiveness of legal protection in case of decisions based on complex composite procedures.

The introduction to this research discusses how increasingly important shared administrations are to the implementation of EU law and, subsequently, how relevant it has become in shared administrations to search for effective legal protection without hampering the EU law's effectiveness.¹ Although this research focuses solely on the composite procedures in place within the SSM, the general categorization of composite procedures used for the research (i.e. bottom-up versus top-down and formalized intermediate measures versus more informal cooperation) can be applied to composite procedures in other fields of law as well. And although it may prove to be impossible to make a one-to-one comparison between composite procedures in different fields of law, these general categorizations do enhance the relevance of this research' analyses to other shared administrations.² The overall observations, findings and recommendations discussed in this chapter may thus also serve to improve the effectiveness of legal protection in other shared administrations than the SSM.

The analysis of Part II of this research teaches us that the current system of legal protection does not seem to be fully prepared for the complexity of composite procedures within the European Union nowadays. Ensuring effective legal protection may at times conflict with preserving the autonomy, unity and primacy of Union law.

¹ Chapter 1, Sections 1 and 4.5.

² See Chapter 1, Section 4.3.

Although it seems necessary to intertwine the Union and national administrations so as to ensure effective prudential banking supervision, the current system of legal protection becomes complex in case it is applied to decisions based on the composite procedures ensuing from the shared administration. The complexity of the system creates many uncertainties and may increase the risk of lengthy judicial proceedings.³ Moreover, since a uniform EU administrative framework and fully harmonized substantive laws are lacking, it becomes more challenging to efficiently regulate and review the supervisory authorities' powers while guaranteeing respect of the legal safeguards, without hampering the European Central Bank and the National Competent Authorities to carry out their supervisory tasks.

The path chosen by the Court as well as the possibilities and recommendations discussed in this chapter to ensure an effective legal protection both have side effects, similar to the way in which the system created to ensure effective prudential banking supervision affects the effectiveness of legal protection (see Chapter 1). Although an extensive discussion about these effects is outside the scope of this research and may, incidentally, be an interesting question for further investigation, some of those effects are worth keeping in mind.

As an important side effect, the possibilities to strengthen legal protection may at the same time increase the number of different administrative regimes that are applicable within the participating Member States to their Significant and Less Significant Institutions. This risk has already been embedded in the set-up of the SSM by allocating the direct supervision of SIs and LSIs to the ECB and NCAs, respectively. Yet, both the name 'SSM' and the ECB's final responsibility for the effective and consistent functioning of the mechanism⁴ embody the idea of having one supervisory system.

The way in which legal protection is provided may either increase or reduce the divergence in applicable administrative standards and legal protection before court for both SIs and LSIs. Preparatory measures issued by NCAs, for instance, may be reviewed differently if considered by the Court as part of an EU decision-making process than if considered by a national court in the context of LSI supervision. This may cause a more complex administrative regime, about which more uncertainties may arise, for both NCAs when carrying out their supervisory tasks and the banks that are subject to their supervision.

³ The problem of lengthy judicial proceedings is partly addressed by the possibility to have an ECB decision reviewed by the Administrative Board of Review (cf. Chapter 1, Section 4.4). However, the Board's purely internal administrative, non-legally binding review, does not qualify as a judicial review by an independent court under Article 47 Charter. For the purposes of this research, these reviews fall thus outside the scope of judicial protection. Nevertheless, the Board's reviews are a valuable element in ensuring effective legal protection, since they provide an extra possibility to have a quick administrative review, without obliging the parties to follow this path first before going to the CJEU and thus without hampering the effectiveness of legal protection before court.

⁴ Article 6(1) SSM Regulation.

2 The SSM and the Court's first judgments

The centralization of prudential banking supervision by the establishment of the SSM had to ensure strict and impartial banking supervision of high quality, and was meant to restore trust in the supervision of banks and to stop financial fragmentation. At the same time, centralized supervision was needed to better supervise the banking sector's cross-border activities and the effects of credit institutions' interconnectedness. This centralization had to be realized, however, within the existing legal framework and the experience, knowledge and resources existing within the Member States were still needed.⁵ The result is a Single Supervisory Mechanism in which EU and national administrations closely collaborate and intertwine.

The ECB is responsible for the effective and consistent functioning of the SSM, but the NCAs still have an important role to play in daily practice. The ECB directly supervises the large banks, which it does with the assistance of NCAs. The NCAs carry out the direct supervision of smaller banks, but have to follow the ECB's general guidance in this respect, and the ECB may ultimately decide to take on the supervision of one or more smaller banks itself.⁶ This way of organizing tasks illustrates the authorities' interdependence when carrying out their supervision, without allowing it to affect the ECB's final responsibility for the overall functioning of the system.

In its first evaluation of the SSM, the Commission arrives at an overall positive assessment of the way in which the SSM Regulation has been applied and the ECB has been acting in its supervisory capacity these first years.⁷ The Commission concludes that the effectiveness of supervision has improved in these years, that for SIs the regulatory framework has reached a higher degree of harmonization, and that SI supervision has been based on common methodologies applied in a consistent way. In its assessment, the Commission also remarks that in several core supervisory areas the quality of supervision has perceptibly increased. With respect to LSIs, the report concludes that the ECB took important steps in harmonizing supervisory practices, but also that more time is needed for this harmonization to reach an adequate degree.⁸ The implementation of the SSM has been beneficial to the level playing field in the participating Member States both for SIs among themselves and for SIs and LSIs among each other,⁹ and the integrated supervision has increased confidence.¹⁰

⁵ Cf. Recital 12 SSM Regulation; MEMO/13/780; MEMO(2012) 510 final; Report Van Rompuy 2012; ECB Opinion 2012. Also: Wissink 2015, p. 5.

⁶ See Chapter 2 for a more detailed description of the system.

⁷ COM(2017) 591 final, p. 3.

⁸ COM(2017) 591 final, p. 19.

⁹ COM(2017) 591 final, p. 19.

¹⁰ COM(2017) 591 final, p. 3.

With respect to the division of tasks and responsibilities between the ECB and NCAs, the Commission concludes in its evaluation that it seems to work well in practice. The ECB is able to accumulate knowledge and expertise while it constantly interacts with NCAs, and the NCAs are able to reinforce their know-how by intensively interacting with other NCAs and the ECB.¹¹

At the same time, the European Court of Auditors mentions in its own report on the SSM that the ECB heavily relies on NCA resources for carrying out its supervisory tasks, pinpointing this as one of the key risks of the current set-up. It concludes that '[t]he national bodies have the final say regarding the financial and other resources they assign to on-site inspections and their staff appointees to JSTs, even though these areas of supervision are ultimately the responsibility of the ECB'.¹²

The Commission also acknowledges in its evaluation that certain NCAs have expressed their concerns regarding the ECB's role in relation to LSIs, the unpredictability of the ECB's influence, and the possibility the ECB has to eventually take over supervision.¹³ The Commission furthermore acknowledges the unprecedented circumstances that have been created in which the ECB has to apply national law implementing relevant Union law and may derive concrete powers from such national laws. The Commission recommends in this respect that in future relevant Union law such supervisory powers have to be explicitly spelled out in directly applicable provisions.¹⁴ The evaluations show that NCAs still have an important role to play in practice, and that the shared administrations seem to support the effectiveness of prudential supervision, while at the same time leaving quite some practical and legal challenges unsolved.

In the first judicial proceedings within the context of the SSM, the Court has focused on the ECB's final responsibility, and emphasized the centralization of prudential supervision and the accompanying centralized judicial review by the EU Courts in its judgments. In the *Landeskreditbank* case,¹⁵ the Court concludes that the ECB is exclusively competent to carry out all the prudential supervisory tasks listed in Article 4(1) of the SSM Regulation in relation to all institutions, and the NCAs assist the ECB in carrying out these tasks by a decentralized implementation of some of these tasks in relation to LSIs.¹⁶

¹¹ COM(2017) 591 final, p. 7. For a more extensive description of the evaluation, see: SWD(2017) 336 Final, pp. 24-26.

¹² Special Report European Court of Auditors 2016, p. 25, JSTs being short for Joint Supervisory Teams.

¹³ COM(2017) 591 final, p. 7.

¹⁴ COM(2017) 591 final, p. 8. Also: SWD(2017) 336 Final, pp. 26-27.

¹⁵ Case C-450/17 P, *Landeskreditbank Baden-Württemberg v ECB*, ECLI:EU:C:2019:372. For a more extensive discussion of this case, see: Annunziata 2019, pp. 3-13 (see pp. 5-10 in particular on the issue of decentralized implementation).

¹⁶ Case C-450/17 P, *Landeskreditbank Baden-Württemberg v ECB*, ECLI:EU:C:2019:372, paras 37-41.

In *Berlusconi and Fininvest*,¹⁷ the Court states that a single judicial review by the EU Courts is required in case of a decision on the acquisition of a qualifying holding.¹⁸ It concludes that the EU legislature does not aim to establish a division between the EU and national powers, but quite the contrary, stipulates that the ECB has the exclusive decision-making power.¹⁹ Accordingly, the Court alone has jurisdiction to rule on the legality of such a final ECB decision and, in order to ensure effective judicial protection of the persons concerned, to examine whether any defects vitiating the NCA's preparatory acts or proposals would affect the validity of that final ECB decision.²⁰

The Court emphasizes that, in case of a specific cooperation mechanism based on the exclusive decision-making power of the EU authority, a single judicial review is needed in order for such a decision-making process to be effective.²¹

It furthermore concludes that if, in this type of procedure, national remedies against national preparatory acts exist alongside the action before the EU Courts against the final EU decision, the risk of divergent assessments in one and the same procedure would not be ruled out, and the Court's exclusive competence to rule on the final EU decision could be compromised.²²

The exact scope of the judgment in *Berlusconi and Fininvest* still remains to be seen, as discussed in Section 4.1 of this chapter, but in my view the conclusion that the Court may have to review national parts of an EU procedure as well illustrates the Court's willingness to accept a more centralized judicial review in order to ensure effective judicial protection. While it is settled case law that a national court is not competent to declare an EU measure invalid,²³ the EU Courts are thus competent to review certain national preparatory measures on their validity to the extent it may affect the validity of the final EU measure following such a preparatory measure.

This tendency towards centralization is also visible in other cases. The Court has, for instance, also included national substantive law – as a question of law – in its review of ECB decisions partly based on national law, which is a novelty under Union law.²⁴

¹⁷ Case C-219/17, Berlusconi and Fininvest, ECLI:EU:C:2018:1023.

¹⁸ One of the common procedures, cf. Chapter 2, Section 2.

¹⁹ Case C-219/17, Berlusconi and Fininvest, ECLI:EU:C:2018:1023, para. 56 in conjunction with paras 43-44.

²⁰ Case C-219/17, Berlusconi and Fininvest, ECLI:EU:C:2018:1023, para. 44 in conjunction with paras 57-59.

²¹ Case C-219/17, Berlusconi and Fininvest, ECLI:EU:C:2018:1023, para. 44 in conjunction with paras 48-49.

²² Case C-219/17, Berlusconi and Fininvest, ECLI:EU:C:2018:1023, para. 44 in conjunction with para. 50.

²³ Case 314/85, Foto-Frost v Hauptzollamt Lübeck-Ost, ECLI:EU:C:1987:452.

²⁴ Case C-152/18 P, Crédit mutual Arkéa v ECB, ECLI:EU:C:2019:810; Joined cases T-133/16 to T-136/16, Caisse régionale de crédit agricole mutuel Provence v ECB, ECLI:EU:T:2018:219. Cf. Gagliardi &

The Court's focus on the centralized supervisory responsibility of the ECB seems to be in line with the overall idea underlying the SSM, but the above-mentioned evaluations indicate that in practice the ECB seems to be heavily relying on NCAs in order to fulfil this responsibility. The relevant Union laws also assign an important role to the NCAs and the national legal context. Does the Court's focus on centralizing at the Union level in this context perhaps entail a disproportionate or unjustified burden for the ECB and affect its effectiveness, or is it simply the only path to ensure effective legal protection? The analysis in the research teaches us that centralization of judicial review may be necessary in order to avoid gaps in legal protection before court, and may be the only path to ensure judicial protection at all. Be that as it may, the research' analysis also shows that there are still quite some hurdles to overcome. Sections 4 and 5 clarify to what extent effective legal protection is ensured by the Court's approach, which is embedded in the current legal framework, as discussed in Section 3 below.

3 Assessment Framework

The framework for assessing the effectiveness of the legal protection in place is built upon two parts. The first part contains the requirements that must be met in order to have an effective legal protection, while the second part lays down the starting points for a complete system of legal remedies and procedures within the EU. Together they provide a framework to assess the effectiveness of the legal protection for individual decisions based on the composite procedures within the SSM. In this assessment framework, effective legal protection is interpreted in a way capturing both the safeguard and the instrumental perspective. In the meaning of this research, legal protection is thus only effective when a persons' rights are guaranteed without hampering the effectiveness of the relevant Union law.

In the first part of the framework the safeguard and instrumental perspectives and the general EU principles of legality and legal certainty converge. The safeguard perspective refers to safeguards provided by standards in the administrative procedure, as well as safeguards provided by the general EU principle of effective judicial protection before court. The instrumental perspective relates to the principles and elements which are to ensure the effectiveness of Union law, and a judicial organization that does not stand in the way of achieving relevant Union law objectives. The framework also encompasses the general EU principles of legality and legal certainty. It only includes the elements that are relevant to composite procedures, which are briefly set forth below.²⁵

Wissink 2020; Smits 2018.

²⁵ This section's summary of the assessment framework is based on Chapter 3 and the literature and case law mentioned there.

Legal protection starts off with the legal safeguards in place for the principle of legality, which requires among others that the administrative authorities' acts have a legal basis and are thus limited and regulated by law, and that administrative standards exist by which to assess these acts.

These administrative standards firstly reflect the principle of good administration (in the context of the SSM also often referred to as due process) and, inter alia, concern the right to be heard; the right to have access to files; the duty for the authority to provide reasons for its decision; the right to have affairs handled impartially, fairly and within a reasonable time; the obligation of thorough decision-making; and the principle of legal privilege. These rights of defence have to be guaranteed as from an early stage in the decision-making process, since they apply in all proceedings initiated against a person that may result in a measure adversely affecting that person.

The administrative standards also include the right of respect for private and family life and the right not to incriminate oneself. The right of respect for private and family life must be observed in all proceedings and is in the SSM context particularly relevant in the case of on-site inspections. The right not to incriminate oneself applies as from an early stage of supervision, as do the other rights of defence. However, it is uncertain whether the Court will apply this right in all proceedings or, similar to the ECtHR case law, only in those leading to sanctions of a criminal nature. In this research, the right not to incriminate oneself is discussed in the context of investigations and sanctions of a criminal nature.

Administrative standards provide safeguards which ensure that administrative authorities respect the rights of defence. As a consequence, persons are able to effectively defend themselves against an administrative authority's act, which includes the ability of these persons to defend themselves as from the preparatory phase of decision-making, on the one hand, and to decide with full knowledge of the relevant facts whether or not to go to court, on the other hand. At the same time, it obliges the relevant authority to properly think through its opinion and decision.

These safeguards may become even more imperative in case of composite procedures. Judicial proceedings in general can already be quite time-consuming, so lodging an appeal against decisions based on complex composite procedures are likely to take even more time. Therefore, in order to be able to take a well-informed decision about any further legal action, persons need to know the administrative authority's precise and complete reasoning in a certain matter. At the same time, these safeguards enable the administrative authorities to further improve their opinions and decisions, which may be necessary because the preparation of a decision involves various administrative layers and, consequently, different opinions and input. Lastly, the safeguards have to result in properly motivated decisions, which enable a court to adequately review the

administrative authority's actions and which ensure, thus, a more effective legal protection before court.

The legal safeguards in the phase of judicial proceedings before court are captured by the principle of effective judicial protection. This principle implies that all persons need to have the opportunity to enforce the rights they obtain under Union law before court and entails, *inter alia*, that persons need to have access to a court which has to be independent and impartial, that persons can exercise their rights of fair and public hearings and due process, and can have their affairs handled within a reasonable time.

Some of these elements, such as the independence and impartiality of the court or the right to fair and public hearings, are not affected by having in place composite procedures. The general right of access to court may, however, be limited in certain parts of composite procedures. When parts of a decision-making procedure would not be subject to judicial review, a person does not have access to a court insofar as it concerns that part of the procedure. This touches upon the foundation of ensuring effective judicial protection. It is important to keep considering that access to court may indeed already be relevant in the preparatory phase of supervision, as some of the actions that the administrative authorities take in order to prepare a final decision may turn out to be reviewable in themselves.

A last element of the principle of effective judicial protection is the requirement that courts must ensure a sufficient review of all questions of fact and of law relevant to the dispute before it. Whereas the Court usually determines the answers to the questions of law completely, it may distance itself from questions regarding the appraisal of facts in technical, scientific, economic and factual complex matters, and when the law has given discretion to the administrative authorities. The establishing of the facts is nonetheless reviewed more strictly. The Court assesses whether the evidence relied on is factually accurate, reliable and consistent, whether it contains all the information that is to be considered in order to assess a complex situation, and whether it can serve to substantiate the conclusions drawn from it. Any judicial deference is, furthermore, to a certain extent compensated by a strict procedural review. In case of sanctions of a criminal nature, the Court applies an unlimited judicial review to the amount of the fine, combined with a 'normal' review on the basis of Article 263 TFEU of the question whether the person concerned has breached the relevant Union rules.

The instrumental perspective is based on various principles relating to the effectiveness of Union law, in particular the general EU principle of effectiveness, which is grounded in the principle of loyal cooperation. The latter principle requires Member States to take appropriate measures to ensure that they fulfil the obligations arising from the Treaties or Union acts and to refrain from

any measures that may jeopardize the Union's objectives being reached. On the basis of this principle the Court has formulated the obligation for Member States to ensure Union law is enforced at the national level in a way that meets the requirements of equivalence, effectiveness, proportionality and dissuasiveness. This obligation demonstrates the relevance of the effectiveness of EU law and the importance the Court attaches to it.

The principles of effectiveness and loyal cooperation closely relate to the principle, or idea, of national procedural autonomy. National procedural autonomy is the idea that, if no Union rules exist to govern a matter, Member States must lay down detailed national procedural rules governing such actions in order to safeguard persons' individual rights under Union law. This procedural autonomy is subject to the principles of equivalence and effectiveness.

Besides these general principles, the instrumental perspective also includes various aspects that have to be considered when ensuring a judicial organization which does not prevent an effective implementation of EU law. Examples of such aspects are the legislator's intentions, the processing speed of the judicial system, and the coherence of the overall system of legal remedies and procedures.

The second part of the framework pertains to the division of tasks and responsibilities between the EU and national courts ensuing from the complete system of legal remedies and procedures within the EU. Broadly speaking, the EU Courts are competent to review Union decisions, either directly pursuant to Article 263 TFEU or indirectly by means of a preliminary request on the basis of Article 267 TFEU, and national courts are competent to review national legally-binding decisions. How this works out exactly for the composite procedures in place, and that these procedures do complicate matters considerably, is elaborated in Sections 4 and 5 of this chapter.

4 The effectiveness of legal protection in case of bottom-up procedures

This section sets out in which way legal protection is guaranteed in bottom-up procedures and how effective it is. This research has looked into various bottom-up procedures: common procedures, bottom-up procedures in ongoing supervision, and bottom-up procedures ending in a sanction of a criminal nature. The discussion in this section pertains to all bottom-up procedures discussed in this research to provide an overall picture. After all, although the analysis in Chapter 7 shows that, due to the legal safeguards that additionally apply, the legal issues and challenges in case of sanctions of a criminal nature may even be bigger than in case of ongoing supervision,²⁶ the challenges

²⁶ Cf. Chapter 7, Section 3.

arising for legal protection in the supervisory phase do not differ significantly from those arising in case of sanctions of a criminal nature.

All bottom-up procedures have in common that they end in an ECB final decision and are partly based on preparatory measures of NCAs. To be more specific, these procedures may end in a final ECB decision granting or denying approvals, withdrawing licences, imposing supervisory measures, and imposing sanctions both of a criminal and not of a criminal nature.²⁷ The ECB decisions are based on relevant Union law, which includes substantive laws that are still partly laid down in national law transposing relevant Union law and which has not been fully harmonized yet.

The NCAs' preparatory measures come in different kinds. A preparatory measure may take the form of an NCA draft decision addressed to the ECB, which in common procedures is a formal step and in ongoing supervision a step that may be made. NCA preparatory measures may also be measures carried out by NCA staff, who then usually are NCA members of the Joint Supervisory Teams and on-site inspection teams, in preparation of a final ECB decision. When participating in Joint Supervisory Teams, NCA staff remain national staff and will thus use their powers under national law, while they may use powers laid down in Union law when joining an on-site inspection team.²⁸

In these cases, the NCA staff's input relates, first of all, to information gathering and establishing, which can be done either formally or informally, i.e. respectively with or without adopting a decision to do so. Additionally, NCA staff participate by using other general investigatory powers such as examining books and records, obtaining written or oral explanations and interviewing persons, or other powers NCAs have been provided with under national law. The information gathered in these ways may also lead to, or be part of, a referral to the Investigating Unit, which may end in a sanction of a criminal nature.²⁹

4.1 The competent court

As this research's analysis shows, the judicial protection risks to present gaps when dealing with decisions based on bottom-up procedures within the SSM. Obviously, this would immediately conflict with the safeguard perspective of effective legal protection. Particularly the national preparatory part of the procedure ensuring effective legal protection may prove challenging and is therefore further discussed below.

Although, in general, the Court is competent to review EU decisions, this does not yet provide an answer to the question of which court will review preparatory

²⁷ Cf. Chapter 4, Section 2; Chapter 5, Section 2; and Chapter 7, Section 2.

²⁸ Cf. Chapter 5, Section 2.

²⁹ Cf. Chapter 7, Section 2.

measures carried out at the national level. As a general rule in ‘normal’ – not composite – procedures, any irregularities of a preparatory measure must be relied upon in a procedure against the final measure, except when such a preparatory measure is separately subject to review under Article 263 TFEU. According to the Court’s standards based on Article 263 TFEU, that exception would arise if the preparatory measure creates legal effect vis-à-vis the person concerned and is a culmination of a special procedure distinct from the preparatory proceeding for the final measure. When assessing whether this is the case, the Court considers the effect that the measure creates and whether the provided judicial protection suffices, and it considers the procedural rules that apply (to determine the legislator’s intention), and whether the procedural stages possibly risk to get confused.³⁰ Chapter 5, Section 3.1 contains the analysis of which use of powers laid down in Articles 10-13 of the SSM Regulation may be separately subject to judicial review.

Presumably, ECB decisions requesting ad hoc information will usually be separately subject to review, which seems at the very least necessary if any irregularities in such a request cannot be relied upon when challenging the ensuing final decision. This could, for example, be the case if such a request covers information that is not used in the final decision or if it is addressed to a person other than the addressee of the final decision. ECB decisions ordering the use of general investigatory powers or an on-site inspection seem likely to be separately subject to review as well.

Preparatory measures are also subject to separate review if certain rights of defence would be irremediably impaired during the preparatory phase. This could, for instance, occur when the principle of legal privilege and the right not to incriminate oneself become an issue.³¹ However, to get the act to be reviewable, persons involved have to invoke these rights when the information is requested.³²

In practice, ECB decisions ordering the use of powers may probably not be challenged that often, since these powers are mostly used in the context of ongoing supervision and often shall not be that controversial. Moreover, a judicial proceeding would be against the decision ordering the *use* of that power and not a decision to *implement* that power, i.e. to actually use it, nor would it concern the use of information gathered by using that power.³³ However, as follows from the above, it seems likely that persons can gain judicial protection if they would deem the use of such powers unlawful or, at least, if they would otherwise be deprived of judicial protection or their rights of defence would be irremediably impaired.

³⁰ Cf. Chapter 3, Section 5.2.

³¹ Cf. Chapter 3, Section 5.2.

³² Cf. Chapter 3, Section 5.2 and Chapter 5, Section 3.1.

³³ Cf. Chapter 5, Section 3.1.

Whereas it remains thus uncertain for now which ECB preparatory measures are considered to be separately subject to judicial review, it is even more uncertain which criteria have to be applied when dealing with composite procedures in order to determine whether a preparatory measure is separately subject to judicial review. And while it remains uncertain what measures create legal effect vis-à-vis persons involved, it is also uncertain on the basis of which standards it is to be determined what measures are targeted and what court would have to review such measures. This is concretized below in three scenarios.

In the *Borelli* case, the Court clarifies that national courts have to provide judicial protection against national measures that are binding upon the EU authority, even when part of an EU procedure.³⁴ However, the preparatory measures carried out by NCAs in the context of the SSM are not legally binding upon the ECB. NCA draft decisions are explicitly non-binding upon the ECB³⁵ and the other measures merely exist of carrying out supervisory powers similar to the ones laid down in Articles 10-13 of the SSM Regulation. Thus, the question to be explored next is in what way judicial protection is or can be ensured when dealing with such not legally binding preparatory measures of NCAs.

As an answer to this issue, the Court has taken some first steps towards a single judicial review of bottom-up procedures in *Berlusconi and Fininvest*. In its judgment, the Court states that it is exclusively competent to review the validity of a final ECB decision opposing an acquisition of a qualifying holding pursuant to Article 15 of the SSM Regulation and, as an incidental matter, to determine whether the preparatory national acts are vitiated by defects such as to affect the validity of the ECB's decision.³⁶ Although this case concerns a particular procedure, the ruling confirms the Court's readiness to also review certain national preparatory measures and to accept, to a certain extent, that the final decision runs a risk of contamination by irregularities in the preparatory measures carried out at the other level than the one at which the final decision is adopted.³⁷ These are important steps in avoiding gaps in judicial protection and, consequently, in ensuring effective judicial protection in case of bottom-up procedures. The ruling leaves, nonetheless, unanswered what measures are precisely captured by the Court's judgment.

This approach has already been pleaded for by Gaja in his comment on the *Greenpeace* case.³⁸ He maintains that the Court's exclusivity to rule on the validity

³⁴ Cf. Chapter 3, Section 5.1.

³⁵ Cf. Chapter 4, Section 2.

³⁶ Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, para. 58. See Chapter 4, Section 3.1 for a more extensive discussion of the case.

³⁷ For a discussion on the risk of contamination, see: Brito Bastos 2015, pp. 287-288; and, particularly in the context of the *Berlusconi and Fininvest* case, see: Brito Bastos 2019, pp. 1371 and 1375.

³⁸ Case C-6/99, *Greenpeace France and others*, ECLI:EU:C:2000:148.

of EU acts does not necessarily infer that the national courts have exclusive jurisdiction with respect to national measures. He agrees that, if national acts are directly challenged, action has to be brought only to a national court, as has been the case in *inter alia Benvenuto*³⁹ and *Borelli*.⁴⁰ Additionally, he argues that this may be different when an EU act is challenged before the EU Courts and the validity of that EU act depends on the validity of the national measure. In his view, the Court should arguably be entitled to examine all questions relevant to reviewing the validity of the EU act, regardless of them relating to facts, EU law or national law. The Court's exclusive competence is justified in light of its reasoning in *Foto-Frost*, i.e. that it must guarantee the uniform application of EU acts throughout the EU. A similar reasoning cannot be held up to justify any exclusivity of national courts with respect to national measures. The fact that only national courts may ask the Court of Justice for preliminary rulings, and not vice versa, supports this idea in his view.⁴¹

Chapter 5 discusses three different scenarios, ensuing from the judgment in *Berlusconi and Fininvest*, about which NCA preparatory measures the Court may take into account when reviewing a final ECB decision.⁴² First of all, the Court could review only NCA preparatory measures which are formally addressed to, but not legally binding upon, the ECB (e.g. NCA draft decisions). In this scenario, all other NCA preparatory measures that are part of an ECB decision-making procedure remain subject to national judicial review in accordance with the relevant national law. Second, the Court could also review *all* non-binding NCA preparatory measures that are part of an ECB decision-making procedure, and thus ignore the standards it has developed for EU institutions on the basis of Article 263 TFEU for determining when a measure is separately subject to judicial review, as well as the relevant national standards in this respect. Thirdly and lastly, the Court could apply its own standard of reviewability based on Article 263 TFEU to both the ECB's and NCAs' preparatory measures. It would review those NCA preparatory measures that are (i) not binding upon the ECB, and thus not separately subject to national judicial review, and (ii) not separately subject to judicial review on the basis of the standards under Article 263 TFEU. These scenarios are briefly described below.⁴³

The first scenario, in which the Court reviews NCA draft decisions only, would easiest fit into the current system of legal remedies and procedures and respect

³⁹ Case C-46/81, *Benvenuto*, ECLI:EU:C:1981:64.

⁴⁰ Case C-97/91, *Oleificio Borelli v Commission*, ECLI:EU:C:1992:491.

⁴¹ Gaja 2000, p. 1431-1432

⁴² Cf. Chapter 5, Section 3.2.

⁴³ In theory, it is also possible that the EU Courts would only review national preparatory measures which are not separately subject to judicial review according to the relevant *national* laws. Given the unlikelihood of this scenario, this possibility has been left aside in this research, as mentioned in Chapter 5, Section 3.2.

the idea of national procedural autonomy. The Court only reviews national preparatory measures which are formally addressed to the ECB, i.e. formal intermediate steps on the basis of the applicable rules, but which are not binding upon the ECB.⁴⁴ The national preparatory measures concerned are NCA draft decisions in common procedures and NCA draft decisions in ongoing supervision.

This group of preparatory measures is rather straightforward, which may foster clarity about the judicial protection in place. Moreover, in this scenario the judicial protection currently provided before national courts remains intact with respect to all other national preparatory measures, such as national information requests or national decisions to conduct on-site inspections. The national courts can thus still assess most of the national preparatory measures which are, according to their national standards, separately subject to review. Leaving the judicial protection of most national preparatory measures at the national level also has the advantage that they are reviewed by the national court, which after all is better equipped to review national measures given its knowledge of national law and the legal context.

However, the biggest disadvantage is that this scenario increases the risk of leaving gaps in judicial protection. When a non-binding measure is not directed to the ECB and is thus, in this scenario, not reviewed by the Court and is not separately subject to review by the national court either, it will not be subject to any review at all, at least as concerns the use of powers by NCAs. The Court still has to review whether the information on which the ECB final decision is based suffices to support that decision, a review that includes information gathered by the NCA and used to support the ECB final decision. Regardless, any scenario leaving gaps in judicial protection should be considered a ‘no go’ from a safeguard perspective, since judicial protection is not just ineffective, but simply not there at all.

From an instrumental perspective, this scenario also has the disadvantage for the legal protection’s effectiveness that it involves national courts in ensuring judicial protection in EU decision-making procedures. This disadvantage holds true for all scenarios involving national courts, and thus applies to the third scenario as well.

Judicial proceedings before national courts may interfere with the ECB decision-making procedure, since the validity of national preparatory measures is at issue and it may take time for the national judicial proceedings to finalize. In this specific scenario, the judicial protection with respect to preparatory measures furthermore runs the risk of becoming divergent between Member States. Although these preparatory measures are similar and adopted within one and

⁴⁴ in line with the Borelli case, binding preparatory measures are subject to national review. Cf. Chapter 3 Section 5.1.

the same supervisory system, perhaps even within one and the same decision-making procedure, they may thus be treated differently in each Member State. This situation leads to uncertainty about what may or may not be challenged at the relevant national level, which infers, accordingly, that it becomes uncertain whether the decision-making procedure will continue smoothly at the EU level. These negative effects from an instrumental perspective may even become stronger as the national judicial proceedings are not harmonized and the length of national proceedings may thus differ (see also the third scenario below).

The second scenario, in which the Court reviews *all* non-binding national preparatory measures,⁴⁵ does avoid gaps in judicial protection since all national preparatory measures are included in the Court's review. This clearly is desirable from a safeguard perspective. At the same time though, the national courts, which may be best placed to review acts of national authorities and apply the relevant national rules, are set aside in this scenario, as is the national procedural autonomy in this respect.

More importantly, this scenario does not allow for judicial protection in an earlier stage of the administrative procedure when this is necessary to ensure effective legal protection. As discussed, the Court adopts a rather balanced approach with respect to the judicial reviewability of preparatory measures carried out by EU institutions when determining that a measure is separately subject to judicial review if this is needed, for instance, to avoid that any rights of defence are irretrievably impaired or if otherwise no sufficient judicial protection is available. If in such cases no judicial protection can be provided as from an early stage, it may be offered too late to be effective. This would be detrimental to the effectiveness of legal protection from a safeguard perspective.

Considering the above, this approach may create an, in my opinion unjustified, divergence in the judicial review of ECB and NCA preparatory measures. The Court's reasoning used to ensure effective judicial protection in case of ECB preparatory measures does, in this scenario, not apply to NCA preparatory measures, although these preparatory measures do not differ from one another in any other way than in the authority carrying out the measure. One could reason that this divergence can be sufficiently justified precisely because the judicial protection is provided on different levels if the Court does, contrary to this scenario, *not* carry out the judicial review of all national preparatory measures, and assuming that in such cases national courts review national preparatory measures which are separately subject to review according to the standards under Article 263 TFEU. The limitation to the judicial protection implied in this scenario infers, however, that the Court's own standard of effective

⁴⁵ Note that this would concern all national preparatory measures except for measures that are binding upon the ECB, as referred to in the Borelli case, which are to be reviewed by national courts, as discussed in Chapter 3, Section 5.1. However, in the context of the SSM no national measures exist that are binding upon the ECB.

judicial protection in case of EU preparatory measures is not met with respect to national preparatory measures. If, according to the Court's interpretation of Article 263 TFEU, judicial review of certain EU preparatory acts is needed already in an early stage to ensure the effectiveness of judicial protection, the same interpretation should be applied to national preparatory measures in order to ensure effective judicial protection in bottom-up procedures. If these national preparatory measures do not receive the same treatment, these measures will, according to the Court's own standards, not reach a sufficient level of judicial protection.

A third, and in my opinion preferred, scenario is that the Court includes, in its review of the ECB final decision, all not legally binding national preparatory measures that are not separately subject to judicial review according to the reviewability standards under Article 263 TFEU. Such measures are NCA draft decisions and measures that relate, *inter alia*, to the way in which an NCA carries out a general power or to the question whether or not information that the NCAs have gathered and the ECB has used to support its final decision sufficiently endorses that decision.

This approach entails a harmonization of the reviewability standards for measures that are part of an EU decision-making procedure and thus reduces the differences between Member States, while also being a significant change compared to the current situation.

The Court's interpretation of Article 263 TFEU serves as a basis to determine whether EU preparatory measures are or are not separately subject to judicial review and, as such, the same interpretation also determines, *a contrario*, which EU preparatory measures are included in the review of the final EU decisions ensuing from such measures. In this scenario, the same approach will also be applied to national preparatory measures that are part of an EU decision-making procedure.

One could argue that this is justified since the Court reviews ECB decisions on the basis of Article 263 TFEU, a provision laying down the requirements for access to the Court which also holds for ECB decisions that are partly or entirely based on national preparatory measures. Thus, it may be considered a logical consequence to also apply the Court's interpretation – i.e. the answer to the question whether or not a preparatory measure is part of the review of a final ECB decision – to national measures in preparation of such ECB final decisions. However, while it is for the EU Courts to separately review ECB preparatory measures on the basis of Article 263 TFEU, it is for the national courts to do so in case of NCA preparatory measures.

By determining which preparatory measures, from both the ECB and NCAs, are included in its review of an ECB final decision, the Court also indicates which national preparatory measures the national courts may *not* review anymore. It imposes thus indirectly its own reviewability standards under Article 263 TFEU

upon national courts in cases in which the national preparatory measure is part of an EU decision-making procedure.

In this scenario, national courts have to apply the Court's interpretation of its reviewability standards under Article 263 TFEU to assess whether they are still competent to review a national preparatory measure that is part of an EU decision-making procedure. The national court will, after all, no longer be competent to review preparatory measures that are to be included in the Court's review of the final EU decision.

As a logical following step in this scenario, the Court will oblige national courts to ensure effective judicial protection in case of national preparatory measures that are separately subject to review on the basis of the Court's interpretation of the reviewability standards under Article 263 TFEU.

Since the EU Courts will not be reviewing these measures, it has to oblige national courts, similar to its ruling in the *Borelli* case, to ensure effective judicial protection in such cases even when national laws do not provide for it so as to avoid gaps in the judicial protection in Member States where such measures are not subject to judicial review according to national standards.

As argued by Brito Bastos in his work about the *Borelli* case, the qualification of a composite procedure as *European* in nature may justify that judicial review has to be carried out according to the *EU* understanding of the criteria of reviewability of measures. It avoids that the judicial protection for preparatory measures which are part of an EU decision-making procedure depends on the applicable national regime.⁴⁶

This next step seems particularly important for ensuring effective legal protection, since the preparatory measures concerned are the measures of which the Court has determined that judicial protection has to be provided already in an earlier stage if it is to be adequate. This may be relevant, for instance, in cases in which rights may be irretrievably impaired or in which otherwise no judicial protection would be available. In practice, however, these cases may be rather rare.

This scenario will limit the national procedural autonomy substantially, but ensures an equal treatment of the ECB's and NCAs' preparatory measures that are part of an ECB decision-making procedure. The Court's approach to ensure effective judicial protection with respect to EU preparatory measures will then be applied *mutatis mutandis* to national preparatory measures that are part of an EU decision-making procedure.⁴⁷ At the same time, the national courts, and

⁴⁶ Brito Bastos 2015, p. 295.

⁴⁷ In this approach, the Court seeks, as Advocate General Bot puts it, to ensure effective judicial protection of an individual's rights under EU law, but also to avoid a multiplication of actions against preparatory measures, which could paralyse the activity of the institutions. It furthermore aims to preserve the division of powers and the system of legal remedies. (Opinion of Advocate General Bot in Joined cases

national administrative standards, still have an important role to play in ensuring effective legal protection as well.

A disadvantage, albeit temporarily, may be that the number of requests for preliminary rulings possibly increases, as national courts will require further explanations from the Court to familiarize themselves with the reviewability standards under Article 263 TFEU. Although this may harm the effectiveness of legal protection, this risk should diminish over time with the guidance the Court provides.

Other challenges may arise because national judicial procedures will interfere with the ECB decision-making process and judicial proceedings at a national level differ from one another. The challenge of interference holds true in each scenario (see also the discussion of the first scenario above) in which national courts have a role to play in the context of EU decision-making procedures.

The challenge of divergent national judicial proceedings may cause uncertainties and increase the risk that judicial proceedings become even more time-consuming because the national level is involved as well. Uncertainties arise, for example, since harmonization is still lacking for the number of appeal possibilities under national law or for a possible suspensory effect of a national judicial proceeding. Although it may be possible to reason that an action brought before national courts may not have suspensory effect if it is an action brought against a national measure that is part of an EU decision-making procedure,⁴⁸ it may not be achievable to harmonize all these aspects of national judicial proceedings.

National judicial proceedings regarding preparatory measures for an ECB final decision may thus cause delays in the ECB's decision-making procedure and harm the ECB's effectiveness, which is undesirable from an instrumental perspective. However, let us keep in mind that the number of cases concerned will probably be limited and that the role of the national courts is relatively small compared to the first scenario discussed earlier.

4.2 Applicable administrative standards

This research analyses which administrative standards are applicable to respectively the ECB and NCAs when carrying out their tasks in

C-463/10 P and C-475/10 P, Deutsche Post AG, Federal Republic of Germany v European Commission, ECLI:EU:C:2011:445, paras 78-79. Cf. Chapter 3, Section 5.2.)

⁴⁸ Article 278 TFEU determines, after all, that actions brought before the CJEU shall not have suspensory effect. According to this provision, it is for the Court to consider whether the circumstances require a suspension, and, if so, to order that the application of the contested act be suspended. It could be reasoned that it is thus the Court's competence to rule on suspension of the application of EU acts, which arguably is an exclusive competence of the Court in order to ensure the primacy, unity and effectiveness of EU law. Note that if the application of a national act to carry out a power is suspended, the ECB may decide to carry out the power itself, which will obviously be subject to the Court's review and the rules to suspensory effect laid down in Article 278 TFEU.

the context of bottom-up procedures within the SSM. In the procedures, the issues mainly relate to the administrative standards that are applicable to NCAs. In principle, the ECB is subject to EU administrative standards and NCAs to their respective national standards, whereby the EU administrative standards as laid down in the Charter and ensuing from the EU general principles are the minimum standards for NCAs since they are implementing EU law in this context.⁴⁹

Administrative standards may pertain to legal safeguards as well as to procedural rules. Procedural rules concern, for instance, provisions regarding time limits and notification procedures. In certain situations, national law possibly provides for more detailed procedural rules. These are allowed when there is no EU law governing the matter and they are in line with the principle of national procedural autonomy and subject to the principles of equivalence and effectiveness.⁵⁰ Chapter 4 contains the conclusion that when additional national procedural rules are allowed, they are probably not only applicable to NCAs but also to the ECB when they relate to a specific power under national law that is carried out by the ECB.⁵¹

The relevant legal safeguards discussed in the context of this research are the principle of good administration (e.g. the right to be heard, the obligation to provide reasons, the right of access to files, due care), the principle of legal privilege and the right of respect for private and family life. Additionally, the right not to incriminate oneself is relevant in case of sanctions of a criminal nature.

As national law sometimes sets more protective rules, additional national legal safeguards may apply, but these are only allowed if the relevant Union law provides for discretion for the Member States and if these safeguards do not compromise the primacy, unity and effectiveness of Union law.⁵² The applicability of such safeguards is more uncertain and therefore looked into below.

The Court will probably review ECB acts only on the basis of EU administrative standards so as to ensure the unity, primacy and effectiveness of Union law. However, according to the Court's ruling in *Akzo Nobel Chemicals and Akcros Chemicals v Commission* (referred to as the *Akzo* case),⁵³ the references to national law in the relevant EU laws may possibly justify the applicability of national legal safeguards to the EU level and thus make national legal safeguards that are more protective in character also applicable to the ECB. Nevertheless, as explained in Chapter 4, this chance is considered to be small. Indeed, although the legal framework does refer to national law, it does not explicitly oblige the

⁴⁹ Cf. Chapter 3, Section 3 and Chapter 4, Section 4.2.

⁵⁰ Cf. Chapter 4, Section 4.2.

⁵¹ Cf. Chapter 4, Section 4.2.

⁵² Cf. Chapter 4, Section 4.2.

⁵³ Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:512.

ECB to comply with national legal safeguards and, moreover, more protective national legal safeguards are only allowed in specific circumstances (as discussed below).⁵⁴

A subsequent question is whether NCA preparatory measures that are part of a bottom-up procedure would be subject to national legal safeguards that provide for more protection than is provided for under Union law. However, even this is debatable. I would prefer an approach in which more protective national legal safeguards are applied by national courts when reviewing, in line with the third – and in my view preferred – scenario set out in Section 4.1, NCA preparatory measures that are separately subject to judicial review by analogy to the reviewability standards under Article 263 TFEU. All other national preparatory measures, which are in my preferred scenario included by the EU Courts in their review of the ECB final decision, should be assessed against the EU standards. This approach is elaborated in this section.

The national preparatory measures at stake are NCA draft decisions and measures carried out by NCA staff who are part of Joint Supervisory Teams, in which capacity NCA staff use their powers under national law to assist the ECB in carrying out its supervisory tasks, for instance, by gathering information, examining books and records, and interviewing persons, without a formal decision to use such powers.⁵⁵ These preparatory measures are not binding upon the ECB (i.e. the discretionary power remains with the ECB) and may lead to draft decisions or information that may be used by the ECB to support its final decision.⁵⁶

The discussion below focuses on the NCAs' measures. The information gathered by such NCA measures may be considered to be evidence supporting the ECB decision, if used by the ECB. The ECB may freely decide whether or not it wants to take the information into account and whether or not it will base its decision on the information. If it decides to use the information, the main question in my view is whether the information indeed sufficiently supports that decision (further discussed in Section 5.2 of this chapter, when considering the reverse situation).

⁵⁴ Cf. Chapter 4, Section 4.2.

⁵⁵ When NCA staff assist the ECB in an on-site inspection, they may use the necessary powers on the basis of the SSM Regulation, as laid down in Article 12(4) in connection with Article 12(2) SSM Regulation. In such a case, EU administrative standards would logically apply given the fact that the NCA staff operate on the basis of EU law. Therefore the discussion in this section focuses on the powers carried out by NCA staff on the basis of national laws.

⁵⁶ In the SSM context none of the national preparatory measures are legally binding upon the ECB. If they existed, they would have to be reviewed by the national court in line with the Borelli judgment (Chapter 3, Section 5.1). These measures are therefore not part of the discussion in this section.

The preferred approach ensures respect for the national legal safeguards to the extent possible in my view, which is beneficial for effective legal protection from a safeguard perspective, especially since this protection may not be available in case of a subsequent EU judicial proceeding against an ECB final decision (see below). In cases in which more protective national legal safeguards are relevant, the persons involved may have the possibility, in accordance with the relevant national laws, to gain that protection. Cases in which this may occur, are for instance when irregularities in an information request cannot be relied upon in an action against a final decision or when certain rights of defence would be irremediably impaired during a preparatory phase.

When, for instance, the safeguards provided for under the principle of legal privilege provide for more protection under national law than under EU law,⁵⁷ persons in that Member State can benefit from the protection provided under their national laws.

If the relevant NCA gathers information and in doing so fails, in the opinion of the person involved, to fulfil the national requirements with respect to the principle of legal privilege, the person involved can refuse to cooperate with the NCA or request protection under these rights, and consequently enforce a formal decision from the NCA or a decision rejecting such a request. In the preferred approach, such a formal decision is separately subject to review according to the Court's interpretation of the standards under Article 263 TFEU. In the preferred scenario, this review is to be carried out by the national court in accordance with their national legal framework and thus the protection provided for under national law in such a case.

When NCA preparatory measures are not separately subject to judicial review according to the Court's interpretation of Article 263 TFEU, the Court will, in the preferred scenario, review such measures against the EU standards.⁵⁸ The measures that the Court will review include the use of powers insofar as they have not been challenged before a national court, and NCA draft decisions. In case of on-site inspections, the NCA staff are allotted the necessary powers on the basis of the SSM Regulation, which logically is included by the Court in its review of the ECB final decision.⁵⁹

The analysis in Chapter 4 shows that, even when more protective national legal safeguards are allowed, it still is questionable whether the Court would review NCA preparatory measures that are part of bottom-up procedures on the basis of such national legal safeguards. The Court does not per se exclude the possibility of having different sets of administrative standards for EU and

⁵⁷ This problem was at issue in the Akzo case, as discussed in Chapter 4, Section 4.2.

⁵⁸ Note that, if there were any national preparatory measures binding upon the ECB, which is not the case, they would, in line with the Borelli case, have to be reviewed by national courts instead of the EU Courts (Chapter 3, Section 5.1).

⁵⁹ Cf. Chapter 5, Section 2 and 4.1.

national authorities. After all, in the field of competition law, it has ruled that having different administrative standards for respectively the Commission and national competition authorities is not in breach of the principle of legal certainty. It is nonetheless questionable whether the Court would allow this when EU and national authorities both carry out preparatory measures in respect of one and the same EU decision-making procedure, such as is the case in the SSM. Whereas legal certainty may be easier to guarantee in case of common procedures due to the well-defined steps of the decision-making procedures, it seems harder in case of more informal and closer cooperation as in the Joint Supervisory Teams. In these cases, it is doubtful whether persons involved can determine which rights and obligations they have vis-à-vis the ECB and NCAs, respectively. More importantly, even if this would not harm the legal certainty of the persons involved, it indirectly implies that the ECB final decision is reviewed on the basis of national administrative standards. This seems to conflict with the autonomy of Union law, and may harm its unity and effectiveness.⁶⁰ Therefore the analysis arrives at the conclusion that the Court will probably not apply national legal safeguards in cases like these.

The above conclusion also seems necessary to arrive at when considering the implications for the actual review. Although the powers used by NCA staff to carry out preparatory measures are based on national law, it will in my opinion become too complicated to still ensure effective legal protection if the Court is to review these preparatory measures on the basis of the respective national administrative standards applying to that particular case. The national preparatory measures that may be subject to the Court's review may be difficult to disentangle from ECB preparatory measures. While preparatory measures may be easier to disentangle in, for instance, common procedures with their well-defined procedural steps, this seems more difficult in ongoing supervision given the close cooperation in Joint Supervisory Teams. In addition to the general challenge for the Court to interpret and apply national administrative standards, the problem thus lies in disentangling the various preparatory measures.

In the same vein, it is debatable whether the ECB at all has the possibility to guarantee respect of all different national administrative standards in case of such informal ways of cooperation. The fact that there are nineteen different national laws involved will not help the effectiveness in this respect.

A disadvantage of this approach is that NCAs have to apply different sets of administrative standards depending on the tasks they carry out. In practice, however, this seems to be manageable. The problem seems most relevant in case of authorization procedures (one of the common procedures), since an NCA does not know beforehand whether it will approve the application and send an NCA draft decision to the ECB proposing to grant the authorization, or whether it

⁶⁰ Cf. Chapter 4, Section 4.2.

will immediately reject the request by means of an NCA decision.⁶¹ Although an NCA may in such cases need to apply respectively EU or national administrative standards, Chapter 4 shows that the main aspects of a good administration in this respect may not cause many issues. The issues will mainly revolve around the right to be heard, the right of access to files, the obligation to provide reasons for the decision and due care. The rights which are often more challenging to respect, such as the principle of legal privilege or the right not to incriminate oneself, are not relevant in this context.⁶²

The risk that this disadvantage poses also seems to be limited in case of ongoing supervision, since the preparatory measures in respect of SI supervision will in practice probably be carried out by other divisions within national authorities than the ones dealing with LSI supervision.

Although the differences will probably be relatively small considering the limited possibilities to have additional national legal safeguards to begin with, NCAs still will need to know about these differences and apply the right set of administrative standards to the specific situations.

These issues with respect to disentangling where information originates from and the administrative standards belonging to them result in my opinion in a situation that requires one set of administrative standards, being the Union ones, since otherwise the effectiveness of both the supervisors and the Court will be hampered significantly and the effectiveness of the legal protection will be at stake from an instrumental point of view. As discussed in this section, the risk of reduced judicial protection seems rather limited in the preferred scenario, which makes it acceptable from both a safeguard and an instrumental perspective of effective legal protection to have EU administrative standards as the lower and upper limit of protection for the national preparatory measures that are to be included by the Court in their review of the ECB final decision.

4.3 The implementation of administrative standards

Respect of the administrative standards is, in principle, to be ensured by the authority adopting the final decision. This means that, essentially, the ECB is responsible for ensuring a good administration in case of common procedures and other bottom-up composite procedures.⁶³ In the preferred approach set out in Sections 4.1 and 4.2, the ECB does not have to consider additional national administrative standards with respect to legal safeguards, although in certain cases it may have to apply additional national procedural rules. In all cases, it is for the ECB to ascertain that it respects or the involved NCAs respect the EU administrative standards.

⁶¹ Cf. Chapter 4, Section 2.

⁶² Cf. Chapter 4, Section 4 (footnote 92).

⁶³ Cf. Chapter 4, Section 4.1; Chapter 5, Section 4.2; and Chapter 7, Section 3.2.

This comprehensive starting point seems to be the most secure way to guarantee effective legal protection from a safeguard perspective. Indeed, only one authority is responsible for the entire preparatory and decision-making procedure, and the court reviewing the final decision can easily review its actions. This emphasis on good administration, by allocating full responsibility to the final decision-making body, may well be desirable in the context of prudential banking supervision due to the technical area of law and the possible deference applied by courts when reviewing final decisions in this context.⁶⁴

On the down side of the coin, this solution places a heavy burden on the final decision-making authority and thus increases the risk of hampering an efficient implementation of Union law. This is particularly relevant in case of bottom-up procedures, in which the ECB is the final decision-making authority, for it may infer that the ECB has to constantly verify the NCAs' work, or ascertain the work has been done correctly by carrying out itself certain steps of ensuring a good administration afterwards, or accept the risk that NCAs may have made mistakes in the preparatory phase.

Another drawback of allocating full responsibility for ensuring a good administration to the final decision-making body in all cases, is the risk of misalignment between the formal and the actual decision-making process. Following the assessment framework, it is desirable to provide legal protection at the level at which the decision is actually taken in practice, so to provide protection at the level at which the facts are established, the interests are weighed, and discretion is used. When full responsibility for a due process is automatically assigned to the final decision-making body, this will not necessarily match.⁶⁵

The Court may have found a good compromise in the obligation to provide reasons. In short, in cases revolving around this issue, the Court holds the EU authorities responsible for meeting the obligation to state reasons, but also allows them to justify their decisions by referring with sufficient clarity to national preparatory measures containing the explanation.⁶⁶ This provides the ECB with sufficient leeway to meet the principle of good administration, while still ensuring legal safeguards by imputing the final responsibility to the ECB.

However, the Court's willingness to provide flexibility in satisfying the right to be heard still seems difficult to predict.⁶⁷ The ECB's possibilities to rely on the NCAs may be easier to apply to some safeguards than to others. It can, for example, be relatively easily verified whether the NCA has ensured the right to be heard and the ECB can repair any irregularities by hearing a person itself. As the final decision-making body, the ECB furthermore has to carefully weigh all

⁶⁴ Cf. Chapter 4, Section 3.2.

⁶⁵ Cf. Chapter 3, Section 4.3.2.

⁶⁶ Cf. Chapter 4, Section 4.1.

⁶⁷ Cf. Chapter 4, Section 4.1.

the interests at stake. The NCAs may assist in preparing the ECB's considerations, but it is up to the ECB to actually weigh these interests and adopt the final decision in accordance with the balance it strikes.

Ensuring a good administration may be more difficult with respect to the right not to incriminate oneself. The analysis in Chapter 7 illustrates that this may require a detailed examination of what exactly has happened at the national level to verify whether the NCA involved has respected this right.⁶⁸ Whether such an examination is required depends on the specific situation at hand and on which scenario is applicable to determine when judicial review is available, as discussed in Section 4.1 of this chapter. If the credit institution involved refuses to answer certain questions and invokes its right not to incriminate itself and the relevant NCA refuses to grant that protection, this would in the preferred scenario be separately subject to judicial review by a national court and so reduce the ECB's role. However, if there is no separate judicial review when this right has possibly been infringed and the NCA continues its investigation, the ECB may have to take up a larger role in ensuring the safeguards connected to this right, which may require a more detailed examination of what has happened at the national level. This illustrates that, in certain cases, fully ensuring the legal safeguards provided by the administrative standards may hamper the ECB's effectiveness and thus an effective implementation of Union law. On the other hand, enabling the ECB to be as efficient as possible in these cases will certainly harm the effectiveness of legal protection from a safeguard perspective.

In my view, a middle ground is to be found for the various administrative standards that must be respected, similar to the Court's approach with respect to the obligation to state reasons. To ensure the administrative standards are respected, the ECB has to be able to rely on the NCAs, whenever possible without harming the legal safeguards at stake. When relying on NCAs does harm the safeguards at stake, the ECB has to fulfil its final responsibility and ensure respect of the administrative standards itself, despite the fact that this may reduce the ECB's efficiency in carrying out its tasks.

4.4 Judicial review by the EU Courts

The previous sections have clearly brought to the fore that the effectiveness of legal protection is predominantly challenged by issues with respect to ensuring legal protection for the administrative procedure's national part. These challenges also arise in the judicial review by the EU Courts. Due to the shared administration, the EU Courts may be facing questions of fact and of law relating to the national level when reviewing an ECB final decision based on a bottom-up procedure. This section discusses the various situations in which

⁶⁸ Cf. Chapter 7, Section 3.2.

the EU Courts have to review national aspects and proposes possible ways for the EU Courts to approach such situations.

The questions of fact concern factual information gathered and established by NCAs and used by the ECB to base its final decision on, and the questions of law concern both national substantive laws and administrative standards. National substantive laws are still relevant, since the ECB has to apply all relevant Union law, including national laws transposing such Union laws. The ECB final decision may thus be, partly, based on national substantive laws. The administrative standards pertain to additional national legal safeguards, although Section 4.2 of this chapter shows that this seems less likely, and additional national procedural rules specifically related to a national rule or power governing the matter insofar as the EU rules do not.

Chapter 4 explains that the Court's approach for considering national measures or laws, as reflected in its existing case law, may be too limited in order to ensure effective legal protection in the case of bottom-up composite procedures. The role of the NCAs is bigger than the Member States' role in the cases discussed, and the approach with respect to national laws may not be adequate in all situations.⁶⁹ Moreover, the approach the Court has taken in its case law so far would result in a different judicial review of the national measures or national laws involved compared to the EU measures and laws involved. The EU Courts would thus apply another degree of judicial review to national measures that are part of an EU decision-making procedure than the judicial review it considers necessary to ensure effective judicial protection in case of EU measures. Therefore Chapter 4 looks into exactly what kind of issues may arise in the judicial review regarding questions of fact and of law related to the national level. Below the findings are summarized and followed by suggestions to overcome these problems within the current legal framework.

The questions of fact relating to the national level seem to give rise to little issues. First of all, it is for the ECB to decide whether or not to use facts that are gathered and established by NCAs to support its final decision. Accordingly, the ECB becomes responsible for these facts and whether the decision may be based on them. Moreover, the role of the parties to a judicial proceeding is usually bigger when it concerns questions of fact than questions of law. Accordingly, the EU Courts play a smaller part when it comes to questions of fact and relies more heavily on the input from the parties; it could even request NCAs to supply all information it considers necessary for the proceedings.⁷⁰ The EU Courts could involve the NCAs in other ways too, as discussed towards the end of this section.

⁶⁹ Cf. Chapter 4, Section 3.2.

⁷⁰ Article 53 in conjunction with Article 24 Statute of the CJEU. Cf. Chapter 4, Section 3.2.

In addition, the EU Courts will presumably carry out a limited review with respect to the appraisal of the facts when reviewing ECB final decisions, due to the specialized area of law and the discretions granted to the ECB. The establishment of the facts will however be reviewed more strictly, although it seems irrelevant to this review whether the facts are gathered and established by an NCA or the ECB. The EU Courts will review whether the evidence relied on is factually accurate, reliable and consistent, whether it contains all information to be considered to assess a complex situation, and whether it is capable of substantiating the conclusions drawn from it. The EU Courts may make this assessment regardless of the level at which the evidence is gathered and established and of the national background.⁷¹

The limited review of the appraisal of the facts is to a certain extent compensated by a strict procedural review. It seems possible for the EU Courts to strictly review the national part of the procedure when it concerns rather straightforward rights of defence, such as the right to be heard, since the EU Courts will probably be able to verify whether this right has been respected at the national level. However, this may be more challenging when it concerns the right not to incriminate oneself, since this may require a very detailed assessment of what exactly has happened at the national level, as shown in Chapter 7.⁷²

A strict procedural review of the national preparatory measure will clearly be more challenging for the EU Courts if additional national legal safeguards are declared applicable to these measures. After all, the EU Courts would then be required to interpret and apply the national legal safeguards at issue, possibly resulting in similar challenges as discussed below with respect to questions of law.

Besides the questions of fact, Chapter 4 also discusses the Court's review of questions of law as regards national laws,⁷³ which may be the most challenging part of the review. The legal basis for the EU Courts to review EU decisions at first instance and in appeal may be a first hurdle. The provisions laying down that legal basis will need to be broadly interpreted in order to ensure that the judicial review of questions of national law is similar to the review of questions of Union law. A second hurdle is the fact that the EU Courts are not necessarily familiar with the national laws at issue, their interpretations and national legal contexts.

In the recent cases in which the Court has reviewed an ECB decision partly based on national law, the Court refers to the interpretation given by national courts to interpret the national laws in question. This approach is used in cases in which the national law at issue is considered to be a question of fact, which means that the national law is needed to prove a certain position or to establish a

⁷¹ Cf. Chapter 4, Section 3.2.

⁷² Cf. Chapter 7, Section 3.2.

⁷³ Cf. Chapter 4, Section 3.2.

fact. It is, however, doubtful whether this is a satisfying approach if the national law is considered to be a question of law, since this requires that the national rule at issue is actually interpreted and applied. Furthermore, the interpretations given by national courts may not suffice to answer the question of national law at stake, thus making it uncertain how the EU Courts can ensure effective judicial protection in this respect.

The EU Courts will thus be facing situations which require a more in-depth and up-to-date knowledge about the national substantive laws, national procedural rules and, possibly, national administrative standards at issue. Below the section looks into the possibilities that the EU Courts currently have to improve this knowledge and acquire the information needed to carry out the necessary judicial review. Section 6 of this chapter elaborates the idea of a reversed preliminary ruling procedure.

The EU Courts currently already use experts on national law to carry out comparative law studies. The national law experts are staff members of the Research and Documentation Directorate and are, *inter alia*, responsible for drafting research notes at the request of the EU Courts about approaches taken in the national legal systems to resolve a legal issue.⁷⁴ The tasks of national law experts could be broadened when specific input is required with respect to national law at issue.⁷⁵ The obvious advantage is that an already existing source is used, which does not require any legislative amendment. One must bear in mind nonetheless that the national law experts are CJEU employees and not formal representatives of national courts, making it debatable to what extent the national legal system and the unity of the national law are respected in this way.

A second possibility is for the CJEU to deepen the collaboration between EU and national courts by way of the already existing networks. Firstly, the informal network of Councils of State and Supreme Administrative Jurisdictions of the Union⁷⁶ is an association composed of the CJEU and the Councils of State or the Supreme Administrative Jurisdictions of each of the Member States. Currently, their mission is focused on a better understanding of EU law and each other's systems.⁷⁷ This focus could be broadened to also provide the EU Courts with a better understanding of national administrative laws.

⁷⁴ See: https://curia.europa.eu/jcms/jcms_02_11968/en/ (last visit on 26 August 2020).

⁷⁵ See also: Prek & Lefèvre 2017, p. 395; Gagliardi & Wissink 2020, p. 65.

⁷⁶ The Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, see: <http://www.aca-europe.eu/index.php/en/> (last visit on 15 September 2020). Cf. Ortlep & Widdershoven 2015, p. 365; Gagliardi & Wissink 2020, p. 65.

⁷⁷ Their current mission is: [...] to obtain a better understanding of EU law by the judges of the Supreme Administrative Courts across Europe and a better knowledge of the functioning of the other Supreme Administrative Courts in the implementation of EU law; to improve the mutual trust between judges of

Another network the CJEU has recently established is the Judicial Network of the European Union (JNEU), consisting of the constitutional and supreme courts of the Member States and the CJEU.⁷⁸ In its annual report, the CJEU indicates that this network, together with the collaborative platform between its members, provides a good basis for collaboration and allows its members, *inter alia*, to develop their cooperation, to facilitate monitoring activities and to pool work of common interest (e.g. legal research).⁷⁹ This cooperation network could also be used in light of the current context.

Again, the advantage of deepening the collaboration in this way is that the networks are already in place and their informal character would not require an amendment of the legislative framework. At the same time, the informal character is also its disadvantage, since it will only allow for an exchange of general views, and presumably no confidential information about pending cases may be shared to acquire specific information about the legal question regarding the national law or national acts at issue. The informal nature may also cause a lack of transparency,⁸⁰ because no formal requirements are applicable and parties to a case may not gain full insight in the way in which the EU Courts form their opinion in a judicial procedure with the aid of such networks. This last disadvantage is partly addressed by the creation of a secure exchange platform for member courts of the JNEU, and the subsequent choice to share all non-confidential documents with the general public by opening an area dedicated to this network on Curia, the CJEU's general website.⁸¹

As a third possibility, the EU Courts could try to optimize the national input by way of the existing procedure before the EU Courts. There are particular provisions in both the Statute and the Rules of Procedure of the CJEU that, at the very minimum, give the Court some tools to gain information about the national part of the procedure.

the Supreme Administrative Courts; to foster an effectively and efficiently functioning of administrative justice in the EU; to provide exchange of ideas on the rule of law in the administrative judicial systems and, finally, to ensure access to the decisions of the Supreme Administrative Courts implementing EU law' (see: <http://www.aca-europe.eu/index.php/en/>; last visit on 15 September 2020).

⁷⁸ This network has been established on 27 March 2017 to celebrate the 60th anniversary of the signing of the Treaties. See: https://curia.europa.eu/jcms/jcms/pi_2170157/en/ (last visit on 15 September 2020).

⁷⁹ Annual Report CJEU 2018, p. 58.

⁸⁰ See also Rapport Commissie rechtseenheid bestuursrecht 2016 (in Dutch), p. 17, a report on a comparable consideration of interests with respect to the question in which way the judicial power is to be organized in order to ensure unity within administrative law and with other fields of law, in the Netherlands. The report points at the importance to have various tools for collaboration, given the different types of questions that may be relevant in order to maintain that unity. More general questions could be discussed in a general, informal network, while e.g. case-related questions require more transparency (pp. 16-17).

⁸¹ See: https://curia.europa.eu/jcms/jcms/pi_2170157/en/ (last visit on 15 September 2020).

Article 20 of the Statute of the CJEU lays down that the written procedure concerns the parties and the Union institutions whose decisions are in dispute, and that in the oral procedure, agents, advisers and lawyers, and the Advocate General's submissions can be heard by the Court of Justice, as well as witnesses and experts.⁸² Article 24 of the Statute of the CJEU states that the Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable.⁸³ This way, the Court may already gain useful information about the relevant national laws and the national legal context. Furthermore, the Court may require the Member States and institutions, bodies, offices and agencies not being party to the case to supply all information it considers necessary for the proceedings.⁸⁴ This provision could be interesting, since one could reason that the enumeration also includes national courts, although it would admittedly require a broad interpretation.⁸⁵ However, if this interpretation holds ground, the Court would be able to request information about the relevant national substantive laws and administrative standards.⁸⁶ Lastly, the Court may entrust any individual, body, authority, committee or other organization it chooses with the task of giving an expert opinion.⁸⁷

Additionally, the Rules of Procedure of the Court of Justice provide the Court in Article 61 with the possibility to invite parties or the interested persons referred to in Article 23 of the Statute of the CJEU⁸⁸ to answer certain questions in writing or at the hearing.⁸⁹ Although the current wording of this provision does not

⁸² The written procedure consists of the communication to the parties and the relevant EU institution, of applications, statements of case, defences and observations, replies, if any, as well as all supporting papers and documents (Article 20 Statute of the CJEU). This possibility is also available to the General Court (Article 53 in conjunction with Article 20 Statute of the CJEU).

⁸³ A possibility which is also available to the General Court (Article 53 in conjunction with Article 24 Statute of the CJEU).

⁸⁴ Article 24, second subparagraph, Statute of the CJEU. This possibility too is available to the General Court as well (Article 53 in conjunction with Article 24, second subparagraph, Statute of the CJEU).

⁸⁵ This idea has been proposed by Gagliardi and is further discussed in Gagliardi & Wissink 2020 (pp. 66-67).

⁸⁶ The persons would be obliged to comply with such a request under the general duty of sincere cooperation as laid down in Article 4(3) TEU (Barents 2020, p. 1229, para. 17.47).

⁸⁷ Article 25 Statute of the CJEU. Cf. Article 70 Rules of Procedure CJ. This possibility is also available to the General Court (Article 53 in conjunction with Article 25 Statute of the CJEU; Article 97 Rules of Procedure GC).

⁸⁸ Article 23 Statute of the CJEU concerns the preliminary ruling procedure. The interested persons referred to in this article are the Member States, the Commission, and the EU institution, body, office or agency that adopted the act at issue.

⁸⁹ A similar possibility is laid down in the Rules of Procedure GC, although this possibility is more specific (cf. Article 89 Rules of Procedure GC). Such a measure may also be prescribed by the Judge-Rapporteur or the Advocate General (Article 62 Rules of Procedure CJ; Article 90 Rules of Procedure GC).

seem to leave room for national courts to be invited to answer questions, the scope of this provision could perhaps be broadened to include those courts too.⁹⁰

The Rules of Procedure also enable the Court in Article 64 to request information as a measure of inquiry in order to establish the facts to be proven.⁹¹ This provision has as an advantage that it does not specify, in so far as it concerns the Court's possibility thereto, to which persons such a request may be addressed,⁹² and thus, in theory, this may include national courts too. However, the current purpose for using a measure of inquiry is limited to establishing the facts to be proven;⁹³ it would be useful to broaden the provision's scope so as to include requests to clarify the relevant national law and national legal context as well.

The General Court may furthermore need tools to answer the questions of fact related to the national preparatory measures. It would be helpful in this respect if the General Court could ask the NCA directly for more information about its preparatory measures. In the current situation, the relevant NCA is not automatically part of the judicial proceedings before the Court. In order to ensure that the NCA can provide its views as well, the ECB could include the NCA's input in its written statements, observations, papers and documents in support of the case, so the input becomes part of the written procedure. Another tool may be the possibility of an information request addressed to NCAs, so the General Court can request the information it needs in order to assess the questions of fact.⁹⁴

Should the NCA want to intervene independently, it has to establish an interest in the result of a case submitted to the Court.⁹⁵ The rights in case of such an intervention are, however, limited and the intervention itself will have be

⁹⁰ Amending the Rules of Procedure is relatively easy. The Court of Justice and General Court adopt their own Rules of Procedure, and any amendments thereto, subject to the approval of the Council (Article 253, sixth subparagraph, TFEU) and, in case of the General Court, in agreement with the Court of Justice (Article 254, fifth subparagraph, TFEU). Barents points out that in practice the adoption of amendments to the Rules of Procedure is a matter of consensus between the (lower bodies of the) Council, the Court of Justice or General Court and the Commission (Barents 2020, p. 47, para. 1.34).

⁹¹ This is also available to the General Court; see: Article 91 Rules of Procedure GC.

⁹² Barents 2020, p. 1217, para. 17.16. In the Rules of Procedure GC, this is limited to the parties (Article 91(b) Rules of Procedure GC; Barents 2020, p. 1217, para. 17.16). If this would be considered a useful tool to also gain information about national law from national courts, the Rules of Procedure GC would have to be amended in line with the Rules of Procedures CJ at this point.

⁹³ Cf. Barents 2020, p. 1217, para. 17.17.

⁹⁴ Article 53 in conjunction with Article 24 Statute of the CJEU.

⁹⁵ Article 40, second subparagraph, Statute of the CJEU. Note that natural and legal persons shall not intervene in cases between Member States, between EU institutions or between Member States and EU institutions (Article 40, second subparagraph, Statute of the CJEU). Any person whose application to intervene has been dismissed by the General Court may appeal to the Court of Justice pursuant to Article 57 Statute of the CJEU.

limited to supporting, in whole or in part, the form of order sought by one of the parties.⁹⁶ It would nevertheless provide for the possibility to bring forward the NCA's own pleas in law and arguments, and any evidence produced or offered.⁹⁷

More in general, it could be argued that Member States, and their representatives such as NCAs, must assist the Court, when necessary, on the basis of the general duty of sincere cooperation following from Article 4(3) TEU. Should the Court find it useful to have the NCA participate in the procedure so as to provide additional information about the questions of fact, the status of the national law in question and the national legal context, it could be argued that the relevant NCA may be obliged to participate in EU judicial proceedings in order to ensure the effectiveness of the relevant Union law.

The downside of the above-mentioned possibilities is that they need Article 24 of the Statute of the CJEU to be interpreted rather broadly or the Rules of Procedure for the EU Courts to be amended in order to gain the possibility to obtain information from the highest relevant national court in a specific case. Information from the highest relevant national court may, however, be relevant to an objective explanation of the national law in question. After all, both competent authorities and credit institutions may have an interest in a specific interpretation of such national law and they may have different opinions about how to interpret it, which makes the possibility to have a national court give an objective interpretation all the more important. Moreover, both the possibility offered by the Statute and the use of informal networks do not guarantee that the parties involved are able to provide their views on the interpretation of the national law at issue. This seems particularly relevant since the national court involved in these cases is not necessarily the highest relevant national court. These disadvantages are not applicable to the reversed preliminary ruling procedure proposed in Section 6.

5 The effectiveness of legal protection in case of top-down procedures

This section discusses the legal protection in place for decisions based on top-down procedures, thus ending in an NCA final decision and partly based on ECB preparatory measures, and the legal protection's effectiveness. The top-down procedures in the supervisory phase, relating to ongoing supervision, and in the investigatory phase, possibly ending in sanctions of a criminal nature, are both taken into account.

As ensues from the discussion in Chapter 7, the additional legal safeguards applicable in case of investigations and decisions imposing sanctions of a

⁹⁶ Article 129 Rules of Procedure CJ; Article 142 Rules of Procedure GC.

⁹⁷ Article 132 Rules of Procedure CJ; Article 145 Rules of Procedure GC.

criminal nature may pose some extra challenges to the legal protection, but the issues that arise are not significantly different. Although the top-down procedure related to sanctions, i.e. the procedure provided for in Article 18(5) of the SSM Regulation, is different from the ongoing supervisory top-down procedures, the analysis of whether the ECB's preparatory measures are separately subject to judicial review concerns similar questions. Also, the challenges related to the implementation and application of administrative standards do not differ that much from those discussed in the context of the supervisory phase. However, the implementation and application of administrative standards may be more challenging in the investigatory phase with respect to the right not to incriminate oneself, since ensuring this right may ask for a rather in-depth factual analysis of what has happened in certain cases, but this still does not require a separate discussion.

The following sections therefore discuss the various top-down procedures together, while keeping in mind the characteristics of each procedure, in order to gain an overall view of the effectiveness of legal protection in case of top-down procedures.

Top-down procedures may result in an NCA decision vis-à-vis an SI by which the NCA uses its powers under national law following an ECB instruction; an NCA decision in ongoing supervision vis-à-vis LSIs which may relate to granting or denying approvals, imposing supervisory measures, or imposing sanctions not of a criminal nature and sanctions of a criminal nature; and, lastly, an NCA decision imposing sanctions of a criminal nature on an SI at the ECB's request.⁹⁸

The ECB's preparatory measures in respect of top-down procedures may consist of binding regulations, guidelines or general instructions to NCAs, which have to be complied with by NCAs when adopting decisions, as well as non-binding general instruments such as guides and recommendations. Preparatory measures from the ECB in top-down procedures may furthermore include requests to further investigate a material supervisory procedure or an expression of its view on material supervisory draft decisions. The ECB may also use its powers laid down in Articles 10-13 of the SSM Regulation to provide its expertise and support to NCAs, which preparatory measures may be followed by an NCA decision. With respect to NCA decisions vis-à-vis SIs, the ECB's preparatory measure may consist of an instruction pursuant to Article 9(1) of the SSM Regulation or a request to open proceedings pursuant to Article 18(5) of the SSM Regulation.⁹⁹

⁹⁸ Cf. Chapter 6, Section 2, and Chapter 7, Section 2.

⁹⁹ Cf. Chapter 6, Section 2, and Chapter 7, Section 2.

5.1 The competent court

In principle, the national court is competent to review the NCA final decision based on a top-down composite procedure. A national court is, however, not allowed to declare an EU measure invalid¹⁰⁰ and, consequently, it cannot fully review the ECB's preparatory measures in these procedures.

In the *TWD* case, the Court has ruled that persons involved have to bring a case against an EU measure that is part of a composite procedure directly before the Court if they are fully aware of the Union act and if they may without any doubt challenge the act before the Court. Thus, when an action on the basis of Article 263 TFEU is available, the persons involved have to challenge the act in line with that article and the time limits mentioned there, so the time limits cannot be avoided by way of a national judicial proceeding and legal certainty is upheld.¹⁰¹ This may, for instance, occur when the ECB adopts a formal decision ordering the use of its powers laid down in Articles 10-13 of the SSM Regulation vis-à-vis a specific LSI, in particular, if otherwise no sufficient protection is provided or if rights of defence would be irreremediably impaired.¹⁰²

If an ECB preparatory measure is not separately subject to judicial review or not communicated to the person concerned, i.e. if the criteria determined in the *TWD* case are not met, a person may challenge the NCA final decision in a national judicial procedure in accordance with the relevant national laws. If necessary, the national court may ask for a preliminary ruling on the validity of the EU preparatory measure at issue.¹⁰³ This will probably apply to most of the ECB preparatory measures in top-down procedures within the SSM, such as the implementation of a decision ordering the use of its powers laid down in Articles 10-13 of the SSM Regulation, an instruction to the NCA on the basis of Article 9(1) of the SSM Regulation, a request to the NCA on the basis of Article 18(5) of the SSM Regulation, or an ECB's view or request in case of material supervisory investigations and decisions.¹⁰⁴

The *TWD* criteria are supposed to serve the effectiveness of legal protection by prioritizing legal certainty.¹⁰⁵ However, in the context of the SSM none of the ECB's preparatory measures that are part of a top-down procedure meet these criteria without any questions attached. First of all, it is often uncertain whether an action on the basis of Article 263 TFEU is available, and it is thus not 'without any doubt' that an action can be brought before the Court. It is furthermore not publicly known whether or not the ECB preparatory measure is

¹⁰⁰ Cf. Chapter 3, Section 5.5.

¹⁰¹ Cf. Chapter 3, Section 5.1.

¹⁰² Cf. Chapter 6, Section 3.3.

¹⁰³ Cf. Chapter 6 Section 3.1.

¹⁰⁴ Cf. Chapter 6, Sections 3.3-3.5, and Chapter 7, Section 4.1.

¹⁰⁵ Cf. Chapter 3, Section 4.4.

communicated to the credit institution concerned. This may result in a solution in which the parties involved start judicial proceedings before both the EU and national courts in order to avoid being left empty-handed.

Whereas the TWD criteria are supposed to serve legal certainty and, thus, the effectiveness of legal protection from an instrumental perspective, the complex reality may render them less useful in practice and turn them into a less efficient ‘tool’ for ensuring effective legal protection in this particular context. This will nonetheless be solved, at least partly, over time with more cases being brought before the Court. Moreover, the logic underlying the criteria is in my opinion still relevant and should not simply be put aside, although the effectiveness of legal protection might, for instance, have benefitted from a clearer indication in the applicable rules whether or not the relevant ECB preparatory measures are subject to the Court’s review under Article 263 TFEU.

In case of top-down procedures, gaps in judicial protection are basically avoided by the preliminary ruling procedure in place. The preliminary ruling procedure is not ideal, but provides the Court at least with the possibility to review the EU part of the procedure. This way, judicial protection is provided at the right level, which is favorable from an instrumental point of view, and gaps in judicial protection can be avoided.

It is however not a given fact that the relevant national court refers its question about the validity of the ECB preparatory measure to the Court of Justice for a preliminary ruling.¹⁰⁶ If national courts do *not* file a request for a preliminary ruling with the Court, the legal safeguards provided by the preliminary ruling procedure might turn into mere theoretical ones, which is obviously not supporting the effectiveness of legal protection. If national courts *do* file a preliminary ruling request, the judicial proceedings may as a result take more time due to the additional step in the national procedure, which is not very attractive from an instrumental point of view.

This discussion illustrates how difficult it may be to strike a balance between the safeguard and instrumental perspectives of having in place effective legal protection. Indeed, ensuring that the entire decision-making procedure is governed by judicial review may require ways of judicial review which are not necessarily effective, but augmenting the effectiveness of the legal protection’s system may result in gaps or a more limited judicial review.

5.2 Applicable administrative standards

Another element to be considered is what administrative standards apply to the ECB and NCAs in case of top-down procedures. The basic principle is again that the ECB will be subject to EU administrative standards and NCAs to their respective national administrative standards, whereby EU administrative standards are also the minimum for NCAs.

¹⁰⁶ See e.g.: Luchtman & Wasmeier 2017, p. 238; Prechal & Widdershoven 2020, p. 90.

In case of top-down procedures, the main issue boils down to what consequences it may have if information gathered and established by the ECB or any views, requests or instructions from the ECB to NCAs are based on legal safeguards that provide for less protection than any additional national legal safeguards, if these are allowed. This question needs answering as regards the ECB's powers to issue binding regulations, guidelines and general instructions to NCAs with respect to their LSI supervision, ECB decisions ordering the use of its powers laid down in Articles 10-13 of the SSM Regulation vis-à-vis an LSI, the ECB's views with respect to material supervisory decisions, ECB instructions on the basis of Article 9(1) of the SSM Regulation, and ECB requests on the basis of Article 18(5) of the SSM Regulation.

Usually, any validity question regarding the ECB preparatory measures will need to be asked by the relevant national court by way of a preliminary ruling procedure. As analysed, when reviewing ECB measures the Court will probably only apply EU administrative standards.¹⁰⁷ There is no reason to expect the Court to deviate from the *Akzo* judgment and apply national legal safeguards providing more protection to the ECB's actions as well.¹⁰⁸ The validity of these ECB preparatory measures can be, directly or indirectly, reviewed by the Court itself. The legal framework does not contain any link to national law that justifies the application of national legal safeguards. Where national law is explicitly mentioned in the relevant legal framework, the obligation to ensure compliance with it is even specifically allocated to the NCAs involved.¹⁰⁹ Should additional legal safeguards be applied, the primacy, unity and effectiveness of EU law may be harmed, which is undesirable for the effectiveness of legal protection from an instrumental point of view. Given these considerations, it would in my opinion be inconsistent and therefore undesirable from an instrumental perspective to review ECB preparatory acts against national standards.

The main question ensuing from the previous one is what consequences it may have when the relevant national laws provide for more protection than the EU administrative standards and the ECB does not comply with the additional national protection in its preparatory measures. The question whether or not an NCA may use such information, or evidence, to base its decision on has to be answered on the basis of national law, subject to the principle of equivalence and effectiveness, and the *Melloni* requirement that the application of more protective national legal safeguards may not compromise the primacy, unity and effectiveness of Union law.

¹⁰⁷ Cf. Chapter 4, Section 4.2, and Chapter 6, Section 4.1.

¹⁰⁸ Cf. Chapter 4, Section 4.2.

¹⁰⁹ Cf. in Articles 9(1) and 18(5) SSM Regulation.

As discussed in Chapter 6, one could reason that the principle of equivalence requires that ECB evidence is admissible in national judicial proceedings in a similar way as NCA evidence is. A general exclusion of ECB evidence that does not meet any more protective national legal safeguards seems to conflict with the *Melloni* requirements, since that would subject the ECB acts to standards that differ for each Member State and accordingly compromise the unity and effectiveness of Union law. A national court could still review such ECB evidence on the basis of its national evidential laws, provided that the principles of equivalence and effectiveness are met, to determine whether it suffices to support the NCA final decision.

This way judicial protection can still be provided, and relatively quickly so, at the national level, but the answer to the question whether or not the ECB's information is accepted as evidence for the NCA final decision may be different in each Member State. Any questions national courts may have regarding the applicability of more protective national legal safeguards can be submitted to the Court of Justice by way of a preliminary ruling procedure.

5.3 The implementation of administrative standards

Similar to the ECB's final responsibility for ensuring respect of the applicable administrative standards in bottom-up procedures, NCAs will in principle have to ensure respect of these standards in case of top-down procedures. However, a different situation applies to ECB preparatory measures that are separately subject to judicial review, in which case the ECB is the responsible authority. The latter situation may cause uncertainties, since it is not always clear whether or not the ECB preparatory measure creates legal effect vis-à-vis a credit institution, as discussed in Section 5.2.

When the NCA is responsible for respect of the administrative standards, it is for the national courts to review this and decide upon the flexibility they may allow the NCA to meet these requirements, for instance, whether an NCA has to carry out the right to be heard itself, or if it may satisfy itself that the ECB has done so.

Furthermore, Chapter 6 shows that particularly the right of access to files may be challenging in top-down procedures insofar as it concerns access to an ECB document that is not included in the NCA's file. An NCA may not have the formal tools to request a document from the ECB, not even if requested by a national court, which would require the persons involved to address their request for access to an ECB document directly to the ECB.

A more efficient solution would be to allow national courts to obtain information and documents directly from the ECB under the duty of sincere cooperation as laid down in Article 4(3) TFEU, similar to the approach chosen by the Court in the *Eurobold* case in the context of the preliminary ruling procedure.

Although the *Eurobolt* case has created an opening for this approach, it still is uncertain whether the Court would allow national courts to involve EU institutions in other kinds of national judicial proceedings as well. It seems nonetheless a welcome tool in order to ensure the effectiveness of legal protection in case of top-down procedures.

5.4 Judicial review by the national courts

National courts may face different kinds of ECB preparatory measures when reviewing a final NCA decision based on a top-down procedure. Only measures that are without any doubt subject to the EU Courts' review and communicated to the persons involved, have to be challenged directly before the EU Courts and will thus not be reviewed by the national courts. All other ECB preparatory measures have to be challenged indirectly by way of a national judicial procedure.

Due to the preliminary ruling procedure, the national courts will, however, face less challenges in this respect than the EU Courts do in bottom-up procedures. After all, they may ask the Court of Justice for a ruling on the validity and interpretation of an ECB measure. The preliminary ruling procedure thus facilitates a uniform interpretation and application of Union law throughout the Member States,¹¹⁰ enables the Court to hold on to its exclusive competence with respect to reviewing the lawfulness of measures of Union institutions, and avoids any gaps in judicial protection in case of top-down procedures.¹¹¹ In short, the preliminary ruling procedure is an important tool to support effective legal protection in top-down procedures.

However, this procedure also has some major limitations and drawbacks.¹¹² For instance, due to the increasing number of preliminary ruling requests the Court's workload increases¹¹³ and, consequently, national procedures including a preliminary ruling request take more time. Furthermore, national courts deal with ambiguity about when a question may or should be submitted for a preliminary ruling. And, as a third example, parties to the procedure do not have the 'right' to ask for a preliminary ruling; it is for the national court to decide

¹¹⁰ See Chapter 3, Section 5.5.

¹¹¹ Eliantonio points out that the preliminary ruling procedure should ensure the completeness of the system of legal remedies and procedures in top-down procedures but that it has its shortcomings (Eliantonio 2014, pp. 98-99).

¹¹² Cf. Arnulf 2006, pp. 129-131.

¹¹³ Arnulf 2012, p. 128. Langer recommends to examine how new requests for a preliminary ruling can be reduced within the existing framework (Langer 2015, p. 15). In his opinion, the Court could, for instance, be stricter in accepting requests for a preliminary ruling and emphasize the role of national courts (pp. 16-17) or use Article 256(3) TFEU, on the basis of which the Court of Justice can determine which matters could be referred to the General Court (pp. 18-19).

whether or not to submit a question to be answered in a preliminary ruling procedure.¹¹⁴ The indirect procedure to get a ruling about the lawfulness of the EU measure at hand may also lead to miscommunication, which may in turn result in a less useful answer. The ruling's usefulness will depend, for instance, on the quality of the request and the reasoning of the Court.¹¹⁵ Additionally, as Langer points out, the referring judge is not involved in the procedure before the Court, which may hamper an effective dialogue between both courts.¹¹⁶ Lastly, the procedure is not always used.¹¹⁷

An advantage of using the preliminary ruling procedure is the possibility for the ECB to be involved in the review of its own preparatory measures. In case a national court submits a preliminary ruling request to the Court of Justice, the relevant actors seem to have ample opportunities to be involved in the procedure before the Court. After all, in such a case, the parties, the Member States, the Commission and, when appropriate, the institution, body, office or agency that adopted the act of which the validity or interpretation is in dispute are entitled

¹¹⁴ Cf. *inter alia*: Eliantonio 2014, pp. 98-99. Eliantonio refers to Advocate General Jacobs' opinion in the UPA case. Jacobs is critical of the actual judicial protection given by means of the preliminary ruling procedure in case of matters exclusively concerning the validity of an EU measure. The case at issue concerns the question whether by way of the preliminary ruling procedure effective judicial protection can be guaranteed against EU measures of general application and whether the Court may hold on to its strict interpretation of the *locus standi* in such cases. Jacobs concludes that effective judicial protection in cases concerning exclusively the validity of an EU measure fails to be appropriate due to the drawbacks of the preliminary ruling procedure and the absence of the possibility of an appeal on points of law before the EU Courts (Opinion of Advocate General Jacobs in Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, delivered on 21 March 2002, ECLI:EU:C:2002:197, paras 38-49). Jacobs mentions, for instance, the likeliness of substantial extra delays and costs in case of a preliminary ruling procedure, the discretions of national courts in deciding upon submitting a request, and the possibility of conflicting decisions from courts in different Member States regarding interim measures (para 42 and 44).

¹¹⁵ Langer 2015, pp. 3-11. When the referring court does not explain the relationship between the relevant EU and national law, for instance, the Court's ruling will of course not be as useful as it could have been in case of a complete request; see: Case C-686/18, *Adusbef and Others*, ECLI:EU:C:2020:567. For a short analysis of the Advocate General's opinion in this case, in which this point is also addressed, see: Wissink 2020.

¹¹⁶ Langer 2015, pp. 11-12. Langer is of the opinion that a more frequent use of Article 101 Rules of Procedure CJ, according to which the Court can ask the referring judge for further explanation, may encourage the dialogue, although he also recognizes that this may have certain drawbacks, depending on the national law at hand (p. 12).

¹¹⁷ Cf. Luchtman & Wasmeier 2017, p. 238; Prechal & Widdershoven 2020, p. 90. Nevertheless, each year still totals many requests (568 in 2018, see Annual report CJEU 2018, p. 42). There is a wide variation in reference rates per Member State though (Arnull 2012, p. 123). For the reasons why national courts have embraced the preliminary ruling procedure, see Arnull 2012, pp. 119-123; and for possible explanations about the differences in references rates, see Arnull 2012, pp. 123-127.

to submit statements of case or written observations to the Court. This would thus also include the ECB and give it the opportunity to be heard in such a procedure.¹¹⁸ National laws may also provide national courts with the possibility to invite an EU institution, in this case the ECB, to participate in the national judicial procedure. However, since such a possibility has not yet been laid down in Union law, its existence will depend on the relevant national law,¹¹⁹ an idea which is comparable to the role of *amicus curiae* in the field of competition law, as discussed in Section 6.3. of this chapter. For now, the ECB's involvement seems therefore best ensured in the preliminary ruling procedure.

Thus, although it is debatable whether the preliminary ruling procedure is a very efficient solution to guarantee effective legal protection in case of so many complex composite procedures as in place within the SSM, it is an essential tool to guarantee effective legal protection from a safeguard perspective while ensuring the unity and effectiveness of Union law.

6 Long-term recommendations

The discussion in Sections 4 and 5 shows that overall the issues are generally caused by uncertainty about which preparatory measures can be challenged before court, about what administrative standards apply, about the different levels of protection that may exist for persons due to divergent administrative standards, as well as by the possibility that the Court may have to interpret and apply national substantive laws and perhaps even national administrative standards and may need to thoroughly assess what exactly has happened at the national level, and by the risk of double procedures and the lack of coherence between EU and national judicial proceedings.

Whereas Sections 4 and 5 describe the legal protection currently in place and possible ways for the Court to deal with the challenges due to the composite procedures in place within the SSM, this section focuses on solutions for the longer term that may improve the effectiveness of legal protection in case of composite procedures. Because of the general nature of the proposed solutions, they are relevant not only to the legal protection in the SSM's shared administration, but to shared administrations in general. Below, some more general ideas about using the legislator's tools, strengthening the cooperation between the EU

¹¹⁸ Article 23 Statute of the CJEU.

¹¹⁹ Cf. Case C-334/95, Krüger v Hauptzollamt Hamburg-Jonas, ECLI:EU:C:1997:378. In this case, the Court has rejected the Commission's claim to a right to express its views in a national judicial procedure in which an EU act's validity is in doubt, and has emphasized that '[i]t is for the national court [...] to decide, in accordance with its own rules of procedure, which is the most appropriate way of obtaining all relevant information on the Community act in question' (para. 46). Cf. Ortlep & Widdershoven 2015, p. 427.

and national courts, and better aligning EU and national judicial proceedings are being put forward to foster a broader discussion about this topic.

Scholars have also suggested to broaden the scope of reviewability of acts,¹²⁰ as that would grant easier access to court for the persons involved and would increase the number of preparatory measures separately subject to judicial review. Broadening this scope nonetheless also entails that there will be more split procedures, in which a preparatory measure is reviewed by a court separately from the final decision. Although it may be an easier and more efficient way of having the preparatory measure reviewed, it may at the same time lead to inefficiencies in the overall judicial protection since it may cause an inefficient concurrence of the EU and national judicial proceedings. Given the number of decisions in the SSM based on composite procedures, this may result in many diverging judgments at different levels, which may constrain the overall effectiveness of the SSM. Since broadening the scope of reviewability thus seems not to result in a more effective legal protection from both a safeguard and an instrumental perspective, it is not further looked into in the following sections.

6.1 Strengthening the cooperation between the CJEU and national courts

Sections 4.4 and 5.4 of this chapter discuss the tools the EU and national courts currently have to cooperate. However, in my view, the EU Courts require more specific tools to ask a national court for an opinion or a ruling regarding specific case-related questions about national substantive laws and national administrative standards in bottom-up procedures.

The introduction of a reversed preliminary ruling procedure could be interesting in this respect and may strengthen the effectiveness of legal protection in case of bottom-up procedures.¹²¹ In such a reversed procedure, the Court will be able to request a ruling or opinion from the relevant highest competent

¹²⁰ The scope of reviewability could, for instance, be broadened by redefining the meaning of legal effect of a decision, thus allowing for review of factual conduct as a ‘*tacit decision*’ under Article 263 TFEU, or allowing for a declaratory action alleging the illegality of factual conduct (Hofmann 2009, pp. 161-163). Hofmann points out that factual conduct, such as generally gathering or exchanging information, currently is only subject to review either in light of an objection against the final decision in which the results of the factual conduct are used, or in the framework of a claim for damages under Article 340 TFEU (Hofmann 2009, pp. 159-161). He thinks the General Court’s interpretation in the *Akzo* case could be of interest for broadening the meaning of legal effect, since the General Court has used the notion of ‘*tacit decision*’, meaning that a physical act may be considered to be an implicit administrative decision and, as such, be subject to review by the court (Hofmann 2009, p. 162).

¹²¹ This has been suggested more often to address legal challenges in the context of composite procedures; see e.g.: Hofmann 2009, p. 159; Alonso de León 2017, pp. 357-360. Alonso de León argues this would be an incident procedure which could be included in the Statute of the CJEU and subsequently in the Rules of Procedures of the Court of Justice and the General Court (pp. 357-358).

national court. An opinion seems preferable, instead of a ruling, since this tool fully respects the Court's exclusive competence to rule on the validity of ECB decisions,¹²² thus avoiding that a national court may indirectly affect the validity of the ECB decision in question, even if the national opinion or, for that matter, ruling is about the interpretation of national law only.

Preferably, such a procedure would be included in the Treaties. However, the EU Courts may also have the possibility to require national courts to give the requested opinion on the basis of a Member State's general duty of loyal cooperation laid down in Article 4(3) TEU. Giving such an opinion about national substantive law or national administrative standards may be deemed necessary in order to ensure effective judicial protection, and thus be considered to be a measure the Member State must take in order to fulfil its obligations arising from the Treaties.¹²³ It would be a broad and novel interpretation of Article 4(3) TEU, but the Court has used this legal basis more often to find new forms of cooperation between the EU and national level.¹²⁴

The possibility to ask national courts for an opinion could also be included in the Rules of Procedure by amending, as discussed in Section 4.4. above, Articles 61 and 64 Rules of Procedure CJ to broaden the scope so as to include information requests to national courts.¹²⁵ This would probably be a rather small amendment. However, this only amends provisions that are meant to ensure a smooth procedure and to prove alleged facts and not to address questions of law. It could therefore also be considered worthwhile to include a new provision in the Rules of Procedure of both the Court of Justice and the General Court that would provide both EU Courts with the possibility to request national courts for an opinion in a specific case about the interpretation of the national law at issue. For instance, as a new Section 3 in Title II, Chapter 7, of the Rules of Procedure CJ following the sections regarding 'measures of organisation of procedure'

¹²² Gagliardi & Wissink 2020, p. 66.

¹²³ See Chapter 3, Section 4.3.1.

¹²⁴ Ortlep & Widdershoven 2015, p. 361-362. They discuss that these forms of cooperation are based on the principle of loyal cooperation and often laid down in more detail in a regulation or soft law, such as the national courts' possibility to ask the Commission's opinion on the application of EU competition rules and the Commission's possibility to submit as *amici curiae* oral and written observations to the national courts on competition law issues (pp. 362-363). For more examples of such other forms of cooperation, see Ortlep & Widdershoven 2015, pp. 362-365. Cf. Gagliardi & Wissink 2020, p. 66.

¹²⁵ With respect to the General Court, these concern Articles 89 and 91 Rules of Procedure GC. As discussed in footnote 90 of this chapter, amending the Rules of Procedure seems a relatively easy process. The Rules of Procedure can be amended by the Court of Justice and General Court themselves, although in case of the General Court in agreement with the Court of Justice, and must be approved by the Council according to Articles 253, sixth subparagraph, and 254, fifth subparagraph, TFEU respectively. This is a lighter procedure than the amendment procedure for the Statute of the CJEU which requires adoption by the European Parliament and the Council after consultation of the Commission (Article 281 TFEU). Cf. Barents 2020, pp. 44 (para. 1.24) and 45 (para. 1.26).

and ‘measures of inquiry’ (and similarly, in the Rules of Procedure GC, a new Section 3 – making the current Section 3 a new Section 4 – in Title III, Chapter 6). Such a new provision could fully address the purpose of gaining an opinion from national courts enabling the EU Courts to answer any questions of law regarding the national law at issue.

A ‘lighter’ possibility would be to include the reverse preliminary ruling procedure in soft law, comparable to the recommendations of the Court to national courts and tribunals in relation to the initiation of preliminary ruling procedures.¹²⁶ Similar to the preliminary ruling procedure on the basis of Article 267 TFEU, the highest competent national court providing such an opinion should hear the relevant NCA and credit institutions and other persons involved.¹²⁷ Although submitting a request for a reverse preliminary ruling may take more time, it ensures a more effective legal protection from a safeguard perspective as regards the national part of the procedure.

6.2 Using the legislator’s tools

The current legal framework of the SSM has been drafted under a lot of pressure due to the financial crisis of 2008, and I am aware that it is never easy to introduce amendments to EU laws, since already the drafting of legislation within the EU is not an easy or straightforward task or process due to the number of actors and interests involved. However, accepting this as a justification for the EU legislator to not even try to improve its legislation would turn the EU’s strength – the involvement of all these actors and the fact that all these interests are considered – into its weakness and should thus, in my view, not dismiss the EU legislator from taking on its responsibilities in this respect. After all, many decisions about the set-up of administrative procedures, and accordingly the legal protection in place, are in the legislators’ hands.¹²⁸ Thus, it also has to be considered what could be done to improve the effectiveness of legal protection by means of legislation, since that is the foundation of it all.

An often-discussed step towards improving the ECB’s effectiveness is the harmonization of the relevant substantive banking laws.¹²⁹ It clearly will also

¹²⁶ Recommendations Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01) (available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_2019_380_R_0001; last visited on 28 November 2020)

¹²⁷ Cf. Article 96 Rules of Procedure CJ.

¹²⁸ Cf. Craig 2018, p. 289, who emphasizes that the political reality cannot be forgotten when we discuss possible reforms to improve the EU’s judicial system. He points out that the political reality has to temper this discussion, since the ultimate decision regarding such reforms lies with the EU’s political organs and their agendas are not necessarily uniform.

¹²⁹ See e.g.: Lefterov 2015, p. 45; Arranz 2016; Lehmann 2017, pp. 17-18; Lo Schiavo 2019, pp. 193-194; and the ECB itself (see e.g.: interview with Sabine Lautenschläger, 13 February 2019, available at: <https://www.banksupervision.europa.eu/press/interviews/date/2019/html/ssm.in190213~6ab38b5f16>).

be beneficial to the effectiveness of legal protection when the substantive laws are harmonized and the Court does not have to interpret and apply national law transposing the relevant EU law or ‘purely’ national law that is not even directly related to any transposition of EU law. Additionally, harmonizing administrative laws within the EU or having one EU administrative act may facilitate a more effective legal protection. With respect to the harmonization of administrative laws, the idea of adopting a general administrative code has already been discussed quite often.¹³⁰

Further harmonization would clearly better address the reality of the complex composite administrative procedures in place nowadays by diminishing divergences between Member States. Nevertheless, such harmonization is difficult to achieve due to the differences in cultures, interests and legal systems between Member States, and the legal basis of the relevant rules.¹³¹ Moreover, EU laws apply in all Member States, while the SSM, and the harmonization for further optimization of the ECB’s effectiveness, is only relevant for the Member States participating in the SSM.¹³² Thus, below smaller and possibly helpful changes are looked into as well.

In light of the discussion about the applicable administrative standards, it may be worth considering to provide NCA staff assisting the ECB with powers on the basis of the SSM Regulation. Although this reduces the national procedural autonomy, this solution will clarify and harmonize the administrative standards applicable to supervisors, increase the legal certainty of the persons involved, and simplify the Court’s review of final ECB decisions based on NCAs’ assistance. The SSM Regulation could set the powers allocated to NCAs when assisting the ECB, similar to the way this currently has been done in respect of on-site inspections. This will ensure a uniform legal framework for assessing the use of powers by the ECB and NCAs involved in preparing a final ECB decision.

The downside may be that national legal safeguards providing more protection than provided for by the safeguards under EU law are sacrificed at the expense of the protection of the persons involved.

en.html; last visit on 27 August 2020). For more about the relevant substantive EU laws, see Chapter 2, Section 9.

¹³⁰ Cf. Craig 2018, pp. 276-279. The Research Network on EU Administrative Law (ReNEUAL) has proposed model rules on EU administrative procedures (http://www.reneual.eu/images/Home/ReNEUAL-Model_Rules-Compilation_BooksI_VI_2014-09-03.pdf; last visit on 27 August 2020) and the European Parliament has adopted a resolution in this respect (<https://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-eu-administrative-procedure>; last visit on 27 August 2020). In 2018, ReNEUAL took up a new project called ‘ReNEUAL 2.0’ about common EU administrative principles, digitalization and international and transnational administrative law. This project has not been finalized yet (more information is available at: <http://www.reneual.eu/index.php/projects-and-publications/reneual-2-0>; last visit on 27 August 2020).

¹³¹ Cf. Wissink 2017, pp. 438 and 444.

¹³² Arranz 2016, p. 266.

Another more specific step consists of clarifying in the SSM Regulation which measures will be separately subject to judicial review. Similar to the relevant competition laws, the regulation could indicate in which cases ECB decisions ordering the use of a power must mention that the decision is subject to the Court's review on the basis of Article 263 TFEU.

In line with this, the features of the ECB instruction pursuant to Article 9(1) of the SSM Regulation, a tool which currently is rather broad, could be specified. If the legislator – or the ECB in its supervisory manual – explicitly lays down, for instance, whether or not the ECB instruction has to be communicated to the persons involved, this helps to determine whether or not the TWD criteria are met in case of top-down procedures.

Lastly, an *amicus curiae* provision could be helpful to improve the participation of the various parties in relevant judicial proceedings on either the EU or the national level. Although no general provision in this respect exists in Union law,¹³³ a provision similar to this already exists in the field of competition law.¹³⁴ Incorporating an *amicus curiae* provision in the SSM Regulation would enable the ECB and NCAs to submit of their own accord as a, sometimes third, party any written, and with the permission of the court also oral, observations to the relevant national court on issues relating to the relevant Union law and the national implementation thereof.¹³⁵ A similar provision could even be introduced for EU judicial proceedings, enabling NCAs to submit observations of their own accord in relevant judicial procedures before the EU Courts.

¹³³ Cf. Varney 2019, pp. 397 and 406.

¹³⁴ Article 15(3) Regulation 1/2003 reads: ‘Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations. For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.’

¹³⁵ For an explanation of the *amicus curiae* provision in the field of competition law on which these aspects are based, see: Ottow 2006, p. 357; Ortlep & Widdershoven 2015, p. 363. In so far as the SSM Regulation does not yet provide for an *amicus curiae* provision, the possibility for national courts to invite the ECB to participate in national judicial proceedings may be possible under national laws (see Section 5.4. of this chapter).

6.3 Aligning EU and national judicial proceedings concerning related cases

This section discusses some of the possibilities to better align the EU and national judicial proceedings in case the EU and national cases are closely related, thus improving the effectiveness of the overall judicial protection for the persons involved. The ideas are based on existing arrangements between the General Court and the Court of Justice. In light of the complexity of composite procedures nowadays, these arrangements could in my view also be useful to have for the cooperation between the CJEU and national courts.

Currently, the complete system of legal remedies and procedures does not include a procedure by which EU and national courts can refer cases to each other. I agree with Eliantonio that such a possibility of transfer from one court to the other could be a useful instrument in the current complex legal reality.¹³⁶ If courts can simply refer a case instead of requiring the persons involved to start a new procedure, judicial proceedings will be shortened and costs reduced for the persons involved. It may also limit the cases in which the persons involved are afraid to miss out on time limits to bring a case before court and, for the sake of certainty, challenge a decision before both the EU and the national courts.

It has to be possible for both the EU Courts and national courts to refer a case to the other level in case it is inadmissible on its own level and the court reviewing the admission finds that the action falls within the jurisdiction of the other court. It is then to be arranged that this does not result in the period allowed to bring a case to court being exceeded, and that the person involved has the possibility to meet the formal requirements for access to the court to which the case has been referred.

A comparable provision for reference of cases between the General Court and the Court of Justice is laid down in Article 54 of the Statute of the CJEU. This provision stipulates that when the General Court finds it does not have jurisdiction to hear and determine an action in respect of which the Court of Justice has jurisdiction, it shall refer that action to the Court of Justice, and vice versa.¹³⁷

It will furthermore be helpful if respectively an EU or national court has the possibility to stay the proceeding before it when the same case is brought before the other court as well. Similar to the provision laid down Article 54 of the

¹³⁶ Eliantonio 2014, p. 98.

¹³⁷ Article 54, second subparagraph, Statute of the CJEU. Note that the first subparagraph is probably less relevant in the current context, since it is about applications or other procedural documents which are mistakenly addressed to the wrong registrar. In such cases the registrar of the General Court or of Court of Justice, respectively, shall transmit the application or procedural document to the other registrar. It is rather unlikely that a person sends an application or procedural document by mistake to 'the other level'. Nevertheless, such a provision could be included in a solution as well in order to avoid gaps.

Statute of the CJEU with respect to the collaboration between the General Court and the Court of Justice, both EU and national courts should have the possibility to stay a proceeding in case the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called in question. The procedural rules laid down in Article 55 of the Rules of Procedure CJ could be applied *mutatis mutandis* to such an arrangement between EU and national courts.¹³⁸

7 Conclusions

At the start of this chapter, the functioning of the SSM and the relevant case law so far have been discussed, continuing with a recapitulation of the assessment framework and an overview of the overall challenges and issues in case of respectively bottom-up and top-down procedures within the SSM. The chapter provides proposals for improving the effectiveness of legal protection on the short term within the current legal framework. Also, some solutions that will take a longer breath to implement have been put forward so as to help improving the effectiveness of legal protection in case of composite procedures within the SSM.

Step by step the path towards ensuring effective legal protection unwinds. The first cases related to the SSM illustrate that the Court tends to further centralize the judicial review at the EU level. The Court emphasizes the ECB's central role and in certain cases extends its review to, for instance, ECB decisions involving questions of law regarding national law and national preparatory measures.

In case of bottom-up procedures, the Court already obliges national courts to provide effective judicial protection in case of national measures that are legally binding upon the EU institution even when part of an EU decision-making procedure. In more recent case law, the Court prohibits national courts to review certain national preparatory measures that are part of an EU decision-making procedure and not legally binding upon the EU authority, since the Court includes these, as mentioned, in its review of the ECB final decision.

In top-down procedures, on the other hand, national courts are not allowed to declare EU measures invalid, and must assume the validity of an EU measure in case the person involved had to challenge that measure before the EU Courts pursuant to the TWD criteria but did not do so.

Although this case law already provides a useful framework, many questions remain unanswered. The overall challenges and issues relate to uncertainty about the competent court with regard to the preparatory measures, the applicable administrative standards and the diverging levels of protection provided

¹³⁸ This provision determines, inter alia, as of when the stay of proceedings shall take effect and what effect it has on the procedural time limits. For the General Court, this is stipulated in Articles 69-71 Rules of Procedure GC.

by some of these standards on an EU and a national level, and the possibility that the Court may have to interpret and apply national substantive laws and national administrative standards and may need to verify national facts into a high degree of detail. Accompanying challenges are the risk of double judicial procedures due to the existing uncertainties and the lack of coherence between EU and national judicial proceedings.

An important step to take, in my opinion, is to harmonize the EU standards for reviewability within the EU. Harmonization will enable the Court to review only those national preparatory measures that are not separately subject to review according to the reviewability standards under Article 263 TFEU. Subsequently, national courts have to ensure the judicial review of the measures that are separately subject to review under these standards. These measures would probably be NCA decisions ordering the use of powers similar to the ones laid down in Articles 10-13 of the SSM Regulation for the ECB, such as submitting documents, examining books or obtaining written or oral explanations, especially if otherwise no sufficient judicial protection is provided or rights are irremediably impaired in an early stage. Any irregularities in all other national preparatory measures that are part of a bottom-up procedure would be assessed by the Court in its review of the ECB final decision.

This approach will enable national courts to review national measures that create legal effect or which require judicial review in an early stage to ensure an effective legal protection and, accordingly, to apply their national standards to such measures. This seems also a logical mirror image of the judicial review in top-down procedures, in which case the Court reviews such measures, either directly or indirectly by way of a preliminary ruling procedure. The advantage is that in both cases the relevant courts can apply their own standards, which minimizes the situations in which courts have to review measures carried out at another level and are confronted with the question about what administrative standards to apply.

For the longer term it is recommended to clarify certain aspects related to legal protection in the relevant Union laws. An indication could, for instance, be added to the SSM Regulation stating that the ECB is to mention in its decisions ordering the use of powers laid down in Articles 10-13 of the SSM Regulation that they can be challenged on the basis of Article 263 TFEU. The ECB could, furthermore, make public what preparatory measures are or are not communicated to the relevant institution.

Whereas centralizing judicial review may be better for ensuring the effectiveness of EU law and the ECB, it seems to be the other way around with respect to national law, in which case the Court will have to interpret and apply national substantive laws and probably also certain national administrative standards. These standards will most likely concern national procedural rules, but could

also concern national legal safeguards. Ensuring effective judicial protection in such cases will clearly be challenging for the Court, since they are not necessarily familiar with the national law and legal context at issue. It is debatable whether the Court can provide the same level of judicial protection if it has to interpret and apply national laws as it does in case of EU laws.

Moreover, if legal protection with respect to national law is ensured by the Court, the risk increases that a uniform application, a principle the Court highly values with respect to Union law, cannot be guaranteed when it comes to national law. It is, nevertheless, likely that the primacy of Union law and the importance of ensuring effective legal protection push aside the importance of the unity of national law.

In my opinion, these considerations only add to the importance to deepen the collaboration between the EU and national courts. The unity of national law could then be guarded better within EU judicial proceedings.

The general trend towards centralizing legal protection may make it look like the role of national courts is diminishing. I believe it is neither necessary nor useful to rule out the national courts' role. It will need to change and be adapted to the current complex administrative procedures in order to ensure effective legal protection in these cases. While perhaps less final judicial decisions will be given at the national level, a larger involvement of national courts in EU judicial proceedings may be necessary, particularly because national law and national preparatory and other measures are still an important part of the current administrative procedures and legal context.

As discussed in this chapter, I recommend to make better use of the existing cooperation arrangements between the EU and national courts, and to possibly complete this with more far-reaching cooperation arrangements such as a reversed preliminary ruling procedure. In addition, a better alignment of EU and national judicial proceedings could be helpful to improve the effectiveness of legal protection.

A strict separation of tasks between EU and national courts may no longer be defendable, and it would be interesting to explore in which way the role of national courts can be maintained within, or adapted to a more centralized system of judicial protection.

All these developments seem to be detrimental to the – political – idea of national procedural autonomy. However, national procedural autonomy is explicitly only applicable when no EU law governs the matter. It is thus inherently secondary to the effectiveness of Union law. Having in place a far-reaching shared administration as the SSM without touching upon the national procedural autonomy of Member States simply seems not maintainable anymore in my view, since it often will go at the cost of the effectiveness of legal protection in place, as this research shows.

The EU's administrative reality may require brave and creative views on the weighing of EU principles and the division of tasks and responsibilities within the EU's judicial system so as to uphold the values on which the European Union is based.

CHAPTER 9

Epilogue

The central question of this research is how effective legal protection can be ensured within the complex shared administration in place within the Single Supervisory Mechanism. This question derives from the tension brought along by the far-reaching shared administration in place within the SSM, on the one hand, combined with the circumstance that there is no uniform set of administrative standards that must be applied by both EU and national authorities and that the judicial orders still are relatively separated from one another, on the other hand.

The far-reaching shared administration is in place to ensure that the European Central Bank and National Competent Authorities are able to effectively carry out their banking supervision, but also results in complex administrative procedures and mixed legal orders. However, the legal and judicial reality, that still lacks a uniform set of administrative standards and is having relatively separated judicial orders, does not match this complex administrative reality yet. This tension between an effective implementation of Union law and ensuring an effective legal protection is at the core of this research. Although the Court is increasingly finding its way in providing legal protection in cases involving composite procedures, many questions in this respect still remain unanswered.

Due to the general categorization of composite procedures analysed in this research, the analyses in Part II of this research may also be relevant to other fields of law in which composite procedures are in place, such as the European Structural Funds, the fisheries policy, and the Single Resolution Mechanism.

A one-to-one comparison between the SSM composite procedures and other shared administrations may prove to be impossible since the exact legal challenges depend on the specific cooperation between EU and national authorities as laid down for each specific composite procedure. However, the overall analyses may still be helpful. After all, composite procedures will either be bottom-up or top-down and use either formalized intermediate steps or more informal cooperation. The legal challenges pointed out in this research may thus also be relevant to other shared administrations.

Likewise, the proposed approach and solutions to overcome such legal challenges are general in nature and take the EU standards as their point of departure, which makes them more generally applicable to shared administrations. And although the choices made in the proposed approach and solutions may actually impact each field of law differently (e.g. the specific procedures and fields of law influence how many of the preparatory measures will be separately subject to judicial review), the proposed approach and solutions may still provide more clarity about the way in which legal protection can be ensured in a way that the safeguard and instrumental perspectives are balanced.

Moreover, the proposed solutions with respect to legislation and the cooperation between the CJEU and national courts provide more general tools to improve legal protection in shared administrations and will therefore also be relevant to other fields of law in which EU law is implemented by means of

composite procedures. Thus, while the research has been focused specifically on the procedures in place within the SSM to gain a detailed and complete overview of the existing legal challenges, the categorization applied to the composite procedures and the proposed, more generic approach and solutions may make the research' findings relevant to the discussion about shared administrations in general.

After introducing the SSM and setting the scene for this research, a framework has been set out to assess the effectiveness of legal protection. This framework has been applied to the various composite procedures in place within the SSM in order to reveal the challenges relating to legal protection in these procedures and to subsequently assess the effectiveness of the legal protection in place. This in-depth analysis teaches us that there is no simple or perfect answer to the research question, although this does not mean that no solutions are available at all. In the last part of this research, the overarching issues and challenges and possible ways to overcome these have been discussed with the aim to find solutions, for both the short and the longer term, that facilitate legal protection without harming the effectiveness of the prudential banking supervision.

Looking at the overall picture, it may be preferable to have the entire decision-making procedure reviewed by one court, and to have the authorities involved in one and the same decision-making procedure subject to one set of administrative standards. This seems, however, rather unrealistic given the current administrative, judicial and legal reality. As long as this preferred situation is not practicable yet, it is in my opinion of paramount importance to avoid any gaps in judicial protection and to respect the legal safeguards that are applicable at the different levels involved in the decision-making procedure to the extent possible under the general principles of Union law. This should moreover be done in the way that affects the effectiveness of the relevant Union law the least. The resulting proposals for the bottom-up and top-down procedures, respectively, are recapitulated in this epilogue.

i Proposals for effective legal protection in bottom-up procedures

In bottom-up procedures, the main challenge is to ensure that effective legal protection is offered in respect of the national part of the procedure. Ensuring sufficient judicial protection and an optimal protection of the legal safeguards in place may often conflict with the autonomy and unity of EU law. Moreover, if legal protection is fully ensured for the national part, the ECB's and EU Courts' effectiveness may be harmed, while, at the same time, not considering the national part adequately seems to contradict the important role that

the legislator has laid down for the NCAs and national law. In both cases, the EU law's effectiveness may thus be harmed, depending on the view taken.

The current case law regarding the SSM shows a tendency, or willingness, of the Court to accept a more centralized judicial review in order to ensure effective legal protection. Whereas it is clearly desirable that effective legal protection is ensured, it is also important that the Court does not lose sight of the role of national authorities and national laws in the decision-making procedures.

As an outcome of this research, I propose to have the court reviewing the final decision also assess the entire decision-making procedure, unless a preparatory measure is in itself subject to judicial review according to the Court's standards of reviewability on the basis of Article 263 TFEU. These preparatory measures, that are separately subject to judicial review, are to be reviewed by the court at the level at which that measure is carried out. In case of top-down procedures, the Court has developed the *TWD* criteria for cases like these (see Section 2). In case of bottom-up procedures, this implies a new step in ensuring legal protection.

By determining what preparatory measures from both the ECB and NCAs are included in its review of an ECB final decision, the Court implicitly indicates what national preparatory measures may *not* be reviewed by national courts. At the same time, it clarifies which national preparatory measures the EU Courts do not include in their review and therefore may – or, to avoid gaps in judicial protection, must – be reviewed by the relevant national court. In order to ensure the judicial protection's effectiveness, the Court will need to oblige national courts to ensure effective judicial protection in these cases, similar to its ruling in the *Borelli* case. This obligation has to ensure that early judicial protection is also provided at the national level with respect to NCA preparatory acts that are part of an EU decision-making procedure in situations in which the Court determines that EU preparatory acts need judicial protection already at an earlier stage in order to guarantee adequate protection.

The involvement of national courts in this approach may cause delays for the ECB's decision-making procedure, since national judicial proceedings are not harmonized and may take time. Yet, the opposite approach, in which all national preparatory measures are reviewed by the Court, results in an, in my opinion unjustified, difference between ECB and NCA preparatory measures that are part of one and the same administrative procedure, and leaves NCA preparatory measures without effective judicial protection when no judicial protection is available in an early stage. All other approaches discussed in the research lead to an even bigger involvement of national courts and laws, and have been ruled out for *inter alia* that very reason.

In light of the unity and effectiveness of EU law, the proposal aims at avoiding, or at least reducing, situations in which the EU Courts have to interpret and apply national administrative standards. Therefore, it is proposed that the EU Courts include most of the national preparatory measures in their review of the ECB final decision and review these on the basis of EU administrative standards only.

Such national preparatory measures comprise, for instance, the NCA draft decisions and information gathered and established by NCAs and used by the ECB to base its final decision on. The EU Courts may review NCA draft decisions on the basis of the EU administrative standards, i.e. the Charter and the general principles of EU law. The review of information coming from NCAs and used to support the ECB's final decision focuses on the question whether this information suffices to support the ECB final decision, in accordance with the Court's own standards to answer that question.

The national preparatory measures that still need review by the national courts are measures which may have legal effect vis-à-vis a person and measures by which rights may be irreremediably impaired or if otherwise no judicial protection would be available. In line with the Court's case law, these are measures that may be separately subject to judicial review on the basis of the reviewability standards under Article 263 TFEU.

In practice, probably but few cases are concerned, since most powers are exercised in ongoing supervision and do not necessarily raise issues regarding their use. Particularly, measures which possibly impair the principle of legal privilege or the right not to incriminate oneself, or decisions rejecting protection under these rights, will presumably be subject to separate judicial review.

By setting apart the measures that are separately subject to judicial review according to the Court's interpretation of Article 263 TFEU, these measures enjoy effective judicial protection as from an early stage and the national courts can apply any national administrative standards that may provide more protection than the EU administrative standards do.

Not applying such additional national administrative standards to the NCA preparatory measures that are not separately reviewable and which, in this approach, are thus reviewed by the EU Courts seems necessary in order to ensure the autonomy, primacy, unity and effectiveness of EU law. In the opposite situation, the ECB final decision would, after all, indirectly be reviewed on the basis of national administrative standards, which would conflict with the EU law principles of autonomy, primacy, unity and effectiveness. The divergences between the relevant national laws even aggravate that risk.

It is clearly better for the Court's effectiveness as well if it can review the entire decision-making procedure on the basis of the same set of administrative standards, i.e. EU administrative standards. In my opinion, this is acceptable, since it is ensured that on crucial issues, such as the principle of legal privilege, any

additional national legal protection can be maintained by having national courts review the national preparatory measures which are separately subject to judicial review on the basis of the reviewability standards under Article 263 TFEU. Parties will be able to request protection under the principle of legal privilege or the right not to incriminate oneself directly from the NCA, or even refuse to cooperate with them so as to enforce an NCA decision that is separately subject to national judicial review.

Being the final responsible authority, the ECB will have to verify whether the NCA has complied with all rights of defence as well, and repair any irregularities that may exist before adopting the final decision. It will increase the ECB's effectiveness when it can do so by applying EU administrative standards only.

The Court will still be facing questions of fact and other questions of law related to the national level. Although the questions of fact should not lead to many problems for the EU Courts, the questions of law may be challenging. The challenges particularly come to the fore in case of any strict procedural review and the review of questions of national substantive law that requires the interpretation and application of substantive national laws.

In the long term, further harmonization of the relevant substantive EU laws and the administrative standards applicable within the EU would be preferable. Harmonized relevant EU substantive laws would enhance both the ECB's and EU Courts' effectiveness, as national divergences can thus be left aside and national laws do not need to be interpreted and applied any longer. Furthermore, if both the ECB and NCAs are subject to one and the same set of administrative rules when implementing EU banking laws, uncertainty about the applicable administrative standards ceases to exist altogether. Although this may be too demanding for this moment in time, every long journey begins by taking the first step.

One first step that may already be helpful is to include some clarifications with respect to legal protection in the relevant EU laws. The legislator could, for instance, clarify which decisions may be contested on the basis of Article 263 TFEU, which preparatory measures are communicated to the persons involved or, if desired, provide an EU legal basis for the NCAs' powers. Thus the legislator would better indicate its intentions in the legislation and better align administrative procedures with the judicial reality.

2 Proposals for effective legal protection in top-down procedures

Ensuring effective legal protection in case of top-down procedures brings along its own challenges. Yet, the possibility for national courts to request a preliminary ruling about the validity and interpretation of an ECB

preparatory measure from the Court of Justice overcomes many issues that are more of a problem in bottom-up procedures. The preliminary ruling procedure is thus a helpful and essential tool to achieve effective legal protection.

In line with the criteria distilled from the *TWD* case, an action has to be brought directly before the EU Courts if it can without any doubt be challenged before the Courts on the basis of Article 263 TFEU and the Union act has been communicated to the person concerned. This resembles the preferred scenario for bottom-up procedures in which national courts will review NCA preparatory measures that are separately subject to judicial review according to the Court's standards on the basis of Article 263 TFEU. Top-down preparatory measures concerned are, for instance, any ECB decision ordering the use of its powers laid down in Articles 10-13 of the SSM Regulation or any ECB request or instruction that would create legal effect vis-à-vis a person and that is communicated to the person involved. All other ECB preparatory measures can be reviewed indirectly by way of national judicial proceedings and possibly a preliminary ruling procedure. Such ECB preparatory measures are, for instance, ECB's instructions or requests that are not creating legal effect vis-à-vis the person directly or which are not communicated to the persons concerned.

When reviewing the ECB's preparatory measures, either directly or indirectly by way of a preliminary ruling, the Court can apply EU administrative standards and, in line with the reasoning set out in Section 1 on bottom-up procedures, disregard any more protective national administrative standards to ensure the primacy, unity and effectiveness of Union law. Moreover, it enhances the judicial review's efficiency, since the Court does not have to consider any national legal context or any national legal safeguards that provide for more protection than provided for under Union law.

Any information the ECB has gathered and established and the NCA has subsequently used to partly or entirely base its decision on may be considered to be supporting evidence and be reviewed by the national courts on the basis of their national evidentiary laws. It is for the NCAs to decide whether they want or can use the ECB's input as evidence for their final decisions, for they are not obliged to use or follow it. Such ECB input could, for instance, be information gathered by the ECB without it adopting a formal decision thereto, and ECB views. This approach could quicken the judicial procedures in these cases as compared to requesting a preliminary ruling from the Court of Justice about such information. However, the overarching question remains whether a national court may apply national evidential law which may exclude ECB information as evidence when it does not meet any national legal safeguards providing for more protection than the relevant EU legal safeguards. A positive answer to this question may subject the ECB to different safeguards in each Member State, which seems to conflict with the *Melloni* requirements as it may compromise the unity and effectiveness of Union law. The national courts may however submit the

question whether they may apply their national evidential law to the Court of Justice by way of a preliminary ruling procedure.

3 Final remarks

This research has tried to find an approach which ensures effective legal protection without hampering the prudential banking supervision, thus to find a middle ground ensuring effective legal protection from both a safeguard and an instrumental perspective. Although the focus has been on composite procedures within the SSM, the research will also be relevant to other shared administrations due to the generic categorization of the analysed procedures. Moreover, the solutions proposed for both the shorter and longer term are general in nature and derived from EU standards which allow a broader application to shared administrations in general.

The proposed approach requires further steps towards harmonization of the relevant laws and standards within the EU, and asks to give up on certain national aspects, so as to provide an effective system of legal protection. At the same time, it may be possible, in crucial situations, to maintain additional protection at the national level. This way, the system of legal protection may be enhanced by attributing sufficient importance to national law and the role of national courts, and employing national laws and courts to strengthen the legal protection. This will require a deepening of the existing cooperation between the EU Courts and national courts, a better alignment of EU and national judicial proceedings, and preferably even the introduction of a new tool that the EU Courts can use to ask national courts for advice. Such a new tool may be created by the Court introducing a reversed preliminary ruling on the basis of Article 4(3) TEU.

It may furthermore be beneficial if the interplay between legislation and the judicial reality receives more attention. The legislator could be more aware of the judicial consequences of the way in which it lays down its intentions, while the EU Courts have to keep their eye on the intended composite administrative structures, and the role of the national context therein, when ensuring effective legal protection.

It will probably not be easy, but it seems possible to achieve effective legal protection from both a safeguard and an instrumental perspective. After all, isn't it worth every effort to have an effective banking supervision in place and, more generally, to have EU law that is implemented effectively by means of shared administrations and meets the values of the rule of law on which the EU is founded?

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Nederlandse samenvatting

De centrale vraag van dit onderzoek is hoe effectieve rechtsbescherming kan worden gewaarborgd in de complexe samengestelde administratieve procedures in het gemeenschappelijk toezichtsmechanisme (Single Supervisory Mechanism, SSM). Het SSM is het systeem voor financieel toezicht dat bestaat uit de Europese Centrale Bank (ECB) en nationale toezichthouders (National Competent Authorities, NCAs). De ECB en NCAs werken hierin nauw samen om effectief banken toezicht te kunnen realiseren. De centrale vraag van dit onderzoek vloeit voort uit de spanning tussen het waarborgen van effectief toezicht enerzijds en van effectieve rechtsbescherming anderzijds.

De verwevenheid van taken en verantwoordelijkheden tussen de ECB en NCAs binnen het SSM leidt tot een verregaande vorm van samengesteld bestuur. Dit verregaande samengestelde bestuur voor het banken toezicht moet waarborgen dat de ECB en NCAs het banken toezicht op effectieve wijze kunnen uitoefenen, maar resulteert ook in complexe administratieve procedures in een gemengde nationaal-Europese rechtsorde. De geldende wettelijke regels en het huidige systeem voor rechtsbescherming lijken nog onvoldoende toegespitst op deze ingewikkelde nieuwe administratieve realiteit: geharmoniseerde bestuursrechtelijke standaarden ontbreken en de Europese en nationale rechtspraak functioneren nog relatief gescheiden. Deze spanning tussen een effectieve implementatie van EU recht en het waarborgen van effectieve rechtsbescherming is de kern van dit onderzoek. Hoewel het Hof van Justitie van de Europese Unie steeds meer zijn weg vindt in het waarborgen van rechtsbescherming in zaken waarin samengestelde procedures spelen, blijven veel vragen nog onbeantwoord.

In het algemeen zou het wenselijk zijn dat de gehele besluitvormingsprocedure door één rechter wordt beoordeeld, en dat autoriteiten betrokken in een en dezelfde besluitvormingsprocedure onderworpen zijn aan dezelfde bestuursrechtelijke standaarden. Dit is voorlopig echter niet realistisch gezien de huidige bestuursrechtelijke standaarden en het huidige systeem voor rechtsbescherming. Zo lang dit voorkeursscenario nog niet mogelijk is, is het naar mijn mening allereerst belangrijk om gaten in de rechtsbescherming te voorkomen. Daarnaast acht ik het wenselijk dat juridische waarborgen die van toepassing zijn op de verschillende niveaus van het besluitvormingsproces zoveel als mogelijk in het licht van de algemene beginselen van het EU recht, worden gerespecteerd. Dit moet vervolgens op een manier gebeuren die de effectiviteit van het relevante Unierecht zo min mogelijk belemmert. De hieruit voortvloeiende aanbevelingen voor bottom-up en top-down procedures worden, na een korte toelichting op de onderzoeksraag en het beoordelingskader, hierna verder besproken.

Onderzoeksraag en opbouw

Met de beantwoording van de onderzoeksraag ‘Hoe kan effectieve rechtsbescherming worden gewaarborgd voor individuele besluiten die zijn gebaseerd op samengestelde administratieve procedures in het gemeenschappelijk toezichtsmechanisme (SSM) zonder een effectieve implementatie van het relevante EU recht te belemmeren?’ wordt in deze studie

een bijdrage geleverd aan deze juridische discussie.

Dit boek bevat, na een inleiding op het onderwerp en de context, een beoordelingskader voor de analyse van de effectiviteit van rechtsbescherming. Dit kader is vervolgens toegepast op de verschillende soorten samengestelde administratieve procedures, zoals door mij onderscheiden in dit onderzoek. Dit betreft de volgende groepen: gezamenlijke procedures (*common procedures*), procedures waarin de voorbereidingshandelingen op nationaal niveau plaatsvinden en het eindbesluit op het Europese niveau wordt genomen (*bottom-up procedures*), procedures waarin de voorbereidingshandelingen op Europees niveau plaatsvinden en het eindbesluit op het nationale niveau wordt genomen (*top-down procedures*) en procedures die kunnen eindigen in sancties van strafrechtelijk aard (*top down and bottom-up procedures of a criminal nature*).

Nadat de rechtsbescherming is geanalyseerd voor deze groepen procedures is per groep een beoordeling gemaakt van de effectiviteit van deze rechtsbescherming op basis van het beoordelingskader. Deze beoordeling is als inbreng gebruikt voor het laatste deel van het onderzoek, waarin aanbevelingen worden gedaan om de effectiviteit van de rechtsbescherming in geval van samengestelde administratieve procedures te optimaliseren. De aanbevelingen zien zowel op mogelijke oplossingen binnen het huidige systeem van rechtsbescherming als mogelijke oplossingen voor de langere termijn.

Bij de bespreking van deze aanbevelingen is het algemene onderscheid van bottom-up en top down procedures aangehouden. De common procedures zijn meegenomen met de bottom-up benadering, en de punitieve procedures kunnen zowel bottom-up als top-down procedures betreffen en behoren derhalve tot beide groepen.

Beoordelingskader

In het onderzoek is effectieve rechtsbescherming ruim geïnterpreteerd. Allereerst omvat rechtsbescherming in dit geval zowel bescherming gedurende de administratieve fase als rechtsbescherming door een rechter. Daarnaast wordt de effectiviteit van rechtsbescherming bekeken vanuit zowel een waarborg als instrumenteel perspectief. Dit houdt in dat rechtsbescherming effectief is in die zin dat alle aspecten van rechtsbescherming van personen zijn gewaarborgd (het waarborgperspectief) zonder dat daarmee de effectiviteit van het relevante Unierecht nodeloos wordt belemmerd (het instrumentele perspectief).

Het beoordelingskader bestaat uit twee delen: het eerste deel omvat de vereisten voor effectieve rechtsbescherming en het tweede deel zet de uitgangspunten van het stelsel van rechtsmiddelen en procedures in de EU uiteen.

In het eerste deel van het beoordelingskader komen de aspecten van rechtsbescherming vanuit het waarborg- en instrumentele perspectief aan bod, alsmede de algemene EU-beginselen legaliteit en rechtszekerheid. Vanuit het waarborgperspectief zijn aspecten van belang die de bescherming van de justitiabelen tijdens de administratieve fase waarborgen (zoals de rechten van verdediging en de vertrouwelijkheid van de communicatie tussen advocaten en cliënten) en aspecten die voortvloeien uit het algemene EU-beginsel van

effectieve rechtsbescherming door een rechter. Vanuit het instrumentele perspectief worden aspecten meegenomen die van belang zijn voor de effectiviteit van het Unierecht en voor het creëren van een gerechtelijke organisatie die het bereiken van de relevante Unierechtelijke doelen (in dit geval effectief banktoezicht) niet meer dan noodzakelijk belemmert.

In het tweede deel van het beoordelingskader wordt de verdeling van taken en verantwoordelijkheden tussen het Hof en de nationale rechters besproken. Dit volgt uit het gehele stelsel van rechtsmiddelen en procedures in de EU en de interpretatie van het Hof daarvan in zijn rechtspraak. In zijn algemeenheid is het Hof bevoegd om Uniehandelingen te beoordelen, dan wel op direct op grond van artikel 263 Verdrag betreffende de werking van de Europese Unie (VWEU) dan wel indirect via een prejudiciële procedure (artikel 267 VWEU). Nationale rechters zijn in principe bevoegd om bindende handelingen van nationale autoriteiten te beoordelen. In het onderzoek is vervolgens gekeken hoe dit uitwerkt in geval van besluiten die zijn gebaseerd op een samengestelde besluitvormingsprocedure. De uitkomsten daarvan worden hieronder besproken.

Voorstellen voor effectieve rechtsbescherming voor bottom-up procedures

De grootste uitdaging in bottom-up procedures is het waarborgen van effectieve rechtsbescherming met betrekking tot het nationale deel van de procedure. Het waarborgen van rechtsbescherming door een rechter en het garanderen van een optimale bescherming van alle bestaande rechtswaarborgen botst al snel met de autonomie en eenheid van het Unierecht. Bovendien ontstaat de situatie dat wanneer rechtsbescherming volledig wordt gewaarborgd voor het nationale deel, dit ten koste gaat van de effectiviteit van de ECB en de Unierechter. Tegelijkertijd lijkt het tegenstrijdig met het belang dat de Europese wetgever aan de rol van NCAs en het nationaal recht heeft toegekend in deze procedures wanneer het nationale deel onvoldoende in aanmerking wordt genomen. In beide gevallen wordt mogelijk de effectiviteit van het Unierecht geschaad, afhankelijk van het perspectief dat wordt ingenomen.

De huidige rechtspraak met betrekking tot het SSM laat zien dat het Hof geneigd, of bereid, is om een meer gecentraliseerde rechterlijke beoordeling te accepteren ter waarborging van een effectieve rechtsbescherming. Hoewel het uiteraard wenselijk is dat effectieve rechtsbescherming wordt gewaarborgd, is het ook belangrijk dat de Unierechter de rol van NCAs en het nationale recht in de besluitvormingsprocedures niet uit het oog verliest.

In het licht van de eenheid en effectiviteit van het Unierecht beoogt het voorstel situaties te vermijden, of in ieder geval te beperken, waarin het Hof nationale administratieve standaarden moet interpreteren en toepassen. Derhalve wordt in lijn met de huidige benadering van het Hof, voorgesteld dat de Unierechter de meeste van de nationale voorbereidingshandelingen meeneemt in zijn beoordeling van het finale ECB besluit, en daarbij alleen Europese administratieve standaarden toepast.

Dergelijke nationale voorbereidingshandelingen zijn bijvoorbeeld concept besluiten van NCAs in de zogenoemde common procedures, alsmede informatie die is verzameld en vastgesteld door NCAs en vervolgens door de ECB is gebruikt

ter (gedeeltelijke) onderbouwing van zijn finale besluit. De EU-rechter kan voornoemd concept besluit van een NCA beoordelen op basis van de Europese administratieve standaarden, i.e. het Handvest van de grondrechten van de EU en de algemene beginselen van het Unierecht. De beoordeling van de informatie die afkomstig is van NCAs en door de ECB wordt gebruikt ter ondersteuning van zijn besluit, betreft de vraag of deze informatie volstaat als onderbouwing van het ECB besluit volgens de standaarden die het Hof daarvoor heeft ontwikkeld.

De enige uitzondering hierop in het voorstel is dat nationale rechters nationale voorbereidingshandelingen beoordelen die zelfstandig vatbaar zijn voor beroep bij een rechter op grond van de standaarden van het Hof daarvoor gebaseerd op artikel 263 VWEU. Deze zelfstandig voor beroep vatbare voorbereidingshandelingen moeten worden beoordeeld door de rechter op het niveau waarop de voorbereidingshandeling is uitgevoerd. Ten aanzien van bottom-up procedures betekent dit een nieuwe stap in het waarborgen van rechtsbescherming.

Wanneer het Hof bepaalt welke voorbereidingshandelingen van de ECB en NCAs worden meegenomen in zijn beoordeling van het finale ECB besluit, geeft het Hof ook impliciet aan welke nationale voorbereidingshandelingen dus *niet* worden meegenomen in de beoordeling. Dit maakt duidelijk welke nationale voorbereidingshandelingen dus niet worden beoordeeld door de Unierechter en daarom door een nationale rechter kunnen – of, ter voorkoming van gaten in de rechtsbescherming, moeten – worden beoordeeld. Ter waarborging van de effectiviteit van rechtsbescherming zou het Hof nationale rechters moeten verplichten, in lijn met de *Borelli* uitspraak, om effectieve rechtsbescherming te bieden in deze gevallen. Deze verplichting voor nationale rechters moet waarborgen dat ook op nationaal niveau rechtsbescherming ten aanzien van nationale voorbereidingshandelingen al in een vroeg stadium wordt geboden in die gevallen waarvoor het Hof heeft bepaald dat dit nodig is om adequate bescherming te garanderen.

De betrokkenheid van nationale rechters in deze benadering kan voor vertraging zorgen in de besluitvormingsprocedures van de ECB, aangezien de nationale gerechtelijke procedures niet zijn geharmoniseerd en tijdrovend kunnen zijn. Echter, de tegenovergestelde benadering waarbij alle nationale voorbereidingshandelingen door de Unierechter worden beoordeeld, resulteert in een naar mijn idee ongerechtvaardig verschil tussen voorbereidingshandelingen van de ECB en voorbereidingshandelingen van NCAs die deel uit maken van een en dezelfde besluitvormingsprocedure. In dat geval zou geen rechtsbescherming bestaan in een vroeg stadium voor de nationale voorbereidingshandelingen, terwijl dit in specifieke gevallen wel vereist is volgens het Hof om adequate bescherming te kunnen bieden. Alle andere benaderingen die zijn besproken in het onderzoek impliceren een grotere betrokkenheid van de nationale rechter en het nationale recht. Deze benaderingen zijn om onder andere die reden niet verder meegenomen.

De nationale voorbereidingshandelingen die door de nationale rechter moeten worden beoordeeld, zijn handelingen die rechtsgevolgen hebben jegens personen

en handelingen waarbij rechten van verdediging onherstelbare schade lijden of waarvoor anders geen rechtsbescherming beschikbaar is. Dergelijke handelingen zijn, indien verricht door een EU instelling, apart appellabel bij de Unierechter op grond van artikel 263 VWEU en zouden mijns inziens indien verricht door nationale autoriteiten appellabel moeten zijn voor de nationale rechter.

In praktijk betreft dit waarschijnlijk slecht enkele gevallen, aangezien de meeste bevoegdheden worden uitgeoefend in het doorlopende toezicht en de uitoefening daarvan vaak geen problemen geeft. Waarschijnlijk zijn voornamelijk voorbereidingshandelingen die mogelijk de vertrouwelijkheid van de communicatie tussen advocaten en cliënten of het verbod van zelfincriminatie schenden, apart aanvechtbaar voor een rechter.

Door deze groep voorbereidingshandelingen apart appellabel te achten bij de nationale rechter, kan rechtsbescherming in een vroeg stadium voor deze groep worden geboden. Tevens kunnen nationale rechters in die gevallen ook nationale administratieve standaarden toepassen die eventueel meer bescherming bieden dan de Unierechtelijke administratieve standaarden.

Het niet toepassen van nationale administratieve standaarden die meer bescherming bieden dan het Unierecht op de nationale voorbereidingshandelingen die niet apart aanvechtbaar zijn voor een rechter, en die in deze benadering dus door de Unierechter worden meegenomen in zijn beoordeling van het finale ECB besluit, lijkt nodig om de autonomie, voorrang, eenheid en effectiviteit van het Unierecht te kunnen blijven waarborgen. Het finale ECB besluit zou anders tenslotte indirect alsnog worden beoordeeld op basis van nationale administratieve standaarden, hetgeen strijdig zou zijn met voornoemde EU-beginselen van autonomie, voorrang, eenheid en effectiviteit van het Unierecht. Bovendien wordt het risico op strijdigheid met deze beginselen vergroot door de bestaande verschillen tussen nationaal recht.

Het is zonder meer ook beter voor de effectiviteit van de Unierechter wanneer deze de gehele besluitvormingsprocedure kan beoordelen op basis van een en dezelfde set (Europese) administratieve standaarden. Dit is naar mijn mening ook acceptabel, aangezien in deze benadering is gewaarborgd dat op cruciale punten, zoals bij het beginsel van vertrouwelijkheid van de communicatie tussen advocaten en cliënten, aanvullende nationale rechtsbescherming kan worden behouden doordat de nationale rechter de apart aanvechtbare nationale voorbereidingshandelingen kan beoordelen.

Als uiteindelijk verantwoordelijke autoriteit zal de ECB moeten verifiëren of ook de NCA heeft voldaan aan alle rechten van verdediging. De ECB zou eventuele gebreken in het nationale deel van de procedure die bestaan voor het nemen van het finale besluit moeten repareren. De effectiviteit van de ECB zal toenemen wanneer dit alleen voor Europese administratieve standaarden hoeft te worden geverified.

Het Hof zal nog steeds worden geconfronteerd met feitelijke- en bepaalde rechtsvragen die zien op het nationale niveau en nationale recht. Hoewel de feitelijke vragen niet direct tot problemen lijken te leiden voor het Hof, kunnen dergelijke rechtsvragen de nodige uitdagingen opleveren. Deze uitdagingen

doen zich vooral voor in geval van een strikte procedurele toetsing, alsmede de beoordeling van rechtsvragen over nationaal materieel recht waarbij het vereist is dat nationaal materiaal recht wordt geïnterpreteerd en toegepast.

Op de lange termijn is het wenselijk dat het relevante materiele recht en de administratieve standaarden die van toepassing zijn binnen de EU verder worden geharmoniseerd. Harmonisatie van het relevant materieel recht zal de effectiviteit van zowel de ECB als het Hof verbeteren, aangezien nationale verschillen ter zijde kunnen worden geschoven en er geen nationaal recht meer hoeft te worden uitgelegd en toegepast. Daarnaast zou onzekerheid over de van toepassing zijnde administratieve standaarden verdwijnen als zowel de ECB als NCAs onderworpen zijn aan een en dezelfde set van administratieve standaarden. Dit lijkt vooralsnog te veeleisend, maar het moet niet worden vergeten dat elke reis begint met een eerste stap.

Een eerste stap die alvast behulpzaam kan zijn, is om in het relevante Unierecht enkele verduidelijkingen op te nemen ten aanzien van rechtsbescherming. De wetgever kan, bijvoorbeeld, verduidelijken welke besluiten kunnen worden aangevochten op basis van artikel 263 VWEU, welke voorbereidingshandelingen moeten worden gecommuniceerd aan de betrokken personen of, indien gewenst, een juridische basis voor bevoegdheden voor NCAs staf opnemen in het relevante Unierecht zelf. De wetgever zou dus beter zijn intenties kunnen weergeven in de wetgeving.

Voorstellen voor effectieve rechtsbescherming voor top-down procedures

Het waarborgen van effectieve rechtsbescherming in top-down procedures brengt zijn eigen uitdagingen met zich. De mogelijkheid voor nationale rechters om prejudiciële vragen te stellen aan het Hof over de geldigheid en interpretatie van voorbereidingshandelingen van de ECB voorkomt niettemin veel problemen die bij bottom-up procedures wel kunnen spelen. De prejudiciële procedure is dus een behulpzaam en essentieel middel om effectieve rechtsbescherming te waarborgen.

In overeenstemming met de criteria van de TWD uitspraak, moet een beroep rechtstreeks bij de Unierechter worden ingesteld indien het zonder enige twijfel kan worden aangevochten voor die rechter op basis van artikel 263 VWEU én de Uniehandeling bekend was bij de persoon in kwestie. Doet deze persoon dat niet (tijdig), dan worden die voorbereidingshandelingen onaantastbaar in de nationale procedure. Dit is gelijk aan het hierboven beschreven voorkeursscenario voor bottom-up procedures waarbij nationale rechters alle nationale voorbereidingshandelingen beoordeelen die op grond van de standaarden van het Hof gebaseerd op artikel 263 VWEU apart aanvechtbaar zijn.

Voorbeelden van top-down voorbereidingshandelingen, die apart appellabel zijn voor de EU-rechter zijn ECB besluiten tot toepassing van de bevoegdheden die zijn neergelegd in de artikelen 10-13 van de SSM Verordening, of ECB verzoeken of instructies die rechtsgevolgen voor personen creëren en die tevens bij die personen bekend zijn. Alle andere voorbereidingshandelingen van de ECB kunnen indirect worden beoordeeld via nationale gerechtelijke procedures en eventueel een prejudiciële procedure. Dit laatste betreft bijvoorbeeld ECB

verzoeken of instructies die geen direct rechtsgevolg hebben ten aanzien van de betrokken personen of die niet bij die personen bekend zijn.

Wanneer het Hof voorbereidingshandelingen van de ECB, dan wel direct dan wel indirect via een prejudiciële geldigheidsverwijzing, beoordeelt, kan het Europese bestuursrechtelijke standaarden toepassen. Het Hof kan in die gevallen, volgens dezelfde redenering als bij bottom-up procedures, nationale bestuursrechtelijke standaarden die meer bescherming bieden dan het Unierecht buiten beschouwing laten. Dit waarborgt het beginsel dat het Europese recht voorrang heeft, alsmede de uniformiteit en de effectiviteit van het Unierecht. Bovendien bevordert dit de effectiviteit van de rechterlijke beoordeling, aangezien het Hof noch de nationale juridische context noch nationale rechtswaarborgen die meer bescherming bieden dan het Unierecht hoeft mee te nemen in zijn beoordeling.

Alle informatie die de ECB heeft verzameld en vastgesteld en die vervolgens door de NCA is gebruikt om zijn besluit – geheel of gedeeltelijk - op te baseren, kan worden gezien als ondersteunend bewijs. Dit kan door de nationale rechter worden beoordeeld op basis van het nationale bewijsrecht. Het is tenslotte aan de NCA of het deze informatie van de ECB gebruikt als bewijs voor zijn besluit of niet: de NCA is niet verplicht dergelijke informatie te gebruiken. Dit betreft bijvoorbeeld informatie verzameld door de ECB zonder dat de ECB een formeel besluit ten aanzien van een informatieverzoek heeft genomen, alsmede ECB-zienswijzen.

Deze benadering kan de gerechtelijke procedures versnellen in deze gevallen, aangezien het stellen van een prejudiciële vraag aan het Hof over dergelijke informatie vermoedelijk meer tijd zal kosten. De vraag blijft echter of een nationale rechter nationaal bewijsrecht mag toepassen op grond waarvan ECB informatie kan worden uitgezonderd als bewijs wanneer deze informatie niet voldoet aan nationale rechtswaarborgen die meer bescherming bieden dan het Unierecht. Een bevestigend antwoord op deze vraag zou de ECB onderwerpen aan verschillende waarborgen per lidstaat. Dit is mijns inziens strijdig met de *Melloni* vereisten aangezien dit de uniformiteit en effectiviteit van het Unierecht kan schaden. Nationale rechters kunnen de vraag of ze nationaal bewijsrecht mogen toepassen uiteraard voorleggen aan het Hof via een prejudiciële procedure.

Afsluitende opmerkingen

In dit onderzoek is geprobeerd een benadering te vinden waarbij effectieve rechtsbescherming wordt gewaarborgd zonder het prudentieel bankentoezicht nodeloos te hinderen: om dus een tussenweg te vinden voor het waarborgen van rechtsbescherming van zowel een waarborg als instrumenteel perspectief. Het onderzoek focuste zich op samengestelde besluitvormingsprocedures in het SSM, maar is dankzij de algemene categorisering van de geanalyseerde besluitvormingsprocedures ook relevant voor andere rechtsgebieden waarin samengestelde besluitvormingsprocedures bestaan. Dit betreft bijvoorbeeld Europese structuurfondsen, visserijbeleid en het gemeenschappelijk resolutiemechanisme. Bovendien zijn de voorgestelde korte- en lange termijn oplossingen van generieke aard en gebaseerd op EU-standaarden, waardoor ook deze breder van

toepassing zijn op samengestelde besluitvormingsprocedures in het algemeen.

De voorgestelde benadering vereist verdere stappen richting harmonisatie van de relevante regelgeving en standaarden binnen de EU, alsmede dat bepaalde nationale aspecten worden losgelaten, zodat een effectief systeem van rechtsbescherming kan worden neergezet. Tegelijkertijd lijkt het mogelijk om in bepaalde, cruciale situaties eventuele aanvullende nationale waarborgen te behouden. Op deze manier kan het systeem van rechtsbescherming worden verrijkt door voldoende belang aan het nationale recht en de rol van de nationale rechter toe te kennen en dit nationale recht en de nationale rechters in te zetten om de rechtsbescherming te versterken.

Dit zal een verdieping van de bestaande samenwerking tussen de Europese en nationale rechters vereisen, alsmede een betere afstemming van Europese en nationale gerechtelijke procedures. Dit omvat bij voorkeur ook een nieuw middel waarmee de Europese rechters de nationale rechters om advies kunnen vragen. Het Hof zou een dergelijk nieuw middel kunnen creëren door een omgekeerde prejudiciële procedure te introduceren op basis van artikel 4(3) Verdrag betreffende de Europese Unie (VEU) en dit verder uit te werken in het Reglement voor de procesvoering van het Hof van Justitie. Tevens wordt voorgesteld om een bepaling op te nemen gelijk aan de *amicus curiae* bepaling in het mededingingsrecht op grond waarvan de Commissie en bevoegde nationale autoriteiten opmerkingen kunnen indienen bij de nationale rechter. Dit kan de deelname van de ECB in nationale gerechtelijke procedures verbeteren, en mogelijk zelfs ook worden opgenomen voor Europees gerechtelijke procedures om de deelname van NCAs daarin te verbeteren.

Ook lijkt het wenselijk dat het samenspel tussen wetgeving en rechtsbescherming meer aandacht krijgt. De wetgever kan zich meer bewust zijn van de juridische consequenties van de manier waarop zijn intenties worden neergelegd in een wet, terwijl de Europese rechters voldoende oog moeten houden voor de bewust gekozen samengestelde besluitvormingsprocedures en de rol die daarin is weggelegd voor de nationale context, wanneer rechtsbescherming wordt verleend.

Het zal zonder twijfel niet gemakkelijk zijn, maar het lijkt mogelijk om effectieve rechtsbescherming te waarborgen vanuit zowel een waarborg- als instrumenteel perspectief. Het is tenslotte de moeite meer dan waard om effectief banken-toezicht te hebben – en meer in het algemeen een effectieve implementatie van EU recht middels samengestelde besluitvormingsprocedures – dat voldoet aan de rechtstatelijke waarden waar de EU op gebaseerd.

